



The Association of
Muslim Lawyers (UK)

RELIGIOUS DISCRIMINATION LEGISLATION – IS THERE A NEED ?

THE HISTORICAL & LEGAL PERSPECTIVES

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INTRODUCTION:

1. Discrimination can be defined as the act of discriminating, distinguishing or noting and marking differences. It is the state of being discriminated, distinguished or set apart from others. 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 unfair and unjust in most cases.
2. For the person being discriminated against, it is degrading, insulting and humiliating. Discrimination is socially divisive and is a cause of many social, political and economic evils. Discrimination is the anti-thesis of equality which is regarded by most religions, political systems and societies as being a fundamental right of all individuals. Equality and discrimination cannot co-exist: where you have discrimination, you cannot have equality.
3. Discrimination can take many forms and may be on many grounds: race, ethnicity, colour, gender, religion, age, nationality, political or other beliefs, social backgrounds, disability and sexual orientation. These are personal and individual attributes or characteristics of individuals. Discrimination on the grounds of religion occurs where someone is singled out for different treatment on the grounds of his religion. In this situation, 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.
4. The purpose of this paper is to look whether and to what extent English law presently deals with religious discrimination and whether there is any need for change. I have considered the legal position from the perspective of a Muslim but the points made are of general application and would apply equally to all religions.
5. First, therefore, I recall the international declarations on the issues of human rights and the protection of minorities. Secondly, I examine the historical position under English law, namely, that applicable prior to the coming into force of the Human Rights Act 1998 (“HRA”) on the 2 October 2000. Thirdly, I look at the present position. 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 the view that I do, that English law does not still prohibit religious discrimination in all its forms I put forward some suggestions as to the way forward.

INTERNATIONAL DECLARATIONS:

6. Various international declarations and treaties to which the United Kingdom is a party forbid discrimination of different types. These include the *Universal Declaration of Human Rights* [1948]. It contains, amongst others, the following provisions:

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“Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country of territory to which a person belongs, whether it be independent, trust, non-self-governing or under other limitation of sovereignty.

Article 7: All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

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.”

7. The *International Covenant on Civil and Political Rights* was adopted and opened for signature, ratification and accession by the UN General Assembly on 16 December 1966. It came into force on the 23 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.”

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

“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.”

9. Article 13 of the *European Community Treaty* states as follows:

“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.”

10. In the *Vienna Declaration* made on the 9 October 1993, the Heads of State and Government of the 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 (see decision in Appendix I)*
- *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 (see Decision in Appendix II)*

11. 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.

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

HISTORICAL POSITION:

13. 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.

14. The situation that prevailed is summarised by Karon Monaghan² 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.”

The United Kingdom’s anti-discrimination legislation proscribes discrimination within limited fields according to the ground upon which the discrimination is alleged to have occurred. Thus discrimination on the grounds of race, sex and disability is proscribed in the provision of goods, facilities and services and the management and disposal of premises. Both racial and sexual discrimination are prohibited in the field of education whereas discrimination on the ground of disability is not. Discrimination in the employment context is proscribed on any of the above stated grounds save that a complaint of pay discrimination can be brought in the more limited circumstances where the complaint is based on sex rather than race or disability. As far as discrimination on the grounds of religion or political opinion is concerned this is only prohibited in Northern Ireland and there solely in the employment context. Discrimination on racial grounds by public authorities in the exercise of their functions will be outlawed by the Race Relations (Amendment) Act 2000 (enacted to give effect to the recommendations in the Stephen Lawrence Enquiry Report that “the full force of the Race Relations legislation should apply to all police officers”) but discrimination on other grounds is not so outlawed.

“In so far as domestic anti-discrimination law is concerned therefore, there is inconsistent protection against discrimination on the grounds of race, sex and disability and a complete absence of explicit protection against discrimination on the grounds of sexuality, age, language and, apart from in Northern Ireland, religion or political opinion. Discrimination on these latter important grounds is only outlawed if a complaint can be framed as a complaint of discrimination on one of the protected grounds. Thus 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. Similarly the only way of challenging the imposition of an age bar would be to establish that it was indirectly discriminatory against a protected group and the same may be true of language bars. Discrimination on the grounds of sexuality, without more, is not made unlawful at all by domestic anti-discrimination legislation.[footnotes omitted and underlining added]”

15. 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.

16. In the case of *Ealing London Borough Council v Race Relations Board*³ 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. It is no offence under the Acts to stir up class hatred. It is, therefore, unquestionably with a limited sort of socially disruptive conduct that the Acts are concerned, and it is, on any reading within a limited sphere that Parliament put its ameliorative measures into action. ...”⁴

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.”⁵

17. In the case of *Mandla v Dowell Lee*⁶ in the Court of Appeal, Lord Denning, M.R. said:

² Limitations and Opportunities: A Review of the Likely Domestic Impact of Article 14 ECHR [2001] EHRLR 167.

³ [1972] AC 342

⁴ *ibid.* p.362

⁵ *ibid.* p.354

*“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”.*⁶

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. ... ”*⁸

18. 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*.⁹

“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.”

19. The fundamental rights enshrined in the ECHR were followed in the jurisprudence of the European Court of Justice. In the case of *ERT*¹⁰, 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”

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

21. Gay Moon and Robin Allen QC¹¹ summarises the historical position under English law as follows:

“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.”

22. The authors refer¹² to a number of cases to highlight the range of decisions from the courts and tribunals. The cases referred to 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)

23. Ms. Monaghan¹³ holds the same view:

⁶ [1983] QB 1

⁷ *ibid.* p.8

⁸ *ibid.* pp.20 and 21

⁹ Judgment 12 November 1969, Case 29/69.

¹⁰ Case C-260/89 [1991] ECR I-2925

¹¹ Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications [2000] EHRLR 580

¹² *ibid.* Footnote 18, p. 584

¹³ [2001] EHRLR 167 @ 172

“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.”

24. It is therefore clear that prior to the coming into force of the Human Rights Act 1998 Muslims were not protected against discrimination on the grounds of religion. The “*marked frustration*” referred to by Messrs. Moon and Allen is felt by the Muslims in this country.
25. The reason for this failure by Parliament to deal with discrimination on the grounds of religion was considered by Lord Templeman in the case of *Mandla v Dowell Lee*¹⁴ as follows:

“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 sever burden on members of religious groups.”

CURRENT POSITION:

26. The HRA indirectly and incompletely incorporated the ECHR into English law. It does not contain a “force of law” provision. Grosz, Beatson and Duffy¹⁵ states: “*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 of the ECHR has been left out by the HRA altogether. Nevertheless, the convention rights and the Starsbourg jurisprudence is and will be considered and followed by English courts.
27. Ms. Monaghan argues¹⁶: “*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 solution to those of us who would wish to see 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.*”
28. Whether the HRA prohibits discrimination on the grounds of religion is not so clear. Although I agree that arguments to the contrary may be advanced, 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.
29. Recently, two European Directives, namely, the Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) have been issued brings in some changes in respect of discrimination on religious grounds. The Race Directive also is to be 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. However, this should be implemented by 2 December 2003. Presently the consultation process is ongoing and legislation will be introduced later in the year. A private members bill is currently before Parliament which is due for a second reading later this month. This covers most of the ground in the Framework Directive.

ATTEMPTS TO LEGISLATE AGAINST RELIGIOUS DISCRIMINATION:

30. Since 1997 there have been five attempts by private members to introduce bills in Parliament to deal with discrimination on the grounds of religion. 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.
31. There have been continuous lobbying by pressure groups and interested persons on this issue. I have seen material sent out by the Association of Muslim Lawyers and others on this issue. However, there seems to be a marked reluctance on the part of the Government to prohibit discrimination on the grounds of religion.
32. The *Vienna Declaration* requires steps to be taken by the signatories to enact legislation prohibiting religious discrimination. This Declaration requires the Government to take various steps to protect national minorities and to eliminate discrimination on all its forms.
33. Art. 13 of the EC Treaty also requires action to “*combat*” such discrimination. I take the view that the Government is morally and legally bound to do so.

WAY FORWARD:

¹⁴ [1983] 2 AC 548 @ 568

¹⁵ Human Rights, Sweet & Maxwell, 2000, p.9

¹⁶ [2001] EHLRLR 167 @179

34. In the United States, the Religious Freedom Restoration Act¹⁷ was passed to reverse a decision of the Supreme Court in the case of *Employment Division v Smith*¹⁸. 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 states¹⁹: “*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 Stavros²⁰ who compares the European and US experiences.
35. A Protocol 12 to the ECHR has been drafted and opened for signature. The UK has not signed it and the Government does not give any indication of its indications in respect of it. It provides:
1. The enjoyment of any right set forth by law shall be secured without discrimination on any grounds 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.
 2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*
36. 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*, Protocol 12 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:

37. 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. ✓

APPENDIX I

National Minorities

The national minorities which the upheavals of history have established in Europe should be protected...

In this Europe we wish to build, we must respond to this challenge: assuring protection of the rights of persons belonging to national minorities within the rule of law...

...

In their actions, States should ensure the respect of the principles which are fundamental to our common European tradition: equality before the law, non-discrimination, equal opportunity, freedom of association and assembly...

States should create the conditions necessary for persons belonging to national minorities to develop their culture, while preserving their religion, traditions and customs. ...

...

We confirm our determination to implement fully the commitments concerning the protection of national minorities contained in the Copenhagen and the other documents of the CSCE.

...

In consequence, we decide to instruct the Committee of Ministers:

...to draft with minimum delay a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities...

APPENDIX II

Convinced furthermore that Europe’s future demands from individuals and from groups not only tolerance but also the will to act together, combining their diverse contributions,

¹⁷ (42 USC 2000 bb seq Supp V 1993)

¹⁸ (494 US 872, 1990)

¹⁹ Religious Freedom 1996, NLJ 1849

²⁰ Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from across the pond ? [1997] EHRLR 607.

**Condemn in the strongest possible terms racism in all its forms, xenophobia, anti-Semitism and intolerance and all forms of religious discrimination*

**Encourage member States to continue efforts already undertaken to eliminate these phenomena, and commit ourselves to strengthening national laws and international instruments and taking appropriate action at national and European level;*

**Undertake to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination, as well as any any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds;*

...

To this end we instruct the Committee of Ministers to develop and implement as soon as possible the following plan of action and mobilise necessary financial resources

Plan of action

1. ...

2. *Invite member States to reinforce guarantees against all forms of discrimination based on race, national or ethnic origin or religion, and to this end to:*

**re-examine without delay their legislation and regulations with a view to eliminating provisions likely to generate discrimination based on any of these reasons or likely to sustain prejudice;*

**generate effective implementation of legislation aimed at combating racism and discrimination;*

**reinforce and implement preventive measures to combat racism, xenophobia, anti-semitism and intolerance, giving special attention to awareness-raising and confidence-building measures.*

...