



RELIGIOUS DISCRIMINATION LEGISLATION: IS THERE A NEED?

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INTRODUCTION

Discrimination is a form of exclusion which leads to people being singled out for different, and more often than not, less favourable treatment. The less favourable treatment is likely to be unfair and unjust.

For the person being discriminated against, it can be degrading and humiliating. Discrimination is socially divisive and a cause of many social, political and economic ills. It is the anti-thesis of equality (regarded by most religious, political and social systems as a fundamental right belonging to all individuals).

Discrimination takes many forms and can be based on grounds such as race, ethnicity, colour, gender, religion, age, nationality, political or other beliefs, social backgrounds, disability and sexual orientation. These grounds are personal attributes or characteristics of individuals.

Discrimination on the grounds of religion occurs where someone is singled out and treated differently on the grounds of his/her religion. Thus the discriminator, for reasons known to himself and which more often than not remain undisclosed, has decided that religion is an important negative factor which solely or mainly operates to the detriment of the person being discriminated against. Therefore, he treats the person less favourably than others.

This paper looks at whether, and, if so, to what extent English law deals with religious discrimination and whether there is a need for change. I have considered the legal position from the perspective of being a Muslim but the points made are of general application and would apply equally to all religions.

First, therefore, I recall some of the international declarations on the issues of human rights and the protection of minorities. Secondly, I examine the historical position under English law (prior to the coming into force of the Human Rights Act 1998 ("HRA")). Thirdly, I look at the position now. Fourthly, I look at the attempts made in the past to rectify the lacuna in our law and the methods adopted in other countries. Finally, taking my submissions that English law still does not prohibit religious discrimination in all its forms I put forward some suggestions as to the way forward.

INTERNATIONAL DECLARATIONS:

Various international declarations and treaties to which the United Kingdom is a party forbid discrimination of different types:

The *Universal Declaration of Human Rights* [1948] contains, amongst others, the following provisions:

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion of belief, and freedom, either alone or in community with others and in public or private, to manifest his religion of belief in teaching practice, worship and observance."

The *International Covenant on Civil and Political Rights* (adopted, opened for signature, ratification and accession by the UN General Assembly on 16 December 1966) came into force on 23rd March 1976. It provides, inter alia, as follows:

“Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The *European Convention for the protection of Human Rights and Fundamental Freedoms* [1950] (“ECHR”), provides:

“Article 9: 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 of 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.

Article 13: Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14: Prohibition of discrimination

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 13 of the *European Community Treaty* states:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The *Vienna Declaration* (made 9th October 1993), Heads of State/Governments of Member States of the Council of Europe resolved, amongst others;

- **To enter into political and legal commitments relating to the protection of national minorities in Europe and to instruct the Committee of Ministers to elaborate appropriate international legal instruments**
- **To pursue a policy for combating racism, xenophobia, anti-Semitism and intolerance, and to adopt for this purpose a Declaration and a Plan of Action**

Several areas of protection are recognised and consistently provided for in these international declarations and treaties. In respect of religious discrimination, they include:

1. Every one is equal in the eyes of the law and is entitled to equal protection of the law without discrimination.
2. There must not be discrimination on the proscribed grounds, one of them being religion.
3. There is right to freedom of religion and to manifest religion.
4. National minorities (including those of a different religion) are vulnerable and need protection.

The ECHR additionally gives a right to an effective remedy before a national authority.

Under the pre-HRA era, the general position was that English law regarded all actions as being lawful except those that have been specifically made unlawful. In the context of discrimination, English law prohibited discrimination on the grounds on colour, race, nationality or ethnic or national origins, (Race Relations Act 1976) sex (Sex Discrimination Act 1975) and disability (Disability Discrimination Act 1995). The definition of discrimination in each of these three statutes is based on less favourable treatment on the prohibited grounds.

The situation that prevailed is summarised by Karen Monaghan¹ as follows:

“Despite the existence of anti-discrimination legislation to tackle race and sex discrimination for more than 35 years and 25 years respectively, the extent of discrimination against racial and other minorities and women remain widespread. Domestic discrimination law has served to reduce, at the very least, the incidence of overt discrimination and is undoubtedly an indispensable component on an effective anti-discrimination strategy. However, the gaps in legislative provision in respect of those grounds presently protected is palpable, as is the absence of any anti-discrimination provision on other grounds. With this in mind the possibility of a wide ranging prohibition against discrimination on arbitrary grounds appears to be timeous, necessary and welcome ...discrimination against persons based on their membership of particular religious groups is only outlawed in mainland Britain if the religious group concerned is capable of being defined by reference to “ethnicity” (and thus a “racial group”) within the meaning section 3(1) of the Race Relations Act 1976. [emphasis added]”

The “gaps” referred to by Ms. Monaghan particularly in respect of discrimination of the grounds of religion have also been exposed in the decided cases.

In the case of *Ealing London Borough Council v Race Relations Board*² Lord Simon of Glaisdale said:

“...The Acts of 1965 and 1968 do not provide a complete code against discrimination or socially divisive propaganda. The Acts do not deal at all with discrimination on the ground of religion or political tenet.

Lord Donovan said:

“Four grounds of discrimination only are specified in Section 1(1). Discrimination on any other ground, e.g, religion or politics, is not unlawful under the Act.”³

In the case of *Mandla v Dowell Lee*⁴ in the Court of Appeal, Lord Denning, M.R. said:

“Most interesting is that it does not include religion or politics or culture. You can discriminate for or against Roman Catholics as much as you like without being in breach of the law. You discriminate for or against Communists as much as you please, without being in breach of the law. You can discriminate for or against the “hippies” as much as you like, without being in breach of the law”⁵

Lord Justice Kerr said:

“Despite the ugly overtones of the word “discrimination”, discrimination is not prohibited by the Act in relation to religious beliefs or practices...

Moreover, religious and religious practices frequently involve acceptance of, or insistence upon, social and other customs on the part of those who strictly observe whatever tenets may thereby be prescribed; such as not to eat pork, or not to drink wine, or not to work on the Sabbath; or – as in the present case – not to cut one’s hair and therefore to wear a turban. To discriminate against such customs and habits, in the sense that others may decline to alter or adapt their own ways of life to them, or may even decline to accept them in organisations or establishments where they are regarded as unsuitable or unwelcome, may be intolerant or even bigoted; but this is not unlawful under the Act...”

Although this was the position under domestic anti-discrimination laws, European Community law seems to provide against discrimination in a slightly different way. It was held in *Erich Stauder v City of Ulm - Sozialamt*.⁶

“Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states must be ensured within the framework of the structure and objectives of the Community;”

The fundamental rights enshrined in the ECHR were followed in the jurisprudence of the European Court of Justice. In the case of *ERT*⁷ it held:

“...as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see in particular, the judgment in Case C-4/73, Nold c Commission [1974] ECR 491, paragraph 13). The European Convention on Human Rights has a special significance in that respect (see in particular Case C-222/84, Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, para. 18). It follows that, as the Court held in its judgment in Case C-5/88 Wachaus v Federal Republic of Germany [1989] ECR 2609, para. 19, the Community cannot accept measures which are incompatible with the observance of human rights thus recognised and guaranteed’

Despite these utterances from the ECJ, there has not been any significant step taken in upholding equality in the face of religious discrimination. The reasons appear to be that the principles (of equality and the ECHR) were used by the ECJ in deciding cases only within the context of Community law; not to prohibit or give any self-standing rights of protection against religious discrimination.

Gay Moon and Robin Allen QC⁸ summarise the historical position under English law:

“In modern times religious discrimination has already been addressed obliquely in Great Britain through its close relationship to race discrimination. This is an inevitable result of the current religious heterogeneity. Thus there have been a number of occasions in which cases, which are closely concerned with religious discrimination in employment, have been brought as cases of direct or indirect race discrimination. These have met with varying degrees of success. The critical point is that there is no obvious bright line to identify when permissible religious discrimination and when impermissible race discrimination had occurred. As a result there is a marked frustration among some religious groups with the lack of a comprehensible and coherent code of protection from discrimination.”

The authors refer⁹ to a number of cases to highlight the range of decisions from the courts and tribunals. These are: *Mandla v Dowell Lee* [1983] 2 AC 548 (Sikhs are a racial group); *Dawkins v Department of Environment* [1993] IRLR 284 (Rastafarians are a religious not a racial group); *Seide v Gillette Industries* [1980] IRLR 427 (Jews are religious and racial group); *Commission for Racial Equality v Dutton* [1989] 1 All ER 306 (Gypsies are a racial group); *Tariq v Young C.O.I.T.* 24773/88 (Muslims are not a racial group).

Ms. Monaghan¹⁰ holds the same view:

“It is difficult to see how the resulting case law can be justified in a human rights context. This case law holds that Jews and Sikhs are “racial groups” but Rastafarians (without a long history) and Muslims (who are insufficiently homogeneous) are not. The consequence is that Sikhs and Jews enjoy full protection against discrimination at work (and in the other areas covered by the Race Relations Act 1976) but other religious groups do not.”

It is therefore clear that prior to the Human Rights Act 1998 Muslims were not protected against religious discrimination. “Marked frustration” referred to by Messrs. Moon and Allen is felt by Muslims in this country.

The reason for Parliament’s failure to deal with religious discrimination was considered by Lord Templeman in *Mandla v Dowell Lee*¹¹:

“The Act does not outlaw discrimination against a group of persons defined by reference to religion. Presumably, Parliament considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups.”

THE CURRENT POSITION

The HRA indirectly and incompletely incorporated the ECHR into English law. It does not contain a “force of law” provision. Grosz, Beatson and Duffy¹² state: “The result of not incorporating the Convention rights is to make them, in effect, a new form of common (i.e. non-statutory) law.” Art. 13 ECHR has been left out by the HRA altogether. Nevertheless, the convention rights and Strasbourg jurisprudence is (and will be) considered and followed by English courts.

Monaghan argues¹³: “Similarly Articles 3 and 14 may be invoked to compel investigations into discriminatory treatment on grounds other than race” while concluding “Article 14 does not provide the perfect solutionof a general non-discrimination measure ... Nevertheless, notwithstanding its deficiencies Article 14 does offer scope for imaginatively progressing

the domestic anti-discrimination protection. Its impact is likely to be felt both in filling some of the jurisdictional gaps in our anti-discrimination laws and in liberalising the definition of discrimination itself.

Whether the HRA prohibits discrimination on the grounds of religion is not clear. It is my view that the HRA does not alter the position that existed before its coming into force. Therefore, the current position under English law is that discrimination on the grounds of religion is not prohibited under English law.

Recently, two European Directives, namely, the Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) have been issued. The Race Directive should have been implemented by December 2003. The Framework Directive is intended to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to member states putting into effect the principle of equal treatment. The consultation process is ongoing and legislation is said to be introduced.

ATTEMPTS TO LEGISLATE AGAINST RELIGIOUS DISCRIMINATION:

Since 1997 there have been five attempts by private members to introduce bills in Parliament to deal with religious discrimination. None of them reached the statute books. One of them was the Race Relations (Religious Discrimination) Bill introduced in the House of Lords in the 1999-2000 session. Its purpose was to extend the Race Relations Act 1976 to include discrimination on the grounds of religion. Had it been passed as law, the extension would have been a good start for giving protection against discrimination on religious grounds.

Continuous lobbying by pressure groups/interested persons has been prevalent. Material has been sent out by groups such as the Association of Muslim Lawyers and others. However, there seems to be a marked reluctance on the part of the Government to prohibit discrimination on the grounds of religion.

The *Vienna Declaration* requires steps to be taken by signatories to enact legislation to protect national minorities and to eliminate discrimination in all its forms, thus prohibiting religious discrimination.

Art. 13 of the EC Treaty also requires action to “*combat*” such discrimination. I submit the Government is morally and legally bound to do so.

THE WAY FORWARD

In the United States, the Religious Freedom Restoration Act¹⁴ was passed to reverse a decision of the Supreme Court in the case of *Employment Division v Smith*¹⁵. This law requires States to provide religious exemptions from racially neutral and generally applicable laws, and thereby mandates religious accommodation unless there is a compelling State interest. As Satvinder Juss states¹⁶: “*The UK Parliament likewise should legislate to secure religious freedoms in Britain’s multicultural society. A simple statute on religious freedoms would be far more consistent with the British system of securing rights through ordinary legislation rather than either an entrenched Bill of Rights or a written constitution which would require a radical overhaul.*” Similar views are expressed by Stephanos Stavros¹⁷ who compares the European and US experiences.

If the political will is there, there are many ways in which legislation can ensure that national minorities are protected and discrimination eliminated from this country. These are:

1. To follow the path suggested by the *Vienna Declaration*, or as argued for by Ms. Monaghan to eliminate discrimination in all its forms. A fresh look at the problem is necessary and the current legislation could be replaced by a single anti-discrimination law.
2. The Race Relations Act could be amended to prohibit religious discrimination as suggested to the House of Lords.
3. The US example could be followed.

CONCLUSION

It seems to me that English law does not prohibit religious discrimination in all its forms. Therefore, there must be specific legislation to deal with it. Under international law, the UK is under legal obligation to protect national minorities from discrimination on several grounds including religion. However, no domestic remedy will be available until there is legislation specifically prohibiting discrimination on the grounds of religion. ✓

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- ⁹ *ibid.* Footnote 18, p. 584
- ¹⁰ [2001] EHRLR 167 @ 172
- ¹¹ [1983] 2 AC 548 @ 568
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- ¹⁴ (42 USC 2000 bb seq Supp V 1993)
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