

FREEDOM OF RELIGION AND BELIEF

Freedom of Religion, Minorities and the Law by SAMANTHA KNIGHTS, Oxford, Oxford University Press, 2007, xxxv + 216 pp, Hardback, £46.95, ISBN 978-0-19-929062-8,

The publication of “Freedom of Religion, Minorities and the Law” comes at an opportune time. In the middle years of the second half of the twentieth century many would have assumed that religion would play an ever decreasing role in our modern, technologically advanced British society. Recent years, however, have witnessed a marked increase in cases in which disputes concerning religion have been brought before the courts.ⁱ

The reasons for the increase in such disputes are complex, but the juxtaposition of the terms “Freedom of Religion” “Minorities” and “Law” in the title of this book is surely significant in this regard, for it is a virtual truism that it is only when religious practices are exercised by *minorities* that the law becomes involved at all. Legal disputes with religion at their centre were comparatively rare in the UK in the early decades of the twentieth century when there existed a general broadly Christian consensus. But increasing immigration in the second half of the twentieth and early years of the twenty first centuries has increased the number of those minorities with religious beliefs different to those of the majority; it has resulted in Britain becoming a much more religiously diverse place.

Conflicts involving law and religion tend to occur when the religious practices of minorities are perceived to be at odds with those of the secular or moderately Christian majority consensus as embodied in society’s legal rules. In the modern democratic state it is really only for minorities, those *dissenting* from the main stream, that religious freedom assumes importance, for it is only *their* religious practices that tend to rub up against long standing legal and societal norms and conventions. The author quotes the philosopher and

revolutionary Rosa Luxembour, writing in a different context: “[f]reedom always means freedom for the dissenters.”ⁱⁱ

There is of course a further reason why religious conflicts are far more frequently being played out in the UK’s courts in the early years of the twenty first century: the incorporation by the Human Rights Act 1998 (HRA) of Article 9 of the European Convention on Human Rights (ECHR) ; the right to freedom of thought, conscience and religion.ⁱⁱⁱ Whereas before protection for the right to freedom of religion did not exist – there was just the freedom *simpliciter* - now there exists a positively expressed right. This, as the author notes in her preface “marks a fundamental change in English law and its protection of civil liberties”.^{iv} Post HRA any interference with a person’s manifestation of their religion or belief has to be in accordance with the strictures laid down in the second paragraph of Article 9. Most importantly it must not be disproportionate to the aim sought to be achieved (for example the protection of health or morals or the rights of others). The HRA has provided the main legal avenue via which the claims emanating from the societal tensions briefly touched on above have been brought to the courts.

Furthermore, this is an area which is unusually subject to strange and paradoxical sensitivities. For *within* minority religious groups there may be others, not least women and children, whose interests may be perceived to run counter to the dominant religious beliefs of the group (or at least its leaders). Take for example the children of members of certain Christian groups who believe that “to spare the rod is to spoil the child”,^v the Muslim woman who is *required* to wear the *hijab* upon entering a public space, or Jewish boys circumcised as infants. As the author says “[w]ilst sensitivity to religious and cultural difference is important, it should not be used as a means of undermining the rights of the vulnerable and the weak”.^{vi} Yet there is a further twist still, for often it is the supposed “vulnerable and

weak” individuals, those apparent victims of oppressive religious doctrine, who actually *bring the claims themselves*.^{vii}

In the preface the author notes that in determining the level of legal protection to be afforded to religion difficult questions are raised about “how a liberal democracy should balance the interests of the individual or group against the interests of the modern state, the extent to which the state will intervene in the affairs of religious organisations, and about the politics of assimilation and multiculturalism”.^{viii} It is against this complex background with its swirling undercurrents of politics, philosophy, culture and history that the author sets out her aim:

“to provide a bridge between some of the underlying issues that feature in academic writing, and the practice of law. [The book] is intended as a user-friendly guide for practitioners, while at the same time placing these issues in context”.^{ix}

This is no easy bridge to build – to give both a meaningful flavour of the swirling undercurrents themselves whilst at the same time providing a workable “black letter” guide to the law for those litigating these claims before the courts. In trying to achieve two separate, and in their own right ambitious aims, there is a danger that such a work will fall short of both.

However in this reviewer’s opinion the author has emphatically succeeded in her aim and avoided these potential traps. The first three chapters of the book deal largely with the above-mentioned undercurrents whilst the remaining chapters deal with specific areas in which conflict has arisen whilst keeping an eye on the context.

Chapter 1, “Context and Background”, provides an elegant and pithy account of the historical and political factors that have led to the current religiously diverse population. It

then goes on to consider some of the political and philosophical underpinnings of religious freedom and multiculturalism. Finally the relationship between religion and the state is examined, with particular reference to the status of the established Church of England. Chapter 2 provides an overview of the main relevant domestic law: the common law, the Race Relations Act 1976, the Human Rights Act 1998, the Equality Act 2006 as well as EC Directives and other European instruments. There follows a comprehensive section on Article 9 ECHR: when the right is engaged, and when limitations may justifiably be imposed on the manifestation of religion or belief. There is an up to date summary of the case law including recent domestic decisions such as *Williamson*, *Begum* and *Copsey*.^x There follows a section on the provisions relating to discrimination – in particular Article 14 ECHR. Chapter 3 examines the issue of how to balance conflicting rights and interests – perhaps the central issue in all human rights adjudication. It considers, specifically, possible tensions between the religious freedom of the individual and that of the religious group, the rights of the child and those of the parent, and the rights of the majority versus those of the minority. The remaining four chapters deal, in detail and depth with the civil law in several specific areas: education, employment, immigration and asylum, health and safety, animal rights, planning and prison law. These chapters provide an excellent guide to what are sometimes complex legal regimes.

One of the issues which has been controversial in the recent case law is when exactly there is considered to be an *interference* with manifestation of religious belief so as to require a justification under Article 9(2). There have been a series of employment cases in which employee's religious beliefs have come into conflict with the terms of his or her employment, ending in dismissal. In such cases the courts have held there to be *no interference* with Article 9 rights (since the employee is free to seek employment elsewhere) thus precluding any need to examine justifications under Article 9(2).

The author is critical of this approach. She tellingly compares the approach to cases involving other rights in which the courts have been much less willing to accept that existence of potential alternative employment.^{xi} For example in the field of Article 8, the right to respect for a private life, dismissal from employment on the grounds of sexual orientation has been found to be an interference, notwithstanding the existence of alternative employment opportunities.^{xii} She comments that “while it is plain that certain professions . . . may require religious beliefs to be subjugated to the needs of the job . . . it would be preferable to recognise the interference and deal with it on the basis of justification”.^{xiii}

The author is also critical of the ease with which this logic has been transplanted into the field of education. In *Begum*, the House of Lords, relying on the employment case-law, held that the refusal by a state school to allow a female pupil to wear a *jilbab* (long Islamic cloak) did not constitute an interference with her Article 9 rights since she could have attended another school which would have permitted such attire.^{xiv} As the author notes “it is questionable whether the provision of state funded education can be so readily aligned with the situation of private employers”.^{xv}

Perhaps one area which bears heavily on the protection of religious rights, and on which this reviewer would have liked to see a little more critical comment is the margin of appreciation doctrine. Under this international law doctrine latitude is given to states by the Strasbourg court on the basis, partly, that there exists no consensus in Europe on questions of religion. There are hints in recent case law on religion that the doctrine will find its surrogate in the UK.^{xvi} Of course, as noted at the beginning of this review, it is usually only when the consensus, the majority view, is departed from, (axiomatically by *minorities*) that legal rights need to be invoked at all. There is a certain irony in the fact the margin of appreciation is invoked because of an absence of consensus, when it is this very absence (and the presence of diversity) that renders the right to freedom of religion and belief of such importance.

This is perhaps a carping criticism however. For this is an excellent book which successfully achieves the difficult tasks it sets itself, bridging the gap between the contextual academic and practitioner text without losing sight of either, and achieving the strengths of both. It deserves to be read not just by practitioners, but also by academics, students and all those with an interest in this, one of the big questions of the age.

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ⁱ See eg, *R (Begum) v Denbigh High School Governors* [2006] UKHL 15; *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; *Azmi v Kirklees MBC* [2001] ICR 1154; *R (Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin); *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893; *Copsey v WWB Devon Clays Ltd* [2005]. EWCA Civ 932.

ⁱⁱ At p 17.

ⁱⁱⁱ Also of particular importance in this context is Article 2 of protocol 1, (the right to education, which states that the state shall “respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions”) and Article 14 (the right not to be discriminated against in relation to the other ECHR rights).

^{iv} At p vii.

^v See *Williamson*, note 1 above.

^{vi} At p 12.

^{vii} See eg, the religious dress cases *Begum* and *Azmi*, note 1 above.

^{viii} At p viii.

^{ix} At p ix.

^x Note 1 above.

^{xi} See eg, *Ahmad v UK* (1981) 4 EHRR 126; *Stedman v UK* (1997) 87 EHRR CD 168.

^{xii} *Smith and Grady v UK* (1999) 29 EHRR 4993. Similar approaches have been adopted in the fields of Article 10 and 11 also.

^{xiii} At p 136-7 para 5.30.

^{xiv} Note 1 above.

^{xv} At p 48 para 2.72.

^{xvi} See eg, the speech of Lord Hoffmann in *Begum*, note 1, at [62 – 64].

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