CHAPTER ONE

THE NEW WORLD

EVERYTHING CHANGES

On 22 March 2006 religious freedom died. On that day, the judicial committee of the British House of Lords[1] delivered their speeches in the case of *Begum*.[2] They proclaimed that interference with the right to religious freedom 'is not easily established'.[3] They declared that the right to manifest one's religion or belief did 'not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'.[4] Rather, 'people sometimes have to suffer some inconvenience for their beliefs'. The House of Lords said that for religious believers there was an 'expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs'.[5]

The claim had been brought on behalf of a thirteen-year-old Muslim schoolgirl who had wished to wear a *jilbab*, which was not allowed under the school rules.[6] When she was told to go home and change, she contended that she had been 'excluded/suspended' from the school in breach of her right to manifest her religion under Article 9 of the European Convention on Human Rights (ECHR); a right which was

[1] Now known as the Supreme Court.
[2] *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2006] UKHL 15.
[3] Lord Bingham, para. 24. [4] Lord Hoffmann, para. 50. [5] Lord Hoffmann, para. 54.
[6] Begum was aged 13 at the time of the dispute and was 17 years old by the time of the House of Lords judgment. A *jilbab* was described in the judgment as 'a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs'. By comparison, the permitted *shalwar kameez* was described as a sleeveless, smock-like dress worn to between knee and mid-calf length (see para. 79).

now actionable in English courts by virtue of the Human Rights Act 1998. This right to manifest one's religion or belief in worship, teaching, practice and observance is a qualified right. This means that if a court holds that there has been interference with the right to manifest religion under Article 9(1), it must then move on to discuss whether that interference was justified under Article 9(2). The interference will only be justified if it is 'prescribed by law and . . . necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'.[7]

Although the judicial committee in *Begum* were unanimous in their disposal of Begum's claim, their reasoning differed. Lord Nicholls and Lady Hale held that there had been an interference with Article 9(1) but that it had been justified under Article 9(2). In contrast, Lords Bingham, Hoffmann and Scott held that there had been no interference with Article 9(1).[8] The school's refusal to allow Ms Begum to wear a *jilbab* did not interfere with her religious freedom. This seems to be counter-intuitive: the refusal to allow her to attend school clearly prevented her from manifesting her religion in practice or observance. Moreover, deciding the case in this way meant that little attention was paid to the question of justification. This was unfortunate. Cases concerning religious rights require nuanced, fact-specific judgments, which are best reached by focusing upon the question of justification. Yet, it is the reasoning of Lords Bingham, Hoffmann and Scott that has proved to be influential. This is particularly true of Lord Bingham's speech in which he stated:

> The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.[9]

For Lord Bingham, reference to the Article 9 case law of the European Court of Human Rights showed that 'there remains a coherent

[7] For a fuller discussion see R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 5.
[8] Lord Bingham did note that Article 9 was 'engaged or applicable' but by this he seems simply to recognise that the clamant was sincere: para. 21.
[9] Para. 23.

and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established'.[10] However, it is questionable whether this overstates the jurisprudence of the European Court of Human Rights. It is true that there have been occasions where Strasbourg institutions have held that there had been no interference with Article 9(1).[11] However, the more recent decisions by the Strasbourg Court tend to focus less on the question of interference under Article 9(1), preferring instead to focus on the question of justification under Article 9(2).[12] Moreover, even in the older cases, there is some doubt as to the parameters of the particular rule Lord Bingham referred to, which has been referred to as the 'specific situation rule'.[13] Lord Bingham's elucidation of the rule suggests that two requirements must be met for the rule to apply. First, the claimant must have 'voluntarily accepted an employment or role which does not accommodate' the religious manifestation they seek to exercise. Second, there must be 'other means open to the person to practise or observe his or her religion without undue hardship or inconvenience'. However, their Lordships seem to have placed greater emphasis upon this second requirement. They focused upon the issue of whether Begum could have gone to another school and gave rather less attention to the question of whether she voluntarily submitted to the system of norms.[14] By contrast, the Strasbourg case law focused on the first requirement.[15] The rule typically applied in relation to employment.[16]

[10] [2006] UKHL 15, para. 24.

[11] See, most notably, the assertion in *Arrowsmith* v. *United Kingdom* (1981) 3 EHRR 218 that the term practice 'does not cover each act which is motivated or influenced by a religion or a belief' and that Article 9 was not interfered with where, although the act was 'motivated or influenced' by the claimant's belief, it did not 'actually express the belief concerned'.

[12] See, e.g., *Hasan and Chaush* v. *Bulgaria* (2002) 34 EHRR 55, *Şahin* v. *Turkey* (2005) 41 EHRR 8 and *Dogru* v. *France* [2008] ECHR 1579.

[13] Sandberg, *Law and Religion*, 84–5.

[14] Note, by contrast, the speech of Baroness Hale, which suggested this is a significant issue based on the facts given that 'the choice of secondary school is usually made by parents or guardians rather than by the child herself' at para. 92.

[15] There is some limited support against this interpretation in the European Court of Human Rights decision in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek* v. *France* (2000) 9 BHRC 27 in which it was held that an 'alternative means of accommodating religious beliefs had . . . to be "impossible" before a claim of interference under article 9 could succeed'. However, this lone elucidation of the 'impossibility' test has not been followed in subsequent Strasbourg judgments. See Lord Nicholls in *R* v. *Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para. 38 and Lords Bingham and Hoffmann in *Begum* at paras. 24 and 52.

[16] The rule has also been applied to other situations where the claimant has voluntarily submitted themselves to a system of norms. It has been applied in relation to those who voluntarily submit to military service (*Kalaç* v. *Turkey* (1997) 27 EHRR 552), those who voluntarily enter into

This meant that where, for example, a claimant signs a contract to become a school teacher, they cannot then bring an Article 9 claim on the basis that they are not permitted to leave the school to worship on a Friday.[17] As Lord Nicholls put it in the earlier House of Lords decision in *Williamson*,[18] the rule applies only when there is a 'special feature affecting the position of the claimant'.[19] The judgment in *Begum*, however, by focusing on the second part of the rule, has given the 'specific situation rule' general effect: there will be no interference with Article 9 'where the individual is left with a viable and voluntary choice to put themselves in a position where they can manifest their religion, even if this requires some personal sacrifice'.[20]

A series of lower court decisions concerning school uniforms have regarded the *Begum* precedent as an 'insuperable barrier' to religious rights claims, which has erected 'a high threshold before interference can be established'.[21] Moreover, lower court decisions have often adopted an even more restrictive approach. While Lord Bingham's speech stated that both requirements of the rule were required, lower courts have questioned whether the 'specific situation rule' should apply where only the second requirement is met.[22] In *X v. Y School*[23] Silber J stated that Lord Bingham's rule did not only apply where both requirements were met.[24] There was no interference with Article 9 where the claimant was free to go to another school. The same conclusion was reached by the High Court in *Playfoot*[25] where the Court deemed itself competent to determine questions of Christian doctrine. Supperstone QC, sitting as a High Court judge, held that although the claimant believed that she was wearing a 'purity ring' at school as a sign of her sexual restraint, this was not protected under Article 9: she was not manifesting her Christian beliefs because she 'was under no

a contract of employment (*Stedman* v. *United Kingdom* (1997) 5 EHRLR 544) and those who voluntarily enrol at a university (*Karaduman* v. *Turkey* (1993) 74 DR 93).

17 *Ahmad* v. *Inner London Education Authority* [1978] QB 38; *Ahmad* v. *United Kingdom* (1981) 4 EHRR 126.

18 *R* v. *Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15.

19 Para. 39.

20 M Malik, 'Judgment: *R (SB)* v. *Denbigh High School*' in R Hunter *et al.* (eds.), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 336, 339.

21 *R (on the application of X)* v. *Y School* [2006] EWHC 298 (Admin), para. 38, 100.

22 Under this interpretation, the rule may be more accurately referred to as the 'contracting out doctrine', see Malik, 'Judgment', 338.

23 *R (on the application of X)* v. *Y School* [2006] EWHC 298 (Admin).

24 Para. 29.

25 *R (on the Application of Playfoot (A Child))* v. *Millais School Governing Body* [2007] EWHC 1698 (Admin).

obligation, by reason of her belief, to wear the ring; nor does she suggest that she was so obliged'.[26] Moreover Supperstone QC held that, even if the wearing of the ring was deemed to be a manifestation, the school's refusal to allow it to be worn did not represent an interference with Article 9 given that there were 'other means by which the Claimant [could] express her belief' such as by attaching the ring to her bag, wearing a badge or sticker instead, contributing to personal and social health education classes on the topic or by transferring to another school.[27]

This focus on the second requirement of Lord Bingham's test means that the rule now has general effect. There is no interference with Article 9 if it is possible for the claimant to manifest their religion elsewhere, even in ways which are inconvenient and require significant upheaval. This has meant that little attention has been afforded to the question of justification under Article 9(2).[28] As the Equality and Human Rights Commission concluded in their 2012 Human Rights Review: 'Courts are setting too high a threshold for establishing "interference" with the right to manifest a religion or belief, and are therefore not properly addressing whether limitations on Article 9 rights are justifiable.'[29] This is unfortunate since the question of justification allows consideration of the full merits of the claim within its social context.[30] Judges seem to be operating under the presumption that religion does not affect all aspects of a believer's life. If a believer chooses to enter the public sphere then they are expected to leave their religiosity at the door of their workplace or school.[31] This approach is particularly disturbing since earlier decisions conveyed a more generous approach. Most notably, in the earlier House of Lords decision of

[26] Para. 23. [27] Para. 30.

[28] Many of the judgments did discuss issues of justification but did so briefly given the matter was *obiter*. As Peter Cumper and Tom Lewis have noted, the recognised structured tests concerning proportionality 'have only been sporadically referred to, still less applied with any degree of rigour': P Cumper and T Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion or Belief under the Human Rights Act 1998' (2011) 22 *King's Law Journal* 131, 142–3. Moreover, future decisions using these judgments as precedent may well omit the justification in its entirety.

[29] At page 315. The full report is available at: www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-review. The chapter on Article 9 is also available separately at: www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_9.pdf.

[30] See, further, M Pearson, 'Proportionality, A Way Forward for Resolving Religious Claims' in N Spencer (ed.), *Religion and Law* (Theos, 2012) 35.

[31] However, it does not seem that the English case law is unique in this regard. For Norman Doe, it is a principle of religion law common to the states of Europe that 'everyone may abandon the right to manifest religion by voluntary waiver': N Doe, *Law and Religion in Europe* (Oxford University Press, 2011) 263.

Williamson,[32] Lord Nicholls stressed how 'freedom of religion protects the subjective belief of an individual'.[33] In contrast, following *Begum*, judges have dismissed the claims of those whom the court deem able to manifest their religion elsewhere and have held that manifestations need to be required by the religion in question in order to be protected. The courts have shown an increased willingness to determine what constitutes a manifestation. Furthermore, as Peter Edge has noted, courts seem particularly confident to do this when claims concern Christian claimants; by contrast, when judges discuss non-Christian beliefs they tend to require evidence such as the testimonies of experts, 'a need not felt for Christianities'.[34]

These shortcomings in the case law may help to explain one of the main ironies concerning the interaction between law and religion in England and Wales in the twenty-first century. Although the first decade of the twenty-first century has seen the enactment of many laws protecting religious freedom,[35] there is a feeling amongst many religious believers that legal protection has decreased rather than increased.[36] Commentators have spoken of the marginalisation of Christianity and a degree of 'religious illiteracy',[37] which has led to discrimination towards (but not the persecution of) believers.[38] The Conservative peer Baroness Warsi has warned that Britain is under threat from a rising tide of 'militant secularisation' whereby religion is being 'sidelined, marginalised and downgraded in the public sphere'.[39] Moreover, it has

[32] *R* v. *Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15.
[33] Para. 22.
[34] P W Edge, 'Determining Religion in English Courts' (2012) 1(2) *Oxford Journal of Law and Religion* 402, 414.
[35] These laws may be collectively referred to as 'religion law'. This term refers to external laws or norms affecting religion which are made by the State, international bodies and sub-State institutions. This term may be contrasted with 'religious law', that is, the internal laws or norms made by religious groups themselves. The study of law and religion includes both the study of religion law and religious law: see, further, Sandberg, *Law and Religion*, chapter 1.
[36] A national opinion poll carried out by the *Sunday Telegraph* in May 2009 found that three-quarters of Christians polled felt there was less religious freedom than twenty years ago: www.telegraph.co.uk/news/religion/5413311/Christians-risk-rejection-and-discrimination-for-their-faith-a-study-claims.html.
[37] See the Bishop of Bradford, Nick Baines: www.guardian.co.uk/world/2011/Jul/10/christian-mp-inquiry-religious-discrimination.
[38] A February 2009 survey of members of the General Synod of the Church of England found that two-thirds believed that Christians were discriminated against at work: www.telegraph.co.uk/news/religion/4622858/Christians-face-discrimination-in-workplace-say-church-leaders.html.
[39] See www.bbc.co.uk/news/uk-17021831 and www.telegraph.co.uk/news/religion/9080441/We-stand-side-by-side-with-the-Pope-in-fighting-for-faith.html.

been argued that the new legal framework concerning religion has been a key contribution to this situation. A 2012 inquiry by Christians in Parliament (an official All-Party Parliamentary Group) concluded that: 'Christians in the UK face problems in living out their faith and these problems have been mostly caused and exacerbated by social, cultural and legal changes over the past decade.'[40]

The former Archbishop of Canterbury, Lord Carey of Clifton, has written that 'in little more than a decade of successive developments in law . . . Britain has become a much colder place for religious conscience'.[41] However, it is the reasoning of judges in adjudicating these new laws rather than the laws themselves that have dropped the temperature.[42] Telling claimants that there has not been any interference with their religious rights because they could have resigned their job or because that practice does not appear to be obliged by the religion in question is likely to further fears that the law is unreceptive to religion. As Lord Carey has put it, many judgments seem 'ill at ease with public expressions of faith' and often cling to 'a misconception that it can be consigned to a purely private place only to be brought out at Sunday worship'.[43] This is not to say that the 'religion or belief' argument always needs to be successful. However, the 'religion or belief' argument needs to be considered seriously and treated as being as important as other rights. This does not seem to occur at present.

So, does this mean that the judgments of the judicial committee of the House of Lords in *Begum*[44] have killed religious freedom? On the one hand, such a claim seems nonsensical. People remain free to form and hold beliefs and to act upon those beliefs. However, in one important sense religious freedom has died. Following *Begum*, identity claims by religious believers have been regularly dismissed on the basis that there was no interference with Article 9(1). The effect of *Begum* is that the law has not moved beyond the stance of religious

[40] See the 'Clearing the Ground Inquiry' Published by Christians in Parliament: www.eauk.org/clearingtheground/.
[41] G Carey and A Carey, *We Don't Do God: The Marginalization of Public Faith* (Monarch Books, 2012) 92.
[42] Generally, legislation has not prevented the manifestation of religion. The decision not to exempt Catholic adoption agencies from laws prohibiting discrimination on sexual orientation provides a rare exception; see Sandberg, *Law and Religion*, 125–6.
[43] Carey and Carey, *We Don't Do God*, 16, 87.
[44] *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

tolerance that existed before the Human Rights Act 1998.[45] The post-*Begum* supremacy of the specific situation rule has left Article 9 largely moribund.[46] Judges now stress that sacrifice, inconvenience and compromise should be the norm for believers. If a believer can go elsewhere to manifest their religion, probably outside the public sphere, then they cannot rely upon their religious rights. The *Begum* ultimatum requires believers to leave their faith at the door or to go elsewhere. The current case law suggests that the judiciary are uncomfortable dealing with religious rights.[47] The *Begum* legacy is unsurprising given that these judgments have taken place against a backdrop of significant social and legal change regarding religion. These judgments both result from and perpetuate anxieties and confusions surrounding the relationship between religion, law and society in the twenty-first century. In the shadows of September 11th and other terrorist atrocities, long-held assumptions about the role and social significance of faith have been questioned.

The opening years of the twenty-first century have witnessed significant legal changes, which may be summed up in the phrase the 'juridification of religion'.[48] New legislation heralding positive religious rights has extended the reach of the law and has led to both an increase in litigation and a process of 'legal framing', the way 'by which people increasingly tend to think of themselves and others as legal subjects'.[49] Religious liberty may long have been implicit in the common law but the form religious rights now take and the awareness and promotion of these rights represents a step change. Religious freedom is increasingly seen as an individual right and this has meant that the language of religious rights has become commonplace. These new laws are expressed in rather abstract ways which make new demands of judges.[50] Judges have therefore understandably tended to focus on questions of

[45] See Sandberg, *Law and Religion*, chapter 2 for a discussion of the historical development of law and religion in England.

[46] There have been some successful cases, particularly by lower courts, but these are exceptional. See, e.g., *R on the Application of Bashir* v. *The Independent Adjudicator and HMP Ryehull and the Secretary of State for Justice* [2011] EWHC 1108 (Admin), discussed in Chapter 5 below.

[47] M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488, 505–6; Cumper and Lewis, 'Public Reason', 133.

[48] See Sandberg, *Law and Religion*, 193–5.

[49] L C Blicher and A Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36, 39.

[50] See S Sedley, 'Human Rights: A Judicial Approach' in M Hill (ed.), *Religious Liberty & Human Rights* (University of Wales Press, 2002) 1.

interference in religious rights claims because the Article 9(1) question of interference is a legal test which can be reduced to a technical analysis of whether the facts fit the language of the provisions. By contrast, judges have sought to avoid the Article 9(2) question of justification which requires judges to undertake sociological evaluations.[51]

The fact that adjudicating religious rights often includes a sociological test provides an impetus for dialogue between legal and sociological studies of religion. As the sociologist of religion Grace Davie has argued, the nature of conflicts concerning religion and human rights is 'determined by sociological as much as legal factors'.[52] The juridification of religion is both the result and the cause of sociological changes concerning religion. Since laws do not exist in a social vacuum, it can be argued that a fuller understanding of these issues can be achieved by fusing disciplinary approaches. As Brian Grim has argued: 'Religious freedom may have as much to do with the attitudes and actions of people in society as it does with the laws and policies of governments. If this is the case, cross-disciplinary approaches are indeed crucial to the study of religion and law in order to have a clear understanding of the forces shaping the world today.'[53] However, to date, the study of religion, law and society has largely been characterised by academic isolationism. Law and religion academics have studied the relationship between religion and law while sociologists of religion have examined the relationship between religion and society. Dialogue between the two has been the exception rather than the norm.

The aim of this book is to explore whether this ought to change. It examines the interface between law and religion and the sociology of religion to determine whether and how an interdisciplinary interaction between the two can inform our understanding of the place of religion in the twenty-first century. However, before addressing this, it is necessary to explore how the legal and sociological study of religion has evolved within England and Wales and the extent to which dialogue and collaboration between the lawyers and sociologists have already taken place. This is the focus of the next section.

[51] Peter Edge has commented on how some twenty-first century decisions have taken what he refers to as a 'sociological strategy' which emphasises 'the authority of the community itself to determine religious content through its practice': Edge, 'Determining Religion', 416.

[52] G Davie, 'Law, Sociology and Religion: An Awkward Threesome' (2011) 1(1) *Oxford Journal of Law and Religion* 235, 244.

[53] B J Grim, 'Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research' (2012) 1(1) *Oxford Journal of Law and Religion* 249, 271.

TOWARDS AN INTERDISCIPLINARY APPROACH

As Roger Cotterrell has pointed out, academic disciplines need to be understood 'primarily as social phenomena'.[54] This means that disciplines need to be understood as the social creation of those who work in each knowledge field. Cotterrell states that is particularly true where attention is paid to the 'meeting or confrontation' of disciplines since such accounts seek 'to compare, and generalize about, social constructs . . . that have quite different historical origins or patterns of development, social and institutional contexts of existence, and social and political consequences or effects'.[55] It is necessary to pay attention to how those within each field understand and reproduce their knowledge fields given that, as Anthony Giddens has argued, all disciplines develop their own 'constructed history': 'Every recognized intellectual discipline has gone through a process of self-legitimization not unlike that involved in the founding of nations. All disciplines have their fictive histories; all are imagined communities which invoke myths of the past as a means of both charting their own internal development and unity, and also drawing boundaries between themselves and other neighbouring disciplines.'[56] This is true of both law and religion and the sociology of religion. The following section examines the historical development of law and religion and the sociology of religion in England and Wales, paying particular attention to the 'constructed histories' that have been developed by the two respective academic communities. Both law and religion and the sociology of religion will be described as sub-disciplines rather than being described as 'subjects', 'themes', 'areas' or 'branches'.[57] This is to allow a contrast to be made between law and religion and the sociology of religion as sub-disciplines and law and sociology as disciplines. Law and religion can be understood as a sub-discipline of law, like family law, sports law or criminal law, in the same way that the sociology of religion can be described as a

[54] Cotterrell cites the work of Michel Foucault, particularly M Foucault, *The Archaeology of Knowledge* (Routledge, 2002 [originally published in 1969]) as a highly influential way of thinking of academic disciplines as social constructs: R Cotterrell, *Law's Community* (Clarendon Press, 1995) 42.

[55] Cotterrell, *Law's Community*, 43–4.

[56] A Giddens, *Politics, Sociology and Social Theory* (Polity Press, 1995) 5.

[57] This conception of law and religion as a sub-discipline follows A Bradney, 'Some Sceptical Thoughts about the Academic Analysis of Law and Religion in the United Kingdom' in Doe and Sandberg (eds.) *Law and Religion*, 299 and, more generally, A Bradney, 'The Rise and Rise of Legal Education' (1997) 4 *Web Journal of Current Legal Issues*: http://webjcli.ncl.ac.uk/.