

Review of Litigating Religions: An Essay
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Litigating Religions: An Essay on Human Rights, Courts and Beliefs

CHRISTOPHER MCCRUDDEN

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The material that makes up this ‘essay’ was first prepared as part of the Alberico Gentile Lectures given in 2015 at the University of Macerata, Italy. The original lectures are available to watch on YouTube. McCrudden presents an interpretation of the phenomenon he coins ‘religious litigation’ to make sense of the relationship between courts and religions. (p viii). To analyse this relationship, the work also draws extensively on his previous academic work. His basic argument is that the relationship between human rights and religion is becoming more conflictual because of the changing role of religion and the changing role of human rights (p 125). The trouble is that this is more of an observation than an argument and does not really advance the debate. It is disappointing that McCrudden does not propose more practical suggestions to deal with the conflict or propose other ways to resolve tensions.

McCrudden does not seek to resolve tensions but ‘rather only provide mechanisms by which the tensions I’ve identified may be addressed in a way that may prove more productive than the approaches adopted up to now have proved to be’. (p 126). As McCrudden identifies that he is not proactively seeking to resolve tensions, this explains why at the end of the essay he concludes that ‘[m]y suggestion is that the current litigation...is a place for both courts and religions to look, not for answers but for questions, and a forum to examine these questions further’ (p163). As there are no tensions resolved or answers given, it is necessary to focus on the ‘questions’ identified in the work.

One way that the McCrudden analyses the questions facing religion is by pointing out the danger posed by public reasoning. Public reasoning and the concept of public reasonableness is a mode of reasoning commonly used by members within a society to reach a majority consensus. It is most famously associated with the work of John Rawls.¹ McCrudden considers that the threat posed by public reasoning is why:

¹ J Rawls, *A Theory of Justice* (Harvard University Press, 1971) 221 and J Rawls, *Political Liberalism* (Columbia University Press, 1993) 7.

religious litigation is often conceived in a discourse that is not explicitly religious, and why religious believers increasingly resort to human rights principles other than [*sic*] freedom of religion (pp 99-100).

This refers to the recent trend to argue cases involving religion relying upon human rights other than Article 9 of the European Convention on Human Rights, on Freedom of Thought, Conscience and Religion. This is a practical observation dealing with recent religious litigation. A good example is *Lee v Ashers Baking Company Ltd*.² McCrudden notes that this case was litigated ‘relying heavily on a freedom of expression argument, taken together with freedom of religion’ (pp 99-100). It is unclear whether he considers this reliance upon different human rights to be a form of public reasoning, but it is evident that he identifies a synthesis between the ‘ideology of human rights and the ideology of several organized religions’ (pp 24-25) and he establishes that human rights cases concerning religion are not merely confined to Article 9 ECHR; religious claimants can benefit from drawing upon other protected rights, such as Article 10 ECHR (Freedom of Expression).

This is helpful because McCrudden has acted in leading cases involving human rights and religion, by his own admission ‘largely by accident’ (p xiii). These include *R(E) v Governing Body of JFS*,³ *Jivraj v Hashwani*,⁴ *Eweida and Others v United Kingdom*⁵ and *Lee v McArthur and Ashers Bakery*.⁶ The experience provides potential for McCrudden to offer unique insight into religious litigation and makes this book timely. The cases considered in the text illustrate some of the tensions between religious positions and secular understandings of human rights. Regrettably, only the Court of Appeal decision in Northern Ireland is considered in relation to *Ashers*⁷ and not the recent Supreme Court judgment.⁸

² *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

³ *R (E) v Governing Body of JFS* [2010] IRLR 136.

⁴ *Jivraj v Hashwani* [2011] UKSC 40.

⁵ *Eweida and Others v The United Kingdom* [2013] ECHR 37.

⁶ *Lee v McArthur and Ashers Bakery* [2016] NICA 39.

⁷ *Ibid.*

⁸ See *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

Following a body of academic consensus,⁹ McCrudden argues that in *Eweida and Others v United Kingdom*¹⁰ the European Court of Human Rights should have introduced a concept of reasonable accommodation for the appellant Ms Ladele, whereby an employer may be expected to accommodate an employee's practices: 'the court ought to have held that there could be no proportionate justification for refusing to accommodate her conscientious objection' (p 147). The failure of the ECtHR to do so here highlights problems that courts encounter when litigating religion.

The essay is clearly written by an academic working in the Roman Catholic tradition. For instance, chapter 6 focuses largely on Catholic social teaching. McCrudden admits, 'I am more familiar with this [Catholic] tradition than with others, but I write from the perspective of a human rights academic and practitioner, not a theologian or philosopher' (p viii). As such, it is evident that although informed by his faith, McCrudden grounds his work in human rights and equality law. A strength in the work is that insight into philosophical theology is used to supplement legal argument.

In light of the Equality Act 2010 (and the discrimination law contained within it) McCrudden identifies well that arguments concerning the place of religion in the public or private spheres are now 'frequently reframed in practice as issues of "discrimination" and "equality"' (p 73). This situates his approach alongside equality law that frequently impacts upon religion. He believes that this allows dialogue between human rights and religion in the role exercised by the courts.

There is an attempt made to provide a 'bibliographical essay' at the end of the monograph rather than using traditional footnotes. This makes for a disjointed reading experience. Either the reader needs to refer constantly to the end of the work and cross-reference earlier academic sources, or to ignore references entirely. Neither approach really works, and it would make a far smoother reading experience if traditional footnotes or endnotes were adopted throughout.

⁹ See A Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (2013) 2(1) *Ox. J Law Religion* 50, 61; M Hill, 'Religion at Work' (2013) 163 *NLJ* 89; D McIlroy, 'A Marginal Victory for Freedom of Religion' (2013) 2 *Ox. J Law Religion* 1 210, 213; K Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation* (Hart, 2017). See further, *Eweida and Others v The United Kingdom* (2013) (Partly dissenting opinion of Judges Vučinić and De Gaetano).

¹⁰ *Eweida and Others v The United Kingdom* [2013] ECHR 37.

The work is a contribution by a leading practitioner actively litigating religion at the forefront of recent developments. However, it is a missed opportunity to provide deeper insight into current and future trends within religious litigation. The ‘clash of rights’ is considered and dialogue is generated between the identified tensions, but it is a pity that more answers are not suggested as well as questions.

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