



# Institute of Advanced Legal Studies

(University of London)

Charles Clore House  
17 Russell Square  
London WC1B 5DR

Telephone: 01-637 1731  
Telex: 269 400 SH UL (ref. IALS)  
Fax: 01-436 8824

MCH91-102-4-1

W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

*Legislating for a Multi-Faith Society:  
Some Problems of Special Treatment*

Jonathan Montgomery  
(Southampton University)

Wednesday 4 July 1990



## LEGISLATING FOR A MULTI-FAITH SOCIETY: SOME PROBLEMS OF SPECIAL TREATMENT

Jonathan Montgomery  
Lecturer in Law, Southampton University

As Sebastian Poulter's paper demonstrates, the satisfactory adaptation of the English legal system to the needs of a multicultural society may require differential treatment. Provisions providing for formal equality may result in greater restrictions of the freedom of minority groups than is experienced by the majority. Differential treatment may therefore be legitimate in order to offer equal concern and respect to all.

A number of commentators have observed that the individualistic cast of much human rights rhetoric may need to be supplemented by group rights if the needs of all minorities are to be respected. It may be necessary to accept or devise special rules governing a particular group. If so this raises both technical problems of definition and theoretical difficulties in relation to the justification of special treatment. However, the appropriate special treatment may turn out to require even greater sophistication from the law. Accepting that it is necessary to ensure that a community has access to undefiled food does not necessarily mean that all individuals belonging to that group should be exempt from restrictions on methods of slaughter. It may well be sufficient that only a few specific individuals are exempted, in recognition of the needs of a whole group.

This paper is concerned with some of the problems of offering such special treatment. The specific context is that of religious minorities. Such traditions tend already to have a group identity independent of legal intervention and this makes some of the issues clearer. In addition, a number of special exemptions from the criminal law already exist: the wearing of protective helmets by motor-cycle riders and construction site workers, Sunday trading and the slaughtering of animals. These provide the focus of the study. Particular consideration is given to the problems of defining religious groups, the identification in our democratic political process of principles to justify special treatment and the way in which it might be interpreted by members of the minority groups.

### Constructing a religious minority

A number of techniques for controlling access to an exemption are found. These range from individual self-selection through licensing powers for existing religious bodies and the creation of new commissions made up of the members of the religious group to control by those external to the tradition in question. Examples of the possible range of tests for qualification include:



(i) The right of a witness to take a non-biblical oath is recognised on the basis of their objection to doing so, without further scrutiny (Oaths Act 1978).

(ii) Persons are exempt from wearing motor-cycle helmets on the basis that they are (i) wearing a turban and (ii) a follower of the Sikh religion (Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 s 1). As there is no further definition of the word "follower" this test is essentially subjective rather than objective in that a claim that someone is a follower of the Sikh religion will be virtually uncontrovertible for practical purposes. The same approach has been used to exempt construction workers from regulations concerning the wearing of protective headgear, under s 11 Employment Act 1989.

(iii) Exemption from the prohibition on sunday trading is available to Jews who have registered an objection to opening on saturdays with the relevant local authority. This registration must be accompanied by (i) a declaration from the shopkeeper that the objection is held on religious grounds and (ii) a certificate from a panel appointed by the Board of Deputies affirming that the objection is genuine (Shops Act 1950 s 53, SI 1979/1294). This requires submission to the Board of Deputies, a body whose role and authority is a matter of disagreement. The latter requirement was introduced only in 1979 amid much controversy.

(iv) Exemption for religious slaughter works differently for Jews and Muslims. Muslim's are exempted where the killing is "by the Mohammedan method for the food of Mohammedans and by a Mohammedan". Jews can only come within the exemption when they are licensed by the Rabbinical Commission specially set up under the Slaughterhouses Act 1974 for the purpose. A new body was created because there were objections from some sections of the Jewish community to increasing the power of the Chief Rabbi by giving him the licensing responsibility.

(v) In addition to the processes described in (iv) there remains a requirement for local authority licensing of the premises where exempt slaughtering techniques are used which submits the religious slaughterers to secular scrutiny.

These examples illustrate a number of difficulties. In particular, two sets of issues are raised:

(a) How far are exemptions designed to further individual religious freedom and how far are they designed only to facilitate the life-style of a minority group ?

(b) How far does the way in which the qualifications for the exemptions are defined distort the nature of the groups concerned ? Any exemption will inevitably do so in some way, but what are the relative merits of different approaches ?



### The rhetoric of exemption

This section is concerned with identifying concepts used to legitimate dispensing with the usual legal rules. Sebastian's paper considers some of the normative principles applicable, the focus here is on what is said in parliament and in the courts.

(i) The most common principle appealed to is the need to permit 'official' or 'required' religious practices. It is argued that members of religious minorities should not be required to go against their consciences where this would be contrary to "a fundamental question of religious principle" (Lord Avebury, Hansard HL Vol 374, Col 1058). This raises problems of definition, what practices are "required" ? It also raises questions of consistency, why do we not also exempt Rastafarians from prohibitions on the use of drugs ?

(ii) A second justification offered is the need to protect members of religious minorities from injustices produced by the Christian assumptions on which English law is in part still based. Thus it would be unjust to force a Jewish shop to be closed on two days in a week (*Thanet DC v Ninedrive Ltd* [1978] 1 All ER 703). Again there are problems of consistency. This argument does not explain why only those religions whose holy day is saturday should benefit from such an exemption.

(iii) The impact of political and historical factors is often ignored. The House of Lords debates of the motor-cycle helmets issue refers to the contribution of Sikh troops to the Allied forces in World War II as often as it does to religious requirements. Is the economic importance of the Jewish trading community the most plausible explanation for the existence of the sunday trading exemption ?

(iv) Can arguments based human rights be used ? One approach is to try to work out whether an exemption is required by religious freedom. Another is to ask whether it would conflict with other recognised human rights. (S. Poulter, "Ethnic Minority Customs, English Law and Human Rights" (1987) 36 I.C.L.Q. 589).

These considerations must be related back to the issues identified in the first sections. The process of translating the desire to provide an exemption into legislation may frustrate the expressed intentions behind it. Arguments that required practices may be permitted will probably be distorted by the process of allowing one section of the minority community to determine what is required. Thus some individuals may not be allowed to act in a way in which they personally feel required to act by their religion but which the authorised body feels is not mandatory (see the problems exposed in *Saggers v BRB* [1977] I.C.R. 809 and *Saggers v BRB* (No 2) [1978] I.C.R. 1111).

The principles expressed to be the reasons for exemption by the lawmakers must also be related to the concerns of the exempted groups. The reasons given for justifying an exemption



may be quite different from the reasons for the importance of the exemption for the group itself. This is the concern of the final section of the paper.

### Reading an exemption

In order to understand the difference between the way in which the legislators and those given special treatment understand the significance of statutory exemptions, the way in which cultural signs are interpreted must be considered. This paper makes use of the distinction drawn by the French post-structuralist thinker Roland Barthes between denoted meaning and connoted meaning (See "Rhetoric of the Image" in *Image-Music-Text* (1977)). Denoted meaning is used by Barthes to refer to what is actually perceived when an image is considered, connoted meanings are created when those perceptions are interpreted by reference to the prior knowledge and experience of the 'reader'. While denoted meaning is usually relatively uncontroversial, the scope for variation between the connoted meanings of any particular image is enormous because they derive from widely different experiences.

In the context of special treatment the paper argues that issues about what actually may be done under an exemption are analogous to the concept of denoted meanings. Issues of statutory interpretation can therefore be debated within the standard legal discourse without overwhelming confusion. However, it is impossible to understand the significance of special treatment without also considering the connotations. For the legislators the connotations will be conditioned by assumptions of benevolence; the feeling that they are giving groups better treatment than they would otherwise receive. For minorities, it may be just another example of a debilitating paternalism based on misunderstandings of their values. Careful consideration of the significance of special treatment needs to be able to take such problems into account.

Examining these issues further undermines the suggestion that it is possible to base special treatment on objective normative principles. When cases studies are considered it becomes apparent that the immediate political context may colour the minorities' views of what sort of special treatment is appropriate or necessary. The campaign for the right to wear a turban is an interesting example. The turban has caused the more controversy than the 'five symbols' of Sikhism, which are more fundamental to the religion's way of life. This is probably best explained by its visibility, which enables it to function as a symbol of independence and solidarity. One study of young Sikhs observed a pattern of early rebellion against the practice of growing hair and wearing a turban followed by the adoption of the traditions in response to experiences of prejudice as "a symbolic act of pride in being different" (James, *Sikh Children in Britain* (1974) p. 50). Similarly, a public dispute about the right of transport workers to wear turbans in Wolverhampton was accompanied by a revived enthusiasm, in solidarity, amongst the Sikh community (Beetham, *Transport and Turbans* (1971)). The significance of the exemptions from wearing protective headgear



for the Sikh community itself would therefore seem to be more that they claim the right to display a symbol of resistance to the dominant culture than that there is a religious obligation at stake. These connotations are underplayed by an analysis based on the latter assumption.

The control by the Jewish authorities over the licensing of Sunday trading illustrates a different aspect of the politics of special treatment. The introduction of the need for a certificate to support a shopkeeper's declaration of religious conviction resulted from pressure from Jewish leaders motivated by fears that the reputation of their community was being tarnished. This move has been criticised as promoting the well-being of the religious establishment at the expense of individual religious freedom (Alderman, "Jews and Sunday trading: the use and abuse of delegated legislation" (1982) 60 Public Administration 99-104). Many applicants have been refused certificates.

The courts have refused to intervene to protect individual Jews against alleged abuses. An attempt to challenge the introduction of the 1979 regulations was thrown out (R v London Committee of Deputies of British Jews ex p. Helmcourt Times 16 July 1981.) In a case on the licensing of ritual slaughter the Court of Appeal declined to intervene on the basis that there was "a clear intention that such matters should be left to... those in the Jewish community best qualified to decide thereon." (R v Rabbinical Commission for the Licensing of Shochetim, ex p. Cohen Times 22 December 1987.) This deference to the Jewish authorities may not be legitimate in the light of internal religious politics. Complete neutrality is, of course, impossible. However, that does not excuse legislators from ignoring such political factors.

### Conclusion

This paper has attempted to unravel some of the complexities of providing special treatment for religious minorities. Rather than suggesting solutions it has tried to uncover the inadequacies of existing analysis of the criteria which justify exemptions from the criminal law. It has been argued that the main defects spring from lack of attention to the technical difficulties of drafting exemptions and the political context out of which the calls for exemptions arise and which surrounds their operation. Consideration of these factors needs to supplement rather than replace existing theories of special treatment, but this paper contends that without it those theories cannot be maintained.

Jonathan Montgomery  
18 May 1990