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# The conflicts of legal pluralism: Secular law and religious faith in the united kingdom, Pilgrim fathers' lecture 2018

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**THE CONFLICTS OF LEGAL PLURALISM:  
SECULAR LAW AND RELIGIOUS FAITH IN THE UNITED KINGDOM  
PILGRIM FATHERS' LECTURE 2018<sup>1</sup>**

***Sir Terence Etherton MR***

1. On 16 September 1620, the Pilgrim Fathers set sail from Plymouth to what is now known as New England in the United States of America. In doing so, they sought to escape the intolerance and persecution they had faced in England as a result of their Puritan faith and their rejection of the established Church of England. Practising as a minority religion has been a problem faced by religious communities for thousands of years.
2. One of the most difficult and contentious areas of our law today is the resolution of disputes generated by a conflict between, on the one hand, the religious beliefs of an individual and, on the other hand, actions which that individual is required to take, whether that requirement is by a public body, a private employer or another individual. The problem is particularly acute where the conflict is directly or indirectly between one individual's religious beliefs and another's non-religious human rights.<sup>2</sup> This is what has been called "legal pluralism": the idea that it is "normal for more than one 'legal' system to coexist in the same social arena".<sup>3</sup>
3. In complex communities different people have many common goals but also many different values and priorities. We may not agree with the values and priorities of others but we may well recognise them to have a rational or moral force. In such communities harmonious, productive and enriching co-existence requires compromises. Especially with regard to religion, this is a subject that affects many countries as they have become more liberal, multicultural and

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<sup>1</sup> I am grateful to my judicial assistant Joshua Cainer for his assistance in the preparation of this lecture

<sup>2</sup> For two enlightening commentaries, see Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) MLR 223-253 and Ronan McCrea, 'Religion in the Workplace, *Eweida and Others v United Kingdom*' (2014) 77(2) MLR 277-291.

<sup>3</sup> Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: OUP, 2001) 171.

secular.<sup>4</sup> Law is increasingly used to solve the tensions, conflicts and problems posed by legal pluralism where people of different religions, or where people with religious values and those who are entirely secular, share the same public space by identifying when one value system should trump or be trumped by another.<sup>5</sup> This subject is large and complex and the law relevant to it is growing at a remarkably fast pace.<sup>6</sup>

## **The Legal Framework**

4. For most advanced democracies the end of World War II was a watershed in terms of human rights and the protection of minority groups. Prior to then the position in the UK, and I suspect most Western European countries, was that the law and social values reflected a special status for one religion, Christianity, and there were no anti-discrimination laws in relation to other faiths or beliefs specifically designed to protect or enhance the rights of minorities.
5. That state of affairs has plainly changed beyond all recognition since the middle of the 20<sup>th</sup> century. The foundation stones for the remarkable transformation lay in the reaction to the atrocities of Nazism and fascism. The Preamble to the 1945 Charter of the United Nations, the 1948 Universal Declaration of Human Rights, and the European Convention on Human Rights ('the Convention') signed in 1950 represented a collective rejection of all that Nazism and fascism stood for. They enshrine an ethos of equality in dignity and rights, as distinct from simple majoritarianism, and which has come to reflect one of the core values of liberal western democracy.
6. I start with the Convention.<sup>7</sup> The UK was the first country to ratify it in November 1950. Particularly significant, for the purposes of this address, are Articles 8

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<sup>4</sup> See, e.g., Carl F. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29(4) OJLS 729-755.

<sup>5</sup> Russell Sandberg refers to this phenomenon as the "juridification of religion": see Russell Sandberg, *Law and Religion* (Cambridge: CUP, 2011) Chapter 10 and Russell Sandberg, *Religion, Law and Society* (Cambridge, CUP, 2014) Chapter 1.

<sup>6</sup> See the masterly survey of Sir James Dingemans, Can Yeginsu, Tom Cross and Hafsah Masood, *The Protections for Religious Rights: Law and Practice* (Oxford: OUP, 2013).

<sup>7</sup> The Convention itself may be seen as reflecting a particular polity, namely a secular liberal democracy constituted by popular elections, the rule of law, pluralism in the political sphere and respect for public freedoms and human rights: see Mashood A. Baderin, 'An Analysis of the Relationship between Shari'a and Secular Democracy and the Compatibility of Islamic Law with the

(right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 14 (prohibition of discrimination) and Article 2 of the First Protocol (right to education).

7. Article 9 provides (1) that everyone has the right to freedom of thought, conscience and religion; but (2) freedom to manifest one's religion or beliefs may be subject to limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
8. The following initial points must be made about Article 9. First, the jurisprudence of the European Court of Human Rights ("ECrHR") has highlighted the importance of the rights protected by Article 9 in a pluralist democratic society. In *Leyla Sahin v Turkey* (2005) 41 EHRR 8 the Grand Chamber of the ECrHR said:

"104. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion ..."<sup>8</sup>

9. Secondly, as appears from that quotation and other cases, a belief may fall within the protection of Article 9 and Article 2 of the First Protocol even though it has nothing to do with religion, as commonly understood, provided that the belief satisfies some minimum requirements as to seriousness, cogency and recognition of human dignity.<sup>9</sup> Indeed, the protection of Article 9 goes beyond

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European Convention on Human Rights' in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge: CUP, 2013) 81.

<sup>8</sup> See also *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, at [15].

<sup>9</sup> *Ibid.*, at [23]. See also *Lautsi v Italy* (2012) 54 EHRR 3; Dingemans et al (n 6), paras 3.19, 3.23. The UK courts generally have refused to evaluate the core tenets of particular beliefs. There should be noted the recent decision of the Court of Appeal in *MBA v London Borough of Merton* [2014] 1 All ER 1235, where the majority held that Article 9 made it irrelevant for the purposes of the proportionality assessment whether a belief, in that case the refusal of a Christian to work on a Sunday, was or was

atheists, agnostics and sceptics and extends to veganism, Scientology and Jehovah's Witnesses.

10. Thirdly, there is a critical distinction under Article 9 between the freedom to hold a belief and the freedom to express or 'manifest' a belief. The former right is absolute. The latter right, the freedom to manifest a belief, is qualified.<sup>10</sup>
11. Fourthly, the protection conferred on freedom of thought, conscience and religion under Article 9 must, of course, take its place alongside and must accommodate the other freedoms and protections conferred by the Convention.<sup>11</sup> The ethos of mutual respect and tolerance applies equally where several religions co-exist in the same population.<sup>12</sup> This is essential to the pluralism which is indissociable from a democratic society, support for pluralist democracy being the cornerstone upon which the Convention is based.<sup>13</sup>
12. Fifthly, the ECtHR acknowledges the wide divergence between the national traditions and societal values of the different Member States in relation to Article 9 rights and the political sensitivities surrounding those rights. Accordingly, it gives Member states a wide margin of appreciation in relation to the balancing exercise under Article 9(2).<sup>14</sup> This is a critical aspect of the jurisprudence, which has proved decisive in many cases and is a principle to which I will return.

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not "*a core component of the Christian faith*"; per Elias LJ at [34] et seq with whom Vos LJ agreed (at [39]); Maurice Kay LJ reached the same conclusion but without resort to Article 9 (at [18]-[19]). In *R (Hodkin) v Registrar of Births, Death and Marriages* [2013] UKSC 77, [2014] 2 WLR 23, at [57], Lord Toulson described religion for the purpose of the Place of Worship Registration Act 1855 in the following terms: "...I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word "supernatural" to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula."

<sup>10</sup> *R (Williamson) v Secretary of State for Education and Employment* (n 8), at [16].

<sup>11</sup> *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, at [47].

<sup>12</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, at 418-419.

<sup>13</sup> For a particularly valuable summary of the ECtHR's approach to democracy, law and religion in this regard, see *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1, paras [90]-[92], approved most recently in *M (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWCA Civ 2164, [2018] 4 WLR 60, para [124].

<sup>14</sup> *Dingemans et al* (n 6), paras 3.92 ff.

13. Many of the cases under Article 9 concern the right to wear items of clothing regarded by the applicant as having religious significance, which are prohibited. One of the first and most important in laying down general principles was *Leyla Sahin v Turkey*.<sup>15</sup>
14. The applicant in *Leyla Sahin v Turkey* brought proceedings in Strasbourg as a result of being suspended from Istanbul University for insisting on wearing the Islamic headscarf in breach of the ruling of the Vice-Chancellor of the University that students who wore the Islamic headscarf would not be admitted to lectures. She claimed that the ruling and its implementation infringed her rights under Articles 8, 9 and 14 of the Convention and Article 2 of Protocol No 1. The ECtHR held that the prohibition on wearing the Islamic headscarf fell within the margin of appreciation allowed to Turkey, bearing in mind in particular that the principle that the state should be secular was one of the fundamental principles of the Turkish state.
15. The Court commented upon, and compared, the existence or absence of regulations on the wearing of the Islamic headscarf in schools and universities in France, Belgium, Austria, Germany, the Netherlands, Spain, Sweden, Switzerland and the UK and observed that there was no uniformity of approach. In France, for example, where secularism is regarded as one of the cornerstones of republican values, the wearing of signs or clothes manifesting a religious affiliation in state primary and secondary schools is prohibited, including, for example, the *kippah*, the Islamic headscarf and a large cross.<sup>16</sup> The Court singled out the UK as a place notable for its tolerant attitude to pupils who wear religious signs.
16. In the result, the Court in *Leyla Sahin v Turkey* founded its decision on the importance of the role of the national decision-making bodies in the difficult and sensitive area of the relationship between the State and religion.<sup>17</sup> It said:

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<sup>15</sup> (2005) 41 EHRR 8.

<sup>16</sup> See also *S.A.S. v France* [2014] ECHR 695 in which the ECtHR held that French legislation making it an offence for a person to conceal their face in a public place does not infringe the Convention.

<sup>17</sup> See also, by way of example, *Dogru v France* [2008] ECHR 1579 and *S.A.S. v France* (n 16).

“109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order ... Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context ... .”

17. There is a principle, highlighted in the decision of the UK House of Lords in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, 1 AC 100, concerning the wish of a schoolgirl to wear the *jilbab*, that (save in an employment situation) there will not be an infringement of the right to manifest religious belief where there are other means open to the person to practise or observe his or her religion without hardship or inconvenience (in that case, by attending another school which allowed that form of dress).
18. On the issue of the application of Article 9 to prohibitions on religious signs and dress, two of the most important cases have arisen in the employment context in the UK. Both cases were heard at the same time by the ECtHR.
19. In *Eweida v UK* (2013) 57 EHRR 8 the applicant, a practising Coptic Christian employed by British Airways, claimed that BA had directly and indirectly discriminated against her and was in breach of Article 9 of the Convention when it refused to permit her to wear a cross visible to customers.
20. The ECtHR held that there had been a violation of Article 9.<sup>18</sup> On the facts, Ms Eweida's insistence on visibly wearing a cross at work was motivated by her desire to bear witness to her Christian faith and was a manifestation of her religious belief which attracted the protection of Article 9.<sup>19</sup>
21. The Court said that, in order to count as a “manifestation” within the meaning of Article 9, there must exist a sufficiently close and direct nexus between the act and the underlying belief. A manifestation of religious belief within Article 9

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<sup>18</sup> Ms Eweida's claim was rejected by the Employment Tribunal as she had not established indirect discrimination. Her appeal to the Court of Appeal was dismissed. The Supreme Court refused her permission to appeal.

<sup>19</sup> At [89]; see also *MBA v Merton London Borough Council* (n 9), at [34] (Kay LJ) and [41] (Vos LJ).

is not limited, however, to an act of worship or devotion which forms part of the practice of a religion or belief or to an act in fulfilment of a duty required by the religion in question.<sup>20</sup>

22. The Court acknowledged that there is case law which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no infringement of the right under Article 9(1).<sup>21</sup> The Court, however, distinguished employment cases where there is, of course, always an option for the employee to resign from the job and change employment. The Strasbourg Court determined that, where an individual complains of a restriction of freedom of religion in the workplace, rather than holding that the possibility of changing the job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction is proportionate.<sup>22</sup>
23. The Court held, accordingly, that there was an interference with Ms Eweida's right to manifest her religion and the only question was whether that was justified under Article 9(2). Since the interference with Ms Eweida's Article 9 rights was not directly attributable to the State, the Court's task was to examine whether in all the circumstances her right freely to manifest her religion was sufficiently secured by domestic laws and whether a fair balance was struck between her rights and those of others.<sup>23</sup>
24. The Court concluded that a fair balance had not been struck. It acknowledged that the aim of BA's uniform code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff. It held, however, that the domestic courts had accorded that aim too much weight. They had failed to give sufficient weight to the consideration that the desire to manifest religious belief is a fundamental right both because a healthy democratic society needs to tolerate and sustain pluralism and diversity and

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<sup>20</sup> At [82].

<sup>21</sup> It referred in that context to Lord Bingham's observations in *R (SB) v Governors of Denbigh High School*.

<sup>22</sup> *Ibid.*, at [83].

<sup>23</sup> *Ibid.*, at [91].



because of the value to an individual, who has made religion a central tenet of his or her life, to be able to communicate that belief to others. Furthermore, on the facts of the case, there was no evidence of any real encroachment on the interests of others: Ms Eweida's cross was discreet, did not detract from her professional appearance and there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans or hijabs, had any negative impact on BA's brand or image.<sup>24</sup>

25. That case maybe contrasted with *Chaplin v UK* (2013) 57 EHRR 8, which was decided by the ECtHR at the same time as *Eweida*. Ms Chaplin was a Christian who, like Ms Eweida, wore a cross on a chain around her neck as a manifestation of her religious belief. She was employed by a National Health Service Trust as a nurse. The Trust had a uniform policy, based on guidance from the Department of Health, which prohibited the wearing of necklaces. The reason for the restriction on jewellery was to protect the health and safety of nurses and patients as it posed a risk of injury or infection. Ms Chaplin was asked to remove the cross and chain, but refused to do so, and was moved to a non-nursing position, which subsequently ceased to exist.
26. The ECtHR held, consistently with its reasoning in *Eweida*, that there was an interference with Ms Chaplin's Article 9(1) rights<sup>25</sup> and the issue was whether the interference by the NHS Trust, a public body, was necessary in a democratic society in pursuit of one of the aims set out in Article 9(2).<sup>26</sup> The Court considered in this case that the interference was justified on the facts. It considered that the reason for asking Ms Chaplin to remove the cross, namely the protection of health and safety on a hospital ward, was of a greater magnitude than that which applied in respect of Ms Eweida. Further, clinical safety was a field in which the domestic authorities must be allowed a wide margin of appreciation. It followed that the Court was unable to conclude that the measures of which Ms Chaplin complained were disproportionate.<sup>27</sup>

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<sup>24</sup> *Ibid.*, at [92]-[95].

<sup>25</sup> *Ibid.*, at [97].

<sup>26</sup> *Ibid.*, at [98].

<sup>27</sup> *Ibid.*, at [99]-[101].

27. Reference to employment now takes us to membership of what is now the EU. This has resulted in a further layer of rights and obligations bearing on the manifestation of religious beliefs and their reconciliation with other rights and obligations. This has produced legal complexity and cases of considerable difficulty and sensitivity.
28. There are two strands to this. The first stems from the EU's Charter of Fundamental Rights, which was issued in 2000 and became legally binding on Member States with the entry into force of the Treaty of Lisbon in December 2009. The Charter entrenches various rights, freedoms and principles, including those enshrined in the Convention. The effect of Article 52(3) of the Charter is that, where there are comparable provisions in both the Charter and the Convention, the meaning and scope of the right in the Charter are to be the same as in the Convention but the EU can provide for even greater protection.
29. Although section 5(4) of the European Union (Withdrawal) Act 2018 states that rights under the Charter will not be retained as part of English law upon the UK's departure from the EU, section 5(5) states that this does not "affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter" (section 5(5)). The important question upon withdrawal, therefore, is likely to be whether the relevant rights in this area exist irrespective of their recognition under the Charter.<sup>28</sup>
30. The second strand is the specific legislation of the EU bearing on the issues of religion and discrimination particularly in the employment field. Due to its incorporation into national legislation, this will remain relevant, indeed crucial, to this area of law.

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<sup>28</sup> J. Segan, 'The European Union (Withdrawal) Act 2018: Ten Key Implications for UK Law and Lawyers' (*UK Constitutional Law Blog*, 26 July 2018) <<https://ukconstitutionallaw.org/2018/07/26/james-segan-the-european-union-withdrawal-act-2018-ten-key-implications-for-uk-law-and-lawyers/>> (last accessed 1 August 2018).

31. Important amendments were made to the EC Treaty by the Treaty of Amsterdam in November 1997. Article 13, inserted by the Treaty of Amsterdam, provided that:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council ... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

32. Pursuant to Article 13, three new Directives were enacted, one of which was the Framework Directive.<sup>29</sup> The Framework Directive required Member States to outlaw discrimination connected to religion and belief, disability, sexual orientation, and age in employment and related fields. What is immediately striking, in the context of the subject matter of this address, is that the Framework Directive not only, for the first time in Europe, expressly outlawed discrimination in relation to sexual orientation, but it did so alongside express protection against discrimination connected with religion or belief, and without conferring any superiority of the one over the other. Yet, as history has shown again and again, religion and sexual orientation are often conflicting values. Accordingly, the Framework Directive almost inevitably laid the ground for future conflict and litigation because those Christians who wish to manifest their belief in the sinfulness of homosexual practices, and gay men and lesbians, who do not wish to be discriminated against, can claim the protection of Articles 8, 9 and 14 of the Convention.
33. The UK introduced two sets of regulations to give effect to the anti-discrimination provisions in the Framework Directive concerning religion or belief on the one hand, and sexual orientation on the other hand. These were the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003. The former protected against discrimination connected with religion and belief in employment and related fields; and the latter conferred non-discrimination

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<sup>29</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJL 303, 2 Dec 2000, 16).

rights for gay men and lesbians in employment and related fields. The relevant legislation is now contained in the UK's Equality Act 2010.

### **Conscientious Objection and Sexual Discrimination**

34. One of the most difficult and sensitive issues currently faced by the courts is the extent to which it is legally permissible for public institutions and our law to favour one protected right over another. This has arisen most markedly in the friction between the right of sincere Christians to manifest their religious convictions, notably in the belief of some Christians in the sinfulness of homosexual practices, through conscientious objection to having to conduct themselves contrary to their faith, and the right of gay men and lesbians not to be discriminated against. Both can claim to rely on Articles 8, 9 and 14 of the Convention and on the anti-discrimination provisions now to be found in the EA 2010.
35. Important recent cases provide guidance on how the courts should approach these difficult conflicts between the manifestation of Christian (or, indeed, other religious) beliefs and the protection and promotion of secular values and other conduct protected by the Convention and anti-discrimination legislation.
36. In *Ladele v UK* (2013) 57 EHRR 8, the claimant, a Registrar of Births, Marriages and Deaths, employed by the London Borough of Islington since before the introduction of civil partnerships for same sex couples, refused to officiate at civil partnerships on the ground that, as an orthodox Christian, she believed that marriage is the union of one man and one woman for life. Her employer initiated disciplinary proceedings because, by refusing to conduct civil partnership ceremonies, she had failed to comply with the local authority's code of conduct and equality and diversity policy. Ms Ladele applied to the ECtHR<sup>30</sup> on the ground that the local authority's decision not to make an exception for her and others in her situation amounted to discrimination in breach of Article

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<sup>30</sup> The Employment Tribunal upheld Ms Ladele's complaint of direct and indirect discrimination. The Employment Appeal Tribunal reversed that decision. The Court of Appeal rejected her appeal. The Supreme Court refused her permission to appeal.

14. The Court held that there had been no violation of Article 14 taken in conjunction with Article 9.
37. The Court noted that it had previously held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification and that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship. It also noted, however, that since practice in that regard was still evolving across Europe, Member States enjoyed a wide margin of appreciation as to the ways in which that is achieved within the domestic legal order.<sup>31</sup>
38. The Court acknowledged that the consequences for Ms Ladele were serious in that she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar, and ultimately she lost her job. The Court also noted that the requirement to participate in the creation of civil partnerships was introduced subsequent to her entry into her contract of employment. The Court said that, on the other hand, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. It concluded that the local authority, which initiated the disciplinary proceedings, and the domestic courts, which rejected Ms Ladele's discrimination claim, had not exceeded the margin of appreciation available to them.<sup>32</sup>
39. In *McFarlane v UK* (2013) 57 EHRR 8, Mr McFarlane, a Christian, was employed as a counsellor. He was not willing to work with same-sex couples in cases where issues of psycho-sexual therapy were involved, and he was dismissed for that reason. The employers had an equal opportunities policy which required them to ensure "that no person ... receives less favourable treatment on the basis of characteristics, such as ... sexual orientation". On entering into his contract of employment, the claimant signed up to the employers' equal opportunities policy.

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<sup>31</sup> (2013) 57 EHRR 8, at [105].

<sup>32</sup> *Ibid.*, at [106].

40. The ECtHR noted that Mr McFarlane was employed by a private company. In determining whether the United Kingdom had complied with its positive obligation to secure Mr McFarlane's rights under Article 9, and whether a fair balance was struck between the competing interests at stake, the Court noted that the loss of Mr McFarlane's job was a severe sanction for him. It also noted, on the other hand, that he was aware at the time of his enrolment that his employer operated an equal opportunities policy and that the filtering of clients on the ground of sexual orientation would not be possible.<sup>33</sup>
41. The Court said, however, that the most important factor was that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The Court did not consider that the margin of appreciation was exceeded,<sup>34</sup> and so concluded that there had been no violation of Article 9, taken alone or in conjunction with Article 14.<sup>35</sup>
42. Some have seen those cases, and *Ladele* in particular, as giving effect to a legal policy that it would never be right to grant an exemption on religious grounds from non-discrimination norms aimed to secure the rights of others under the Convention, regardless of whether a service would actually be impaired.
43. This would certainly chime with the decisions of the Court of Appeal of England and Wales in two cases arising out of a conflict between the rights of gay men not to be discriminated against on the basis of their sexuality and the defendants' views about homosexuality as sincere Christians.
44. In *Preddy v Bull*<sup>36</sup> the defendants ran a private hotel. In *Black v Wilkinson*<sup>37</sup> the defendant let out rooms in her family home on a bed and breakfast basis. In both cases the defendants were Christians who, because of their religious beliefs, operated a policy to restrict occupancy of their double-bedded rooms to married couples. In both cases they turned away the claimants, who were

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<sup>33</sup> *Ibid.*, at [109].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at [110].

<sup>36</sup> [2012] 1 WLR 2514; on appeal [2013] 1 WLR 2741.

<sup>37</sup> [2013] 1 WLR 2490.

homosexual couples. The claimants in *Preddy* were in a civil partnership. The claimants in *Black* were partners, but not civil partners. The claimants in both cases brought proceedings alleging discrimination contrary to the Equality Act (Sexual Orientation) Regulations 2007 (“the Sexual Orientation Regulations”). Those Regulations contained specific exceptions, including an exemption for religious organisations in Regulation 14.

45. The Court of Appeal in both *Preddy* and *Black* concluded that there had been direct discrimination on grounds of sexual orientation because at that time the claimants, being of the same sex, could not marry.<sup>38</sup> Mr and Mrs Bull and Mrs Wilkinson were granted permission to appeal to the Supreme Court, but Mrs Wilkinson decided not to pursue the appeal.
46. While the judges in the Supreme Court disagreed over whether the defendants had directly (as opposed to indirectly) discriminated against the claimants on the grounds of sexual orientation (with the majority led by Lady Hale finding that there had been direct discrimination<sup>39</sup>), all of the judges agreed that the policy of letting double-bedded rooms only to married couples was unjustified discrimination on the basis of sexual orientation within Regulation 3(3) of the Sexual Orientation Regulations. The Supreme Court also unanimously rejected the argument that the Regulations needed to be read so as to give effect to the defendants’ Article 9 right of freedom to manifest their religious beliefs. The limitation on Mr and Mrs Bulls’ Article 9 rights was deemed a proportionate means of pursuing the legitimate aim of protecting the claimants’ rights not to be unlawfully discriminated against on the basis of their sexual orientation.
47. The most recent legal episode involving this particular issue is the Northern Ireland case of *Lee v McArthur*, which has become widely referred to as the “gay cake case”, and on which the Supreme Court has recently ruled.<sup>40</sup> In that

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<sup>38</sup> The judges in *Black* indicated that they would have preferred to hold that there had been indirect discrimination rather than direct discrimination, but considered that they were bound in that respect by the earlier decision in *Preddy v Bull*.

<sup>39</sup> For further exploration of the distinction between direct and indirect discrimination, see Lady Hale, ‘Religion and Sexual Orientation: The clash of equality rights’, 7 March 2014, The Comparative and Administrative Law Conference, Yale Law School.

<sup>40</sup> *Lee v McArthur* [2016] NICA 39, [2017] IRLR 69; *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

case, the defendant owners of a bakery refused to fulfil the claimant's order for a cake bearing the message "Support Gay Marriage" due to their opposition same-sex marriage on the ground of their Christian beliefs.

48. The law in Northern Ireland, in contrast to the rest of the UK, contains particular provision under the Northern Ireland Constitution Act 1973 (in section 17) and the Northern Ireland Act 1998 (in section 24) that no Act of the Northern Ireland Assembly, nor any subordinate legislation made, or act done, by a Minister or Northern Ireland department, can discriminate on the grounds of religious belief or political opinion.
49. It was accepted that it was the message to which the bakery owners objected; they would also have refused to supply the same order from a heterosexual customer. Therefore, the issue centred around the message on the cake and not the customer's identity; they would have supplied a cake without the message to any customer, regardless of their sexuality.
50. The NI Court of Appeal held against the bakery and in favour of Mr Lee.
51. The Supreme Court disagreed with the Court of Appeal. It held that Mr Lee had not been discriminated against since the objection of the bakery was "to the message [on the cake], not to any particular person or persons". The court held that, while the bakers could not have refused to provide a service on the basis of another person's sexual orientation, that was different from requiring them to produce a cake bearing a message with which they profoundly disagreed. Such a requirement would have interfered with their Article 9 and 10 rights, which include a right not to express a particular opinion contrary to one's religious beliefs. The bakers would only be required to do so if there was some justification for requiring them to do so, and none had been shown in this case.<sup>41</sup>
52. That, therefore, was a case in which the right to freedom of expression, rather than the manifestation of religious belief, took centre stage and trumped the secular sensibilities of the other party to the dispute. It is a good illustration of

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<sup>41</sup> *Ibid.* at [50]-[55], [62].



the complexity of identifying and weighing the competing interests and values involved.<sup>42</sup>

53. A recent case provides another interesting counterpoint to the usual equality approach to equal treatment. In its 2018 judgment in *Adath Yisroel Burial Society v HM Senior Coroner for Inner North London*<sup>43</sup> the High Court noted that “Although the principle of equality requires like cases to be treated alike, it is not always sufficiently appreciated that it also requires that different cases should be treated differently”<sup>44</sup> and that “What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality”.<sup>45</sup>
54. That case concerned the lawfulness of a policy which was adopted by the Senior Coroner for Inner North London in respect of the processing of those who died within her constituency. The policy was described as being a “cab rank rule” and “an equality protocol” and was to the following effect:
- “No death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner’s officers or coroners.”<sup>46</sup>
55. Whilst many families in the UK are now content for a funeral to be delayed for a significant period of time after the death of a relative; for certain faith groups, in particular those of the Jewish and Muslim faiths, it is very important that a funeral should take place as soon as possible, ideally on the day of death itself.<sup>47</sup> Judicial review proceedings were brought by a concerned 79-year-old orthodox Jewish woman and by the Adath Yisroel Burial Society, a Jewish burial society representing over 5,000 members, most if not all of whom would be affected by the Senior Coroner’s policy. The claimants argued that the policy

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<sup>42</sup> See also the US gay cake case in the US Supreme Court *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 548 US \_\_\_\_.

<sup>43</sup> *Adath Yisroel Burial Society v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin), [2018] Med LR 410.

<sup>44</sup> *Adath Yisroel Burial Society* (n 52), para [117].

<sup>45</sup> *Adath Yisroel Burial Society* (n 52), para [111].

<sup>46</sup> *Adath Yisroel Burial Society* (n 52), paras [2]-[3].

<sup>47</sup> *Adath Yisroel Burial Society* (n 52), paras [57]-[63].

as currently drafted was insufficiently flexible with regards to taking into account religious needs.<sup>48</sup>

56. The Divisional Court of the Queen's Bench Division (Singh LJ and Whipple J) held that the policy was unlawful for a number of reasons. They held that the policy was unlawful as it imposed a blanket rule preventing the Coroner from taking any account of the circumstances of any individual family where those circumstances had a religious basis. It amounted to a fetter on the Senior Coroner's discretion as to when and how to exercise her various powers and for how long to retain custody of a body.<sup>49</sup>
57. The Court held that the policy interfered with the right to manifest religion under Article 9 and also served a legitimate aim, in particular the protection of the rights and freedoms of others. It went on to hold that the policy failed to strike a fair balance between the rights and interests of different people in society. Indeed, it failed to strike any balance at all. The policy therefore breached Article 9.<sup>50</sup> It also breached Article 14, when read with Article 9.<sup>51</sup> Finally, the Court held that the policy was indirectly discriminatory under sections 19 and 29 of the Equality Act 2010 on grounds of religious belief. Consequently, the Court declared the policy to be unlawful and issued a quashing order to set it aside.<sup>52</sup>
58. There are particular problems concerning children posed by the intersection of law and religion. The conflicts that arise in this area are especially sensitive because childhood is a key time of life when personal development and identity are subject to the greatest influence. Further, there are three primary interests:<sup>53</sup> (1) the interests of parents in raising their children as they wish, according to their religious beliefs; (2) the interests of children and the opportunities they desire for themselves, which may or may not accord with the

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<sup>48</sup> *Adath Yisroel Burial Society* (n 52), paras [59] and [70].

<sup>49</sup> *Adath Yisroel Burial Society* (n 52), paras [86]-[88].

<sup>50</sup> *Adath Yisroel Burial Society* (n 52), paras [93]-[112].

<sup>51</sup> *Adath Yisroel Burial Society* (n 52), paras [113]-[125].

<sup>52</sup> *Adath Yisroel Burial Society* (n 52), para [164].

<sup>53</sup> See S. Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015), pp.259-260.

beliefs of their parents;<sup>54</sup> and (3) the interests of the state in ensuring that children have an upbringing that is in their best interests, as conceived within a western liberal democracy.

59. A case decided by the Civil Division of the Court of Appeal, in which I presided, *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School*<sup>55</sup>, concerned a voluntary aided Islamic faith school in Birmingham for boys and girls. In line with its religious ethos, the school practised a policy of gender-based segregation of boys and girls aged between 9 and 16 years of age for all school activities – a policy publicised and known to parents of potential pupils.
60. We held the policy of strict segregation constituted unlawful direct discrimination on grounds of sex under the Equality Act 2010 because each girl pupil was prevented from interacting, socialising and intermixing with a boy pupil purely on the basis of her sex and vice versa. Each pupil, therefore, suffered less favourable treatment by reason of their sex: the differential treatment under this policy was detrimental to each pupil in its adverse impact upon the quality and effectiveness of their education.<sup>56</sup>
61. The Court reiterated the well-established principle that the religious motive for discrimination, in this case a desire to adhere to what the School regarded as the applicable tenets of Islam, is irrelevant to a finding of unlawful discrimination. It was also irrelevant that the parent body approved of the policy, and indeed had chosen to send their children to the School precisely because of its policy. The individual statutory rights of the child not to be unlawfully discriminated against trumped these interests.<sup>57</sup>

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<sup>54</sup> See, for example, the partial dissent of Mr Justice Douglas in the landmark judgment of the US Supreme Court in *State of Wisconsin v Jonas Yoder* 406 US 205 (1972), at 244: "It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny ... The child, therefore, should be given an opportunity to be heard ..."

<sup>55</sup> *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426, [2018] 1 WLR 1471.

<sup>56</sup> *Al-Hijrah School* (n 64), paras [48] and [50]-[55].

<sup>57</sup> *Al-Hijrah School* (n 64), paras [81]-[82].

62. Finally, matters of religion often raise very difficult questions in the realm of child welfare cases, where disputes between parents subsequent to a family break-up, or between parents and local authorities, arise in relation to adoption, residence and contact arrangements, or other issues.<sup>58</sup> Areas of controversy have included disagreements over whether a male child should be circumcised,<sup>59</sup> disagreements over whether the religiously- and culturally-sensitive names of children should be changed by deed poll,<sup>60</sup> and disagreements over the nature of the religious upbringing of children.<sup>61</sup> For the believers of a number of religions, these matters go to the heart of the entire way in which they live their lives.
63. One of the most difficult recent cases where courts have had to address the problems posed by balancing rights in a context where religious belief encompasses the totality of one's life is the case of *M (Children)*.<sup>62</sup> In that case the mother, father and their five children were members of the North Manchester Chareidi Jewish community. The father was transgender and left the family home in June 2015 to live as a transgender person – she now lives as a woman.<sup>63</sup> For the sole reason that she was transgender, the father was shunned by the community and the children faced ostracism by the community if they had direct contact with her, all on the basis of the community's religious beliefs about transgender people.<sup>64</sup> Although both parents agreed that the children should live with the mother and should continue to be brought up within

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<sup>58</sup> See D. Herman, *An Unfortunate Coincidence: Jews, Jewishness, & English Law* (OUP 2011), ch.4 for an enlightening discussion of how courts have addressed issues of religious identity in such cases.

<sup>59</sup> See, for example: *Re J (A Minor) (Prohibited Steps Order: Circumcision)* [1999] 2 FLR 678 (Fam) and [2000] 1 FLR 571 (CA) where the Turkish Muslim father wished to have his child circumcised and the child's English Christian mother objected; and *Re S (Children) (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam), [2005] 1 FLR 236.

<sup>60</sup> See, for example: *Re S (A Child) (Change of Names: Cultural Factors)* [2001] 2 F.L.R. 1005 where a Muslim mother wished to change her child's Sikh names so that he would be accepted within the Muslim community of which she was a part – the Sikh father objected to this.

<sup>61</sup> See, for example, *Re A (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam), [2011] PTSR 602.

<sup>62</sup> *In the matter of M (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWCA Civ 2164, [2018] 4 WLR 60.

<sup>63</sup> For a recent description of the significant challenges faced by people experiencing gender dysphoria, see Lady Hale's comments in *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127 at [1].

<sup>64</sup> *M (Children)* (n 79), para [7].

the community, the dispute between them centred around the father's desire for direct contact with his children – a wish which the mother opposed.

64. In the Family Division of the High Court, Peter Jackson J, noted that the children would suffer serious harm if they are deprived of a relationship with their father.<sup>65</sup> Nonetheless, he concluded, unhappily, that direct contact was not in the best interests of the children, on the basis that:

“... the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact”.<sup>66</sup>

65. In particular, there was a real danger of psychological harm to the children that might be caused by their being denied access to schools or to social events involving their peers.<sup>67</sup>
66. The Court of Appeal allowed the father's appeal of this decision. The Court found that the Judge had failed to ask a number of pertinent questions. In particular, the Judge had failed to consider whether he should directly and explicitly confront the mother and the community with the fact that its behaviour may be unlawfully discriminatory; the Judge “gave up too easily” and decided the question of direct contact there and then without directing even a single attempt to try and make it work.<sup>68</sup>
67. The Court noted that, as far as potential ostracism and discrimination towards the children by the schools in the community are concerned, where this was done on the basis of the father's transgender status this would be unlawful discrimination under the Equality Act 2010.<sup>69</sup> The Court reiterated the point that it is irrelevant to the lawfulness of discrimination that it is motivated by religious belief.<sup>70</sup> It also made clear that the courts should not, as a matter of policy, treat

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<sup>65</sup> [2017] EWFC 4, [2017] 4 WLR 201, para [156].

<sup>66</sup> [2017] EWFC 4, [2017] 4 WLR 201, para [187].

<sup>67</sup> [2017] EWFC 4, [2017] 4 WLR 201, paras [73]-[74] and [108]-[111].

<sup>68</sup> *M (Children)* (n 71), para [77] and [80].

<sup>69</sup> *M (Children)* (n 71), para [94]. The Court was of the opinion that, in such circumstances, the school's conduct would engage s.85 and would constitute direct associative discrimination of the children on the grounds of their father's transgender status under s.13(1), read with ss.4 and 7.

<sup>70</sup> *M (Children)* (n 71), para [95].

the possibility of unlawful discrimination as a factor to be weighed against permitting direct contact between the father and children – such an approach would be contrary to the rule of law.<sup>71</sup>

68. The Court of Appeal therefore allowed the appeal and directed that the matter go back for a further hearing in the Family Court.
69. As the Court noted, society has undergone remarkable changes in recent years, is still changing and will no doubt continue to change at a quite remarkable rate and it is essential that our law keeps pace with these societal realities.<sup>72</sup> This is especially true in an increasingly polarised world characterised by ever more difficult conflicts between different value systems, between the religious and the secular. What judges must seek to achieve in these difficult cases is a result that is most appropriate for a society with a plurality of values, cultures and religions: a society of respect, tolerance and understanding.

Terence Etherton

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<sup>71</sup> *M (Children)* (n 7), para [97].

<sup>72</sup> *M (Children)* (n 71), para [45]. See also Sir James Munby, 'Changing families: family law yesterday, today and tomorrow – a view from south of the Border' (Law School, University of Edinburgh, 20 March 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/03/speech-pfd-changing-families-edinburgh.pdf>> (last accessed 1 August 2018).