
THE PROTECTIONS
FOR RELIGIOUS
RIGHTS

Law and Practice

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FOREWORD

This is an important work on what is, somewhat strange to say, essentially a new subject to English law. Sir James Dingemans and his co-authors have performed a service to all those who are interested in the field of law and religion. They have created, in one substantial volume, a restatement, in the form of a critical treatise, of the current law in twenty-first century Britain on the protections for religious rights. More than that, they have set their restatement in its necessary international context.

Thus, after an introductory chapter, in which some of the critical issues of the subject in the modern world are highlighted, and a whirlwind but fascinating sketch of the history of English law and religious rights is given, the authors turn in their next few chapters to discuss the modern international and European setting for the standards which operate in this field. Both in terms of the standards emerging from the United Nations, and in terms of the teaching of the European Convention on Human Rights, it is perhaps noticeable that this modern setting derives almost entirely from the catastrophe of the relatively recent period of the Holocaust. It is noticeable, however, that despite that circumstance, the dominant court in this field, namely the European Court of Human Rights sitting in Strasbourg, has—at any rate until very recently, I have in mind cases such as *Lautsi v Italy* (2012) and *Eweida v United Kingdom* (2013)—on the whole given only at most lukewarm support to the protection of religious rights to be found in the Convention's Article 9.

In the past, at least in Britain and in Europe, the relevant law was mainly concerned with the entrenchment of the dominant religion and the disabilities of other religions. Increasingly, however, in the modern, more secular and pluralist, world, the law has adopted a more neutral role. Perceptively, the authors point out that 'neutral' may be a better word than 'secular' to describe the attitude of the law and the courts which are called on to apply it. In that, however, the authors may be speaking as it should be, rather than as it is.

Before turning to domestic law, in a major chapter called 'Comparative Perspectives', the authors have co-opted a team of distinguished scholars to write about the law as found and practised in other parts of the world, mainly in other common law jurisdictions, but also in Turkey. In this respect, it may be observed that the United States (also included in this survey), because of its First Amendment's prohibition on the free exercise of religion and its tradition of separation of church and state, has one of the oldest, richest, and most refined jurisprudence on the subject to be found anywhere in the world. In a field in which it is necessary to have as broad a view of the subject as possible, this chapter sets a benchmark for a work of this kind in its provision of valuable insights into the relevant law across major parts of the globe.

It is against this background that the authors turn their attention to the domestic scene. There are chapters on the Human Rights Act 1998 and on the Equality Act 2010. In the latter case, as the authors observe, the most important protections for religious rights are to be found, almost perversely, in the exceptions to the discrimination provisions for protected characteristics. The difficulties created by the tension between equality and non-discrimination law, on the one hand, and legal protection for religious rights on the other, are well demonstrated in

the unhappy decision in the *Jewish Free School* case, where even the majority in the Supreme Court are to be found wringing their hands at their conclusion.

Having set out the statutory background, the authors then adopt a functional approach to their remaining chapters, which helpfully cover such discrete areas as services and public functions, employment, education, religious expression, and the family. There are also appendices which contain within them much of the relevant statutory and constitutional texts not only from Britain but also from around the world.

This is a difficult and developing area of the law, and, for Britain, with its unwritten constitution and (prior to the Human Rights Act) quiescent common law, a relatively new one. It still remains to be seen how the traditional British virtues of democratic pluralism and tolerance will work out the tensions created by a new era in which religious fundamentalism poses grave risks to social cohesion and world peace. Sometimes the law is needed to protect and mediate between religious and other freedoms, or to assist real victims. Often, however, the law is used, not always successfully, due to the intractable nature of the problems, by litigants whose main interest is to espouse an extreme point of view. In such circumstances, much jurisprudence in the field has sought, in my respectful view wrongly, to find instant and artificial tests to eliminate proper enquiry. However, it is rather in the tools of justification, proportionality, and reasonable accommodation that a way forward can be provided. As it has been said, 'Come, let us reason together'¹ (Isaiah 1:18).

This is an important modern work on an age-old problem which is becoming increasingly topical in its legal perspectives. I congratulate the authors on its production and wish it the success which it deserves.

Sir Bernard Rix
August 2013

¹ *The Holy Bible, King James Version*. New York: Oxford Edition: 1769; *King James Bible Online*, 2008. <<http://www.kingjamesbibleonline.org/>>.

PREFACE

In the twenty-first century, courts and tribunals around the world have to adjudicate on sensitive issues relating to the freedom of religion or conscience. The initiative for this book came because there was no single textbook which set out, in one place, the protections for religious rights available in international and domestic law.

It had become apparent from the submissions made in cases raising issues of religious freedoms that there were other jurisdictions which offered interesting perspectives and guidance in these cases. However, it had also become clear that it was necessary to have a better understanding of the constitutional and legal context in which those decisions had been made, so that the respective judgments might be accorded their proper weight. We were therefore keen to include comparative perspectives in this work. In this respect, we have been very lucky to secure contributions from expert commentators from Australia, Canada, India, New Zealand, Northern Ireland, the Republic of Ireland, South Africa, Turkey, and the United States.

There have been times during the research and writing of this book when we wondered whether it was a sensible thing to have started. But the hope that this book might help to avoid litigation for those blessed or burdened (we will not really know which it is until later) with a religious belief, and those in legal conflict with them, has kept us all going.

It is the aim of this book, which has been written and contributed to by persons with a wide range of beliefs, views, and perspectives, to set out what is the law in this area. Our principal hope is that you find this book both interesting and helpful. As there is such a diversity of writers and contributors we should state that the views expressed in the text are ours alone, although not necessarily shared by us all.

It is, of course, not possible to write a book of this nature without the help of others. We would like to thank Jessica Elliott and Jack Williams, who provided us with invaluable assistance on this project. We are also indebted to Christopher Knight, Hagen Kruger, Daniel Lewis, Michael Waibel, and Andrew Young for taking the time to review parts of our manuscripts and for providing us with valuable comments.

We would also like to thank all of those involved in this project at Oxford University Press—Zoe Organ, Vicky Pittman, Rachel Holt, and Matthew Humphrys—for their patience and support.

While Oxford University Press may have tolerated our failings, our families and friends have to live with them, and we thank them knowing that without them this book would not have been written.

The responsibility for errors and omissions is, of course, entirely ours. We have attempted to state the law as at 1 May 2013, but we have managed to include some later developments.

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