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INTRODUCTION

Despite its sixty year history, the European Court of Human Rights has only recently begun to develop a cohesive systematic jurisprudence on freedom of religion and belief. Hitherto, other articles were generally engaged in conjunction with those touching religious liberty—for example, freedom of association or freedom of expression—and having found a violation in relation to one of these articles, the Court has deemed it unnecessary to consider the separate and parallel violation of Article 9. Thus, the academic world has been denied detailed and systematic judicial pronouncements on the reach of freedom of religion and belief and the extent to which it may be qualified by other human rights. As yet, therefore there is only a nascent body of jurisprudence by which commentators can fully assess the extent to which the European Court of Human Rights positions the place of religion in a democratic society. However, such limited pronouncements as exist promote the importance and centrality of freedom of religion and belief as being a core component to human existence. Where the jurisprudence is largely silent, however, is in the tension which exists between religious liberty and other rights protected by the Convention and by other international instruments.

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There are obvious synergies between associational rights and freedom of expression and religious liberty, since faith is lived out in community with others and by outward manifestations. But the more complex—and more tendentious—clash is with the right of family life. The understanding of "family" is now very different from when the court was established sixty years ago. As a matter of law (the Convention being a "living instrument," reinventing meanings and definitions with societal changes over generations) a same-sex relationship is now considered a "family"—even though many religious groups find this concept doctrinally unacceptable.

I. GAY RIGHTS AND RELIGIOUS LIBERTY: AN EXAMPLE FROM THE UNITED KINGDOM

An example of the conflict between faith and human sexuality arose recently in the UK: Lillian Ladele was a devout Christian. She was employed by Islington Borough Council as a registrar of marriages. She did this job conscientiously for many years. Then the law changed in the UK. Civil partnerships were introduced and these were to be registered by marriage registrars. For a while Islington arranged its rosters so that Lilian only registered marriages. Many other councils made similar arrangements. However, after persistent lobbying from gay colleagues, Islington changed its policy and required all its registrars to register both marriages and civil partnerships.

Due to her religious beliefs, Lilian in good conscience could not register civil partnerships. She resigned from her job and brought a claim against Islington for constructive dismissal. She lost. She ought to have won because Islington could and should have accommodated her beliefs. Sadly, she also lost in the European Court of Human Rights (ECtHR).[1] The court applied the "margin of appreciation" deferring the value judgment to the legislature and judiciary of the member state: a form of moral subsidiarity.

But in the linked appeal of *Eweida* (heard at the same time), there was no such restraint by the ECtHR: it micro-managed the contractual terms of engagement concerning a private company (British Airways) and one of its employees (a Coptic Christian).[2] In a

1. Eweida v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10 & 36516/10, Eur. Ct. H.R. 37, ¶¶ 23–30 (2013).

2. *Eweida*, Eur. Ct. H.R. 37.

single judgment, the ECtHR both overreached itself and abrogated its duty to secure human rights protection under the European Convention on Human Rights (ECHR).

Lilian's religious conscience was sacrificed at the altar of non-discrimination. The Equality Act, which implemented a European Directive, outlaws discrimination on the grounds of what are called "protected characteristics": sex, race, age, disability, sexual orientation, etc. Islington council would breach its equality duty if it discriminated on the ground of sexual orientation.

But where was the greater harm? No gay couple was denied civil partnership status. Islington could still provide the service in the borough. But Lilian was rendered unemployed. In pursuing a non-discrimination agenda, the Court was complicit in a "race to the bottom": secularism triumphing over pluralism.

II. EQUALITY: A RISING TIDE FOR ALL RELIGIONS

As George Orwell famously observed in his novel *Animal Farm*, although all men may be equal, some are more equal than others.[3] The concept of equality, therefore, needs to be clearly identified, formulated, and implemented if it is not to become an instrument which drives religion out of the public square, providing nothing more than an anodyne core stripped of cultural, social, religious, and ethical viewpoints which animate human well-being and interaction. The nightmare vision of a white light of neutrality, bland and blinding in its effect, needs to be replaced with a rainbow spectrum of multi-coloured diversity, in which difference is valued and respected, refracted through the prism of faith being lived out in community.

In many ways, newly minted equality provisions, both of national and international origin, can be used to promote the goal of religious liberty in countries where, historically, there is a favored or privileged religion: for example, the Church of England in part of the United Kingdom or Protestant denominations in northern Europe. To the extent that rights or privileges are afforded to one church, the prohibition on discrimination under Article 14 of the ECHR requires that similar rights and privileges should be afforded to ALL churches.[4] This promotes a healthy pluralism and acts as a

3. GEORGE ORWELL, ANIMAL FARM 133 (Signet 2004) (1945).

4. Convention for the Protection of Human Rights and Fundamental Freedoms art.

bastion against secularism. To adopt a nautical image, the rising tide lifts all boats.

Properly nurtured, the principle of equality need not result in a retreat into secularism, but can actively promote religious liberty, by giving to minorities precisely the same rights and advantages as are enjoyed by majoritarian or State churches. This key point of engagement is precisely the issue which the ECtHR will need to address in its determination in *Church of Jesus Christ of Latter-day Saints v. United Kingdom*. The LDS church maintains that it is disadvantaged since it is denied a favourable exemption from a tax liability which is enjoyed by the Church of England and by other mainstream Christian denominations. The judgment of the Strasbourg is awaited.[5]

III. PARALLEL SYSTEMS OF REDRESS IN EUROPE?

Europe has the benefit of (or is burdened by—depending on one's viewpoint) two pan-national courts.[6] The domestic courts of member states benefit from these pan-national institutions for their methodology and analysis, for the exposure of conceptual, cultural, terminological, and linguistic misunderstandings amongst European lawyers, and for the development of substantive jurisprudence.[7] The respective courts in Strasbourg and Luxembourg are distinctly different in a number of ways, both procedurally and substantively. They have rarely been compared systematically, hence the analysis which follows.

The European Court of Human Rights was established in 1959 under the auspices of the Council of Europe.[8] The Convention charged the Court with the enforcement and implementation of the

14, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

5. Church of Jesus Christ of Latter-day Saints v. United Kingdom, App. No. 7552/09 Eur. Ct. H.R. (2014), was decided five months after this address was given in October 2013. The Court held that there was no violation.

6. I am grateful to Thomas Jones for his assistance in researching this section of the paper and to Dr. Russell Sandberg of Cardiff University and Dr. Ronan McCrea of University College, London, for commenting on earlier drafts.

7. The benefits also extend beyond the territorial borders of Europe. For example, in the 2007 *Pillay* case, Justice Pius Langa for the South African Constitutional Court referred to the application of the margin of appreciation to faith-based cases in Strasbourg in his discussion of the autonomy of school boards in determining uniform codes impinging on religious rights. MEC for Education: KwaZulu-Natal v. Pillay, 2008 (1) SA 474 (CC) ¶ 80 (S. Afr.).

8. Not to be confused with the European Union or any of its previous incarnations.

ECHR in all forty-seven member states of the Council of Europe. The Court of Justice of the European Union (CJEU) is not related to the ECtHR.[9] However, all EU states are members of the Council of Europe and signatories to the ECHR. The CJEU refers to the case law of the ECtHR and treats the ECHR as though it were part of the EU's legal system. All EU institutions are bound under Article 6 of the EU Treaty of Nice to respect human rights under the ECHR. Under the Treaty of Lisbon (December 1, 2009), the EU became a party to the ECHR, and thus CJEU is bound by the case law of the ECtHR.[10]

The ECtHR's seminal judgment in the recent case of *Eweida and Others v. United Kingdom*[11] provides a helpful snapshot of its current approach to religious liberty.[12] In these conjoined applications (one of which was made by Lilian Ladele, whose treatment at the hands of the United Kingdom courts has been discussed in an earlier section of this paper) the principles raised had been adverted to in a lecture by Sir Nicolas Bratza.[13] They are helpfully summarized in paragraphs 79 and 80 of the Court's judgment.[14]

The Court stated that, as enshrined in Article 9, freedom of thought, conscience, and religion is one of the foundations of a democratic society.[15] In its religious dimension, it is one of the most vital elements that makes up the identity of believers and their

9. For a very full discussion of issues of religion within the institutional framework of the EU, see RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION (2010).

10. For some hints on collaborative practice between the Strasbourg and Luxembourg courts, see Jean Paul Costa, The Relationship Between the European Court of Human Rights and National Constitutional Courts, Sir David Williams Lecture, University of Cambridge (Feb. 15, 2013).

11. Eweida v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10 & 36516/10, Eur. Ct. H.R. 37, ¶¶ 23–30 (2013). For a detailed analysis of the decision, see Mark Hill, *Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in* Eweida and others v United Kingdom, 15 ECC. L.J. 191 (2013).

12. For a full analysis see Mark Hill, *Religion and Anti-Discrimination Norms: Strasbourg and Luxembourg Compared* in the proceedings of the Third Convention of the International Consortium of Law and Religion Scholars (forthcoming 2014).

13. Nicolas Bratza, *The "Precious Asset": Freedom of Religion under the European Convention on Human Rights*, *in* RELIGIOUS DISCRIMINATION IN THE EUROPEAN UNION 9–26 (Mark Hill ed., 2012), reproduced in 14 ECC. L.J. 256–271 (2012).

14. *Eweida*, Eur. Ct. H.R. 37 ¶¶ 79–80.

15. *Id.*

conception of life. But it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. Religious freedom is primarily a matter of individual thought and conscience, which is absolute and unqualified. Manifestation of belief, alone and in private, but also in community with others and in public (in worship, teaching, practice and observance)[16] may have an impact on others. Article 9 section 2 qualifies the right such that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more legitimate aims.

After setting out these broad, well-established, and non-controversial statements of principle, the majority opinion then identifies three subtle but significant elucidations through which the Article 9 right to freedom of religion is reinforced. In re-articulating the ambit of Article 9, through this carefully voiced judgment, the effective reach of the provision as an instrument for securing religious liberty is significantly increased.[17] First, the ECtHR has made plain that the duty of neutrality of individual governments "is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the way those beliefs are expressed," provided that the religious view demonstrates a certain level of cogency, seriousness, cohesion, and importance.[18] Second, the judgment outlaws the narrow interpretation of manifestation which required a doctrinal mandate. While rightly acknowledging that liturgical acts are self-evidently outward expressions of belief, the ECtHR made clear that the manifestation of religion is much wider than this. The third and most significant aspect of the Court's judgment is the laying to rest of a principle that had been gaining currency in both Strasbourg and domestic jurisprudence, to the

16. *See* Kokkinakis v. Greece, App. No. 14307/88, 260-A Eur. Ct. H.R. (ser. A) 18, ¶ 31 (1993); *see also* Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H.R. Rep. 5, ¶ 105 (Grand Chamber 2005).

17. Significantly, this is the first adverse determination for the United Kingdom on Article 9 since it became a signatory to the Convention and runs counter to the trend identified in Silvio Ferrari, *Law and Religion in a Secular World: A European Perspective*, 14 ECC. L.J. 363 (2012).

18. *Eweida*, Eur. Ct. H.R. 37 ¶ 81. This clarification might legitimately be applied, for example, in the pending case of *Church of Jesus Christ of Latter-day Saints v. United Kingdom*, App. No. 7552/09, communicated to the Government on 26 April 2011. The challenged decision of the Judicial Committee of the House of Lords can be found at *Gallagher (Valuation Officer) v. Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56.

effect that if a person can take steps to circumvent a limitation placed upon him or her, such as resigning from a particular job, then there is no interference with the Article 9 right.[19]

The emergence of a distinctive European jurisprudence is valuable as a counter balance to denominational majorities and religious nationalism.[20] From the *Kokkinakis* case in 1993[21] to the French case *Association Les Témoins de Jéhovah* in 2011,[22] the ECtHR has developed a robust protection of the rights and interests of religious minorities. Sometimes national courts have paved the way, but the contribution of the ECtHR cannot be ignored. In his concurring opinion for the Grand Chamber of the Court of Strasbourg in the 2011 appeal judgment on *Lautsi*, Justice Bonello warned:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity.[23]

In many ways, this represents the pursuit of transformative justice instead of acquiescence in what might be considered to be the untouchable identity of a given country. Similarly, in the *Refah Partisi* decisions, the idea of the State's role as supreme umpire or moderator encapsulates what some consider to be "the European project":

19. As the Court states in the opinion of the majority:

> Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing 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 was proportionate.

Eweida, Eur. Ct. H.R. 37 ¶ 83.

20. *See* Marco Ventura, *The Changing Civil Religion of Secular Europe*, in 41 GEO. WASH. INT'L L. REV. 947–61 (2010).

21. *Kokkinakis*, 260-A Eur. Ct. H.R. (ser. A) 18.

22. Association Les Témoins de Jehovah v. France, App. No. 8916/05, Eur. Ct. H.R. (2011).

23. Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. (Grand Chamber 2011) ¶ 1.1.

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs . . . and that it requires the State to ensure mutual tolerance between opposing groups.[24]

The endeavour of the ECtHR was about reconciling principles with reality. Justice Tulkens's powerful dissenting opinion in *Leyla Sahin* affirmed this:

> the Court's review must be conducted *in concreto*, in principle by reference to three criteria: first, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; second, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing interests.[25]

However, because human rights scholars and practitioners tend to concentrate upon the ECtHR in Strasbourg, the potential of the CJEU in Luxembourg has been largely overlooked. Article 10 of the EU Charter of Fundamental Rights has very similar terms as Article 9 of the ECHR.[26] The CJEU characterizes the ECHR as an instrument having "special relevance" for the determination and interpretation of EU law,[27] and Article 52 section 3 of the EU Charter states that Charter rights are to be interpreted consistently with corresponding rights guaranteed by the ECHR. The EU Charter, unlike the ECHR, is not a universal document of human rights protection; instead its provisions apply to EU institutions and member States when they are "implementing EU law."[28]

24. Partisi v Turkey, App. Nos. 41340/98, 41342/98, & 41343/98 Eur. Ct. H.R. (Grand Chamber 2003).

25. Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H.R. Rep. 5 (Grand Chamber 2005) (Tulkens, J., dissenting, ¶ 2).

26. European Union, Charter of Fundamental Rights of the European Union, art. 10, 2012/C 326/02 (Oct. 26, 2012) [hereinafter EU Charter].

27. Hoechst AG v. Commission, joined cases 46/87 and 227/88, 1989 E.C.R. 2859.

28. EU Charter, *supra* note 26, art. 51.

Council Directive 2004/113 of the European Community, concerning equal treatment between men and women in the access to and supply of goods and services, contains as Recital 3 of its Preamble: "While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including . . . the freedom of religion."[29] The EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief [30] were adopted on June 24, 2013 by the EU Council of Foreign Affairs. The guidelines seek to promote religious liberty in countries beyond EU borders. The guidelines detail the EU's approach to the freedom of religion or belief which the EU will promote in its negotiations with other countries.

Article 19 of the Treaty on the Functioning of the European Union (TFEU), which was introduced by the Treaty of Amsterdam, allows the EU Council to pass legislation combating discrimination on grounds of on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. It requires unanimity in the Council. It does not prohibit discrimination in itself but acts as a legal mechanism for the adoption of legislation designed to combat discrimination, for example Directive 2000/78[31] and Directive 2000/43.[32]

Article 21 of the EU Charter states that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation, shall be prohibited."[33]

29. Council Directive 2004/113/EC, 2004 O.J. (L373) preamble (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF.

30. Foreign Affairs Council of the European Union, EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (June 24, 2013), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf.

31. Council Directive 2000/78/EC, 2000 O.J. (L303) (establishing a general framework for equal treatment in employment and occupation aimed at combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation).

32. Council Directive 2000/43/EC, 2000 O.J. (L180) (implementing the principle of equal treatment between persons of racial or ethnic origin).

33. EU Charter, *supra* note 26, art. 21.

Directive 2000/78 establishing a general framework for equal treatment in employment and occupation aimed at combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation[34] was adopted on the basis of Article 19 TFEU. It requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation, and vocational training, and applies to everybody in the private or public sector and public bodies. The Directive prohibits direct and indirect discrimination,[35] harassment,[36] instructions to discriminate,[37] and victimization[38] based on religion or belief. These terms are not defined in Directive itself, leaving it to the Member States to do so.

Member States are required to transpose Directive 2000/78 into their domestic legal systems. They are free to extend the prohibition of discrimination on grounds of religion or belief to situations beyond employment, occupation, and vocational training.[39] When interpreting Directive 2000/78, the European Court of Justice is required to have due regard to Strasbourg jurisprudence, the 1961 European Social Charter, and the 1996 Revised European Social Charter. The proposal for Council Directive 2008/426 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation[40] was announced by the European Commission on July 2, 2008. As with Directive 2000/78, the proposal for Council Directive 2008/426 applies to everybody in the private or public sector and to public bodies. However, the scope of the proposal is much broader, covering social protection (including social security and health care), social advantages, education, as well as access to and supply of goods and services, such as housing and transport. The principle of equal treatment, as provided for in the proposal for

34. Council Directive 2000/78, 2000 O.J. (L303), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML.

35. *Id*. art. 2(2).

36. *Id*. art. 2(3).

37. *Id*. art. 2(4).

38. *Id*. art. 11.

39. For example, the UK Equality Act 2010 prohibits discrimination on grounds of religion or belief in relation to housing and education.

40. Proposed Council Directive 2008/426 (July 2, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:HTML.

Council Directive 2008/426, does not apply to differences in treatment based on religion or beliefs vis-à-vis access to educational institutions founded on a particular religion or belief. As with Directive 2000/78, Member States may introduce or maintain more protective provisions than the minimum requirements provided for in the proposed Directive.

Corrigendum to Directive 2004/58[41] was adopted by virtue of Articles 18, 21, 46, 50 and 59 TFEU with regards to the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States.[42] The corrigendum sought to remedy the piecemeal approach to the right of free movement and residence by providing a single, all-encompassing legislative provision. Recital 31 of the Preamble to the Corrigendum states that: "Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as . . . religion or beliefs . . . ."[43]

The document *Communication from the Commission to the Council, the Parliament, the European Economic and Social Committee and the Committee of the Regions on Non-Discrimination and Equal Opportunities For All: A Framework Strategy*[44] sets out the Commission's strategy for the positive and active promotion of non-discrimination and equal opportunities for all. The Commission's strategy includes ensuring effective legal protection against discrimination on grounds of religion or belief across the EU through the full transposition by all Member States of the Community legislation in this field, notably Directives 2000/78 and Directive 2000/43, discussed above. Decision No. 771/2006 of the European Parliament and of the Council, establishing the European Year of Equal Opportunities for All: Towards a Just Society,[45] sought to raise public awareness of the substantial community *acquis* in the field of equality and non-discrimination.

41. Corrigendum to Council Directive 2004/58/EC, 2004 O.J. (L158) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0038R(01):en:HTML.

42. Formerly Articles 12, 18, 40, 44 and 52 TEC.

43. Corrigendum to Council Directive 2004/58/EC, *supra* note 41.

44. COM(2005), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0224&from=EN.

45. European Parliament Decision no. 771/2006, O.J. (L146), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0771:EN:HTML.

An early sign of the general approach may be gauged from the decision of the CJEU in the *Steymann* case.[46] The Court had been asked to decide on whether a member of a religious community was entitled to a pension for his work. The judges had to assess whether the question pertained to a purely religious matter or had an economic dimension, thus falling within the competence of the Court. The judges stated that Article 2 of the EEC Treaty must be interpreted such that activities performed by members of a community based on religion or philosophy as part of the commercial activities of that community constitute economic activities insofar as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.

There are a number of significant differences which, from a litigant's point of view, might tend to favor the CJEU over the ECtHR:[47]

i. Exhaustion of domestic remedies

The ECHR and the procedural rules of the ECtHR require that any potential applicants exhaust their domestic remedies before they claim relief in the supra-national court. This means that many years can be taken up in domestic first instance and appellate courts before an application is filed in the ECtHR.[48] Referrals to the CJEU can be made at any time and declarations are generally given more speedily in respect of interpretative decisions on EU Directives;

ii. Delay

The backlog of cases in the ECtHR means that many years will elapse between the incident complained about and the determination of the ECtHR.[49] The caseload at the CJEU is growing but it is does not have such a long backlog of cases.

46. Case 196/87, Udo Steymann v. Staatssecretaris van Justitie, 1988 E.C.R. 6159.

47. It may be that trial advocates prefer Strasbourg to Luxembourg as the restaurants may be considered superior.

48. In the case of Nadia Eweida, she was refused permission openly to wear the cross in 2006 but did not obtain declaratory relief from the ECtHR until 2013. It is of note that British Airways relaxed its dress code within weeks of Ms. Eweida's complaint so the issue had become of wholly academic interest many years prior to the case even reaching Strasbourg.

49. At the end of 2011, the backlog of cases exceeded 152,000. *See Ken Clarke hails deal to overhaul European Court of Human Rights*, BBC NEWS (April 19, 2012 12:16 ET), http://www.bbc.co.uk/news/uk-politics-17762341.

> *iii. Margin of appreciation*
>
> The ECtHR consistently defers to national legislators in relation to political, social, cultural, and other considerations. While the CJEU openly acknowledges and applies the principle of subsidiarity in many instances, no such elasticity is afforded in the enforcement of EU Directives which are of direct application member states. The CJEU's interpretative jurisdiction is universally binding and takes effect without any reference to a broad margin of appreciation. This key matter is addressed more fully below in relation to principles of equality.
>
> *iv. Political considerations*
>
> Some critics have commented on a lack of clarity and inconsistency of decision making within the ECtHR. Others have pointed to the ideological and political underpinning of its case law. It straddles jurisprudence and politics, and as one commentator has indicated, it occasionally overreaches itself.[50] The CJEU, though not immune to political pressures, is not required to make the same type of sensitive value judgments.
>
> *v. Parties*
>
> In the ECtHR, proceedings can only be brought against Member States and the Government of that Member State is the Respondent. However, with the leave of the United Kingdom domestic courts, referrals are made to the CJEU by the actual litigants in the disputes giving an immediacy and a pragmatism to their decisions, which are often less theoretical and more rooted in reality.

Returning to the uncertain dynamic between religious liberty and equality provisions, the obvious question which arises is what will be the level of discretion which the CJEU will leave to national authorities in implementing and applying the non-discrimination provisions of the equality directives in this sensitive area? A strict interpretation could entail far-reaching obligations to accommodate religion in the workplace that may not be acceptable to all Member States. For instance, the Dutch interpretation of non-discrimination law, which does not permit refusal to allow a Muslim school teacher to wear a headscarf, would appear unacceptable to France. Although EU directives may leave the forms and methods chosen to the

50. See the comments of Lord Hoffmann and David Cameron.

discretion of Member States, the stated objective is binding. This suggests a uniform outcome of discrimination claims across Europe, at least as far as minimum standards are concerned. In the area of sex discrimination this seems to be the case. The CJEU's case law has provided detailed rules which govern the interpretation and transposition of the directives in all Member States. They ensure that the levels of protection against discrimination to be derived from EU law are identical between countries.[51]

In comparison, the ECtHR leaves the signatory states a wide margin of appreciation to regulate relationships between state and religion, and it has been particularly deferential in its case law concerning headscarf bans in public education. In the landmark case *Sahin v Turkey*,[52] it held a headscarf ban at universities to be compatible with the rights enshrined in the ECHR, "where questions concerning the relationship between State and religions are concerned, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[53]

The ECtHR accorded particular importance to the lack of common ground amongst the states party to the Convention on this matter, and consequently the Turkish government was given a significant margin of appreciation to decide whether it was necessary in the Turkish context to maintain the ban. The ECtHR accepted those arguments that referred to the specific Turkish history of secularism and the strong political significance of wearing a headscarf in Turkey allied to the growing influence of extremist political movements. As a result, Turkey was allowed to prohibit not just teachers but also adult students from wearing religious symbols in educational institutions. Even in France, well known for its strict *laïcité*, the legal ban introduced in 2004 extends only to primary and secondary education, not to universities.

A similarly deferential approach might be politically attractive for the CJEU. As has been pointed out by Bell, the EU often tries to avoid getting involved in moral controversies. He refers to the transnational (non)recognition of same-sex partnerships as an

51. For an overview of sex discrimination case law see e.g. E. Ellis, *EU-antidiscrimination Law* (Oxford University Press 2005).

52. Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H.R. Rep. 5 (Grand Chamber 2005).

53. *Id.* ¶ 109.

example. In this context the CJEU has taken pains not to adopt any particular task. As Bell remarks: "This is perhaps best described as a form of 'moral subsidiarity,' which regards issues of cultural or moral sensitivity as best left to national discretion."[54]

Though politically understandable, such an approach might leave vulnerable minority groups with less human rights protection than majority groups. The German experience may provide an example how this may resolve itself. The *Bundesverfassungsgericht* was confronted with the question of whether it was constitutional for a public school to prohibit a Muslim teacher from wearing a headscarf in the class room. The Court held that this issue should be decided through the democratic process and that any restriction would have to be based on a formal act of the legislatures of the German *Länder*. Subsequently several states adopted such legislation restricting the right to manifest religion through certain forms of dress. Several introduced legislation effectively banning Muslim religious attire whilst leaving Christian symbols untouched. The difference in treatment was sometimes justified by the argument that Christian symbols are to be perceived as religiously neutral as they have become part of the Western cultural tradition. As such, the legislation was presented not as privileging one religion over another, but as just protecting a neutral educational setting. To date, such regulations have not been struck down by German courts as incompatible with equality and non-discrimination.[55]

A deferential approach by the CJEU potentially leads to widely diverging outcomes of transposing the equality directives: they may come to mean entirely different things in different countries. This is all the more problematic as some of the issues engage potential sex discrimination, an area where the CJEU traditionally has been strict in not allowing widely diverging practices between states.

We will have to wait and see how the CJEU deals with this situation. Will it impose a universal standard on all Member States in these controversial areas or instead leave them a wide discretion? Although Member States may choose the means to implement the

54. MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION 120 (2002).

55. For an overview of the German developments see Ute Sacksofsky, *Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective*, *in* EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTI-DIMENSIONAL EQUALITY LAW 353–70 (Dagmar Schiek & Victoria Chege eds., 2009).

non-discrimination standards laid down in the equality directives, they are bound to achieve an equal outcome, namely to guarantee an equal level of protection against discrimination on grounds of religion, sex and race. Yet, it is hard to conceive of a substantively uniform level of protection that would be politically acceptable in all EU countries. Approaches in the UK and France, to name but two, are worlds apart.

IV. NON-JUSTICIABILITY AND MEDIATION: TWIN PILLARS FOR SAFEGUARDING RELIGIOUS LIBERTY

This paper has concentrated upon the institutional safeguarding of religious liberty in domestic and international courts. This is unsurprising having regard to the author's position as both a scholar of religious liberty and a trial lawyer. The decisions of judges in disputed cases provide a practical framework for working out the competing rights of faith groups and the state. But care must be taken in using this growing jurisprudence as a socio-cultural means of evaluating the extent of the problem and the means of resolution. Litigation is thankfully rare and the headline cases can often give misleading indications. The decisions concerning Lilian Ladele and Nadia Eweida, which have given context to much of the discussion in this paper, might suggest a highly litigious workforce and an immovable and bigoted body of private and public sector employers. The truth, I venture, is rather different. Every day, up and down the country, small differences are being accommodated in the workplace with good grace and practical good sense. Give and take is the order of the day, and little compromises at a grass roots level ensure a harmonious workforce where religious sensibilities are taken into account by simple, practical measures.

There are two separate but complementary reasons why disputes of this nature should be kept out of the courts. First, we have unrealistic expectations of our judiciary. Judges hate religious disputes and are ill-equipped to deal with them. They lack the appropriate knowledge, as there is a profound religious illiteracy within the government, the executive, and the judiciary. A small improvement is that the recent Equality Act has introduced a new provision allowing a judge to appoint an expert to advise him or her with respect to the protected characteristic (e.g. race, disability, or religion). However, in relation to matters of doctrine, this is an area into which courts should not trespass. The precise extent of the

principle of judicial restraint which stems from the non-justiciability of religious disputes will be considered by the United Kingdom Supreme Court in February 2014 when it hears the appeal in *Khaira v. Shergill*,[56] concerning doctrinal issues in a dispute involving Sikh *gurdwara* in England and the claims of religious leaders based in India.

Second, parallel with judicial self-restraint comes the principle of mediation and alternative dispute resolution. The major Abrahamic faiths each espouse the doctrine of being reconciled with one's neighbor and avoiding litigation. This scriptural enjoinder seems at times to be singularly lacking in a society which is becoming increasing litigious, with civic rights trumping social duty. Article 6 of the ECHR gives a right to a fair trial, but ought there be a corresponding obligation to refrain from engaging in unedifying litigation? Far better than taking matters to court, a culture of civility should encourage individuals to resolve matters in the workplace, the school, the university, and so on.[57] Sensible people can generally come to workable compromises.

For centuries religions have led the world in humanitarian work, education, healthcare, and the relief of poverty. Perhaps now is the time for people of faith and communities of faith to be judged by their deeds not their words and to show their value to society through promotion of mediation and reconciliation: "By their fruits shall you know them."

56. [2012] EWCA (Civ) 983.

57. The author is a founder and now co-chair of BIMA (Belief in Mediation and Arbitration), a charity established in the United Kingdom to encourage alternative dispute resolution of matters with a religious dimension. All major faith groups are represented in BIMA, which runs educational activities in addition to providing co-mediators for the resolution of disputes.