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# RELIGIOUS FREEDOM AND EQUAL TREATMENT: A UNITED KINGDOM PERSPECTIVE

*Karon Monaghan QC\**

## I. INTRODUCTION

Religious discrimination is institutionalized in the United Kingdom.<sup>1</sup> The Church of England occupies a privileged space in the United Kingdom's constitutional arrangements. The Queen, as a constitutional monarch, holds the title "defender of the Faith and Supreme Governor of the Church of England."<sup>2</sup> Twenty-six Bishops of the Church of England<sup>3</sup> sit in the legislature's upper house, the House of Lords.<sup>4</sup> The position of these "Lords

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<sup>1</sup> New constitutional settlements with Wales, Scotland, and Northern Ireland have devolved specified matters to regional assemblies but Parliament retains responsibility for certain matters and the fundamental constitutional arrangements remain in place (subject to referenda in the case of Scotland and Northern Ireland). Government of Wales Act, 1998, c. 38; Government of Wales Act, 2006, c. 26; Scotland Act, 1998, c. 46, §1, sch. 5; Northern Ireland Act, 1998, c. 47, §§ 1-4, sch. 3.

<sup>2</sup> *Queen and the Church of England*, THE BRIT. MONARCHY, <http://www.royal.gov.uk/MonarchUK/QueenandChurch/QueenandtheChurchofEngland.aspx> (last visited Mar. 17, 2014).

<sup>3</sup> All Bishops are men as the Church of England does not allow women in the episcopate (that is, to become Bishops).

<sup>4</sup> The number of Bishops is limited to twenty-six. *Bishops in the House of Lords*, THE CHURCH OF ENGLAND, <http://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx> (last visited Feb. 22, 2014); *How Do You Become a Member of the House of Lords?*, U.K.

Spiritual” is unique: no representatives from other religious organizations are entitled as of right to membership of the House of Lords.<sup>5</sup>

These facts establish the United Kingdom as an essentially Christian State,<sup>6</sup> and this is reflected in a number of legal measures. For example, education law in the United Kingdom requires that every pupil take part in a daily act of collective worship, which must be wholly or mainly of a broadly Christian character.<sup>7</sup> It is difficult to understand why this state of affairs is tolerated in an apparently modern, pluralistic, liberal democracy. However, notwithstanding the wide-ranging constitutional reforms put into place by the last Labour Government,<sup>8</sup> the right

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PARLIAMENT, <http://www.parliament.uk/about/mps-and-lords/about-lords/lords-appointment/> (last visited Feb. 22, 2014). Presently, there are only twenty-three Lords Spiritual. *Lords by Party, Type of Peerage and Gender*, PARLIAMENT.UK, <http://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/> (last visited Feb. 22, 2014). It is customary for one of the Lords Spiritual to read prayers in the House at the beginning of each day’s proceedings, and for this purpose a rota is furnished to the House in which certain of the Lords Spiritual are allotted periods for which they are responsible for this duty. See 78 HALSBURY’S LAWS OF ENGLAND, para. 833 (5th ed. 2010).

<sup>5</sup> *Bishops in the House of Lords*, *supra* note 4.

<sup>6</sup> David Cameron, Prime Minister, has declared of the United Kingdom: “We are a Christian country[,] and we should not be afraid to say so.” *David Cameron Says the UK is a Christian Country*, BBC NEWS (Dec. 16, 2011), <http://www.bbc.co.uk/news/uk-politics-16224394?>

<sup>7</sup> School Standards and Framework Act, 1998, c. 31, § 70 (UK) (stating that all students in attendance must take part in collective worship). “Collective worship is of a broadly Christian character if it reflects the broad traditions of Christian belief without being distinctive of any particular Christian denomination.” *Id.* sch. 20. A parent may request that a pupil be wholly or partly excused from receiving religious education and the pupil may be so excused. *Id.* § 71(1). The 1998 Act does not apply to Scotland. *Id.* § 145. For Scotland, see SCOTTISH GOVERNMENT CIRCULAR, PROVISION OF RELIGIOUS OBSERVANCE IN SCOTTISH SCHOOLS (2005).

<sup>8</sup> See House of Lords Act, 1999, c. 34 (restricting membership of the House of Lords by virtue of a hereditary peerage); Constitutional Reform Act, 2005, c.4 (formally separating the state’s judicial and legislative functions by the creation of a Supreme Court and making consequential changes). See also Government of Wales Act, 1998, c. 38; Government of Wales Act, 2006, c.

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of senior Church of England Bishops to sit in the House of Lords was retained and no changes were made upsetting the primacy of Christianity, and the Church of England in particular, in public life.<sup>9</sup>

This privileging of Christianity over other religious or nonreligious beliefs has, until recently, been aggravated by the absence of any legal protections against religious and belief-based discrimination.<sup>10</sup> Certain “religious” groups have for some time been legally categorized as “ethnic groups.”<sup>11</sup> By this route, certain religious minorities discriminated against because of their religious beliefs have enjoyed the protection of laws against race discrimination,<sup>12</sup> but by and large discrimination connected to religion and belief remained outside of the law. In school and at

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26; Scotland Act, 1998, c. 46; Northern Ireland Act, 1998, c. 47 (redefining the relationship between the three constituent countries of the United Kingdom and between Northern Ireland and Great Britain).

<sup>9</sup> See generally DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER, CONSTITUTIONAL REFORM: NEXT STEPS FOR THE HOUSE OF LORDS (2003).

<sup>10</sup> The position was somewhat different in Northern Ireland because of its particular political context. See Fair Employment and Treatment (Northern Ireland) Order, 1998, SI 1998/3162 (N. Ir. 21), arts. 2–4, 74 (addressing discrimination connected to religious belief and political opinion, and affirmative action).

<sup>11</sup> *Seide v. Gillette Indus. Ltd.*, [1980] I.R.L.R. 427 (Jews); *Mandla v. Dowell Lee*, [1983] 2 A.C. 548 (Sikhs). These cases recognize the relationship between culture and religion: many people belonging to particular racial groups see their religion as occupying more of a cultural or political space in their lives, and “faith” as less significant to their identity. In Northern Ireland, therefore, where there has been compelling protection against discrimination connected with religion and belief in employment and related fields for some time, it is well understood that these protections were passed to address the political and cultural, rather than the theological, divides between the Catholic and Protestant communities. See generally Fair Employment and Treatment (Northern Ireland) Order, 1998, SI 1998/3162 (N. Ir. 21).

<sup>12</sup> This caused a good deal of controversy. When promoting new laws addressing religious discrimination, the Lord Chancellor observed that this “remedie[d] the anomaly whereby members of some religions are protected against discrimination in the provision of goods, facilities and services, but members of other religion or belief groups are not.” Michael Rubenstein, *Equality Act 2006: A Guide*, 151 EQUAL OPPORTUNITY REV. 21, 25 (2006).

work, therefore, working hours, holidays, dress codes, and the like were generally constructed around a Christian norm free from the scrutiny of equality law, sometimes causing real disadvantage to those holding non-Christian beliefs.<sup>13</sup>

The distinction between those religious groups deemed ethnic groups and those not, meant that laws outlawing the incitement of racial hatred protected some religious groups but not others.<sup>14</sup> At the same time, the (now abolished)<sup>15</sup> common law offense of blasphemy protected Christians only against certain forms of insult. Blasphemy was an indictable offense at common law consisting of the publication of any “contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or the formularies of the Church of England.”<sup>16</sup> No comparable protection was afforded to other religious groups.

This disparity was ameliorated by a series of legislative measures. First, the Employment Equality (Religion or Belief) Regulations 2003 made discrimination connected with a person’s religion or belief unlawful in employment and related fields.<sup>17</sup> Second, Part 2 of the Equality Act 2006 outlawed discrimination connected to religion and belief in the provision of goods, facilities, and services; in the disposal and management of premises; in education; and by public authorities.<sup>18</sup> While these laws have now been revoked and repealed, respectively, they have been largely consolidated and are now reflected in near-

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<sup>13</sup> Ahmad v. Inner London Educ. Auth., [1978] Q.B. 36, 40–41; Ahmad v. United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09, 4 Eur. H.R. Rep. 27, para. 12 (1982).

<sup>14</sup> Public Order Act, 1986, c. 64, § 18 (UK).

<sup>15</sup> See Criminal Justice and Immigration Act 1998, c. 4, § 79 (1) (UK).

<sup>16</sup> Whitehouse v. Lemon & Gay News Ltd., [1979] AC 617 (H.L.) 665 (appeal taken from Eng.).

<sup>17</sup> The Employment Equality (Religion or Belief) Regulations, 2003, S.I. 2003/1660, §§ 3, 6 (UK). These regulations covered employees, contract workers, officer holders, the police, barristers, advocates, partnerships, trade organizations, qualifications bodies, providers of vocational training, employment agencies, career guidance services and further and higher education institutions.

<sup>18</sup> Equality Act, 2006, c. 3, §§ 44–80 (UK).

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identical provisions in the Equality Act 2010.<sup>19</sup> Third, the Racial and Religious Hatred Act 2006 now criminalizes “threatening words or behavior, or displays [of] any written material which is threatening” if the person so acting “intends thereby to stir up religious hatred.”<sup>20</sup> These measures were directed at securing greater equality for minority religious belief-holders, and for those without any religious belief at all.<sup>21</sup> However, all of them have proved controversial.

The extension of the hate speech provisions to religious hatred was highly contentious. It led to a campaign by well-known comedians and others concerned about the censoring of religious criticism, whether that criticism was through satire or otherwise.<sup>22</sup> However, the difficulty faced by those resisting this change was that some forms of religious criticism were already outlawed by race hate and blasphemy laws, but only in the case of certain religions. This discriminatory distinction had a pernicious effect on nonprotected religious groups who suffered the public ignominy of apparently legally sanctioned second class status and was plainly difficult to justify. In an environment of increased hostility towards Muslims, in particular, a position where the law protected Christians but left Muslims unprotected was simply unsustainable. The comedians and their protagonists did not succeed in their attempts to have these new laws criminalizing religious hate speech blocked, and the discrimination inherent in hate speech laws that protected some religious groups but not others was eliminated.

The most controversial protections have proved to be those conferring nondiscrimination rights on those who have been disadvantaged because of their religion or belief. This is because such protection, perhaps inevitably, extends beyond disadvantages associated with the *holding* of a particular belief, to religiously motivated *acts*. The problem is not that a Christian, a

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<sup>19</sup> Equality Act, 2010, c. 15, pts. 2–14 (UK) and associated Schedules.

<sup>20</sup> Racial and Religious Hatred Act, 2006, c. 1, § 29B(1), sch. 1 (UK) (amending the Public Order Act 1986, c. 64 (UK)).

<sup>21</sup> *Id.* § 29A.

<sup>22</sup> *Atkinson’s Religious Hate Worry*, BBC NEWS (Dec. 7, 2004), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4073997.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4073997.stm).

Muslim, or a Jew, as the case may be, can call on the protection of antidiscrimination law when discriminated against because they adhere to particular religious beliefs. Instead, it is that they may rely on those same laws for license to act in ways said to be in pursuance of those beliefs. Sometimes this is uncontroversial. A woman who wishes to wear a crucifix at work, absent any specific and compelling requirements of the job, can easily be accommodated, as can a turban-wearing Sikh, or a Muslim seeking to observe prayers on certain days of the week.<sup>23</sup> More problematic, and increasingly so given changes in United Kingdom and regional antidiscrimination and human rights law, are those cases where the assertion of a religious belief through practice impinges on the rights of others, particularly women and sexual minorities. It is this issue that is the focus of this Article.

Section II of this Article will identify the various legal measures operating in the United Kingdom that confer the right to religious freedom and the right to freedom of religious expression. Section III examines the way in which competing rights, particularly those affecting women and sexual minorities, are managed within those legal frameworks. Section IV concludes that both statutory law and case law afford considerable protection to religious groups and individuals within them, sometimes at the expense of otherwise highly protected classes, women and sexual minorities in particular. This occurs notwithstanding that in practice those religious groups, specifically Christians, who most commonly claim such protections against the interests of women and sexual minorities, can in no sense be regarded as forming a “minority” or as being socially or structurally disadvantaged.

## II. FREEDOM OF RELIGION: THE LEGAL FRAMEWORK

There are four main sources of legal protection against discrimination connected to religious belief in the United

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<sup>23</sup> See *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 3516/10, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

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Kingdom. These derive from the European Convention on Human Rights and Fundamental Freedoms, and its effective transposition into United Kingdom domestic law through the Human Rights Act 1998, European Union law, and the United Kingdom's Equality Act 2010. These legal protections originate from varied historical and political imperatives and, though they inform each other, offer discrete routes to protection, and address religious freedoms and nondiscrimination rights differently.

These measures guarantee the right to freedom of religion and provide compelling protection against religious discrimination. The right to freedom of religion, as protected by these laws, is not restricted to the enjoyment of the right to freedom of conscience (the so-called "forum internum"),<sup>24</sup> but also to the right to manifest religious belief (the so-called "forum externum"). These same laws also provide protection to women and sexual minorities against discrimination. The rights guaranteeing religious freedoms and the dignity and equality rights of women and sexual minorities, in particular, can on occasions conflict. The method by which the coexistence of these rights is managed in an increasingly diverse and pluralistic society varies, but in the case of each of the legal schemes addressed below, resolving such conflicts is complex and controversial.

### *A. European Convention on Human Rights and Fundamental Freedoms*

#### *1. Religious Freedom*

The European Convention on Human Rights and Fundamental Freedoms ("ECHR"),<sup>25</sup> to which all Member States of the Council of Europe are party,<sup>26</sup> contains provisions addressing

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<sup>24</sup> See *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142, para. 147 (1983).

<sup>25</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter ECHR].

<sup>26</sup> New members are expected to ratify the ECHR at the earliest opportunity. See EUR. PARL. ASS., Resolution 1031 (1994).



religious freedom, and nondiscrimination. This reflects the origins of the ECHR, which is firmly rooted in the atrocities of the Second World War.<sup>27</sup> The ECHR was a response to the horrors perpetrated against the Jews, and the commitment to preventing the repeat of any such genocide. Such commitment provided the impetus for embedding the rights and freedoms addressing both religion and nondiscrimination in a legally binding instrument.

As history demonstrates, there can be a close relationship between religion and race. This is especially true in Europe where religion has often been used as a proxy for race. This is evident from the commission of crimes against humanity in Europe, including the atrocities of the Second World War and those after, specifically the “ethnic cleansing” and genocide of Bosnian Muslims under the leadership of Slobodan Milošević. It is also apparent from the rise of political parties across Europe promoting an anti-Islamic discourse.<sup>28</sup> The need for robust protections against religious discrimination cannot, therefore, be doubted.

The specific provision in the ECHR directed at protecting religious freedom confers the right to freedom of thought, conscience, and religion as well as the right to manifest religion

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<sup>27</sup> For more information, see generally DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 2009).

<sup>28</sup> “In the last two decades, parties promoting an anti-Islam discourse have had sufficient electoral success to be represented in the national parliaments of a considerable number of European countries including Austria, Belgium, Denmark, France, Italy, the Netherlands, Norway and Switzerland.” AMNESTY INT’L, CHOICE AND PREJUDICE: DISCRIMINATION AGAINST MUSLIMS IN EUROPE 15 (2012). The Council of Europe’s Commissioner for Human Rights has noted that: “[O]pinion polls in several European Countries reflect fear, suspicion and negative opinions of Muslims and Islamic culture. These Islamophobic prejudices are combined with racist attitudes—directed not least against people originating from Turkey, Arab countries and South Asia.” Thomas Hammarberg, *European Muslims are Stigmatised by Populist Rhetoric*, HUMAN RIGHTS COMMENT (Oct. 28, 2010, 9:19 AM), [http://commissioner.cws.coe.int/tiki-view\\_blog\\_post.php?postId=99](http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=99); see also *Islamophobia Watch: Documenting Anti Muslim Bigotry*, ISLAMOPHOBIA-WATCH.COM, <http://www.islamophobia-watch.com/islamophobia-watch/category/uk> (last visited Feb. 22, 2014).

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or belief, in worship, teaching, practice, and observance.<sup>29</sup> In the latter case, that freedom is qualified. An interference with the right to manifest one's religion or beliefs may be justified where certain criteria are met, in particular where the interference pursues one of a list of enumerated aims and is proportionate.<sup>30</sup> Unsurprisingly given its provenance, the European Court of Human Rights ("ECtHR"), the ultimate arbiter of disputes under the ECHR, regards the guarantee of freedom of thought, conscience, and religion, enshrined in the ECHR, as "one of the foundations of a 'democratic society.'"<sup>31</sup>

The religious freedoms protected by the ECHR are broad because, for good reason, the concept of "religion" is not prescribed. Subject to certain minimum criteria being met, whether a belief is protected under the ECHR is generally not a question for the secular courts. To permit one branch or another of the State to delineate those beliefs worthy of respect and those not, would be to raise just the dangers that recent history shows

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<sup>29</sup> ECHR, *supra* note 25, art. 9. This is the only Convention provision that may be relied upon by an organization, as well as an individual. *See* Church of Scientology Moscow v. Russia, App. No. 18147/08, 46 Eur. Ct. H.R. 16, para. 81 (2008); Supreme Holy Council of the Muslim Cmty. v. Bulgaria, 41 Eur. Ct. H.R. 3, para. 74 (2005).

<sup>30</sup> ECHR, *supra* note 25, art. 9(2) ("Freedom to manifest one's religion or beliefs shall be subject only to such 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."); *see also* R (SB) v. Governors of Denbigh High Sch., [2006] UKHL 15, [20]–[32].

<sup>31</sup> *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 175. There are hints, however, of a privileging here of Christianity over Islam. *Compare* Karaduman v. Turkey, 74 Eur. Comm'n H.R. Dec. & Rep 93 (1993) (holding that there was no interference with the rights guaranteed by Article 9 when a University failed to award the applicant, a Muslim, a diploma because she refused to produce a photograph of her herself without her headscarf), *with* Lautsi v. Italy, 54 Eur. H.R. Rep. 3 (2012) (holding that the presence of crucifixes in State-school class rooms did not violate Article 9), *with* Eweida v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10, and 3516/10, 2013 Eur. Ct. H.R., *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881> (holding that the applicant's rights under Article 9 were violated when she was prohibited from wearing a crucifix at work).

still exist. Instead, the court will generally ask only whether the belief in question is sincerely held. Similarly, whether any act is a “manifestation” of such a sincerely held religious belief is, in the usual case, to be adjudged by the believer herself. The courts do not engage in any assessment of the validity of the belief that is said to drive the actions (or “manifestation”) in issue; they ask only whether an individual genuinely holds that belief.<sup>32</sup> This sets a low threshold for the purposes of determining whether a belief is protected by the ECHR. According to the ECtHR:

[t]he right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance . . . . Provided this is satisfied, 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 or the ways in which those beliefs are expressed.<sup>33</sup>

In particular, it is not necessary or appropriate for the court to question the extent to which other members of the religious group to which a person belongs, and to membership of which they attribute the belief in question, subscribe to that belief or engage in that expression. The answers to any such questions are not relevant in deciding whether that person herself has such a belief, nor are they relevant to whether the belief can be categorized as

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<sup>32</sup> R (Williamson) v. Sec’y of State for Educ. & Emp’t, [2005] 2 A.C. 246 (H.L.) [22]–[23] (appeal taken from Eng.).

<sup>33</sup> *Eweida*, 2013 Eur. Ct. H.R. (citations omitted). In addition to mainstream religious belief, the European Convention institutions have been prepared to assume that more minority beliefs are covered by Article 9, including a belief in the Divine Light Zentrum, *Omkaranda and the Divine Light Zentrum v. Switzerland*, App. No. 8118/77, 25 Eur. Comm’n H.R. Dec. & Rep. 105 (1981); Druidism, *Chappell v. United Kingdom*, App. No. 1046/83, 3 Eur. Comm’n H.R. Dec. & Rep. 241 (1987); and Scientology, *X & Church of Scientology v. Sweden*, App. No. 7805/77, 16 Eur. Comm’n H.R. Dec. & Rep. 68, 69 (1979); *Church of Scientology Moscow v. Russia*, App. No. 18147/02, 46 Eur. Ct. H.R. 16 (2008). For a recent consideration of scientology by the Supreme Court of the U.K., see generally R (Hodkin) v. Registrar General Births, Deaths & Marriages, [2013] UKSC 77 (appeal taken from High Court).

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“religious.” This approach ensures that the religious freedoms guaranteed by the Convention are given very wide reach.

The ECtHR has acknowledged that even in cases where the religious belief asserted meets the necessary threshold, not “every act which is in some way inspired, motivated, or influenced by it constitutes a ‘manifestation’ of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith” are not protected.<sup>34</sup> Nevertheless, the right to manifest religious belief is broad: there need only be “the existence of a sufficiently close and direct nexus between the act and the underlying belief . . . . In particular, there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question.”<sup>35</sup> This has particular ramifications for acts done in pursuance of religious beliefs that discriminate against others, usually women and sexual minorities.<sup>36</sup>

In addition to explicit guarantees relating to freedom of religion, the ECHR contains an open-textured equality clause,<sup>37</sup> triggered when any complaint falls within the scope of one or another of the substantive Convention rights.<sup>38</sup> These include, for example, the privacy provision,<sup>39</sup> which has historically been used to protect the rights of sexual minorities,<sup>40</sup> and the family

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<sup>34</sup> *Eweida*, 2013 Eur. Ct. H.R. at para. 82.

<sup>35</sup> *Id.*

<sup>36</sup> Children are also often affected, though consideration of this impact is outside the scope of this Article.

<sup>37</sup> ECHR, *supra* note 25, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

<sup>38</sup> *See id.* arts. 2–13; protocol no. 1, arts. 1–3; protocol no. 4, arts. 1–4; protocol no. 6, arts. 1–2; protocol no. 7, arts. 1–5; protocol no. 7, arts. 1–5; protocol no. 12, art. 1 (which contains a free standing nondiscrimination right but which is neither signed nor ratified by the United Kingdom); protocol no. 13, art. 1.

<sup>39</sup> *Id.* art. 8 (“Everyone has the right to respect for his private . . . life.”).

<sup>40</sup> *See, e.g.,* *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 126 (1981) (holding that the criminalizing of homosexual acts between consenting adults

life provision.<sup>41</sup> This clause gives wide meaning to the concept of “discrimination,” so as to address not merely formal distinctions in treatment, but also structural and institutional forms of inequality.<sup>42</sup> It covers discrimination on the basis of a long list of enumerated grounds, including sex and religion, and “other status,” which has long since been held to be sufficiently

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was a breach of Article 8); *Lustig-Prean v. United Kingdom*, 29 Eur. Ct. H.R. 449 (1999); *Smith v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999) (holding that the investigation into and subsequent discharge of personnel from the Armed Forces on the basis that they were homosexual was a breach of Article 8); *A.D.T. v. United Kingdom*, 31 Eur. Ct. H.R. 33 (2001) (holding that legislation criminalizing homosexual acts between men in private, and a fortiori prosecution and conviction, was a breach of Article 8); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447 (2002) (holding that a failure to grant legal recognition of a person’s gender re-assignment was a breach of Article 8). Domestically, courts have recognized similar rights. *See, e.g.*, *Ghaidan v. Ghodin-Mendoza*, [2004] 2 A.C. 557 (H.L.) (holding that tenancy succession rules which treated survivors of homosexual partnerships less favorably than survivors of heterosexual partnerships breached Articles 8 and 14).

<sup>41</sup> *Schalk v. Austria*, 2010 Eur. Ct. H.R. (holding that the relationship between a cohabiting same-sex couple living in a stable de facto partnership, fell within the notion of “family life,” just as the relationship of a different-sex couple in the same situation would).

<sup>42</sup> *See, e.g.*, *Jordan v. United Kingdom*, 37 Eur. Ct. H.R. 2 (2003) (a general policy or measure that has disproportionately prejudicial effects on a particular group, may be considered discriminatory notwithstanding that it is not specifically aimed or directed at that group and breach Article 14); *Thlimmenos v. Greece*, 31 Eur. Ct. H.R. 411 (2000) (the right not to be discriminated against in the enjoyment of the rights under the ECHR is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different); *D.H. v. Czech Republic*, 47 Eur. Ct. H.R. 3 (2008) (a breach of Article 14 may occur where a general policy or measure which, though couched in neutral terms, results in disproportionately prejudicial effects against a group); *Opuz v. Turkey*, 50 Eur. Ct. H.R. 695 (2010) (holding that general and discriminatory judicial passivity in Turkey on the issue of domestic violence, albeit unintentional, mainly affected women and the violence could therefore be regarded as gender-based violence and a form of discrimination against women, and that in the circumstances, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors indicated that there was insufficient commitment to take appropriate action to address domestic violence and this amounted to a breach of Article 14).

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expansive to cover sexual orientation.<sup>43</sup> The prohibition on discriminatory treatment appears absolute, but the courts have approached the interpretation of the equality clause on the assumption that it implicitly allows for the justification of discrimination. For any discrimination to be lawful, however, it must be objectively and reasonably justified. The level of scrutiny applied to any discriminatory act or measure for the purposes of determining whether it is justified will reflect the social and legal importance placed upon the relevant distinguishing characteristic. Distinctions based on “suspect” grounds, those being, *inter alia*, religion,<sup>44</sup> sex,<sup>45</sup> and sexual orientation,<sup>46</sup> will be subject to particularly rigorous scrutiny and will require “very weighty reasons”<sup>47</sup> if they are to be justified.

The scheme of the ECHR with its broad protections promotes, or should promote, respect for diversity and for a plurality of divergent beliefs. Difficulties arise, however, because the guarantees of freedom of religion and the prohibition on discrimination may be used by members of more than one suspect class with respect to the same act. This typically occurs when the act in issue discriminates against women or sexual minorities, but the proscribing of it discriminates against those holding particular religious beliefs. While the possibility of justifying what would otherwise be prohibited discrimination seems to be the obvious route by which such conflicts might be resolved, this results in uncertainty. Where the balance will be struck in any particular case can be hard to predict and will sometimes depend upon unknowable factors, such as the personal views of the judge hearing the case. Further, little guidance can be found in the ECtHR’s jurisprudence because of its reliance on the “margin of appreciation.”<sup>48</sup>

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<sup>43</sup> *Salgueiro da Silva Mouta v. Portugal*, 31 Eur. Ct. H.R. 47 (1999).

<sup>44</sup> *Hoffmann v. Austria*, 17 Eur. Ct. H.R. 293, 316 (1993).

<sup>45</sup> *Van Raalte v. The Netherlands*, 24 Eur. Ct. H.R. 503, 518–19 (1997).

<sup>46</sup> *Vejdeland v. Sweden*, 2012 Eur. Ct. H.R. 369; *E.B. v. France*, 47 Eur. Ct. H.R. 41 (2008).

<sup>47</sup> *Abdulaziz v. United Kingdom*, 7 Eur. Ct. H.R. 471 (1985).

<sup>48</sup> For a full discussion, see generally R. CLAYTON & H. TOMLINSON, *THE LAW OF HUMAN RIGHTS* § 6.42 (2d ed. 2009).

In essence, the doctrine of the “margin of appreciation” affords Member States a degree of latitude in their compliance with the Convention rights, reflecting the principle of subsidiarity<sup>49</sup> and the ECtHR’s cognizance of the special conditions that might exist at local level. Its effect is that, in recognition of the status of the ECtHR as a supranational court, the ECtHR will refrain from laying down strict, universally applicable principles. Instead the ECHR confers on States a degree of discretion as to the means by which, or indeed the extent to which, they implement the Convention in domestic law. This doctrine is generally applied “when it comes to striking a balance between competing Convention rights.”<sup>50</sup> This can create particular problems in controversial areas where there is a lack of consensus across States, such as in the interface between religious rights and the rights of sexual minorities.<sup>51</sup>

## 2. *The Court’s Approach to Competing Claims*

The ECHR does not contain any explicit protection for sexual minorities. Instead, the Court’s developing jurisprudence in relation to sexual minorities has largely fashioned what are in essence nondiscrimination rights, from the prohibition on

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<sup>49</sup> This principle requires that States are to be held primarily responsible for securing compliance with the ECHR, *supra* note 25. See generally H. Petzold, *The Convention and the Principle of Subsidiarity*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (R. St. J. Macdonald, eds., 1993). This principle is reflected in both case law under the ECHR and in European Union law. See Treaty on European Union, Mar. 2, 2010, 2010 O.J. (C83/13), art. 5(3) [hereinafter TEU] (“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”).

<sup>50</sup> *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 3516/10, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>51</sup> See, e.g., *Eweida*, 2013 Eur. Ct. H.R.; *Schalk v. Austria*, 2010 Eur. Ct. H.R.

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interferences with private life.<sup>52</sup> As the scope for asserting the right to nondiscrimination in relation to sexual orientation has expanded, so the opportunity for a conflict between the right to freedom of religion and the rights to nondiscrimination has increased. This has resulted in the court resorting to the “margin of appreciation.”

Two cases illustrate this. Both concern the right to freedom of religion, and the right to nondiscrimination enjoyed by sexual minorities. The two cases are *Ladele v. United Kingdom* and *McFarlane v. United Kingdom*.<sup>53</sup> In these cases the applicants, both holding orthodox Christian beliefs, declined to provide certain services to gay and lesbian people, namely the registration of civil partnerships<sup>54</sup> in *Ladele*, and psycho-sexual counseling in *McFarlane*. In the first case, *Ladele*, the applicant, Lillian Ladele, was a civil registrar and as such was obliged to register civil partnerships (the status which affords legal recognition to same-sex couples in the United Kingdom) as part of her job.<sup>55</sup> She complained of indirect discrimination when, having refused to engage in the registration of civil partnerships, she was directed to do so by her employer.<sup>56</sup> Ladele’s refusal was contrary to her public authority employer’s equal opportunities policy, and the requirements of her job. However, she held the orthodox Christian belief that marriage is the union of one man and one woman for life and that same-sex unions are contrary to God’s will. She believed, therefore, that it would be wrong for her to participate in the creation of an institution equivalent to marriage (as she saw it) between a same-sex couple.<sup>57</sup> Her claims failed in the domestic courts on the ground that requiring her to

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<sup>52</sup> See *supra* notes 38–40 and accompanying text.

<sup>53</sup> *Ladele* and *McFarlane* were heard together with *Eweida v. United Kingdom*. See *Eweida*, 2013 Eur. Ct. H.R.

<sup>54</sup> This is available to same sex partners only. Civil Partnership Act, 2004, c. 33, § 1 (U.K.).

<sup>55</sup> *Ladele v. Islington London Borough Council*, [2009] EWCA Civ. 1357, [10] (Eng.).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



conduct civil partnerships was justified under the circumstances.<sup>58</sup> Ladele brought a complaint against the United Kingdom before the ECtHR, in reliance upon the right to freedom of religion and the nondiscrimination guarantee under the ECHR. The ECtHR accepted that her employer's policy of requiring, without exception, that all registrars of births, marriages, and deaths be designated civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs and that it was therefore, *prima facie*, indirectly discriminatory. However, that was not sufficient to make the requirement unlawful.

As with the right to manifest religious belief, the ECtHR held that in order to determine whether her employer's policy violated the nondiscrimination guarantee, it was necessary to decide whether the policy was justified as pursuing a legitimate aim, and was proportionate.<sup>59</sup> The ECtHR noted that the aim of the policy was not limited to providing a service which was effective in terms of practicality and efficiency. It was also to ensure compliance with the employer's overarching policy of being "wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others."<sup>60</sup> The ECtHR held that same-sex couples are in a similar situation to different-sex couples with regard to their need for legal recognition and protection of their relationships, and were thus in an analogous situation to couples seeking to marry. In those circumstances, the ECtHR considered that the aim pursued by the policy was legitimate.<sup>61</sup> Further, following its own case law, the court held that differences in treatment based on sexual orientation require particularly serious reasons if they are to be justified. The ECtHR concluded that notwithstanding the serious impact on Ladele (the loss of her job), her employer and the domestic courts, which had rejected her discrimination claim, had not exceeded the margin of appreciation afforded to them, and accordingly there was no

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<sup>58</sup> *Id.* at [3].

<sup>59</sup> *Eweida*, 2013 Eur. Ct. H.R. at para. 104.

<sup>60</sup> *Id.* at para. 105.

<sup>61</sup> *Id.*

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breach of the Convention rights.<sup>62</sup>

In *McFarlane*, the applicant, Gary McFarlane, was employed by a private enterprise providing relationship counseling and psycho-sexual counseling. Contrary to the policies of his employer, McFarlane refused to provide sexual counseling to same-sex couples because of his Christian beliefs. Consequently, he was dismissed from his employment. According to the ECtHR, as in *Ladele*, the most important factor to be taken into account was the fact that the employer's action was intended to secure the implementation of its policy of providing services without discrimination. The court held that State authorities enjoyed a wide margin of appreciation in deciding where to strike the balance between the right to manifest religious belief and the employer's interest in securing the rights of others. This meant that the United Kingdom was not in breach of the Convention in failing to ensure a remedy for McFarlane's dismissal. As with *Ladele*, the domestic courts had not exceeded the margin of appreciation available to them.<sup>63</sup>

The question left unanswered by these cases is whether the margin of appreciation would have been exceeded if the domestic courts had decided otherwise: that is, that the refusal to provide services to same-sex couples was protected by the right to freedom of religion and that any decision requiring the applicants to deliver such services was unlawful. Whether the right to manifest religious belief would trump the nondiscrimination rights of women, and gay men and lesbians is of particular concern in the United Kingdom, given the role of religion, and specifically Christianity, in public life. Unfortunately, the jurisprudence of the ECtHR does not provide any clear framework for addressing this issue in controversial cases.

*B. Human Rights Act 1998*

The ECHR has been to a large extent transposed into United Kingdom domestic law by the Human Rights Act 1998 ("HRA"),

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<sup>62</sup> *Id.* at para. 106.

<sup>63</sup> *Id.* at para. 109.

a purely domestic statute. The HRA now allows persons who allege that their “Convention rights”<sup>64</sup> have been violated to bring claims in the domestic courts, where previously a complainant could only vindicate those rights by an application to the ECtHR.<sup>65</sup> The coming into force of the HRA has given greater prominence to the ECHR within the domestic legal order and has raised society’s consciousness with regard to the rights it protects. This has resulted in a great deal of case law on matters touching upon the issue of religious freedom.

The HRA does not give the Convention rights the same constitutional status seen in the Bills of Rights and other constitutional instruments in jurisdictions elsewhere.<sup>66</sup> However, it does provide remedies to victims of a violation of the Convention rights.<sup>67</sup> Further, although it does not permit the striking down of primary legislation,<sup>68</sup> the HRA requires that legislation “be read and given effect in a way which is compatible with the Convention rights” so far as it is possible to do so.<sup>69</sup> Further, while the Convention rights, both as a matter of international law and domestic law, bind only public authorities, a court is treated as a public authority for these purposes.<sup>70</sup> This

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<sup>64</sup> See Human Rights Act, 1998, c. 42, § 7 (U.K.). These Convention rights art.s 2–12, 14, 1–18; First Protocol, articles 1–3; and Thirteenth Protocol, article 1.

<sup>65</sup> The Human Rights Act 1998 c. 42 does not preclude an applicant from pursuing an application to the ECtHR once all domestic remedies have been exhausted. See ECHR, *supra* note 25, art. 35.

<sup>66</sup> It does not allow, therefore, for the striking down of legislation incompatible with the Convention rights as would be common in Bills of Rights and constitutional instruments.

<sup>67</sup> Human Rights Act, 1998, c. 42, § 7 (U.K.).

<sup>68</sup> This ensures that the operation of the Human Rights Act 1998 does not result in any challenge to the primacy of Parliament. It allows, however, for the making of a declaration of incompatibility and provides an expeditious route to amending the law in view of that incompatibility, but it does not invalidate the law in the meantime or compel Parliament to amend it. *Id.* § 4.

<sup>69</sup> *Id.* § 3.

<sup>70</sup> *Id.* §§ 6(1), 6(3).

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gives the Convention rights significant horizontal impact.<sup>71</sup>

As the HRA is a domestic legal measure, the doctrine of a “margin of appreciation” does not apply to a ruling made under it by the United Kingdom courts. This is for the obvious reason that it is the State to which any “margin” is accorded, and the principle operates only at supranational level. However, the courts have shown a willingness to afford a degree of respect to acts of the legislature (particularly recent ones).<sup>72</sup> As one member of the Supreme Court<sup>73</sup> put it:

[W]hen we can reasonably predict that [the ECtHR] would regard the matter as within the margin of appreciation left to the member states . . . [the Court] should not attempt to second-guess the conclusion which Parliament has reached. I do not think that this has to do with the subject matter of the issue, whether it be moral, social, economic or libertarian; it has to do with keeping pace with the [ECtHR] jurisprudence as it develops over time, neither more nor less.<sup>74</sup>

This approach has proved to be just as significant domestically as the doctrine of the “margin of appreciation” in the ECtHR, especially where strongly contested matters are in issue. When the legislature has chosen a particular course in an area of controversy, the courts will tend to avoid second-guessing the legislature’s decision, particularly where it is presumed that the ECtHR would not interfere if it were the subject of challenge there. This has broad ramifications, but is specifically relevant to domestic equality laws protecting sexual minorities and the

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<sup>71</sup> By which it is meant that it impacts on private parties (through the decisions of the courts), as well as State actors. *See generally* CLAYTON & TOMLINSON, *supra* note 48.

<sup>72</sup> *R v. Attorney General (Countryside Alliance)*, [2007] UKHL 52 [47], [125]–[127] (appeal taken from Eng.); *Wilson v. First Cnty. Trust No. 2*, [2003] UKHL 40 [70] (appeal taken from Eng.); *R v. Secretary of State for Educ. & Emp’t*, [2005] UKHL15 (appeal taken from Eng.).

<sup>73</sup> Then sitting as a committee of the House of Lords (before the enactment of the Constitutional Reform Act of 2005).

<sup>74</sup> *Countryside Alliance*, [2007] UKHL 52 at [126].

legality of exemptions directed at accommodating religious belief. In short, the courts will be reluctant to interfere with any legislative expression by Parliament as to the balance between competing rights. The impact of this is considered in Section III below.

### *C. European Union Law*

Protection for religious belief and practice in the United Kingdom today is in large part derived from European Union (“EU”) law. There are both similarities and differences as between the protections afforded by the ECHR and EU law. EU law, like the ECHR, guarantees the rights to freedom of religion and to nondiscrimination but these rights are only operative in situations covered by EU law, unlike the ECHR which is of broader impact.<sup>75</sup>

The EU Treaties regulating the European Union<sup>76</sup> contain equality guarantees,<sup>77</sup> as does some secondary legislation under the Treaties.<sup>78</sup> Importantly too, the European Union Charter of Fundamental Rights<sup>79</sup> guarantees the right to freedom of religion<sup>80</sup>

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<sup>75</sup> In addition, the general impact of EU law even within those parameters may be narrower than the ECHR in some circumstances, see, for example, *Association de médiation sociale v. Union locale des syndicats CGT (Union départementale CGT des Bouches-du-Rhône and another intervening)*, [2014] WLR (D) 2.

<sup>76</sup> TEU, *supra* note 49; Treaty on the Functioning of the European Union, Mar. 2, 2010, 2010 O.J. (C83/47) [hereinafter TFEU].

<sup>77</sup> See, e.g., TEU, *supra* note 49, art. 2; TFEU, *supra* note 76, arts. 10, 18, 19, 45, 153(1)(i)–(j), 157.

<sup>78</sup> See, e.g., Council Directive 2000/78/EC, 2000 O.J. (L 303) (EC) (“establishing a general framework for equal treatment in employment and occupation”); Council Directive 2004/113/EC, 2004 O.J. (L 373) (EC) (“implementing the principle of equal treatment between men and women in the access to and supply of goods and services”); Council Directive 2006/54/EC, 2006 O.J. (L 204) (EC) (“implement[ing] [] the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”).

<sup>79</sup> Charter of Fundamental Rights of the European Union, art. 10, 2000 O.J. (C 364/01).

<sup>80</sup> *Id.* at art. 10.

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and to nondiscrimination.<sup>81</sup> The nondiscrimination provisions in the various EU legal instruments address discrimination across a number of grounds, including religion, gender, and sexual orientation. Some address the concept of discrimination in an open-textured way, while some adopt more formalistic meanings of discrimination.<sup>82</sup>

The system of legal rules that flows from the United Kingdom's accession to the European Economic Community ("EEC"), now the EU, means that EU law is of very great importance to both the interpretation and application of domestic equality law and confers, in some cases, directly effective<sup>83</sup> nondiscrimination rights upon individuals.

### *D. Equality Act 2010*

Finally, the United Kingdom's Equality Act 2010 ("Act") outlaws discrimination in certain spheres, on the grounds of religion or belief, gender, gender reassignment, and sexual orientation.<sup>84</sup> The Act is more prescriptive than the ECHR and some parts of European Union law. It enacts closely formulated concepts of discrimination, and to a significant degree the legislature has decreed within it when an interference with the right of an individual or group to be free from discrimination is justified,<sup>85</sup> leaving the courts with little or no discretion. This

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<sup>81</sup> *Id.* at art. 21.

<sup>82</sup> Compare *id.* (adopting in essence the same model as that seen in the nondiscrimination clause under the ECHR, as to which see *supra* note 42 and accompanying text), with Council Directive 2006/54/EC, 2006 O.J. (L 204) (EC) (prescribing closely the forms of discrimination it regulates). For the E.U.'s External Action and the potential for friction between the right to freedom of religion belief and the rights of sexual minorities, see Pasquale Annicchino, *The New Guidelines on Freedom of Religion and LGBTI Rights in the External Action of the European Union*, 6 EUR. HUM. RTS. L. REV. 624 (2013).

<sup>83</sup> See KARON MONAGHAN, MONAGHAN ON EQUALITY LAW 68 (2d ed. 2013) for a full discussion.

<sup>84</sup> See Equality Act, 2010, c. 15, pt. 2, § 4 (UK). The Equality Act also protects against discrimination on other grounds. *Id.*

<sup>85</sup> See *Bull v. Hall*, [2013] UKSC 73, [16] (observations of Lady Hale).

occurs in a number of areas but in particular at the interface between gender and sexual orientation, and religion, as discussed below.

The concept of “religion”<sup>86</sup> is given wide reach under the Act. The Explanatory Notes to the Act, reflecting the jurisprudence of the ECtHR, state that “[i]t is a broad definition in line with the freedom of thought, conscience and religion guaranteed by . . . the European Convention on Human Rights. The main limitation . . . is that the religion must have a clear structure and belief system.”<sup>87</sup> The Explanatory Notes observe that all the main religious groups are covered, including the Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism, and Zoroastrianism, as well as denominations or sects within a religion, such as Protestants and Catholics within Christianity.<sup>88</sup> The domestic courts have held that a belief that homosexual activity is “sinful,”<sup>89</sup> a belief that children should not be placed for adoption with same-sex couples,<sup>90</sup> and a belief that marriage is the union of one man and one woman for life (and as such enabling same-sex unions to be formed is contrary to God’s instructions), are all protected beliefs when they form part of a broader Christian faith.<sup>91</sup>

The concept of discrimination<sup>92</sup> adopted by the Act, however,

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<sup>86</sup> Equality Act, 2010, c.15, pt. 2, c. 1, § 10 (UK).

<sup>87</sup> *Id.* cmt. 51.

<sup>88</sup> *Id.* cmts. 51–53.

<sup>89</sup> *See* *McFarlane v. Relate Avon Ltd.*, [2010] EWCA Civ 771 (refusing permission to appeal from the Employment Appeal Tribunal that proceeded on the same assumption: [2010] ICR 507). *See also* *R (John & Johns) v. Derby City Council*, [2011] EWHC 375, [6] (Admin) (a belief by members of the Pentecostal Church that sexual relations other than those within marriage between one man and one woman were morally wrong and a belief, therefore, that homosexuality was “against God’s laws and morals”).

<sup>90</sup> *McClintock v. Dep’t of Constitutional Affairs*, [2008] IRLR 29.

<sup>91</sup> *Islington London Borough Council v. Ladele*, [2009] EWCA (Civ) 1357. In *Eweida*, the ECtHR proceeded on the same basis. *See generally* *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 3516/10, 2013 Eur. Ct. H.R., *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>92</sup> Equality Act, 2010, c. 2, pt. 2 (UK).

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is narrower than under the ECHR and some EU instruments. “Discrimination” for the purposes of the Act is defined in largely formalistic terms, and the Act proscribes such discrimination only in certain closely defined, albeit wide, circumstances, such as in the provision of services, the exercising of public functions, and in employment.<sup>93</sup> The Act contains a number of exemptions applying to gender, gender reassignment and sexual orientation. It is by this means that the legislature has identified how in certain circumstances<sup>94</sup> conflicts between the rights of different protected groups are to be resolved.<sup>95</sup> As they apply to actions motivated by religious belief, these exemptions are very controversial and are seen by some as giving special privileges to religious individuals and organizations. Addressing potential conflicts through specific and closely circumscribed exemptions does have the virtue of certainty. However, as is discussed under Sections III and IV below, that certainty comes at the expense of full equality for women and sexual minorities whose rights are sometimes subordinated to claims to religious freedom.

### III. PROTECTING THE RIGHTS OF MINORITIES AGAINST DISCRIMINATORY ACTS MOTIVATED BY RELIGIOUS BELIEF

There are, then, four distinct legal schemes addressing equality and nondiscrimination in the United Kingdom. These schemes provide for fairly comprehensive, albeit not always coherent, protections. They also do not stand in isolation since each informs the other. The meaning to be afforded the various expressions under the Equality Act 2010 will so far as possible conform to EHCR law because the HRA requires as much.<sup>96</sup> In addition, a considerable amount of EU law is directly effective in the United Kingdom<sup>97</sup> even without transposing legislation, and in

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<sup>93</sup> *Id.* pts. 3, 5 (UK).

<sup>94</sup> The Court has a role in other circumstances. *See id.* § 19. In particular, where a complaint is made of indirect discrimination, it is left to the courts to determine whether there is justification for any *prima facie* discrimination. *Id.*

<sup>95</sup> *Id.* at sch. 9, para 2; sch. 3, para. 29; sch. 22, para. 3; sch. 23, para. 2.

<sup>96</sup> Human Rights Act, 1998, c. 42, § 3 (UK).

<sup>97</sup> European Communities Act, 1972, c. 68, § 2 (UK).



any event may require that existing domestic legislation be construed compatibly with it.<sup>98</sup> The EU is about to become a member of the Council of Europe<sup>99</sup> and will accede to the ECHR. Further, the EU is bound to act in accordance with the ECHR, the contents of which now comprise general principles of EU law.<sup>100</sup> The Court of Justice of the European Union and the ECtHR have anyway long since taken account of each other's jurisprudence in formulating their own case law.

Taken together these legal schemes ensure that religious freedoms are robustly protected in the United Kingdom. But these legal instruments also protect against gender and sexual orientation discrimination. Refusing to provide employment or services to a woman, a gay man, a lesbian, or a transgendered person because of their status as such, is made unlawful under the ECHR,<sup>101</sup> EU law,<sup>102</sup> and the Equality Act 2010.<sup>103</sup> This creates friction since the expression of religious belief may well impair the enjoyment of the equality rights of women, gay men, lesbians, or transgendered persons.

As domestic case law has made clear, "religious conviction is not a solvent of legal obligation."<sup>104</sup> This does not mean, however, that freedom of religion must always give way to competing rights; this is certainly not the case. There are

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<sup>98</sup> The system of legal rules that flow from the UK's accession to what was then the European Economic Community ("EEC"), now the EU, is complex but the impact of EU law on domestic law largely derives from Section 2 of the European Communities Act. *Id.*

<sup>99</sup> TEU, *supra* note 76, art. 6(2).

<sup>100</sup> *See, e.g., id.* art. 6; Council Directive 2000/78/EC, 2000 O.J (L 303) 1, 4 (EU); Council Directive 2004/113/EC, 2004 O.J (L 373) 1, 2 (EU); Charter of Fundamental Rights of the EU, 2010, O.J. (L364) pmb. (EU).

<sup>101</sup> ECHR, *supra* note 25, arts. 8, 14.

<sup>102</sup> Council Directive 2000/78/EC, 2000 O.J (L 303) 1,4 (EU); Council Directive 2004/113/EC, 2004 O.J (L 373) 1, 2 (EU); Council Directive 2006/54/EC, 2006 O.J. (L 204); Charter of Fundamental Rights of the EU, art. 21, 2000 O.J. (L364) 13.

<sup>103</sup> Equality Act, 2010, c. 15, §§ 4, 29, 39 (UK).

<sup>104</sup> *R (Williamson) v. Secretary of State for Educ. & Emp't*, [2005] 2 A.C. 246 [58] (citing *Church of the New Faith v. Comr. of Pay-Roll Tax*, 154 CLR 120 [136] (1983)).

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numerous examples where religious beliefs are accommodated even where that impinges on the rights of women and sexual minorities. This is sometimes explicitly provided for in legislation, and at other times it occurs through the interpretation (or perhaps stretching) of legislation in such a way as to accommodate religious belief. This allows those motivated by religious beliefs “to be true to their beliefs while remaining respectful of the law.”<sup>105</sup>

Examples abound: The Abortion Act 1967 makes abortion lawful in certain circumstances and at the same time excuses a person from “participat[ing] in any treatment” authorized by the 1967 Act to which they have a conscientious objection.<sup>106</sup> The recent case of *Doogan v. NHS Greater Glasgow & Clyde Health Board*<sup>107</sup> broadly interprets the conscientious objection clause. According to the court in *Doogan*, the clause extends not only to the actual medical or surgical termination but to the “whole process of treatment” given for that purpose.<sup>108</sup> In *Doogan*, two Catholic midwives succeeded in their claim that in addition to refusing to participate in the conducting of an abortion, they were entitled to refuse to carry out supervisory and management responsibilities in relation to staff assisting in abortions, and could refuse to participate in the provision of care to patients undergoing abortions at any stage in the process.<sup>109</sup> There are serious practical consequences in permitting senior midwives to refuse to engage in any activity connected, however remotely, with the carrying out of abortions.<sup>110</sup> Nevertheless, the court

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<sup>105</sup> *Doogan v. NHS Greater Glasgow & Clyde Health Bd.*, [2013] CSIH 36 [37].

<sup>106</sup> Abortion Act, 1967, c. 87, § 4 (U.K.).

<sup>107</sup> *Doogan*, [2013] CSIH 36.

<sup>108</sup> *Id.* at [37].

<sup>109</sup> *Id.* at [6].

<sup>110</sup> Elizabeth Prochaska, *Abortion and Conscientious Objection: What about Human Rights?*, U.K. HUMAN RIGHTS BLOG (May 22, 2013), <http://ukhumanrightsblog.com/2013/05/22/comment-abortion-and-contentious-objection-what-about-human-rights-elizabeth-prochaska/> (last visited Feb. 22, 2014). While section 4(2) of the Abortion Act does not enable a conscientious objection to be raised where the mother is in danger of grave permanent injury or death, as Elizabeth Prochaska points out: “[T]hat is a difficult assessment to

chose to interpret the 1967 Act in a way that allowed the Catholic midwives to “to be true to their beliefs while remaining respectful of the law.”<sup>111</sup> It did this by giving a meaning to the conscientious objection clause that extended well beyond what the 1967 Act appeared to intend, and beyond what the professional nursing bodies had until then understood the limits of the clause to be. Unless the decision is overturned by the United Kingdom Supreme Court,<sup>112</sup> there is a real possibility that the right to access a legal abortion will be impeded, with the foreseeable attendant risk to the health and well-being of women seeking to terminate a pregnancy.

Another such example is the Marriage (Same Sex Couples) Act 2013 (“Same Sex Marriage Act”) which made marriage between same-sex partners lawful, but also introduced provisions that prohibit same-sex marriages from being contracted on religious premises unless very tight conditions are met.<sup>113</sup> The Same Sex Marriage Act allows for same-sex marriages on religious premises only where a religious organization has “opted-in,” in accordance with a prescribed procedure.<sup>114</sup>

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make and a woman’s condition can deteriorate rapidly. Savita Halappanavar’s death shows how a system which ostensibly permitted abortion to save the mother’s life failed to protect her from the conscientious objection of her caregivers. The practical consequences of the judgment may put women at risk.” *Id.*

<sup>111</sup> *Doogan*, [2013] CSIH 36 at [37].

<sup>112</sup> An appeal is currently pending before the Supreme Court under case number UKSC 2013/0124.

<sup>113</sup> Marriage (Same Sex Couples) Act, 2013, c. 30, § 1 (UK).

<sup>114</sup> The Church of England and the Catholic Church have made clear that they will not apply to “opt in” as per the Marriage (Same Sex Couples) Act of 2013, § 3 (UK). *Same-sex Marriage and the Church of England*, CHURCH OF ENG., <http://www.churchofengland.org/our-views/marriage,-family-and-sexuality-issues/same-sex-marriage/same-sex-marriage-and-the-church-of-england-an-explanatory-note.aspx> (last visited Feb. 22, 2014). The bar on civil partnerships being conducted on religious premises has been lifted for those religious groups who seek permission to have their premises approved for the registration of civil partnerships. *See* Marriages and Civil Partnerships (Approved Premises) (Amend.) Regulations 2011, SI 2011/2661 (amending SI 2005/3168) (UK). So far, the Society of Friends (Quakers), Spiritualists, Unitarians, and the United Reformed Church have applied. The mainstream

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Further, the Same Sex Marriage Act strictly prohibits a person being compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement) to conduct a same-sex marriage according to religious rites. This is so even where those persons have the authority to conduct a marriage and are members of a religious organization that has “opted in.”<sup>115</sup>

Also, as mentioned, the Equality Act 2010 contains exemptions privileging religion in certain cases. For example, it allows an employer to require that in order to be hired for a particular job, a person must be of a particular sex; must not be a transsexual person; must not be married or a civil partner, or must not be of a specified sexual orientation. This is permitted where (i) the employer can show that the employment is for the “purposes of an organised religion;” (ii) the application of the requirement engages “the compliance or non-conflict principle,” and (iii) the person to whom the requirement is applied does not meet it, or (save in relation to sex) the person applying the requirement has reasonable grounds for not being satisfied that the person meets it.<sup>116</sup>

The “compliance principle” is engaged where a requirement is applied so as to comply with the doctrines of the religion concerned. The “non-conflict principle” is engaged where, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers.<sup>117</sup> This exemption does not contain any threshold of proportionality,<sup>118</sup> nor does it define what is meant by the expression “for the purposes of an organised religion.”<sup>119</sup> The

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Christian churches (the Church of England and Catholic Church, specifically) have indicated that they will not apply, and protections are built into the legislation to ensure that they will not be required to do so.

<sup>115</sup> Marriage (Same Sex Couples) Act of 2013, § 2 (UK).

<sup>116</sup> Equality Act, 2010, c. 15, § 2(1)(a)–(b), sch. 9 (UK).

<sup>117</sup> *Id.*

<sup>118</sup> Unlike other exemptions, it is not necessary that any requirement be a proportionate means of achieving a legitimate aim. *See, e.g., id.* § 1(1), sch. 9 (ordinary occupational requirements).

<sup>119</sup> *See* CLAYTON & TOMLINSON, *supra* note 48 (discussing the impact of

Government had intended introducing a proportionality requirement, and defining employment “for the purposes of an organised religion” as being employment wholly or mainly involving (a) leading or assisting in the observation of liturgical or ritualistic practices of a religion, or (b) promoting or explaining the doctrine of the religion (whether to followers of the religion or otherwise). The Catholic Bishops’ Conference of England and Wales expressed strong concern that defining employment for the purposes of an organized religion in that way “would unduly narrow the scope of the exception and limit the ‘essential’ ability of the Church in filling posts with a pastoral role ‘to prefer a candidate whose life is in accordance with its ethos.’”<sup>120</sup> Due to the expression of such concerns, the definition of relevant employment for these purposes and the proportionality condition were removed by amendments made in the House of Lords during the passage of the Equality Bill (prior to its enactment as the Equality Act 2010).<sup>121</sup> The Equality Act 2010 also exempts, in prescribed circumstances, sexual orientation discrimination in the provision of services by religious organizations,<sup>122</sup> and it allows discrimination by religious ministers against women through the provision of services only to persons of one sex or separately for men and women.<sup>123</sup> Wide exemptions also apply to faith-based schools<sup>124</sup> (which are lawful in the United Kingdom as part of the State education system).<sup>125</sup>

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Article 9 in this respect).

<sup>120</sup> HOUSE OF LORDS & HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: EQUALITY BILL, 26th Report, Sess. 2008–09 at para. 166 (citing Memorandum from the Catholic Bishops’ Conference of England and Wales (E14) to the Public Bills Committee).

<sup>121</sup> Though this exemption is controversial, interference with the rights of sexual minorities in consequence of a similar exemption under earlier Regulations was found to be lawful. *See, e.g.*, R (on the application of Amicus-MSF Section) v. Secretary of State for Trade & Indus., [2004] IRLR 430.

<sup>122</sup> Equality Act, 2010, c. 15, § 2, sch. 9 (UK).

<sup>123</sup> *Id.* § 29, sch. 3.

<sup>124</sup> Those being schools having a “religious character.” *See* School Standards and Framework Act, 1998, c.31, §§ 20–83 (UK).

<sup>125</sup> Equality Act 2010, c. 15. § 5, sch. 11; *see also id.* § 11, sch. 3.

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Where domestic statutory law prohibits discrimination against women or sexual minorities, then unless there is an exemption for those whose acts are motivated by religious belief, or there is a need to accommodate those beliefs under the ECHR, such discrimination will be unlawful whatever the motivation for it. This is illustrated by the case of *Bull v. Hall*.<sup>126</sup> In *Bull*, the United Kingdom Supreme Court found that a couple operating a small hotel had acted unlawfully in refusing a double-bedded room to a same-sex couple in a civil partnership.<sup>127</sup> This was because the law prohibits sexual orientation discrimination, as it does religious discrimination, in the provision of hotel accommodation and related services. This is without exception for private profit-making businesses run along religious lines. The fact that the discrimination was motivated by the hotel owners' orthodox Christian belief "that the only divinely ordained sexual relationship is that between a man and a woman within bonds of matrimony,"<sup>128</sup> did not rescue the hoteliers. As the Supreme Court held, finding that the hoteliers had acted unlawfully was simply to treat them equally to all other hoteliers. If the claimants in *Bull*, the same-sex couple seeking a room, ran a hotel and denied a double room to the defendants on the ground of their Christian beliefs, they too would have been acting unlawfully.<sup>129</sup> Neither group was privileged in law in this context. However, this does little to abate concerns about those cases where the law does prioritize religious belief over equality for women and sexual minorities.

### IV. RELIGIOUS FREEDOM: A MINORITY RIGHT OR A MAJORITARIAN CLAIM?

Religion may not be the solvent of all legal obligation but, as

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<sup>126</sup> *Bull v. Hall*, [2013] UKSC 73 (appeal taken from Eng.).

<sup>127</sup> The Justices gave different reasons for so holding. *Compare id.* at [24]–[30] (discussing the impact of the couple being in a civil partnership on the conclusion reached), *with id.* at [74]–[76] (Neuberger, L., concurring) (disagreeing as to the significance of a civil partnership).

<sup>128</sup> *Id.* at [9].

<sup>129</sup> *See id.* at [4], [54] (comments by Lady Hale).

the discussion above demonstrates, it can serve to avoid it, at least where women and sexual minorities are concerned.<sup>130</sup> This is either because Parliament has enacted statutory exceptions applicable in cases where discriminatory acts are motivated by religious belief, or because the HRA (or the ECHR) will require that a particular religious belief be accommodated. Given the privileged space occupied by religion in the United Kingdom and, in the case of the Church of England, its legislature, this is perhaps of little surprise.

It is a peculiarity, however, that though the vast majority of the population of the United Kingdom self-identify as “Christian” (73.8%),<sup>131</sup> the official law reports and mainstream media reports indicate that claimants in religious discrimination cases are overwhelmingly likely to be Christian where a “clash” with another’s nondiscrimination rights is engaged. This is most notably the case where the conflict concerns religion on the one hand, and gender or sexual orientation on the other.<sup>132</sup> Christians can barely be said to comprise a minority group by any measurement, whether in actual numbers, or by distribution of

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<sup>130</sup> This would not be tolerated if the discrimination were race-based. *R (E) v. Governing Body of JFS*, [2009] UKSC 15, [33]–[46] (appeal taken from Eng.). *See Timeshev v. Russia*, 2005-XII Eur. Ct. H.R. 169, 187 (holding that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified”). In the context of religion, this prospect is not fanciful. A number of predominantly U.S.-based “Christian” churches including the “Christian Knights of the Ku Klux Klan,” “Aryan Nations,” and a variety of other churches within the “Christian Identity” movement advocate white supremacy and anti-Semitism.

<sup>131</sup> EQUALITY & HUM. RIGHTS COMM’N, *HOW FAIR IS BRITAIN? EQUALITY, HUMAN RIGHTS, AND GOOD RELATIONS IN 2010*, at 63 (2010), *available at* [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/how\\_fair\\_is\\_britain\\_-\\_complete\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_-_complete_report.pdf).

<sup>132</sup> *See, e.g.*, *R (Core Issues Trust) v. Transp. for London*, [2013] EWHC 651 (Admin); [2014] EWCA Civ 34; *Bull v. Hall*, [2013] UKSC 73; *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 3516/10, 2013 Eur. Ct. H.R., *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>; *Doogan v. NHS Greater Glasgow & Clyde Health Bd.*, [2013] CSIH 36 [37]; *Black v. Wilkinson*, [2013] EWCA Civ 820; *R (John & Johns) v. Derby City Council*, [2011] EWHC 375 [6] (Admin).

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power or privilege. This distinguishes this group of claimants from the usual claimant profile in discrimination claims. Women make up the vast majority of claimants in sex discrimination claims; gay men and lesbians in sexual orientation claims; and so on, for obvious historical and structural reasons. Women, gay men, and lesbians generally call on the law to remedy disadvantage experienced by them. However, certainly some Christian claimants pursuing religious discrimination claims might instead be said to be calling on the law to ensure that their privileged place in the public life of the United Kingdom is not displaced.

The dominance of Christianity in the United Kingdom's constitutional settlement, perhaps inevitably, obstructs the achievement of full equality for women and sexual minorities. Until the United Kingdom's formal Head of State and legislature discard their anachronistic ties to the Church of England, it is likely that those whose gender or sexual orientation are not accorded equal respect<sup>133</sup> in the Church's theology and institutions of power will find their equality rights subordinated to the demands of Christianity. This is harmful to women and sexual minorities. However, the continuance of the status quo, though conflicting with all modern concepts of liberal, pluralistic democracy seems likely for some time. There is a political feebleness about tackling the Church of England and the place of Christianity in public life, and none of the mainstream parties have indicated any intention to do so. There are no present proposals to disestablish the Church of England or to otherwise reduce the influence of religion, in particular Christianity, in public life. This is a matter of considerable regret to many.

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<sup>133</sup> Equal respect must ultimately mean equal treatment.