RELIGION AND THE LAW

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Religious liberty in modern English law

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Introduction

'Religious liberty and religious equality are complete,' wrote Maitland[1] at the beginning of our century, but this is a statement which commented merely upon the repeal of the old penal laws[2] which had made a crime of belief, or some forms of disbelief. The early story of the struggle for religious liberty is of sects establishing an identity of their own, with their members being freed from the obligation of supporting a faith they did not hold. From the struggle for existence we pass to the struggle for equality, in many important fields, with the established Church. The traditionalists have tended to think that these two developments suffice to give us religious liberty. They would perhaps equate religious liberty with religious toleration in the sense advanced by Gladstone:

> [Religious toleration requires] that civil penalty or prohibition be not employed to punish or to preclude a man's acting on his own religious opinions ... it requires that no privilege or benefit which a person is capable of receiving rightly and of using beneficially be withheld from him on account of his religious opinions as such.[3]

Gladstone supported toleration because it meant that: conscience should not be prejudiced by threat of material disadvantage; the evil of vesting absolute power in one ecclesiastical establishment was avoided and true religion would grow in strength, its foundation deriving from conviction rather than coercion. A view of religious liberty thus expressed today raises two fundamentals. There are many who whilst advocating religious liberty deny it to a particular group by not regarding that group as a religion. As religious groups are often entitled to privileges above other lawful groups, such as attitude could be considered a mark of intolerance. In England, compared with the United States of America, an attitude of that sort is more likely. This is because in the United States religion was considered to be far too important a matter for the state's

attention.[4] Constitutional guarantees meant that the courts strove, and indeed strive, to achieve 'impartiality as among all religions and irreligions'. Religious liberty in Britain, having a different starting point, has suffered many constraints in the past, but how different the results are in practice today is a matter of debate. Moreover, it is arguable that what the American constitution provides as a matter of law is found in Britain as a matter of convention, in the broadest sense of that term.

The other limitations on religious liberty in its traditional sense are 'paramount social concerns' — those laws that will not give way to religious liberty.

Since the time of Maitland a new and compelling reason has developed for an examination of religious liberty, namely the human rights movement. Seeing freedom of religion as a basic human right, this movement impells us to look at religious liberty as something wider than merely being restricted to 'liberty of conscience or inner Christian liberty or liberty to worship'.[5] The movement finds a more concrete form of expression in such materials of legal importance as the European Convention on Human Rights and Fundamental Freedoms and encourages us to consider the legal position of such a right. Coupled with the human rights argument there is also a theological one — if man's understanding of the ultimate is not perfect he must have a society which allows him to get somewhat closer to that goal by passing along his own path.[6]

As law in society provides protection for those who wish peacefully to follow their chosen (lawful) life style, there can be no religious liberty in a state that refuses to act when powerful groups aim to suppress what they do not like. Law must provide good soil in which the flower of religious liberty can bloom, and so there must be some protection from verbal attacks and false propaganda. Such protection is not easy to provide, as the state must walk a tightrope between seeming to interfere with freedom of speech on the one hand and protecting its citizens' religious feelings on the other. (Indeed, religious feelings may provoke such attacks.) State protection may be quite positive, with certain facilities being provided for the advancement of religion. This may involve, for example, special fiscal laws and may even lead to the prohibition of activities which interfere with religious observances (e.g. Sunday restrictions), although it may be felt that very great justification indeed is needed for the law to travel this far.

Where the state is not actively protecting and advancing religion it has to coexist with it, and this may lead to conflict. The resolution of such conflicts depends on the importance given to religous liberty by

a society and this will depend on the reasons behind its advancement. Thus in the context of whether a state, in this case that of Ontario (Canada), should consider the suppression of religious groups David N. Weisstub has written:

> There are two fundamentally divergent perspectives on religious liberty. ...in the name of 'police power' it is asserted that the state has the right to interfere with any or all of its citizens' activities even if they only endanger the individual. On the other side is the belief that the social order is founded on individual liberty. In this perspective society represents a combination of individuals who, in their individuality, possess natural and inherent rights, that precede any social organisation. From this vantage point, social organisation is provided to ensure that natural rights of freedom of belief and action will not be violated.[7]

The state may be found enforcing a course of action which is in direct opposition to the beliefs and practices of a religious group (e.g. Sikhs and crash helmets) or it may be called upon to arbitrate in such areas as family law and employment relationships.

Religious practices may be accorded great consideration, but can they ever outweigh legal duty? The conflict becomes the more likely the more religious liberty is seen as a full-blooded human right rather than merely a matter of toleration. Religious conscience is surely the father of religious observance, but how will the state react when such observance is contrary to its policy? Even a state that shouts about religious liberty from the rooftops will find itself in difficulty if it also shouts about other freedoms which conflict with religious liberty, and is moreover the advocate of many social policies. In the absence of any clear landmark for the courts, such as a Bill of Rights, it is likely that the legal results of such conflicts will be somewhat confused — a confusion which may be added to where the judge takes a restrictive view of the liberty (toleration) or an expansive one (full human right). It may be concluded that such instruments as the European Convention are changing the climate of thought in this area and even those who believe that our domestic system is not in need of such drastic surgery as a Bill of Rights will generally be seen wishing to present that system in the best possible light.

Notes

1. Quoted in the foreword to C.E. Crowther, *Religious Trusts*, 1954.
2. See the Appendix.
3. Quoted in A.R. Vidler, *The Orb and the Cross*, 1945, pp. 117–18.

4. Editorial, *Journal of Church and State*, VIII, 1967, 333, at p. 334.
5. T. Lorenzen, 'The theological basis for religious liberty: a Christian perspective', *Journal of Church and State*, XX, 1979, 415, at p. 425.
6. Lorenzen, 'Theological basis', at p. 428.
7. *The Legal Regulation of Cults: a Policy Analysis*, 1980, pp. 632–3.

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1 General protections of religious belief

If the Minister of State is still prepared to argue that we do not need the word 'religious' in the Bill, what other remedy will a person have if he finds himself being persecuted, discriminated against, or otherwise maltreated on the grounds of religion? This is a matter of great importance.

[*per* David Lane, M.P., Standing Committee on the Race Relations Bill, 29 April 1976, H.C. Deb. (1975–6), s.c.A, col. 109].

Racial and religious discrimination

The orthodox view has always been that the common law should not prevent a man from discriminating in any way that he may think fit,[1] with the rather minor exception that applies to innkeepers,[2] and this principle has never been altered with regard to acts of religious discrimination within the United Kingdom[3] (Northern Ireland apart). Thus where what appears, or claims, to be a religion encounters hostility for its beliefs and practices, supposed or otherwise — for example the Scientologists who in the 1960s[4] were refused such things as motor insurance, hotel hirings, and central and local government grants[5] — they will be without legal redress. Despite this general principle there has been much discussion as to whether the Race Relations Act of 1976 can affect cases of religious discrimination through the 'indirect discrimination' provisions. Before 1976 it was clear that the previous race relations legislation did not enter into the sphere of religion — in *Ealing London Borough Council* v *Race Relations Board*[6] three members of the House of Lords expressly stated that the words, 'colour, race or ethnic or national origins' did not include discrimination on the grounds of religion,[7] Lord Kilbrandon's justification for this opinion being as follows:

Turning to section 1, we see no provision is made for the prevention of discrimination in the extremely sensitive fields of religion and politics, a refusal

(at least by a private landlord) to house Roman Catholics or Communists as classes would not offend against the Act. ... The forbidden grounds are 'colour, race or ethnic or national origins'. These characteristics seem to have something in common: they have not been acquired, and they are not held by people of their own choice. They are in the nature of inherited features which cannot be changed, as religion, politics and nationality can be changed, more or less at will.

However, the new concept of indirect racial discrimination may have changed this dictum with regard to those religions that are identifiable with particular racial groups. That this would be the effect of the new provision was first foreseen by the Minister of State for the Home Office during the committee stage of the 1976 Race Relations Bill:[8]

The Bill's new concept, that of indirect discrimination, does a great deal to protect those who are discriminated against by reason of their religious observance or otherwise. As I have said, where it impinges upon race relations Clause (1(1)(*b*)(i) provides a great deal more protection than Hon. Members seem to think.[9] ... Let me give some practical examples of what I mean. It is perfectly possible to lay down what is in law notionally equal treatment, such as that all men who are employed as chauffeurs by a particular company should wear a peaked cap. That obviously would, by its very nature, discriminate against a proportion of persons of the Sikh religion because their chances of complying with that requirement would be considerably smaller than those persons not of that particular religious group. The onus is then thrown on the employer — and here we come back to my Hon. Friend's point about 'justifiable' or not — to say that the restriction with which the Sikhs cannot comply is justifiable.[10] ... [Take the] employer who wanted to limit Hindu workers to one shift and Muslim workers to another. He said that of course this was discrimination on religious grounds and would therefore be outside the scope of the Bill. In my view and that of the Government, this would be caught by the concept of indirect discrimination, because it would manifestly — whether one takes the Hindu[11] or the Muslim[12] side of it — constitute (unlawful) discrimination against the particular group.[13]

On the other hand, David Lane, M.P., who later became Chairman of the Commission for Racial Equality, did not think that this new concept could either assist Jews from being discriminated against on religious grounds[14] or prevent Catholics and Protestants from discriminating against each other in Liverpool or in Glasgow.[15]

The assumption that discrimination against Sikhs, with regard to the wearing of beards, is covered by this law was briefly made by the Employment Appeal Tribunal in 1979,[16] and in 1980 Lord Denning M.R., sitting in the Court of Appeal,[17] appeared to accept that racially based religions are covered by 'indirect discrimination'.[18] Although other courts have preferred to approach the problem by regarding the

Sikhs as a religious group outside the protection of the Act,[19] in *Kingstone and Richmond Area Health Authority* v *Kaur*[20] the Employment Appeal Tribunal held that where a nurse's uniform was laid down by a Statutory Instrument the Health Authority was justified in refusing to allow a Sikh girl permission to wear trousers under it. Miss Kaur was, in the end, successful, as the result of her action brought a change of heart within the Health Authority and they resolved[21] that where an applicant was unable to comply with a uniform requirement because of cultural or religious reasons the individual's request would be 'considered sympathetically'. Sensible changes by employers such as this one will be objected to by no one.[22]

The comments quoted earlier in this section occurred during a debate on an amendment to add the word 'religion' to the Bill. Most of the support for this proposal came from those who thought it was somewhat untidy to leave it out. However, the Government was not minded to include it expressly as the committee were dealing with a Race Relations Bill, and, in their view, intermixed racial–religious discrimination was in any case covered by it. Other members of the Committee objected to including 'religion' because:

(1) if there was a real problem it should be dealt with by a separate bill;[23]
(2) if 'religion' were to be included in the Bill many new exceptions would have to be enacted[24] — indeed the whole emphasis of the legislation could shift through such a move;[25] and
(3) no religious group had been consulted about such a change in the law.[26]

One may wonder why these points did not apply to the types of religious discrimination that the Minister explained would in future be outlawed.

The decision of the House of Lords in *Mandla* v *Lee*,[27] may prove one of the most important cases decided on religious liberty in the last decade. An independent school admitted pupils from all different racial groups but insisted that a school uniform be worn and that boys' hair be kept short. It did this as it did not wish to emphasise racial and cultural differences and, being a school run on Christian principles, it objected to such things as Sikh's turbans which were regarded as non-Christian symbols. In the Court of Appeal the sole question of importance was whether the 'ethnic origins' of the Sikhs meant that they were a group protected by the Race Relations Act 1976 — all three members of the Court were unanimous — they were not. Lord Denning considered that 'ethnic' meant, in effect, a sub-racial group[28] which had probably been placed in the Act to make clear that the Jews were covered by it. Oliver L.J. felt that,

'What is embraced in that expression, to my mind, is the notion of a group distinguished by some peculiarity of birth, perhaps as a result of inter-marriage within a community, but lacking any element of free-will. It seems to me entirely inappropriate to describe a group into and out of which anyone may travel as a matter of free choice; and freedom of choice — to join or not to join, to remain or to leave — is inherent in the whole philosophy of Sikhism.'[29] Kerr L.J.[30] stated that ethnic meant something 'pertaining or peculiar to race' and, like the other members of the court concluded that the history and characteristic of the Sikhs meant that they fell outside that definition. The attitude of the Court of Appeal may be sumed up as one of cautious conservatism. It is also of interest to note that the no-turban rule had been produced here not as a rule to keep those with brown skins out (as has sometimes been the case in the past with, for example, clubs) but rather to accord with the sincerely held religious views of a headmaster of an independent school. Outside the confines of a courtroom, however, an authoritative ruling that the Sikhs fell outside the race relations legislation could be seen as an invitation to practice discrimination lawfully against a group which, unlike most religious groups in the country, were likely, because of their distinguishing features, to suffer real hardship as a result.[31]

The House of Lords, seemingly not concerned with the criminal law aspects of the matter as they had been in a previous decision on the 1968 Race Relations Act,[32] were prepared to take a broader view of the term 'ethnic'. The principal judgement came from Lord Frazer of Tullybelton, who noted[33] that over this century the word 'ethnic' had been developing a wider meaning than merely that of pertaining to race. On the other hand it did not include any group which simply shared some common racial or cultural or religious or linguistic characteristics. He stressed that the 1976 Act will not apply to religious groups as such but felt the true approach was that while 'ethnic still retained a racial flavour it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin'.[34] He provided two 'essential factors' which a group must show if it is to be considered 'ethnic':

(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
(2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

In addition he thought that there were additional factors which, although not crucial, were relevant:

(1) either a common geographical origin, or descent from a small number of common ancestors;
(2) a common language, not necessarily peculiar to the group;
(3) a common literature peculiar to the group;
(4) a common religion different from that of neighbouring groups or from the general community surrounding it;
(5) being a minority or being an oppressed or a dominant group.[35]

It is possible to become a member of such a group as well as being a member of it by virtue of one's birth. He then considered the history of the Sikhs and held that they were a racial group, because of their ethnic origin, and thus came under the protection of the race relations legislation.

What other religions will be covered? The answer is not clear, although Lord Fraser did stress that a religious group as such were outside the Act. Perhaps it is easier to say what lies outside rather than in. World religions as such would seem to lie outside because of their universality, although where a particular group, although belonging to a universal religion, have enjoyed a destinctive history of their own they may come within the bounds of the definition — thus Roman Catholics and Muslims as such are outside the definition whilst for historical reasons certain groups of Catholics and Muslims may fall within. Strange results indeed may result. The religious customs of a Muslim from Saudi Arabia may be protected not because he is a Muslim (universal religion) but because of his ethnic origins of which Muslim customs are a manifestation. However, the Muslim observances of a English convert to that religion would not seem to be covered, as Muslim customs are not equated with Englishmen because of their ethnic origins — Islam, being universal, is not identified with one particular area or people (as is the case with Sikhism) so as to be an 'ethnic' group under *Mandla* v. *Lee*. Another class of religions which are clearly outside the definition are the 'new religions' (e.g. the 'Moonies') for the obvious reason that they have not been in existence long enough in order to show that they have 'a long shared history'. Perhaps this is as far as one can be certain — the Sikhs are covered by the law and the clear implication of the case is that the Jews are as well.[36] Future court decisions will have to be awaited for other religions although some of the other ramifications of the case may mean a fairly cautious approach will need to be adopted.

Given that Sikhs were covered by the law had there been unlawful discrimination here? Was the 'no turban' rule a rule which a considerably smaller proportion of Sikhs could comply with[37] than members of other groups. In the Court of Appeal Keir L.J. took the line that with the exception of nationality all of the elements which constituted racial groups for the purpose of the law were based on factors which the individual had no control over (i.e. birth rather than choice) and thus 'can comply' was to be understood in the sense of 'is factually able to comply'.[38] If this was correct none of the cases where beards or turbans were worn for religious reasons came under the ambit of the law as there is always clearly some choice involved in the wearing of such things. However the House of Lords, in keeping with the wider meaning that they had given to 'ethnic', felt that the test was: ' "can in practice" or "can consistently with the customs and cultural conditions of the racial group" '[39] comply.

Under the Race Relations Act even if you have applied such a condition you will not be guilty of unlawful racial discrimination if you can show that the use of the condition was justified 'irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it applied'. Can a religious objection satisfy this? Lord Fraser considered that this was a serious matter:

> [the defendant] objected to the turban on the grounds that it was an outward manifestation of a non-Christian faith. Indeed he regarded it as amounting to a challenge to that faith. I have much sympathy with the respondent on this part of the case and I would have been glad to find that the rule was justifiable within the meaning of the statute, if I could have done so. But in my opinion that is impossible. The onus ... is on the respondent to show that the condition which he seeks to apply is not indeed a necessary condition, but that it is in other circumstances justifiable "irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied", that is to say that it is justifiable without regard to the ethnic origins of that person. But in this case the principal justification on which the respondent relies is that the turban is objectionable just because it is a manifestation of the second appellants' ethnic origins. That is not, in my view, a justification which is admissable ...[40]

This finding is the most difficult part of the decision. The result is that the present law clearly favours the religious customs of one (the Sikh father) to those of another (the Christian headmaster). The freedom to run independent schools following the religious views of one particular religious group is clearly undermined if the law prevents such schools from imposing the customs of their religion. One may only hope that this part of the decision is reconsidered either by the House of Lords

or by Parliament in the light of the traditional tolerance given to freedom of religious association. Although the law has never been understood to allow racial discrimination because of religious beliefs that is no reason to forbid what is in effect religious preference for certain religious rules. The Court of Appeal were advancing a very important point with their 'freedom of choice' approach to the question, while the House of Lords have chosen to make some freedoms of choice greater than others.

Incitement to religious hatred (Northern Ireland)

There is no general United Kingdom law against incitement to religious hatred — thus an attempt to extend what was to become the prohibition in the 1936 Public Order Act of the use of insulting words or behaviour in certain circumstances to the incitement of racial or *religious* prejudice failed,[41] and the crime of incitement of racial hatred, created by the 1965 Race Relations Act, does not apply to the incitement of religious hatred. However, to deal with the very real problem of religious hatred and public disorder in Northern Ireland[42] a special statute[43] was enacted, going much further than the common law. In passing it may be noted that this is within the legislative tradition of Northern Ireland.[44] Under the Act it is an offence if a person, with intent to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland:

(*a*) publishes or distributes written or other matter which is threatening, abusive or insulting, or
(*b*) uses words of a similar nature in any public place or in any public meeting,

if the words are likely to have that effect on any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins.[45] By dealing with incitement to fear it goes further than similar United Kingdom legislation prohibiting incitement to racial hatred.[46] It is enough if the motive behind the incitement is based upon religious grounds; there is no need for the defendant to rant against a defined religious group — an attack on bank managers, by a religion objecting to usury, could in theory constitute the crime.[47] A further offence is the spreading, with the intention of causing a breach of the peace, of a statement or report which the defendant knows to be false, or does not believe to be true, if it is likely to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins.[48] Here the defendant need only intend a breach of the peace, he does