THE PROTECTIONS FOR RELIGIOUS RIGHTS

Law and Practice

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INTRODUCTION

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A. Preamble

1.01 The law is more piecemeal than philosophy, and it is necessarily constrained by many things others than philosophical truth: for example by the facts of any given case; by the evidence adduced; and by the doctrine of precedent. There have, however, been some interesting judicial statements about religious belief. In *United States v Kauten*, Judge Augustus N Hand said:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it[1]

1.02 Mason ACJ and Brennan J expressed similar sentiments in *Church of the New Faith v Commissioner of Pay-Roll Tax* when they said:

> In all societies and in all ages man has pondered upon the explanation of the existence of the phenomenological universe, the meaning of his existence and his destiny . . . For some, the natural order, known or knowable by use of man's senses and his natural reason, provides a sufficient and exhaustive solution to these great problems; for others, an adequate solution can be found only in the supernatural order, in which man may believe as a matter of faith, but which he cannot demonstrate to others who do not share his faith.[2]

1.03 Religious beliefs engage most aspects of everyday life. If the purpose of religion is to enable mankind to seek ultimate truth this is not particularly surprising. Reported cases from all over the world show that religious beliefs will raise issues, from appearance (for example whether to shave, cover the head, or wear a cross), to eating (whether to eat meat only prepared in a certain way) and drinking (normally in relation to alcohol). Religious belief may affect aspects of general behaviour (from providing services to the sick and infirm or refusing

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[1] *US v Kauten* (1943) 133 F (2d) 703, 708.
[2] *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120.

to carry arms) to sexual behaviour. It will affect beliefs about when life begins, and issues about dying. If persons of a particular religion believe that they have found real truth, experience shows that they will want to share that truth, and seek to live their lives in accordance with that truth.

1.04 In these circumstances there is little doubt that it would make states easier to govern if everyone either shared the same religious belief, or had no religious beliefs. However, at least since the Treaties of Westphalia signed between May and October 1648, Western Europe has recognized that rulers cannot compel everyone living in one state to believe the same thing or share a certain religious belief.

1.05 For many years it was not particularly necessary to study the protections available for those with a religious belief in England and Wales. As a matter of social history the laws were informed by an orthodox Judaeo-Christian approach, and this reduced potential areas of conflict with the actions of the majority of the population having those beliefs. But there have been some important developments.

1.06 First, new laws promoting individual self-determination have been enacted. According to some commentators, these laws themselves owe much to religious teaching about tolerance, and have been informed by a better understanding that law needs to protect minorities as well as majorities, but the laws have also raised issues relating to religious freedom. The reality of permissive legislation (as it has sometimes been called) is that it sometimes requires others (who believe the permitted act to involve sinful or religiously wrong behaviour) to become party to the relevant permitted behaviour. So, for example, the statutory right to abortion is capable of engaging the religious conscience of doctors who believe that life begins at conception (this issue was at least addressed in the legislation). If future laws are enacted permitting assisted dying, it is certain that they will engage the religious freedoms of persons who are involved in the nursing or treatment of the dying.

1.07 Secondly, new equality laws have been passed. These prevent discrimination on the basis of protected characteristics. As one of the protected characteristics is religion or belief (along with (currently) race, sex, age, disability, sexual orientation, gender reassignment, and marriage and civil partnership) it might be wondered why equality laws should cause difficulties for religious freedoms, and it is apparent that many of those debating religious freedoms in Parliament have made this working assumption. However, the reason that religious freedoms are still affected is because just as religious beliefs engage all areas of life, so do the other protected characteristics. For example, a religious belief about whether a woman should be a priest, rabbi, or imam will engage the protected characteristic of sex. A religious belief that sexual relations should be restricted to heterosexual marital relations will engage the protected characteristic of sexual orientation. This means, almost perversely, that the most important protections for religious rights in the Equality Act 2010 are set out in the schedules containing exceptions to the discrimination provisions for protected characteristics.

1.08 All of this means that there are now an increasing number of cases raising issues of religious freedom. This might be all well and good for the lawyers involved, but it is hardly satisfactory from the point of view of society generally, or those involved with the relevant disputes.

1.09 It is hoped that a clear explanation of the law might also assist those legislating in this area to understand why equality laws need careful drafting to avoid creating inequality.

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1.10 This book starts with a historical review of some of the main provisions relating to religious freedoms in England and Wales. It then looks at protections available through international treaties, working down to international regional protections, before considering some interesting comparative jurisdictions, before turning—finally—to the domestic law in England and Wales. The reason for looking at international and comparative experiences is because this is likely to assist in an understanding of comparative cases, which are frequently cited and considered in this area of law. For example, if a decision involving Turkey has been cited, either at the domestic level in Turkey or at the level of the European Court of Human Rights (ECtHR), it is necessary to understand the secular nature of the Turkish Constitution and state. It is then important to understand from recent ECtHR cases, such as *Lautsi v Italy*, that secularism is itself a world view which is entitled to the same respect from the law, but no more nor less, as that to be accorded to religious beliefs, and that a neutral approach is not necessarily always the same as a secular approach.[3] It might be thought that there has been confusion in terminology between neutrality and secularism. It is the duty of all courts to demonstrate neutrality towards all religions or beliefs whatever the starting point for that society (whether it is a religious starting point, such as in the Republic of Ireland, or a secular starting point, such as in France), but that does not mean that the courts are secularist.

1.11 Where suggestions are made for the future development of the law, the aim is to make these clearly so that the suggestions can be distinguished from statements about the current state of the law. Any suggestions for the future development of the law are themselves informed by the proposition that understanding and tolerance for everyone, whether with or without a religious belief, is the best way for lasting truth to emerge, and for society to survive and flourish.

B. A Short History of English Law and Religious Rights

(1) Medieval England

1.12 Before the Reformation in the sixteenth century, Catholicism represented the religious orthodoxy in England and had done so since the late seventh century. The Norman Conquest in 1066 resulted in the strengthening of ties between Rome and the Church of England. Tensions soon emerged between the authority of the monarchy and the Papacy, including over the appointment of bishops.[4] The centuries that followed saw various clashes between the monarchy and the Church over the extent of Papal intervention and, as the system of church courts became established, the scope of the ecclesiastical jurisdiction. A number of measures were introduced with a view to managing the relationship between the Church and state.[5]

1.13 If religious liberty was on the agenda at all in this period it was only to secure greater autonomy for the Church. There were calls by churchmen that 'the Church should be free', which for them included at least 'benefit of clergy' (immunity from being tried and punished in the ordinary courts) and freedom of canonical election.[6] The guarantee of freedom for the

[3] See Ch 3.

[4] The so-called 'investiture controversy' of the 12th and 13th centuries was a dispute about the rights of secular rulers to make appointments to church offices.

[5] eg the Constitutions of Clarendon passed by Henry II; and the Statutes of Praemunire passed in the 14th century.

[6] W McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2nd edn, Maclehose, 1914) 18.

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Church came to be enshrined in the first article of the Magna Carta (1215) which declared that 'the English church shall be free, and shall have her rights entire, and her liberties inviolate'.[7] This guarantee is one of the few that remains on the statute book today. The charter went on to set out the liberties granted to 'all freemen of our kingdom'; however, freedom of conscience and religion did not feature.

1.14 The Church was itself intolerant of those who held unorthodox Christian beliefs, particularly where they threatened the Church's authority and power. In 1401 the *de haeretico comburendo* was passed by Henry IV on the advice of the clergy. The statute was aimed at crushing Lollardy, a Christian reform movement which emerged in the fourteenth century and criticized corruption in the Catholic Church. The Lollards also believed in a lay priesthood, challenging the Church's authority to invest the divine authority to make a man a priest.

1.15 The *de haeretico comburendo* prohibited, among other things, the preaching, holding, teaching, or writing of any book contrary to the Catholic faith, or the making of conventicles. It sanctioned the burning of those who refused to abandon their heresy. The measures were expressed by the statute to be for 'the conservation of the Catholic faith' but also 'the safeguard of the estate, rights and liberties of the Church of England'. It was not just the integrity of the Church which was threatened. The statute acknowledged a concern that the Lollards would 'excite and stir' people to 'sedition and insurrection'. It has been said that in this way Lollardy 'cemented a connection between heresy and sedition which ensured the cooperation of the State in repressing dissent for another three centuries'.[8] Many Lollards were burned in the centuries that followed.

1.16 The Jews were the other significant religious minority in medieval England. They had settled in England following the Norman Conquest and were afforded a degree of religious freedom. However, their position was unique. The Jews were afforded privileges principally because of the useful economic function they performed. Being the only persons authorized to lend money at interest they provided money lending services to the general population and were a significant source of revenue for the Crown. The monarchy had a clear interest in securing their protection and ensuring that the community flourished. Successive monarchs, from Henry I onwards, issued charters of protection granting the Jews various rights and liberties, such as the freedom of movement throughout the country and free recourse to royal justice. They were also permitted to practise their faith relatively freely. Until the thirteenth century there was no prohibition on the building of synagogues and, while their conversion was encouraged, the employment of force for this purpose was prohibited.[9] The charter of Henry II even extended to Jews the privilege of internal jurisdiction in accordance with Talmudic law.[10]

1.17 This is not to say that the Jewish community faced no disadvantage or discrimination. They were financially exploited by the Crown and faced hostility from the Christian population and Church. Their religious freedom proved fragile and was increasingly restricted in the

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[7] This was by no means an innovation. The Charters of Henry I, Stephen Blois, and Henry II guaranteed the freedom of the Church. However, what this freedom meant in practice differed from reign to reign: see McKechnie (n 6). The Magna Carta made clear that the freedom included freedom of elections 'which is reckoned most important and very essential to the English church'.

[8] J Rivers, *The Law of Organised Religions* (OUP, 2010) 9.

[9] C Roth, *A History of Jews in England* (3rd edn, Clarendon Press, 1964) 103.

[10] Roth (n 9) 10.

course of the thirteenth century.[11] In 1219 a royal decree was issued requiring all Jews to wear a distinguishing badge so that they could be differentiated from Christians. In 1222 a deacon who had converted to Judaism and married a Jewish woman was burnt for heresy.[12] Further restrictions were imposed on the Jewish community in 1253, including restrictions on where they could live and the building of new synagogues.[13] They were also prohibited from certain activities which risked offending Christian sensibilities, such as eating meat during Lent.

1.18 By 1275 Jews had been prohibited from lending money at interest. As their economic utility diminished they were finally expelled from England in 1290, after anti-Jewish pogroms in London and York, and would not be formally readmitted for another four centuries.

(2) The English Reformation and establishment of the Church of England

1.19 The ties between Rome and the English Church were severed in the early sixteenth century under Henry VIII. This was not for doctrinal reasons but because of the Pope's refusal to annul Henry's first marriage to Catherine of Aragon and assist him in obtaining a legitimate male heir through marriage to Anne Boleyn. The Ecclesiastical Appeals Act 1532 declared that England was 'an empire' governed by 'one supreme head and king'.[14] All matters were to be 'definitively adjudged and determined within the king's jurisdiction and authority' without resort to the Pope or any other foreign courts. A year later, in 1534, the Act of Supremacy declared that the King was the 'supreme head in earth of the Church of England, called *Anglicans Ecclesia*'.[15] It was this process that resulted in the 'establishment' of the Church of England and the special position it enjoys today.

1.20 As the head of the Church of England, the monarch now had greater freedom to control matters of religion. The Act of Supremacy 1534 expressly granted the king, his heirs, and successors 'full power and authority' to 'visit, suppress, redress, reform, order, correct, restrain and amend all such errors, heresies, abuses, offences, contempts and enormities' where necessary for 'the increase of virtue in Christ's religion and for the conservation, peace, unity and tranquillity of this realm'.

1.21 Religious observance came to be tightly regulated by the state in the centuries that followed. Significant reforms were instituted under Edward VI when Catholic doctrines and practices came to be rejected.[16] By the Act of Uniformity 1552 a uniform liturgy in the Protestant tradition was imposed.[17] This Act decreed that the Book of Common Prayer, annexed to the statue, was to be used within the Church of England. Attendance at church, or 'some usual place' where the prescribed common prayer was used, was made compulsory on Sundays and holidays. Attendance was compulsory for all regardless of their religious beliefs and preferences. The statute set down severe penalties for those present at any other manner and form of common prayer.

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[11] These restrictions tended to emulate the regulations of the Fourth Lateran Council in Rome, which issued a series of anti-Jewish regulations.

[12] It has been suggested that this incident served as a common law precedent for the punishment of heretics by burning, for which the *de heretico comburendo* was unnecessary: Roth (n 9) 41.

[13] Roth (n 9) 58–9 and 76–8.

[14] Ecclesiastical Appeals Act 1952 (24 Hen VIII c 12).

[15] Act of Supremacy 1534 (26 Hen VIII c 1).

[16] After a period of uncertainty, Henry VIII had reasserted Catholicism as the orthodoxy by the Act of Six Articles 1539 (the long title of which was 'An Act abolishing diversity in Opinions').

[17] Act of Uniformity 1552 (5 & 6 Edw V1 c 1).

Those found guilty of their third offence faced life imprisonment.[18] These measures significantly curtailed the religious freedom of those whose beliefs did not coincide with those of the Church of England. While individual domestic worship was not affected by the Act of Uniformity, people were required publicly to engage in practices and rituals contrary to their consciences and were prevented from practising their religion in community with others.

1.22 The legislation was repealed during the brief reign of Mary I when Papal authority was restored. This was far from a triumph for religious freedom. The *de haertico comburendo* (which had been repealed by Edward VI) was restored and Protestants were executed for heresy. It was during this time that Archbishop Cranmer and Bishops Ridley and Latimer were burnt at the stake in Oxford.

1.23 The changes were reversed by Elizabeth I and new Acts of Supremacy and Uniformity were passed in 1558.[19] Attendance at church was once again made compulsory with more severe penalties set down for those failing to attend.[20] It has been suggested that, in practice, little attempt was made to deal with Catholic recusants during the first decade of Elizabeth's reign.[21]

1.24 More stringent measures were introduced following Elizabeth's excommunication by the Pope in 1570, as Catholic dissent became a more acute threat to the security of the state. Those who failed to attend church as required by law, or those found present at unlawful 'assemblies, conventicles or meetings' for the exercise of religion, faced imprisonment without any right of bail until they conformed.[22] 'Popish recusants' were also restricted to certain places of abode in an attempt to prevent them from corrupting others and stirring sedition and rebellion.[23]

1.25 Religious disputes continued during the reign of James I, although on the whole his approach was more moderate and tolerant. Following the Gunpowder Plot the Popish Recusants Act 1605 was passed imposing various penalties and restrictions on recusant Catholics. Among other things it provided rewards for those who reported Catholic priests or mass, it required all convicted Catholic recusants to depart from London and prohibited them from practising certain professions or entering into public office.[24] Controversially a new oath of allegiance was also introduced denying the Pope's authority.[25] Catholics who took the oath and displayed outward obedience to the law were tolerated. There were also clashes with the Presbyterians and Puritans. It was during James' reign that a group of Puritans, known as the Pilgrims, left England in the hope that they could practice their faith more freely in the New World.

1.26 Clashes with Puritans and their emigration continued during the reign of Charles I. Charles I was considered to be more authoritarian than his father, James I, and also alienated Parliament by trying to reign without it.

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[18] The statute provided for six months' imprisonment for a first offence, imprisonment for a whole year for a second offence, and life imprisonment for a third offence.

[19] Act of Supremacy 1558 (1 Eliz I c 1) and Act of Uniformity (1 Eliz I c 2). Elizabeth I did make some concessions to Catholicism, including in the liturgy prescribed, eg abuse of the Pope was removed from the litany.

[20] Recusants (those who failed to attend church as required) faced a fine of 12 pence. Under the Act of Uniformity 1552, recusants had simply faced the 'censures of the Church'.

[21] Rivers (n 8) 12.

[22] Religion Act 1592 (35 Eliz I c 1). A conventicle is an unofficial meeting to discuss religious issues.

[23] Popish Recusants Act 1592 (35 Eliz I c 1).

[24] Popish Recusants Act 1605 (3 Jac I c 5).

[25] Popish Recusants Act 1605 (3 Jac I c 4). See further the Oath of Allegiance Act 1609.

1.27 The Civil War, which saw the breakdown of censorship and the collapse of the Church, created a climate in which religious dissent flourished[26] and calls for toleration could be more openly canvassed.[27] The Commonwealth period saw greater toleration of Protestant dissenters; however, restrictions on religious freedom were reinforced following the restoration of the monarchy. Although King Charles II appeared receptive to the idea of religious toleration,[28] the Cavalier Parliament introduced a raft of draconian legislation which severely restricted the political and religious rights of non-conformists. A new Act of Uniformity was passed.[29] The Conventicles Acts of 1664 and 1670 reinforced the prohibition against unlawful assembly, making it a punishable offence to attend an assembly of five persons or more 'under colour or pretense of any exercise of religion, in other manner than according to the liturgy and practice of the Church of England'.[30]

1.28 The ability of non-conformists to participate in public life was also severely curtailed. Under the Corporation Act 1661 and the Test Acts of 1673 and 1678 no person could take up public office unless he had received the Holy Communion 'according to the rites of the Church of England'.[31] Public office holders were also required to take oaths of allegiance and supremacy and to make a declaration against transubstantiation, which imposed a particular burden on Catholics. These restrictions on public office were antithetical to religious freedom and toleration.[32] Moreover, any person convicted of an offence under the Blasphemy Act 1698 faced severe disabilities. The Act made made it an offence for any person educated in, or having made profession of, the Christian religion, to deny the Holy Trinity, to assert that there was more than one god, or to deny that the Christian religion was true or the Holy Scriptures to be of divine authority.[33] A person convicted of their first offence was adjudged incapable and disabled in law to have or to enjoy any office or employment, ecclesiastical, civil, or military. A person convicted of their second offence was disabled to sue, prosecute, or plead any legal action or to be guardian of any child, or executor or administrator of any person, among other things. It has been observed that 'the Legislature, in passing this Act, had not the punishment of blasphemy so much in view as the protecting the Government of the country, by preventing infidels from getting into places of trust.'[34]

1.29 It has been suggested that in practice this body of draconian legislation was not strictly enforced and in some places non-conformists were even able to establish their own places of

[26] There was 'an explosion' in the numbers and variety of Protestant groups: Rivers (n 8) 13.

[27] eg there were calls for religious toleration by the Levellers, a political movement that achieved some prominence during the Civil War.

[28] In the Declaration of Breda, 1660, Charles II declared: 'liberty to tender consciences and that no man shall be disquieted or called in question for differences of opinion in matter of religion, which do not disturb the peace of the kingdom…'. In 1972 he issued his Declaration of Indulgence purporting to extend religious freedom to Catholics and Protestant dissenters but was eventually forced to withdraw the Declaration by the Cavalier Parliament.

[29] Act of Uniformity 1662 (14 Char II c 4).

[30] The Conventicle Act 1664 (16 Char II c 4) and the Conventicle Act 1670 (22 Char II c 1). The Conventicle Act 1670 did not prohibit the assembly of five or more persons of the same household if the assembly was in a house where there was a family inhabiting.

[31] The Corporation Act 1661 (13 Char II St 2 c 1) imposed the requirement on members of all corporations, the Test Act 1673 (25 Char II c 2) extended it to all those holding any civil or military office, and the Test Act 1678 (30 Char II St 2 c 1) to all peers and members of the House of Commons.

[32] It is hoped that well-intentioned legislation does not create a modern day bar to public office for those holding orthodox religious beliefs.

[33] Blasphemy Act 1698 (9 Gul III c 32).

[34] *R v Carlile* (1819) 3 B & Ald 161. In its working paper on Offences against Religion and Public Worship, the Law Commission observed that there were few if any prosecutions under the Blasphemy Act 1968: Law

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worship.[35] Moreover, the Jews remained unaffected by the Conventicles Acts, which were directed at Christian non-conformists. Following their expulsion in the thirteenth century, Jews had re-established themselves in England by 1656[36] and were able to practise their religion relatively freely.[37] Efforts to implicate or prosecute them for non-conformity generally failed. For example, in 1664 the Jewish community was threatened with prosecution under the Conventicle Act 1664 and petitioned the King. The Privy Council affirmed that no instructions had been given for disturbing them and that they could 'promise themselves the effects of the same favour as formerly they have had'. In 1685 there was an express recognition of their right to practise their religion freely. Legal proceedings had been commenced against forty-eight Jews for failure to attend church. The King, upon being petitioned by the wardens of the congregation, issued an Order in Council instructing the Attorney-General to suspend all proceedings: 'His Majesty's Intention being that they should not be troubled upon this account, but quietly enjoy the free exercise of their Religion, whilst they behave themselves dutifully and obediently to his Government.'[38]

1.30 There were other examples of attempts to accommodate the religious differences of Jews. In 1667 the Court of the King's Bench decided that Jews could be sworn on the Old Testament in accordance with their own practices, whilst in 1677 the venue of a case was altered so that a Jewish witness would not have to appear on a Saturday.[39]

1.31 Again, this is not to say that the Jewish community suffered no disadvantage or discrimination. Jews were subject to the same civil disabilities as Christian non-conformists. The Corporation and Test Acts applied to Jews, precluding them from taking public office. They were also unable to acquire the Freedom of the City of London, which inhibited their economic endeavours. However, on the whole, during this period Jews enjoyed more freedom in England than in any other country in Europe.[40]

(3) The dismantling of restrictions on religious freedom

1.32 In the course of the sixteenth and seventeenth centuries a significant body of legislation had built up impinging on the religious and other freedoms of those who held views different from those of the established Church. Although the legislation was not always rigorously enforced and Declarations of Indulgence were issued by Charles II and James II purporting to limit its effect, the legislation remained a potential tool for persecution subject to the whims of the established order.

1.33 The process of dismantling this body of legislation began in earnest upon the accession of William III and Mary II in 1689. The changes that followed were piecemeal, taking the form

Commission of England and Wales, Working Paper No 79, Offences against Religion and Public Worship (1981) para 2.24. The Act was only repealed in 1967.

[35] J Rivers (n 8) 14–15. Rivers suggests that 'generally speaking, rigorous application of the law was the exception, not the rule'.

[36] The Jews were never formally re-admitted by legislative instrument or otherwise. The most that can be said is that their presence was first recognized as legitimate in 1656: Roth (n 9) 166.

[37] Unlike before, no charter was issued setting out their rights and privileges; rather, they were given informal assurances of security.

[38] For other examples, see Roth (n 9) 180–4; TM Endelman, *The Jews of Britain 1656 to 2000* (University of California Press, 2002) 27–8.

[39] Roth (n 9) 180.

[40] Endelman (n 38) 257.

of exemptions carved out for individual groups rather than wholesale change or the creation of any positive rights to religious freedom.

1.34 The first significant piece of legislation was the Toleration Act 1689. The Act sought to provide 'some ease to scrupulous consciences in the exercise of religion';[41] however, it applied only to Trinitarian Protestants.[42] Those who took the oaths and subscribed to the declaration specified in the Act were exempted from the rigours of certain statutes including the Acts of Uniformity 1558 and 1662, the Religion Act 1592, and the Conventicle Act 1670. The Act made specific provision for Quakers by setting down an alternative declaration for those who scrupled 'the taking of any Oath'. Congregations or assemblies for religious worship were permitted under the Act but only if the place of worship was certified and registered and doors remained unlocked at the time of such meeting. Those present at a meeting where the doors were 'locked, barred or bolted' forfeited the concessions granted by the Act.

1.35 The Toleration Act 1689 went further than simply relaxing restrictions on religious observance. It also conferred a degree of positive protection by making it an offence to 'willingly and of purpose, maliciously or contemptuously come into any Cathedral or Parish Church, Chapel or other Congregation permitted by this Act, and disquiet or disturb the same, or misuse any Preacher or Teacher'. This represented for the first time recognition that the religious practice of non-conformists was deserving of positive legal protection.

1.36 While the Toleration Act went some way in establishing freedom of worship for Protestant dissenters, it provided no relief from the requirements imposed by the Corporation Act 1661 and the Test Acts 1673 and 1678, thereby maintaining the link between civic liberties and religious identity.[43] Indeed, in 1711 an attempt was made to discourage the practice of some dissenters who took Holy Communion simply to qualify for public office. The Occasional Conformity Act 1711 set down penalties for those in public office found present at any 'conventicle, assembly or meeting' for the exercise of religion other than according to the liturgy and practice of the Church of England.[44] Another restrictive step was the bar on Roman Catholics becoming monarch. This was introduced by the Bill of Rights which was passed around the same time as the Toleration Act.

1.37 As for freedom of worship, the concessions granted to Trinitarians by the Toleration Act were not extended to Catholics until 1791, over a century later.[45] The Conventicle Act 1670 was finally repealed in 1812 by the Places of Religious Worship Act.[46] The 1812 Act required congregations or assemblies for religious worship of Protestants (at which more than twenty

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[41] Toleration Act 1689 (1 Will & Mar c 18), Preamble.

[42] The Act expressly provided that it did not extend and was not to be construed to extend 'to give any ease, benefit or advantage to any papist or popish recusant whatsoever, or any person that shall deny in his preaching or writing the doctrine of the blessed trinity . . .'.

[43] J Champion, 'Toleration and Citizenship in Enlightenment England: John Toland and the Naturalisation of the Jews' in OP Grell and R Porter, *Toleration in Enlightenment Europe* (CUP, 2000). According to Champion, this compromise 'was the result of the theological origins of the Toleration Act itself. The statutory legislation of 1689 was the result of complex and careful negotiation between Anglican and dissenting interests rather than a conclusion of conceptual considerations about the rights of conscience. Such statutory provisions were calculated to avoid much more dangerous alternatives being advanced: the overwhelming imperative was to preserve the authority and legitimacy of the "true" Anglican religion.'

[44] Occasional Conformity Act 1711 (10 Anne C 6).

[45] By the Roman Catholic Relief Act 1791 (31 Geo III c 32).

[46] The Act also repealed the Quakers Act 1662 (52 Geo III c 155).

people were present) to be certified and registered.[47] Again, doors had to remain unlocked or preachers faced considerable fines and the Act made it an offence to disturb religious assemblies authorized by the Act.[48] By 1813 toleration had also been extended to non-Trinitarian Protestants[49] and in 1846 the Religious Disabilities Act put Jews on the same footing as Protestant dissenters.[50]

1.38 The restrictions on participation in public life began to be dismantled by the late eighteenth century. The Corporation Act 1661 and Test Act 1673 were repealed in 1828 by the Sacramental Test Act but the relief offered was limited.[51] The necessity of receiving Holy Communion as a prerequisite to taking up public office was replaced with a declaration. This required office holders to declare that they would not exercise their power, authority or influence so as 'to injure or weaken the Protestant Church as it is by Law established in England'. Significantly, the declaration had to be made 'upon the Faith of a Christian', which meant that all but Christians remained excluded from public office.

1.39 The exclusion of Catholics from Parliament also remained in place. Catholics were not admitted to Parliament until 1829,[52] a privilege that was not extended to Jews until 1858.[53] However, an elected member still had to take an oath and was not permitted to affirm. Charles Bradlugh, MP for Northampton, was refused permission to take up his seat in the House of Commons on five occasions because of his refusal, as an atheist, to take the oath. After a lengthy campaign by Bradlugh, the law of oaths was completely neutralized in 1888.[54] Anyone who objected to being sworn was permitted to affirm whenever an oath was required.

1.40 Therefore by the end of the nineteenth century considerable progress had been made in extending religious and political freedom to all religious and non-religious groups. The Church of England no longer had a monopoly on public worship, and diversity of religious practice was tolerated. Religious liberty existed as a largely residual and negative freedom—people were free to do what they liked unless prohibited by the law.[55] It was not until the twentieth century that religious liberty came to be guaranteed and promoted as a positive legal right.

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47 ie 20 people besides the family and servants of the occupier.

48 Quakers were expressly exempt from the requirements imposed by the Act.

49 Unitarian Relief Act 1813 (53 Geo III c 160).

50 Religious Disabilities Act 1846 (9 & 10 Vic c 159). The Places of Religious Worship Act 1812, the Roman Catholic Relief Act 1791, and the Religious Disabilities Act 1846 remained on the statute book until 1977 when they were repealed by the Statute (Law Repeals) Act 1977. However, in practice, prosecutions died out in the mid-19th century: Rivers (n 8) 149.

51 Sacramental Test Act 1828 (9 Geo IV c 17).

52 The Roman Catholic Relief Act 1829 (10 Geo IV c 7). This repealed the Test Act 1678.

53 Jewish Relief Act 1858 (21 & 22 Vic c 49).

54 The Oaths Act 1888 (51 & 52 Vic c 46).

55 M Hill and R Sandberg, 'Is nothing sacred? Clashing symbols in a secular world?' (2007) Public Law 488. In the case of Jews, this was reflected in a ruling of Lord Brougham in 1833: 'His Majesty's subjects professing the Jewish religion are born to all the rights, immunities and privileges of His Majesty's other subjects, excepting so far as positive enactments of law deprive them of those rights, immunities, and privileges.' Roth (n 9) 248 and 292, note XI (c). As to the position generally, see the observations in *Attorney-General v Observer Ltd* [1990] 1 AC 109 (HL): 'the starting point of our domestic law is that every person has a right to do what he likes, unless restrained by the common law . . . or by statute'.

(4) Religious freedom in the twentieth and twenty-first centuries

1.41 The promotion and protection of religious liberty as a positive right finds its origins in international law and the human rights movement that developed following the Second World War under the auspices of the United Nations. The UN Charter, signed in 1945, stated that the purposes of the United Nations included 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, Article 18 of which provided a right of 'freedom of thought, conscience and religion' and 'freedom, either alone or in community with others and in public or private, to manifest one's religion or belief in teaching, practice, worship and observance'. Article 2 provided a that everyone was entitled to all the rights and freedoms set forth in the 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'.[56]

1.42 However, the Universal Declaration of Human Rights was simply a declaration and unlike a treaty was not binding on states in the formal sense.[57] While work on drafting a binding international treaty continued,[58] the newly formed Council of Europe resolved to draft a binding human rights treaty for Europe conferring enforceable rights upon individuals in Member States. Drafting was completed by 1950 and the European Convention on Human Rights came into force in 1953. The Convention established the European Commission of Human Rights and the European Court of Human Rights ('the ECtHR') so that individuals could enforce rights guaranteed by the Convention, including the right to freedom of religion enshrined in Article 9. The right was set out in the same terms as Article 18 of the Universal Declaration of Human Rights, except that it contained its own limitation clause.[59] The right to manifest one's religion and belief was expressly made subject 'to 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 the protection of rights and freedoms of others'.

1.43 The United Kingdom was closely involved with the drafting of the Convention as well as the project's inception. However, the proposals were controversial in Britain, facing opposition from members of government and the judiciary. In particular there were concerns about the jurisdiction of the European Court of Human Rights ('the ECtHR') and the potential for interference by foreign judges. Although, in 1951, the United Kingdom became the first state to ratify the Convention, it did not accept the optional right of individual petition to the European Commission and the jurisdiction of the ECtHR until 1966. The Convention was not incorporated into domestic law until 1998.

1.44 Until its incorporation into domestic law, the Convention could not be invoked and enforced directly in English courts. Courts could nevertheless have regard to Convention rights in interpreting legislation and applying common law principles. In *Ahmad v Inner London*

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[56] See Ch 2, part B.

[57] For discussion of whether certain provisions of the Universal Declaration of Human Rights have binding status, see Ch 2, para 2.10.

[58] This would eventually culminate in two treaties—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights—which came into effect in 1976. The right to religious freedom was enshrined in the International Covenant on Civil and Political Rights, Art 18. See further Ch 2, part C.

[59] Although Art 18 of the Universal Declaration of Human Rights does not have its own limitation clause, it is subject to the general limitations in Art 29.

Education Authority the Court of Appeal had regard to Article 9 in a claim for constructive dismissal by a Muslim teacher whose employer had refused to accommodate his absence every Friday afternoon to attend mosque.[60] The majority took the view that Article 9 did not entitle Mr Ahmad to absent himself from work for the purposes of religious worship. Lord Denning advocated a cautious approach:

> Whilst upholding religious freedom to the full, I would suggest that it should be applied with caution, especially having regard to the setting in which it is sought. Applied to our educational system, I think that Mr. Ahmad's right to 'manifest his religion in practice and observance' must be subject to the rights of the education authorities under the contract and to the interests of the children whom he is paid to teach. I see nothing in the European Convention to give Mr. Ahmad any right to manifest his religion on Friday afternoons in derogation of his contract of employment: and certainly not on full pay.[61]

1.45 In some cases domestic law provided more generous protection than Article 9. For example, in 1976 Parliament enacted the Motorcycle Crash Helmets (Religious Exemption) Act which exempted Sikhs from the statutory requirement that motorcyclists wear crash helmets. Notwithstanding the importance of countervailing considerations, such as road safety, Parliament recognized the need to safeguard the religious freedom of adherents of the Sikh religion, a principle of which was that turbans had to be worn by men in public. The European Commission of Human Rights, on the other hand, ruled inadmissible a claim by a Sikh who had been convicted for not wearing a helmet before the exemption was introduced in 1976. The Commission held that the obligation to wear a helmet was a necessary safety measure and that any resulting interference with the applicant's freedom of religion was justified for the protection of health.[62]

1.46 There were, and remain, various other examples of legislative exemptions from the general law on grounds of religion and conscience reflecting specific policy choices by Parliament in favour of religious and conscientious freedom.[63]

1.47 When the Convention was incorporated into domestic law by the Human Rights Act 1998, the Act did not alter the substance of the rights but it did provide easier access to rights which already existed. The effect of the Act is that Convention rights, including Article 9, can now be directly enforced in domestic courts.[64]

1.48 Section 13 of the Human Rights Act provides that courts must pay particular regard to the importance of the right to freedom of religion:

> If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

1.49 Section 13 was included in the Act to meet concerns of religious organizations about the impact of the Act on churches and other bodies of a religious character. There were concerns,

[60] *Ahmad v Inner London Education Authority* [1978] QB 36 (CA). See also *Blathwayt v Lord Crawley* [1976] AC 397 (HL).

[61] *Ahmad* (n 60) 41. Mr Ahmad's claim was also dismissed by the European Commission of Human Rights: *Ahmad v UK* (1981) 4 EHRR 126.

[62] *X v UK* (App 7992/77), Commission decision of 12 July 1978, 14 DR 234).

[63] See Ch 10, part D and Ch 6, part E.

[64] See further Ch 5, part C.

for example, that the Act would require ministers of religion to do things that were contrary to their doctrine or belief. During the passage of the Bill a number of amendments were adopted in an attempt to meet these anxieties, which included the exclusion of specified acts by religious bodies from the scope the Act. The measures were generally expressed to be for the benefit of 'Christian or other principal religious tradition represented in the United Kingdom', which raised issues about discrimination against minority religious traditions. The government eventually secured the removal of the amendments. It provided reassurance that much of what churches did was essentially private in nature and would not be affected by the Act.[65] The government expressed concern that amendments 'raised the prospect of some actions being protected by the provisions that certainly ought to be amenable to correction on human rights grounds'.[66] Section 13 was a compromise, intended to meet the concerns of the Churches 'without violating the Convention or compromising the integrity of the Bill'.[67] The intention was to make it clear that the 'Churches were to have protection consistent with the convention'.[68] Perhaps unsurprisingly, section 13 has added little value in practice.[69]

1.50 Article 9 has been invoked in various cases since the Human Rights Act 1998 came into force, including claims concerning religious dress and symbols in schools,[70] religious expression and association,[71] the use of corporal punishment in Christian schools,[72] conscientious objection in the military context,[73] and a claim by Hindus and Sikhs seeking to have cremations on open air funeral pyres.[74] However, before the judgment of the ECtHR in *Eweida v United Kingdom*[75] in January 2013, claims brought under Article 9 have seldom been successful.[76]

1.51 Another significant development has been the recognition of 'religion and belief' as a protected characteristic in discrimination law. Historically, some religious groups enjoyed a degree of protection under the Race Relations Act 1976, which prohibited discrimination on racial grounds. The Act did not specifically prohibit religious discrimination; however, Jews and Sikhs were held to qualify as a racial group within the meaning of the Act.[77] The impetus to extend discrimination law to religion and belief initially came from the European

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[65] *Hansard* HC, col 1017 (20 May 1998).
[66] *Hansard* HC, col 1021 (20 May 1998).
[67] *Hansard* HC, col 1021 (20 May 1998).
[68] *Hansard* HC, col 1021 (20 May 1998).
[69] See further Ch 5, paras 5.30-5.31.
[70] eg *R (on the application of Begum) v Denbigh High School* [2007] 1 AC 100 (HL); *R (on the application of X) v Headteachers and Governors of Y School* [2008] 1 All ER 249 (QB) (Admin); *R (on the application of Playfoot) v Governing Body of Millais School* [2007] 3 FCR 754 (QB).
[71] eg *Hammond v DPP* (2004) 168 JP 601 (DC); *R (Singh) v Chief Constable of West Midlands Police* [2006] 1 WLR 3374 (CA); *Connolly v DPP* [2008] 1 WLR 276 (DC).
[72] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 (HL).
[73] *Khan v Royal Air Force Summary Appeal Court* [2004] HRLR 40 (DC).
[74] *R (on the application of Ghai) v Newcastle City Council* [2011] QB 591 (CA).
[75] *Eweida and ors v UK* (2013) 57 EHRR 8. For further discussion see Chs 3 and 5.
[76] An example of a case in which Art 9 was successfully invoked is *R (on the application of Bashir) v Independent Adjudicator* [2011] HRLR 30 (QB) which concerned interference with a Muslim prisoner's religious fasting.
[77] *Seide v Gillette Industries* [1980] IRLR 427; *Mandala v Dowell Lee* [1983] 2 AC 548. Adherents of other faiths qualified for protection under the Race Relations Act 1976 if it could be shown that the adverse treatment suffered in a particular case was on the grounds of their race rather than their religion or religious beliefs. See eg *JH Walker Ltd v Hussain and ors* [1996] ICR 291 (EAT).

Union at least in the employment field.[78] The Employment Equality (Religion or Belief) Regulations 2003 prohibited discrimination, victimization, and harassment on grounds of 'religion or belief' in relation to employment and vocational training. The prohibition was later extended to the provision of goods and services by the Equality Act 1996.[79]

1.52 Discrimination law has become an important tool for those wishing to assert their religious rights; however, it is also a source of tension. Alongside religion or belief, the protected characteristics include age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, sex, and sexual orientation.[80] Parliament has sought to strike a balance between competing rights by carving out limited religious-based exceptions to the non-discrimination provisions.[81] Where employment is 'for the purposes of organised religion', for example, an employer can discriminate on grounds of sex or sexual orientation provided certain criteria are met.[82] However, these exceptions are narrow in scope, applying in carefully defined circumstances. In all other cases courts and tribunals are left to adjudicate between different interests. Recent years have seen a proliferation of cases involving a tension between the manifestation of religious beliefs and the protected characteristic of sexual orientation.[83] As these cases and cases concerning Article 9 show, religion and matters of conscience continue to raise difficult and sensitive questions.

(5) The position of the Church of England in the twenty-first century

1.53 In Wales the Church of England was disestablished at the beginning of the twentieth century following the growth of non-conformist churches.[84] In England the Church of England remains 'established', occupying a unique constitutional position which distinguishes it from other religious groups.[85] The Sovereign remains the supreme head of the Church of England[86] with responsibility for a range of functions within the Church, including the appointment of bishops and archbishops. Twenty-six bishops sit in the House of Lords as Lords Spiritual, able to participate in the legislative process. While representatives of other religious groups can be granted life peerages, only the Church of England enjoys guaranteed representation in the Lords.[87] Changes to the internal laws of

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[78] EU Directive 2000/78/EC sought to 'put in place a general framework to ensure equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation, as regards access to employment or occupation and membership of certain organisations'. The Directive provided that discrimination 'based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community'.

[79] The current law is to be found in the Equality Act 2010 which replaced previous discrimination legislation and put in its place a new harmonized scheme. See Ch 6.

[80] Equality Act 2010, s 4.

[81] See further Ch 6, part E.

[82] Equality Act 2010, Sch 9, para 2.

[83] See eg *Ladele v Islington LBC* [2010] 1 WLR 955 (CA); *McFarlane v Relate Avon Ltd* [2010] ICR 507 (EAT) and [2010] IRLR 872 (CA); *R (on the application of Johns) v Derby City Council* [2011] 1 FLR 2094 (QB); *Hall v Bull* [2012] 1 WLR 2514 (CA).

[84] The Welsh Church Act 1914.

[85] It has been said that 'a useful way of looking at establishment is as a special relationship, consisting of both benefits and burdens, between the Church of England and the English State'. P Cumper and P Edge, 'First Amongst Equals: The English State and the Anglican Church in the 21st Century' (2006) 83 University of Detroit Mercy Law Review 601.

[86] See para 1.20.

[87] Cumper and Edge (n 85) 601. Research conducted by a group of academics in 2007 revealed that the majority of bishops purported to act as a voice for all faith communities. However, at the same time they

the Church of England require Royal Assent and once passed form part of the law of the state.[88]

1.54 While the Church of England continues to occupy this unique constitutional position, the religious rights of its members do not enjoy any greater protection in law than those of other faiths. One of the last vestiges of the privileged position historically enjoyed by members of the Church of England was removed in 2008 when the common law offences of blasphemy and blasphemous libel were abolished.[89] The offences, which had an ecclesiastical origin, were directed at attacks on the beliefs of the Church of England. Other religious groups were protected only to the extent that their beliefs were those which were held in common with the established Church.[90] In contrast, the new offences of incitement to religious hatred do not discriminate between religions.[91] In this and other respects the law has become both more neutral and equal in its treatment of different faiths.

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recognized that there were factors limiting the extent to which this could be achieved: see A Harlow, F Cranmer, and N Dow 'Bishops in the House of Lords: a critical analysis' (2008) Public Law 490.

[88] Measures, which also require Parliamentary approval, have the full force and effect of primary legislation, whilst Canons are regarded as a form of secondary legislation.

[89] Criminal Justice and Immigration Act 2008, Part 5. See further Ch 10, part B.

[90] *William's case* (1797) 26 St Tr 654. See also *R v Chief Magistrate Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429 (QB).

[91] See the Racial and Religious Hatred Act 2006.