

EU Trends in Freedom of Religion and Freedom of Speech

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Background and Structure

This lecture will give you a very short synopsis of the relevant case law decisions and their meaning in note form. Now because you're incredibly bright, and you're the brightest students I've ever had, we're going to come to grips with European law and domestic national law of the United Kingdom in approximately half an hour; it is pertinent to note that in some of the cases you have in the Case List, I spent two hours in class on when teaching LLM university students. So if you could just have that case list to the ready, we'll go through that. But I don't intend to just read it—I'll try to expand on it.

Preliminary Remarks

As you know the United Kingdom is in a strategic alliance with the United States, but we're more than that. We are culturally and legally very similar and our pasts are very close. I am what is called a barrister. I just say by way of description, we are one of the funny gentlemen you sometimes see in the press. We wear wigs. It is made of white horsehair and every summer there are very few horses, in the United Kingdom, with any hair on their tails if they happen to have a white tail. There is "sense" in the madness, but I won't explain it now, but it is particularly helpful if you are going bald, I can assure you.

The other general comments that I want to make is that practicing law in the United Kingdom is getting increasingly complex. We have our national laws defined by Parliament. We have EC law that originates from and is adjudicated upon by the European Court in Luxemburg. We have the European Court of Human Rights, and these cases are determined in Strasbourg, France, and we have what is known as *soft law* from the United Nations. So it is quite a handful.

Now when we have a look at the case list, I think it is fair to say that many of you would be rather shocked at the nature of the cases. On the whole, I am ashamed of the decisions of the United Kingdom courts. I am ashamed of the decisions of the European Court of Human Rights, and I think it requires some explanation of how we now find our self in this situation.

The Religion of Secularism and Human Rights Jurisprudence

The reason is secularism. This development has to be explained to some degree. What is often used in argument against religious practice is the issue of "religious intolerance." But in many instances, we are not talking about religious intolerance. We're talking about "secular intolerance."

Secularism in Europe has a very long history. Its modern form originated in a French concept called *laïcité*, which is not too dissimilar from the Marxist analysis of the "withering away of the state" applied to the "withering away of religion." To understand the case list, you must realize that secularism is a religion. It is the nonreligious religion of atheism promoted under the false dichotomy and guise of neutrality and rationality and, of course, like all religions it is neither neutral nor rational. And it has all the attributes of a religion although it lacks a deity. It has a conviction that its views are right and opposing views are wrong. It has a creed, it has adherents, it has militancy in seeking to drive rival religions from the public forum and promoting non-religious belief over religious belief and it is also extremely aggressive. I would not be surprised if wars in the future are based on this new religion or secularism and human rights.

The other development in the United Kingdom, which is rather novel to us, but perhaps not so novel to other constitutional states is the development of human rights jurisprudence. It sounds rather ironic because, of course, the United Kingdom was the first modern parliamentary democracy and, of course, since 1215 we have been subject to Magna Carta and the sovereignty of Parliament.

However, the decisions of the European Court of Human Rights only became binding in the United Kingdom in the year 2000, by means of the Human Rights Act 1998; and thereafter, we witnessed the transfer of power from Parliament to the judiciary and, of course, this has had a very significant and deeply politicizing effect in the United Kingdom. One of the immediate effects was the anti-democratic nature of the litigation in the courts, because there is less of a need to convince your fellow citizens of the merits of your arguments when it's much cheaper and effective to litigate and convince one single individual, the judge. One of our noted modern philosophers, Professor Dworkin of Oxford University, has written about this, calling the judiciary the cementing arbiters of society. And that indeed is in many ways what they are becoming.

Case List

Background Cases

Now let's turn to cases, and we're going to rattle through bearing in mind that secularism is a religion in the context of these cases. My practice has changed very much in the last few years. In a way, if you are sympathetic to the Judeo-Christian principles in society, it is increasingly alarming. It is necessary to note that the following cases

only illuminate some of the cases on religious liberty from the position of the United Kingdom. It is not a conclusive list nor does it represent the definitive statement of the law. There are a large number of cases on religious liberty, far too many to distill to an audience in the short time available. There are issues of evangelism, of religious autonomy, and a whole wealth of case law.

I make the point again, namely that national law does not have primacy in every situation, and we have to consider the judgments of international tribunals and their effect on our national law. We are going to focus now on the decisions of the European Court of Human Rights—and I clearly state that the European Court of Human Rights (based in Strasbourg) has manifested resistance to religious rights.

Konttinen v Finland 3 December 1996, Seventh-day Adventist denied right to Saturday Sabbath, despite being prepared to work extra hours and the employer could have accommodated his religious right.

This was a very significant decision. I'm slightly upset that the former prime minister of Finland has now departed from this conference, because you will note that the date of the decision is 1996, and I approached him last night and, in jest, stated that he was responsible for this state of affairs, in that he could reverse this judgment by national legislation. Of course, he managed to defend himself saying he fell from office in 1995, so I have to live with that answer.

Konttinen v Finland was an interesting case in jurisprudential terms because Mr. Konttinen worked for the Finnish State railways. He then had a subsequent "born again" conversion experience to become a Seventh-day Adventist, who celebrated the traditional Sabbath Day of Saturday rather than Sunday. In law, there are two interesting legal principles; the *first* is that of freedom of contract and sanctity of contract. The *second* is a subsequent religious conversion. In *Konttinen*, there is a conflict of rights between freedom of contract and freedom of religion. However, the decision of the European Commission was extremely alarming and they upheld the sanctity of contract principle, although noting that Mr. Konttinen would have been much better treated if he'd been an alcoholic. The commission rejected any form of any religious accommodation at all as being necessary, because he had commenced employment under certain terms. In reality, this is a very crude decision. I trust in the discussion group I can come back on some of the decisions of the European Court.

Stedman v United Kingdom (1997) 23 EHRR CD 168, Mrs. Stedman denied right to rest on Sunday by employer, despite fact that employer was acting unlawfully. Decision effectively says that Christians have no employment rights.

That is one of my cases and one of the great disasters of the European Human Rights jurisprudence. In *Stedman*, this case took the *Konttinen* decision a stage further. The argument was (to paraphrase), "Well, if Mr. Konttinen suffered

because he commenced employment under certain terms under the contract of employment and had a subsequent conversion—let's take a case when someone is a Christian at the time they commence employment with a job not requiring work on Sunday and it is the employer who changes the contract to work on Sunday." Surely, I must win on that. That was the fool's logic. The European Commission then came out with the principle that Christians (religious adherents) have no employment rights. The European Commission came up with an argument that can only be paraphrased as "If you can't stand the heat, get out of the kitchen" argument. What they meant by that is that having a religion can be a "burden." You must suffer for your religion and therefore part of that burden can be that you can lose your job. Mrs. Stedman could lose her employment, but still practice her faith as a Christian.

There is some sense in the jurisprudence of the European institutions, if you are prepared to concede a purely contractual approach to the economy and this principle was applied across the board a primacy of contract was applicable. But if I could just interject *Smith & Grady v United Kingdom* (1999) Homosexuals in Armed Forces granted full employment rights despite legitimate restriction for combat effectiveness. This case has direct similarities with the case of *Stedman*, except that it involved individuals with a homosexual orientation, rather than a religious adherent. In *Smith & Grady*, three individuals joined the Armed Forces who were homosexuals at the time of their enlistment; the fourth individual had a subsequent conversion to homosexuality after joining the Army.

However, the point of this comparison is that the Army expressly made it clear that they had a "no homosexual" policy in the United Kingdom for the operational reason of military effectiveness of the combat units. The details of this decision are quite interesting and perhaps worth a read, but if they'd applied the *Stedman* principle, they would have said: "Well, you joined an employer knowing in advance to terms of the contract. You knew the terms of the employment. No one's saying you can't be a homosexual. There's a burden to pay for your homosexuality. That's losing your employment. You have to get another job and you can still be a homosexual." That would have been the logical conclusion. Of course, that was rejected. Homosexuality is part of the new secular religion. That could not be transgressed. The Army had to change its employment military efficiency policies. So if you had any delusions that the rights of religious adherents are discounted, put them aside now. If you are a drunkard, you have employment rights. If you are a homosexual, you have employment rights. But if you are religious, get out of the kitchen.

Kalac v Turkey (1997) 27 EHRR 552, Government can interfere with religious rights, on no cognitive basis. Not a reliable decision as Islam is problematic.

Jewish Liturgical Society Cha'are Shalom Ve Tsdeek v France (2000) EHRR, Jews denied rights to special Kosher meat by France on the basis of the test of "impossibility" as the Jewish people could still import meat. This is the most disturbing decision as close to abrogation of all religious rights.

In *Kalac v Turkey*, it involved a Muslim individual dismissed from the Armed Forces. The case is not very representative because it involved the unusual employment of the Armed Services (but note *Smith & Grady* above). Further, Islam is seen as extremely problematic by the European Court. And the Turkish State is fully committed to secularism as a constitutional requirement.

There is another recent decision that should be mentioned, *Rafti (Islamic Welfare Party) v Turkey* (I think there is a delegate here from the Turkish Mission to the United Nations). This is an extremely important decision because the Islamic Welfare Party was the party of Government and it was dissolved by the courts (subsequent to military action). It was in power, it had been elected. It was dissolved by the military and Turkish Supreme Court; the Grand Chamber of the European Court just recently in June 2003 gave a judgment that held Islam was incompatible with democratic society. A highly controversial decision, but not only did it raise the aspect of a secular court ruling on a religious faith, but the language used of course could be applicable to other religious groupings. A highly problematic decision, not the least because of the tautologous question of what does it mean when one says Islam is incompatible with democratic society and the majority of citizens vote for an Islamic government. This argument is at the limits of reason.

Darby v Sweden (1991), Mr. Darby objected to State Church tax; great deference by Court to secular view and law had to be changed.

Darby v Sweden was a reverse case. An atheist objected to paying the Swedish church tax. In Sweden (prior to the disestablishment of the Church of Sweden in 1995) ministers were paid through a church tax. That was deemed by the European Court to be an imposition on nonreligious individuals that was impossible to tolerate. The Swedish laws had to be changed. One of the few certain things to a lawyer in the United Kingdom, is that a challenge to the payment of taxes is impossible. If someone comes to you with a tax problem from not paying their taxes, or perhaps not wanting to pay their taxes, you lose. You can never beat a tax law, because if you challenge a tax law the whole issue of state finance is open and "at large." State finance is undermined: "I want my tax on nuclear weapons. I don't want my tax on nuclear weapons. I believe in private education. I believe in public." The courts won't have it. It's the democratic principle it works on. The democratic legislature chooses on taxes. That was a tax case decision solely, but the European Court had to make an exemption because it was a religious tax.

Troxel v Granville (2000, 530 US 56), The United States Supreme Court grants highest respect to family and religious rights. The decision is applicable in U.S. only and rejected by UK courts.

This is a very important U.S. decision. It could be known as "a hands off the family" decision. And that has been expressly rejected by the United Kingdom courts. The courts of the United Kingdom deem themselves capable to interfere in the most sensitive area of private life. In the case of *Williamson* [in Recent Cases below], the United Kingdom court sanctioned massive intrusion into the religious education of children at school because once the children were at school, it was no longer "home life."

Recent Cases

And now, the recent cases, cases that came in the last eighteen months and some other cases, but some of the most important ones.

Parry v Vine Christian Fellowship (February 2002), Transsexual sues Church for refusal to accept him as a woman. Loses, but considerable legal difficulties caused.

A low-level decision, but this is illustrative of the direction we are going. It was a very hard fought case, but in fact the church prevailed. I represented Vine Christian Fellowship. The facts of this case involved some encapsulation because this was a rather bizarre case and you can imagine our "tabloid press" went rather hysterical on it.

Mr. Perry attended his local Christian denomination in a very remote place of Wales. I think the equivalent geographical district in the United States would be Utah! He turned up one day at his church service wearing a beard and a dress. He then had an operation and became physically, objectively a woman and was permitted by the United Kingdom government to change his identity. He then made a request to his local church minister: "I no longer want to go to the men's prayer meetings that meet on Monday, but I want to go to the women's prayer group meetings that meet on Tuesday, as I am now a woman." And, of course, the minister said, "No way. You go to the men's prayer group meetings dressed as a woman." This case raised issues that are too complex to go into now, but it's whether our "public accommodation laws" (as they're known in the United States or sex discrimination legislation in the United Kingdom) applied to religious bodies. How bad can it get? Well, I think the next two cases will end any further doubt.

Hammond v DPP (May 2002), Mr. Hammond is a street preacher who spoke against homosexuality. Attacked by homosexuals and prosecuted. Subsequently dies and court says homosexuals need special protection. I am taking this case to appeal shortly.

Mr. Hammond was sixty-nine years old. He went into the town of Bournemouth, which is becoming the homosexual resort in the United Kingdom. He unfolded

a banner saying “Stop Immorality. Stop Homosexuality. Turn to Jesus.” He was attacked by about forty individuals: homosexuals, homosexual sympathizers, and bystanders. He wouldn’t let go of his placard. He was thrown to the ground. The police were called. The shopkeepers seeing this scene were horrified by it. The police arrived and what did the good British police do? Did they protect the man on the floor being attacked? No! They arrest Mr. Hammond. He is then subsequently prosecuted because he “incited” his own attack. The individual subsequently died, the police say from unrelated causes, but shortly thereafter.

I just raise the specter for you and you don’t need any imagination. Just imagine the scene of such an assault on an elderly citizen! But let us imagine a distinct scenario. If a homosexual man, for example, walked into a Catholic Church and said words that derided scripture—“I disapprove of Christian teaching on homosexual morality and the Pope is a fool”—and forty of the congregants attacked him and he subsequently died. You do not need any imagination to visualize the campaign that would be launched in the British Parliament and in the media in which religious groups would be attacked. If such an act of barbarism was executed by religious groups, the government would introduce restrictive legislation against religious organizations.

I am taking that case on appeal very shortly. He was convicted in the lower courts and, of course, it’s a freedom of speech and freedom of religious speech case. Actually, just before I left to come to the United States, the Crown very kindly phoned me up and said they are going to do a “strike out” application because Mr. Hammond is now dead and therefore, I do not have any case. In most countries of the world that is probably quite a good argument, but it doesn’t work that well in Britain, because many of our laws date from the thirteenth century, and it doesn’t seem to matter whether you’re alive or dead! But they did indicate that they thought it was time to bring this piece of law up-to-date, so I’ve now got to have a preliminary hearing before I can have a substantive hearing on the real issues.

Peter Thatchell (July 2002), Mr. Thatchell reads calling for homosexual sex with the Lord Jesus in central London. Police refuse to prosecute as freedom of speech. CPS determining decision and funds needed to challenged a failure to prosecute (contrast with Hammond above).

This is another case I was involved in. In this case, three Members of Parliament went to Trafalgar Square in London with a loud speaker, (I think you Americans call it a “bull horn”), and read a poem about homosexual sex with the dying Lord Jesus. The poem is entitled “The Love That Dares Not Speak its Name.” I had to read the materials on this, and it was as crude and as primitive as anything you can imagine. We have blasphemy laws in the United Kingdom that only protect the Christian faith. Jews get some coverage from that because the Christian

faith encompasses Judaism. It has to be said probably aspects of Latter-day Saint faith and certainly Islam will be outside the parameters of our blasphemy laws, but nevertheless that was clearly within our blasphemy laws, and I think many faiths would take objection to these acts.

The police surrounded the MPs saying it was freedom of speech and protected the MPs. They protected the MPs so as to facilitate the reading of the poem. So I just want to juxtapose those two cases. The case of *Hammond* involves a Christian minister fatally beaten, who dies, and the police prosecute the Christian minister before he dies (those that attacked him are free). In this case of *Thatchell*, the police protect this very offensive type of speech. I think in many parts of the world they would have needed the police protection very powerfully.

Family Law Act changed, July 2002, Lord Chancellor changed the definition in the Family Law Act 1996 from the “institution of marriage” to the “adult couple.” Unlawful act, but no funds to challenge.

It was clearly arguable that this was an unlawful act pursuant to the Family Law Act 1996. What he wanted to do was cut off funding to a number of the marriage groups and re-direct monies to same sex marriage groups.

Christian Unions (August 2002), Numerous Christian Unions face expulsion from university campuses. A direct threat to freedom on the university campuses.

In August, I had a number of Christian unions facing expulsion from University Student Unions.

Mental Incapacity Bill (October 2002), Mental Incapacity Bill considered (euthanasia) and homosexual adoption introduced. Social Workers face dismissal.

In October 2002, we had the Mental Incapacity Bill, basically euthanasia or the beginning of the breach of the principle of the “sanctity of life.”

Williamson v Secretary of State (December 2002), Court of Appeal determines that Christians do not have right to establish private schools and bring up their children according to their faith. Currently, I am on appeal to House of Lords.

This is one of the most alarming decisions in recent years. It’s not a very “sexy” decision as we say in the United Kingdom, because it relates to religious schools. Again it was a case involving evangelical Christians but the concern was as to the approach of the Court to this issue. For a variety of reasons we (the religious schools) actually won that case and the court on its own motion devised arguments to prevent the logical application of case law; it ruled on the meaning of religion and the “centrality” of a practice to a religion. So, in effect, what the secular court said: “You say you’re religious. You say you have this religious view. You say your religious view means X. However, we are a

secular court, and we know your religion better than you do. We are going to tell you it doesn't mean X. It means Y. So in fact you haven't got a religious right at all."

So you can just think of the implications of that decision. You thought your Catholic denomination required a pro-life view. Well, the secular court is going to tell you that you got that wrong. You thought your religious view in Islam was opposed to homosexuality. Well, the secular court is now going to tell you you've misinterpreted the Koran. And you haven't even got a religious right "engaging" because a false application of your scriptures cannot be recognized as a "public good" by the courts. I regard it as one of the most dangerous decisions to have come out of the United Kingdom at the moment and that is on appeal at the moment to the House of Lords.

Copsey (January 2003), Mr. Copsey refused by employer to have Sundays for religious purposes. Decision attempting to reverse *Stedman* (above) and Working Time Directive 1993. Currently, I am on appeal.

This case should never have to be run in the United Kingdom. It is a Sabbath working case that is particularly relevant in the United Kingdom to Jews and Christians who have strong Sabbath rules. Mr. Copsey didn't want to work on a Sunday. This is "old hat" law for religious liberty practitioners. Why on earth in 2003 in a modern democratic state is a Sabbath working employment case litigated? Well, it's being litigated because of the *Stedman* decision (above). Christians have no employment rights. Of course, if Copsey was an alcoholic or a homosexual, I'd be home and dry. But he's wants religious rights. So the case should be very, very interesting. For lawyers here, it's a rather interesting international law case, because I'm saying the decisions of the European Court are not binding on the British National Court as a matter of international law. It is rather an interesting argument, but I'm basically saying, "Surely a Christian's got the same rights as an alcoholic or homosexual." I ought to tell you at first instance the judge said: "No, I'm bound by *Stedman*." I am actually confident that I'll probably win that case.

Pinto v DPP (April 2003), Arrest of two pro-life election candidates in elections to Welsh Assembly. The portrayal of an aborted fetus was contrary to the Public Order Act 1986 (as the standards on national television are so high!). I am seeking to clarify law.

Again an extremely alarming decision. A political party known as the Pro-life Alliance was effectively banned from showing their electoral broadcasts on the BBC because the portrayal of aborted fetuses was too repugnant. So two of their candidates for election to the Welsh Assembly (which is a legislature in our domestic constitutional structure) flew to the United States, took some posters (I think you had a recent case of this in the U.S. at Houston University) took

them back to the United Kingdom and promptly walked down the High Street with these abortion posters. They were arrested and prosecuted. The police sought to confiscate their electoral material, but we managed to get their electoral material released. The reason we got their electoral material released—one of the swinging influences on the judge—was that on British television they had recently showed a film called *Beijing Swings*, a highly acclaimed artistic piece of television, and I joke not this was on television, a man cooks a dead baby and eats it and a man eats a cooked penis and we said to the judge, "This is acceptable in British society, but someone who opposes abortion is not allowed to show a poster?" And the judge reluctantly conceded there was illogicality and inconsistency in what was going on and allowed the electoral materials of the parliamentary candidate to be released.

Not only does that show the madness in full light, but in truth and the level of public broadcasting is bordering on filth. However, this case involved a number of compounded rights; arrest, arrest of a Parliamentary candidate, freedom of expression, freedom of religious expression, and freedom during the heat of a general election campaign, where really the laws must be lax. This is because an election is one of the few chances a populace has to find out information and express its democratic choice in controversial areas—to suppress speech in most circumstances is extremely concerning.

EC Directives on Religion and repeal of Section 28

EC Directives on Non-Discrimination on grounds of religion and sexual orientation.

The United Kingdom is introducing EC directives on religion. It is going to be a pitfall to the church, because it is going to be used to prevent the Church from hiring people of the same faith or a compatible sexual practice (with religious faith). This applies across the board, and the synagogue may have trouble for not employing an evangelical Christian, the Latter-day Saints may have trouble not employing a Muslim. It's going to apply across the board and it's going to be mayhem.

Section 28, which I just put there, is a prohibition on the teaching of the promotion of homosexuality. You are allowed to teach homosexuality in schools; you are allowed to discuss it. There are specific directives preventing homophobic bullying. But you are not allowed to "promote it." The government, of course, is repealing it and "promotion" will take place.

These are the main overarching provisions in the European Convention Statutory Provisions.

Article 9 of the European Convention states:

(I) 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 in

private, to manifest his religion or belief, in worship, teaching, practice or observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as 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.

The Human Rights Act 1998 has introduced the principle of Human Rights as a 'norm' into national law. Section 13 of HRA reads:

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organization (itself or of 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.

Article 9 is not as clear cut as it reads. Lawyers have dissected this article and it is more confusing than it appears at first sight. Section 13 is our attempt to give heightened protection to religious rights but our courts have not given effect to that provision on the basis that the court can define religious practice [Paragraph 18].