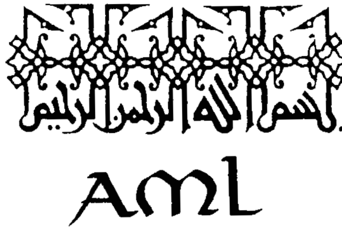

AML

The Association of Muslim Lawyers

Religious Discrimination & The Law

Past and Present Anomalies:

1. It is evident that any system of law which purports to combat racial discrimination whilst at the same time condoning religious discrimination is incomplete and to that extent will be impeded and unable to facilitate and do justice. Whereas a black Falasha Jew from Ethiopia, a white Ashkenazim Jew from Russia and a brown Sephardic Jew from Lebanon are all treated as belonging to the same ethnic race for the purposes of English law – black, white and brown Christians and Muslims from exactly the same countries are not. At present Jews and Sikhs who are discriminated against because of their religion are nevertheless protected by the laws governing racial discrimination and incitement to racial hatred, whereas Hindus, Buddhists, Christians and Muslims are not. It is reasonable to expect and insist that in today's multi-cultural multi-faith society British citizens, whatever their ethnic and religious profiles, should have equal rights. Certainly this is the main thrust and purpose of the proposed *Protocol No. 12* on equality to the *European Convention on Human Rights*.

2. At present, with the exception of Northern Ireland, British justice does not extend to protecting people from religious discrimination or to providing any legal recourse to being granted compensation if direct loss is suffered as a result of such discrimination. If you are sacked simply because you are black or brown, you have a remedy at law. If you are sacked simply because you are a Muslim or a Buddhist, you have none – which is why it is the unstated policy of the Commission for Racial Equality not to proceed with cases in which the complainant has clearly been discriminated against for religious reasons alone rather than racial ones, since in such cases no law has been infringed.

3. There is sometimes an overlap between racial and religious discrimination, but not always. Since, as its title clearly indicates, the *Race Relations Act 1976* was formulated specifically to deal with race discrimination, there is little point or chance of success in invoking the Act to combat religious discrimination, no matter how blatant, extreme or harmful such discrimination may be.

4. It is misleading to assert that the provisions in the *Race Relations Act 1976* regarding indirect discrimination can be invoked successfully in dealing with cases of religious discrimination. They can only be invoked in cases where there is also an element of racial discrimination, and even then it is necessary to prove that the discrimination was intentional before compensation can be awarded. This was the case in *J.H. Walker v Hussain and others*, where the 17 complainants happened to originate from the subcontinent and could therefore be regarded as a minority ethnic group, even though in this case the underlying reason for the discriminatory act – sacking the complainants for attending the *'Id* prayer – was clearly directed more at their religious practice than their ethnicity. If the 17 Muslims had all happened to be white Muslims, they would have had no remedy. Similarly, if both the Muslims and the rest of the work force employed by J.H. Walker had all belonged to a mixture of different ethnic groups, so that it was not possible to view the 17 Muslims as belonging to a distinct separate ethnic group, they would have had no remedy.

5. An example of such reasoning appears in the case of *Safouane & Bouterfas -v- Joseph Ltd and Hannah [1996], (Case No. 12506/95/LS & 12568/95. Decision entered in the Register: 17th July 1996)*: The two Muslim complainants had been summarily dismissed for doing the prayer during their lunch and afternoon tea breaks. Prior to this, someone had urinated on their prayer carpet. The Tribunal concluded *inter alia* that these acts did not amount to indirect racial discrimination, because although the applicants belonged to the same North African ethnic Arab minority, the respondents (respectively North African Jewish and North African Coptic) had a good record of employing staff belonging to a number of other ethnic minorities and could not therefore be regarded as being 'racially' prejudiced! Since the discrimination was religious, the applicants had no remedy.

6. To cite another example, in the case of *Sardar v McDonald's [1998]* the Muslim female complainant was summarily dismissed for covering her hair with a scarf in accordance with the teachings of Islam. She won the case not on the grounds of religious discrimination but on the grounds of sex discrimination – "not because she was a Muslim, but because she was a female Muslim." Her legal representatives were quoted as stating [Muslim News, No. 115, 27th November 1998 – 8th Shaban 1419]: "We fought the case on sexual discrimination grounds and not on religious discrimination, because religion is not recognised in law. If we had taken the case as religious discrimination we would have lost." In spite of the words used, it is nevertheless clear that Sabrina Sardar was sacked because of her religious practice, not because of her gender.

7. It should be clear to all but the severely blinkered and the largely inexperienced that the chances of being able to invoke successfully either the *Race Relations Act 1976* or the *Sex Discrimination Act 1975* to deal with religious discrimination are haphazard, unpredictable and fraught with difficulty. Thus although the CRE may not agree that religious discrimination should be permitted to manifest unchecked, it is at present driven by the logic of the law to condone it, because no tribunal or judge is able to rule that any act of religious discrimination has infringed any law, because there is no law which outlaws it or protects from it in the first place – which means that religious discrimination in its present forms has accordingly become institutionalised – perhaps even more subtly than racial discrimination.

8. The recent observations made during the debate on Religious Discrimination in the House of Lords on the 28th October 1999 by Lord Lester of Herne Hill – who *inter alia* helped frame the *Race Relations Act 1976* and the *Sex Discrimination Act 1975*, was instrumental in the introduction of our Immigration Appeals system, and who worked persistently for years to help bring the *Human Rights Act 1998* to fruition – are both pertinent and germane:

> "The fundamental question raised, with great power, cogency and eloquence by the noble Lord, Lord Ahmed, and the noble Baroness, Lady Uddin, is the problem of Islamophobia. It is the problem of how to give British Muslims the right to effective remedies for arbitrary discrimination and unequal treatment of the kind that people like myself have if we are discriminated against as Jews on racial grounds.
>
> I personally find it strange that I should have a remedy if I am discriminated against on racial grounds but, for example, the noble Lord, Lord Haskel, should not have a remedy if he is discriminated against on religious grounds. When, as an officer in the Army, I experienced discrimination, I could never tell whether the anti-Semitism was on racial or religious grounds. Other noble Lords have referred to the complications, as did the right reverend Prelate the Bishop of Oxford in his important speech.
>
> There surely has to be an effective legal remedy for the wrong of religious discrimination as well as the wrong of racial discrimination. I suggest that those who raise techni-

cal objections to the framing of legislation should concentrate on the need for a legal remedy for British Muslims that is as effective as that which exists for other minorities in this country. That is the pressing social need that must be addressed.

When I hear technical objections being raised I wonder whether we ever look at the laws of other countries. Almost every other Commonwealth and continental European country, as well as Ireland, have in their written constitutions guarantees of equal protection of the law without discrimination on any ground, including religion. It is only because we do not have such constitutional guarantees that we have the incoherent patchwork of laws that act in their place. Surely, it is absurd that my rights as a British citizen should depend on whether I happen to live in Great Britain or Northern Ireland. How can it make sense that religious discrimination is forbidden in Northern Ireland and not in Great Britain? I know of no other country like that."

Future Prospects:

9. The government of the day is now beginning to publicly acknowledge what has been secretly recognised for a long time now – that religious discrimination does occur on a regular basis and those who are subjected to it are in need of protection and compensation just as much as those who are discriminated against because of their race or gender or disability. The work of the Runnymede Trust has been considered and cannot be ignored. The research project being conducted at Derby University is a further step in the right direction. In his Foreword to the CRE's *Proposals for Reform of the Race Relations Act 1976* dated the 30th April 1998, its Chairman Sir Herman Ouseley referred briefly to this state of affairs. Lord Ahmed of Rotherham initiated the debate on Religious Discrimination in the House of Lords on the 28th October 1999. Awareness of this issue is growing. In the meantime, as long as nothing is actually done to change the law, people continue to be discriminated against because of their religion without having any legal redress.

10. Furthermore, once the *Human Rights Act 1998* – which incorporates the *European Convention on Human Rights* into English domestic law – is in force, the government of the day will be under a duty – by virtue of *Article 1* of the *ECHR* – to secure (by passing secondary legislation where necessary) the rights guaranteed by the *Convention* by providing an 'effective remedy' in the English courts 'without discrimination on any ground'. If it fails to do so, the government will then itself be in breach of *Articles 1, 13 and 14* of the *Convention* and unless any such breach is remedied, will eventually and inevitably find itself before the Court of Human Rights in Strasbourg.

11. It follows therefore that the government of the day will – sooner or later – have to enact secondary legislation to secure *inter alia* the *Human Rights Act 1998* rights to practise one's religion, whether alone or in a group, and to educate one's children in accordance with one's religion. It is nonsense to assert – as some do – that the Act only goes so far as to acknowledge such rights and no further. A right which can be ignored and trampled over with impunity and without liability where loss is caused as a result has not been secured – and until it is secured, it is no right at all. It is a mockery of justice.

Proposals for Immediate Reform:

12. Given the growing awareness that religious discrimination and incitement to religious hatred are serious issues, and given that there is sometimes but not always a link between racial and religious discrimination, it follows not only that the lessons which have been

learned in dealing with racial discrimination can be applied when formulating the new laws which are to govern religious discrimination – but also that it would make sense to consider them in conjunction with the current proposed amendments to the *Race Relations Act 1976*. Although it can perhaps be argued that the situation in Northern Ireland is unique, lessons can nevertheless be learned from the experience of implementing the law against religious discrimination which exists there.

13. There are two possibilities: either there should be a *Religious Discrimination Act 2000*, or preferably, the ambit of the new race relations legislation can be extended so as to include religion. It would probably be easier to extend the amended Race Relations Act to include religious discrimination – rather than have an entirely separate Act and an entirely separate Commission for Religious Equality, thereby doubling administration costs and bureaucracy unnecessarily. Given its past experience, the CRE would in fact be best suited to consider both race and religious issues in any case, especially where there is an interlink or an overlap. If it were understood that 'race' included 'religion' then it would not be necessary to insert the word 'religious' either in the title of the Act or in the name of the CRE.

14. **It is proposed** therefore that as regards the rights which are enshrined in *Article 9* of the *ECHR* and *Article 2* of the *First Protocol* to the *ECHR*, and given the national courts' and tribunals' experience and familiarity with the *Race Relations Act 1976* and the *Sex Discrimination Act 1975* (as amended), the easiest way to provide remedies for religious discrimination will be by amending at least the *Race Relations Act* and perhaps also, for the benefit of women especially, the *Sex Discrimination Act*. This could be done by including 'religion' as an additional ground for proving discrimination by way of differential treatment, which would mean inserting the words 'or religious' after and wherever the word 'racial' or 'sexual' appears in the wording of these Acts, and inserting the words 'or religion' after and wherever the word 'race' or 'sex' appears in these Acts. Given Lord Lester of Herne Hill's great experience and expertise, he would no doubt be able to give invaluable advice and practical assistance in framing the new legislation so that it applied to and protected equally the members of all *bona fide* religions.

15. **It is proposed** that whichever possibility is pursued, the new legislation should deal with both direct and indirect religious discrimination. With reference to the CRE's *Proposals for Reform of the Race Relations Act 1976* dated the 30th April 1998, most of the reforms which are at present being sought in the context of racial discrimination should also be sought and applied as regards religious discrimination – including especially:

(i) applicability to all public bodies;

(ii) applicability to all bodies with responsibilities in the field of education;

(iii) a new definition of indirect discrimination and the reversal of the burden of proof once a *prima facie* case is made out;

(iv) the entitlement of a court or tribunal to draw an inference of discrimination on religious grounds without the need for positive evidence where there is a finding of a difference of religion and a finding of discrimination, and the respondent has failed to put forward any adequate or satisfactory explanation;

(v) compensation to be payable for indirect discrimination without the need to show that the discrimination was intentional;

(vi) the duty on tribunals and courts to draw inferences from the failure of respondents to reply to RRA Questionnaires;

(vii) the protection of volunteers;

(viii) the protection of former employees from victimisation by an employer;

(ix) the power of the CRE to issue new Codes of Practice;
(x) the power of the CRE to obtain legally enforceable undertakings;
(xi) the power of the CRE to issue non-discrimination notices;
(xii) as regards permitting positive discrimination, a clear definition of genuine occupational qualification which would require religion to be an essential, defining feature; for example, positive religious discrimination should be permitted as regards the appointment of Directors of Islamic Centres, Imams in Mosques, certain teachers in Muslim schools, and anyone employed in the UK but required to work in places where only Muslims are permitted, such as Makka and Madina in Saudi Arabia.

Proposals for Further Reform:

16. As regards further reform, there are two important considerations: Firstly, simply enacting legislation is not in itself sufficient. Codes of Practice can be of great assistance. People need to be educated generally as regards the basic needs and particular religious duties which characterise each religion. Secondly, different religions sometimes have different basic requirements – and these have to be taken specifically into consideration when framing laws, when formulating Codes of Practice and when preparing educational resources.

17. IT IS PROPOSED therefore, as regards Muslims, that Muslim employees should have statutory rights:

(i) to be able to do the prayer at their place of work (15 minutes is usually adequate to use the toilet, wash and pray) *provided that* the time spent in such prayer breaks is made up either at the beginning or at the end of the working day;
(ii) to have an extended lunchbreak on Fridays so as to be able to attend the collective *Jumu'a* prayer (an extra hour in addition to the normal lunchbreak is usually adequate to attend the nearest mosque for the *Jumu'a* prayer) *provided that* the extra time spent in such a prayer break is made up during the course of the working week;
(iii) to have a day off work on each of the two annual *'Id* prayers (which are held at the end of Ramadan and during the Hajj) *provided that* any such days off which do not happen to coincide with a public holiday are made up either during the course of the working year or are deducted from annual holiday entitlement.

If these simple needs were to be recognised and legally protected, there would be far less unnecessary friction and far more goodwill in the workplace, probably greater productivity – and hopefully hardly any complainants bringing actions in Employment Tribunals on the grounds of religious discrimination.

18. Similar rights should be granted to the members of other *bona fide* religions so as to ensure that they can perform their obligatory prayers and celebrate their main religious feast days – for example the Sabbath of the Jews and the Diwali of the Hindus.

19. It should be pointed out in this context that the Christians in the United Kingdom are already permitted to have the whole day off on Sundays, as well as on their two principal religious feast days, Christmas and Easter. Parking restrictions are relaxed on these days to make it easier for worshippers to go to church, whereas, for example, Muslims often have to regularly pay parking and penalty charges on Fridays and *'Id* days – although more enlightened local authorities are now beginning to relax restrictions for an hour or two on such days. This is not to say that laws need to be passed on such matters, but simply to point out that differential treatment – which can easily be relaxed – does exist in these areas.

20. IT IS PROPOSED also that Muslim employees should be permitted to dress in accordance with their religious teachings. In practical terms this means simply that women should be allowed to cover their hair and dress modestly (a practice which usually results in less cases of sexual harrassment and marital infidelity), and that men should be allowed to wear beards. (I once worked as a theatre porter in a hospital, where the requirements of personal hygiene and cleanliness are arguably greater and more necessary than in any food processing plant or kitchen, and three men there including myself had beards without any adverse results.)

21. At present Muslims in the United Kingdom face additional hardship in that their personal law is not recognised. Marriages and divorces conducted in accordance with the Shari‘ah of Islam are not recognised as valid by the law of the land even though they are acceptable in the sight of God. This leads to difficulties as regards ownership of land, the legal status of children and dealing with public authorities in general, especially when travelling abroad.

22. Similarly, if a Muslim dies intestate, his or her estate is not distributed in accordance with the Shari’ah of Islam. This leads to difficulties as regards the entitlement to and ownership of shares in the estate. (Fortunately, local authorities are allocating land for use as Muslim cemeteries and burials in accordance with the Shari‘ah of Islam are permitted.)

23. These anomalies could easily be remedied to the benefit and satisfaction of the Muslims and without causing detriment to anyone else. Until these anomalies are remedied, the fact that Muslims in the UK are legally prevented from complying directly with these personal aspects of the Shari‘ah in itself indicates the presence of a form of indirect religious discrimination which is inherent in the English legal system and experienced particularly by Muslims.

24. IT IS PROPOSED therefore that legislation should be enacted so that:

(i) Muslim marriages and divorces are recognised as legally valid by the law of the land;
(ii) a Muslim’s wealth is always distributed in accordance with the Shari‘ah after his or her death;
(iii) since the Shari‘ah of Islam permits a Muslim man to marry up to four wives provided that he maintains them and their children as equally as is possible, the law of bigamy is redefined so as to make allowance for valid Muslim marriages. (This is in contrast to English law which punishes bigamy but permits a man to have as many mistresses as he wishes whom he can treat as well or as badly and as openly or as secretly as he wishes, subject usually only to trial by media for the rich and famous.)

Conclusion:

25. The CRE as presently constituted should consider seriously and present soon proposals for the reform of the law governing religious discrimination *together with* its proposals for the reform of the law governing racial discrimination – to be included in the new race relations legislation. The government should move swiftly now from the realm of research and consultation to the realm of legislation and application. The Commission on British Muslims, the Commission for Racial Equality and New Labour are firmly invited to consider, adopt and act on the proposals contained in this document. As the law governing religious discrimination does not yet exist, although clearly it should, this should not be too difficult.

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