CHAPTER EIGHT

RELIGIOUS CONFESSION PRIVILEGE AT COMMON LAW IN THE UNITED KINGDOM AND IRELAND

INTRODUCTION

In tracing the origin and development of religious confession privilege from canon law into the common law, I have already established that materials from which a modern court in the United Kingdom might identify a contemporary form of common law religious confession privilege, still exist. The question that remains is to identify what a British court would decide if a bona fide religious confession case arose for adjudication there in the twenty-first century. The question is whether a correct understanding of the common law on religious confession privilege, the UK Human Rights Act 1998 or Strasbourg jurisprudence will have any impact on or outweigh the traditional text denials that there is any such privilege at common law.

Because the British common law materials have already been thoroughly considered in chapters one through six, this chapter will discuss how the issue of ‘religious confession as a human right’ might reduce the influence of the obiter pronouncements of Sir George Jessel1 and Lord Denning2 against religious confession privilege. Would the material already provided in this book facilitate a unique and modern British religious confession privilege at common law, or does the existence of the European Convention on Human Rights (the Convention)3 and more recently the Human Rights Act (the HRA),4 mean that a current case would be decided by a species of constitutional or statutory interpretation? This consideration will necessarily include discussion of existing British and European jurisprudence in human rights cases since those

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1 Anderson v Bank of British Columbia (1876) 2 Ch D 644, 650–651; Wheeler v LeMarchant [1881–5] All ER 1807, 1809.
4 1998, c 42 (UK).
decisions are likely predictive of the approach British courts would take in a religious confession privilege case.

This chapter will conclude that, like Australian and Canadian courts, British courts are likely to recognise religious confession privilege and even some form of religious communications privilege in the future in cases that do not involve national security or sensitive social issues like child abuse. However, even though the House of Lords “ha[s]… declared that the margin of appreciation does not apply” in British domestic courts, absent the passage of a religious confession privilege statute, in hard cases the English courts will weigh the competing public interests before deciding whether to coerce the disclosure of confidential religious communications or not. This practice will accord with both the ‘case-by-case’ approach adopted in Canada, and the old discretionary approach alluded to by Lord Denning in Attorney-General v Mulholland and Foster. It will also come very close to the use of the European ‘margin of appreciation’ doctrine in English domestic law despite the House of Lord’s statement cited above that it does not apply.

The Human Rights Act 1998

Ian Leigh has described the UK HRA, as a revolution. He says “[t]he Home Secretary’s pre-publicity…trailed this as the biggest legal reform since the Bill of Rights 1689”. Joanna Harrington says that it has become clear that the HRA has brought about profound and significant change within the U.K…and serves as Britain’s first modern bill of rights…to give further effect to the rights and freedoms guaranteed under European Convention on Human Rights

Leigh-Ann Mulcahy summarizes that “[t]he effect of the HRA has been to root the Convention firmly into domestic law” which has

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7 Op cit., p. 323.

