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Religion and Equality

Religion has been and remains perhaps the most controversial area in equality and human rights law. This issue of the Equal Rights Review – devoted to religion and equality – is unique in that its editor disagrees, fully or in part, with at least a third of the assertions made by the authors featured herein. I think I can suggest contra-examples invalidating some of the generalisations attempted in our articles, or question many of the assumptions underlying the authors’ views. Most readers will feel the same, scribbling their critical comments on the margins, which makes this edition a bad choice if one is seeking to fall asleep.

In my view, religion has created a higher number of legitimate differences of opinion among equality and human rights experts than any other rights issue, and this unsettledness is reflected in the legal and policy frameworks and judicial practices related to religion. For example, is the blanket ban on face covering an act of discrimination against French Muslim women which has now been legitimised by the European Court of Human Rights in S.A.S. v France, or is it an act required to protect equal rights through the safeguarding of the rights of “others” to live together in a community?

As Eva Brems explains in our Interview section, when it comes to religion, the same issue can be framed as either religious discrimination or religious freedom – for example, the accommodation of a religious minority members in the workplace. I would half-agree with this: the two rights – of religious freedom and of non-discrimination on the basis of religion – are distinct. There are numerous situations where it is practical to address the matter through just one of these rights, and where an alternative “framing” would be highly artificial: for example, in Communist Albania prior to 1990 any religious expression was totally outlawed and criminalised, and this issue was framed and later addressed as a full denial of religious freedom; while it might also have been presented as discrimination against all believers of all religions, with the comparator being atheists, this would not have added anything in the particular circumstances of post-communist Albania.

As should have been expected, this issue’s thematic scope could not be fitted entirely within one of the two meanings of religious discrimination: discrimination based on the victim’s religion, vs discrimination in the name of the perpetrator’s religion. That is, the distinction between discrimination against people on the basis of their faith and discrimination perpetrated in the name of a religion against groups such as women, sexual minorities and political activists. The Equal Rights Trust research in countries such as Belarus, Malaysia and Sudan in previous years has shed some light on the multi-dimensional maze connecting the two phenomena. Most authors in this issue are keen to highlight the differences and the intersections between them.
However, the above conceptual distinction is one of the few points of consensus in human rights law related to religion. Another might be the established understanding that “religion” as a discrimination ground also covers “the lack of religion”. But the list of unanimous opinions related to religion is not very long. The list of disagreements, some of which are covered in this issue of the Review, while others remain for future issues, is much longer, even if limited to the opinions of experts and advocates whose frame of reference is that of so-called “liberal democracies”.

One controversial question is: what, if anything, makes religion a protected characteristic in equality law, and the related question as to what, if anything, makes the profession of religion a fundamental freedom. I accept that religion attracts protection in a way analogous to that of race where religion is an identity marker, or a genuine and determining characteristic of a social group that has a distinct position in the power structures of society – for example, Catholics and Protestants in Northern Ireland, or Sunni and Shi’a in Iraq. But I am not persuaded by the frequent propositions that religion merits protection because it is a public good. The extreme expression of this view comes in the form of blasphemy laws, in which it is no longer individual or collective human rights that are protected by the state, but rather the religion as such. (Actually, proponents of “defamation of religion” laws have tried hard, for over two decades, to impose a view in the United Nations Human Rights Commission and then Council that the “defamation of religion” should be condemned as a violation of the human rights of believers, arguing that no clear line can be drawn between offending a religion and offending a person professing it.)

A second question is what is covered by the characteristic of “religion”, and the answer would be reflected in the personal scope of discrimination law. A sub-question is whether only adherents to recognised religions should benefit from anti-discrimination protections; and if so, what does “recognition” mean – a formal state sanction or a sufficiently broad public acknowledgement? Many states (Denmark, Bulgaria, etc.) formally “recognise” a limited number of religious denominations, and in some countries non-recognition means not simply denial of charitable status or other benefits, but active prosecution, targeting communities such as Ahmadiyya in Indonesia or Kazakhstan.

A related definitional question with huge practical implications for the personal scope of the law concerns the issue of “belief”, which follows “religion” in many legal instruments providing freedom of “religion or belief”, or protection from discrimination on the basis of “religion or belief”. “Belief” itself then may blend into the protected ground of “political opinion”, creating a sliding continuum from the status-defining personal characteristic of “religion” to the non-immutable and transient “political choice”, a transition not made easier by the fact that,

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1 The Italian Supreme Court has applied the criteria of “public recognitions” (pubblici riconoscimenti) and “common opinion” (commune considerazione) when recognising the Church of Scientology as a religion.

2 It is difficult to draw a bright line between “belief” and “political opinion” in such “worldview” beliefs as communism, pacifism, or Nazism.
for many people, political affiliation is equally (if not more) essential to their identity and dignity compared to the admittedly innate sexual orientation.

A third question is whether religion as a discrimination ground should be treated as analogous to race or gender in discrimination law. The European Council Directive 2000/78/EC (the Employment Directive) allows religious organisations some freedom to discriminate on grounds of religion or belief, while not allowing any similar freedom on grounds of race. Principle 6 of the Declaration of Principles on Equality states that: “Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.” I read this principle to mean that, once protection is provided in law, and once discrimination is established, there should be no hierarchy of grounds in terms of remedy, such that, as far as the victims of discrimination are concerned, they should expect the same level of protection regardless of the ground. However, this does not preclude different approaches to discrimination grounds in respect to relevant exceptions or justifications.

A forth question related to the forms of prohibited conduct is whether the denial of reasonable accommodation for religion constitutes discrimination, and therefore whether protection from religious discrimination requires a duty of reasonable accommodation and if so, what principles can be set out to test this duty. To what extent are people entitled to dress as they please or as required by their religion? Can they wear or display religious symbols, or object to symbols they consider offensive? Can they take time off for religious holidays? Conflicts of rights rage in this area. Aileen McColgan says in her article in this issue that if her religion or worldview required her to present herself publicly (if at all) enveloped in floor length robes and a tall hat, or in full face paint, she would expect to pay the price in terms of her career progression. I personally would not discriminate against her if she came to a job interview at the Equal Rights Trust, and would celebrate the diversity that would come with her attire. However, I would not support her if she filed a complaint against a gym that refused to hire her as a fitness instructor. While the principle behind this example is quite clear – that of genuine and determining occupational requirements, most other cases that have indeed come to the courts have required a hyper-contextual approach.

In fifth place, I will put the vast issue of exceptions: whether it is acceptable, as is often the case, to exempt, religious organisations (including religious schools) from legislative prohibitions on discrimination. To take an example from England and Wales, highlighted by Richy Thompson in his article, to many people, the fact that around one third of children in the country are educated in predominantly state-funded schools that are allowed to directly discriminate on grounds of religion in admissions, employment policies and curricula is a fact of life. However, to others this represents blatant disregard for equal rights in a country that purports to champion them!

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Sixths, there are many issues around the procedural aspects of religious discrimination law. For example, there is no clear consensus or established authority guiding courts in deciding what is necessary to prove one’s belonging to a religious group. In *Kosteski v Macedonia* the European Court of Human Rights ruled that “some level of substantiation” may be required regarding the religious affiliation of an individual claiming an exemption or a privilege based on religion. The applicant in this case was suspected to have had invented his belonging to the Muslim faith in order to justify, ex post facto, his absences from work. Issues of evidence and proof will not be easy in borderline cases which hang on whether the claimant’s possession of the characteristic of religion is genuine, and in any case what is the meaning of “genuine” in this context?

Also related to the rules of evidence in religious discrimination cases, future jurisprudence will clarify further whether an objective or subjective test should be applied to determine if a certain expression or behaviour is a (central, essential, significant, etc.) part of one’s religion. For example, should the question whether the opposition to contraception is inherent in Christian belief be decided primarily as a matter of expertise coming from religious studies academics, or by looking at the subjective feelings of the conscientious objector refusing to sell contraception while working as a pharmacist, in a case like *Pichon and Sajour v France*?

While all the above controversial issues have been and will continue to be addressed in courts and legislatures, we should be mindful of one of the biggest risks in our time: that this entire discourse, with all its achievements and fascinating controversies around religious discrimination tackled in a human rights framework, turns out to be a bubble. Developments IRL,4 with the genie of religious wars once again out of the bottle, demand regular reality checks. But the debate must go on as the effective protection from religious discrimination is an alternative to war.

Dimitrina Petrova

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4 “In the real world”, in geek jargon.
“Although relatively few states have incorporated enforceable socio-economic rights into their constitutions (more usually they are “directive principles of social policy”), progressive equality legislation is increasingly available. Using this legislation to realise socio-economic rights can have special benefits.”

Bob Hepple
Achieving Social Rights Through the Principle of Equality


The Universal Declaration of Human Rights

Sixty-six years ago, on 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). The foundation stone of the UDHR is the principle of equality. Article 1 declares: “All human beings are born free and equal in dignity and rights”. Article 2 states that “Everyone is entitled to all the rights and freedoms set forth in this UDHR without distinction of any kind, such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

These Articles have three significant features:

1. they are universal – they apply to everyone;
2. they apply to all distinctions of every kind, not limited to the specific grounds that are listed such as race or sex and they are open-ended – “or other status”;
3. they apply to all the rights set forth in the UDHR.

These rights are of four kinds:

1. to life liberty and personal security (Articles 3 to 11) – individual rights that had been recognised since the French revolution;
2. rights in civil society (Articles 12 to 17) such as freedom from arbitrary arrest and detention, freedom from interference with privacy, freedom of movement, the rights to seek asylum, to a nationality and to own property;
3. rights in the polity (Articles 18 to 21) such as freedom of religion and belief, freedom of expression and opinion, freedom of assembly and association and participation in government;
4. social, economic and cultural rights (Articles 22 to 27) including the right to social security, the right to work, free choice of employment, to just and favourable remuneration, to form and join trade unions, to rest and leisure, to an adequate standard of living including food, housing, medical care and social services and the right to education and to participate in the cultural life of the community.

¹ QC, FBA. Bob is Honorary President of the Equal Rights Trust.
Economic, Social and Cultural Rights (ESCR) – Why are they difficult to enforce?

It is this fourth category of rights; economic, social and cultural rights (ESCR), that has been the most controversial and difficult to achieve. There are a number of reasons for this.

First, ESCRs face political objections. The inclusion of these rights was initially supported by the US delegation (led by Eleanor Roosevelt) but opposed by Britain and some Commonwealth countries, notably white-dominated South Africa and Australia. There was soon a shift in attitudes in America where Frank Holman, President of the American Bar Association, dubbed it a “pink paper” that would promote “state socialism, if not communism.” In the “deep freeze” of the Cold War, the USA became less enamoured of the idea of enforceable ESCR. It had been contemplated that there would be a single human rights instrument to elaborate the UDHR; instead two separate instruments were adopted by the UN in 1966; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter of these instruments is a much more aspirational document, and is looked on as inferior to the ICCPR. This was also the fate of ESCR in Europe, with the European Social Charter a much weaker instrument than the European Convention on Human Rights. The separation of ESCRs from civil and political rights has had lasting effects. It has been an obstacle to the enforcement of economic and social rights.

Secondly, there have been philosophical and ideological objections to the notion of enforceable ESCRs. The current Chair of the Equality and Human Rights Commission, Baroness O’Neill in her academic writings, influenced by Kant, argues there cannot be a right, “unless others have the obligations to respect these rights.” In the absence of agents whose duty it is to provide particular goods and services, such as health care or education, “rights are a mere pretence.” She distinguishes “liberty rights”, such the right not to be interfered with in one’s property or privacy, from positive claims to something like education, healthcare and food. A liberty right is automatically a universal right against all others and all institutions. For example, we all have an obligation not to torture someone else or to invade their privacy, but there can be no universal obligation to provide goods and services. There must be identifiable obligation bearers. These are imperfect obligations. This is not the unanimous view of philosophers, for example, Amartya Sen argues that rights can be attached to imperfect obligations requiring serious consideration to be given by anyone in a position to provide the goods or service to a person whose human right is threatened. The UK legislature has followed Sen’s approach by requiring public authorities to have “due regard” to the need to eliminate discrimination and advance equality of opportunity.

4 Equality Act 2010, Section 149.
Jude Browne points out that the distinction between liberty rights as opposed to positive rights in goods and services is not as sharp as O’Neill suggests. The delivery of liberty rights requires institutional structures such as courts and enforcement agencies in a similar way to those required to satisfy positive claims. But O’Neill’s view remains influential.

The ideological objections to economic and social rights (ESR) come from those who want to see a contraction of the state. The collectivist, social welfare ideology of the immediate post-war period in which the UDHR was drafted, has increasingly been replaced by a revival of 19th century liberal ideology; the view that the state and other agencies cannot control civil society and the economy and should not try to do so. This has been the inspiration for the “red tape” challenge of the current Coalition Government in the UK; limiting employment rights and other ESCRs. The threat of continued austerity policies by a Conservative-led government after the next British general election in 2015, carries with it the implication that ESCRs will become even more difficult to realise.

A third obstacle to the realisation of ESCRs is said to be institutional incompetence. This is the strongest reason advanced for the failure to enforce substantive socio-economic rights. A court will normally decline to determine the substance of indeterminate obligations such as those to provide “adequate housing” or “sufficient food and water”.

This is illustrated by the South African case of Mazibuko. Section 27(1)(b) of the Constitution confers a right of access to “sufficient water”. Section 27(2) provides that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right. The Water Services Act 1997 sets out criteria for determining the sufficiency of water supply services. The City of Johannesburg restricted the free basic water supply to all residents to the standard of 25 litres per person or 6 kilolitres per household per month, which is the standard set out under the 1997 Act, whose constitutionality was not challenged. The High Court held that this national standard was insufficient to meet residents’ basic needs, and ordered the City to provide 50 litres per person per day. The Supreme Court of Appeal held that 42 litres per day was sufficient, taking into account expert evidence and also decided that a system of prepaid water meters was unlawful. However, the Constitutional Court overturned these decisions. In a judgment written for a unanimous Court, O’ Regan J said:

> Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the

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right. This is a matter, in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.\footnote{Ibid., Para 61.}

There is a long tradition of judicial deference to the legislature, as well as a deeply entrenched separation of law and politics in democratic countries. Under a democratic constitution, the notion of institutional competence has been justified by the separation of powers, and the unaccountability of the judiciary. The independent judiciary is essential. Its duty is to keep the legislature and executive within their powers, but the flip side of this is that it is bound to respect the policy choices and operational decisions made by the elected organs of government. The result is that the role of the judiciary in relation to positive duties is essentially managerial and process-oriented.

A fourth and even deeper reason for the difficulty in directly enforcing ESCRs is their \textit{incompatibility with a market system based on the right to private property}. By its nature the free exercise of this right in a market system generates inequality, cyclical unemployment, and poverty, the very evils that socio-economic and equality rights seek to remedy. After the crisis of the First World War, a new generation of social democratic lawyers, notably the Austro-Marxist Karl Renner, detected a functional transformation in the institution of private property. Using the example of state regulation of a privately-owned railway company, he observed that private property had in effect become a public utility, though it had not become public property. “The sovereign owner of private property has suddenly, by one stroke of the pen, been converted into a subject who has public duties.”\footnote{Renner, K., \textit{The Institutions of Private Law and their Social Functions}, 1949, pp. 118–122. For a critique see Kinsey, R., "Despotism and legality" in Fine, B., et al (eds) \textit{Capitalism and the Rule of Law}, 1979, pp. 46–64.}

He believed that the development of public law institutions and procedures regulating labour, housing, education etc. represented the “first unavoidable step to nationalisation.”\footnote{Ibid., p. 121.}

By the end of the Second World War, however, the experience of the great depression of the 1930s and its outcome in fascism and war, made theorists of the post-1945 welfare state take a more pessimistic view about the possibility of restricting private property rights through social legislation in a democratic capitalist state. For example, Polanyi argued that this would undermine the functioning of the market system, and said it was implausible that there could be a lasting solution to the problem of poverty and unemployment in a market-based economy.\footnote{Polanyi, K., \textit{The Great Transformation: The Political and Economic Origins of our Time}, 1944, p. 234.} This conclusion is shared by those neo-liberal economists who see social and labour
regulation as contributing to rising labour and social costs, increasing unemployment, and putting a country which has such rights at a competitive disadvantage in the global economic system.\footnote{11} In the present period of almost unrestrained financial capitalism in which large sums of capital can be moved around the globe at the touch of a computer key, the weakness of nation states in protecting the poor and vulnerable against the growing power of corporate private property is self-evident.

The South African Constitutional Court has recognised the tension between enforcement of socio-economic rights on the one hand, and the right to property, on the other hand. It has arrived at the conclusion that the best way of balancing these rights in order to achieve just and fair outcomes is through dialogue. In \textit{Port Elizabeth Municipality v Various Occupiers}\footnote{12} Sach J, delivering the Court’s unanimous judgment, elaborated that the Constitution:

\begin{quote}
[I]mposes new obligations on the courts concerning rights relating to property not previously recognised by the common law... It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant to each particular case.\footnote{13}
\end{quote}

After remarking that there are some contradictory values that are intrinsic to the way our society operates that neither the legislature nor the courts can solve them with “correct” answers, he continued:

\begin{quote}
In seeking to resolve [these] contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.\footnote{14}
\end{quote}


\footnote{12} \textit{Port Elizabeth Municipality v Various Occupiers} 2005 (1) SA 217 (CC).

\footnote{13} \textit{Ibid.}, Para 23.

\footnote{14} \textit{Ibid.}, Para 39. The continuing importance of the owner’s common law rights is shown by \textit{President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd} 2005 (5) SA 3 (CC), where the state was required to compensate owner for occupation of its property where the state is unable to provide occupants with suitable alternative accommodation).
I have argued elsewhere that “meaningful engagement” between the state and communities affected by its policies. In other words “deliberative democracy” is likely to be the best way to realise ESCRs, and that the courts have a role in encouraging and supervising such engagement.15

Using the principle of equality

But there is also another approach that can be taken, and this is elaborated in the Equal Rights Trust’s Economic and Social Rights in the Courtroom: a litigator’s guide to using equality and non-discrimination strategies to advance economic and social rights.16 The Trust is deeply concerned that, in all the 30 or more countries in which it works, there continues to be significant inequality in the enjoyment by different groups of ESRs. The Guide argues that one way to move towards the realisation of these rights is through an approach based on the principles of equality and non-discrimination. It provides a detailed step-by-step guide for litigators as to how to raise equality arguments in relation to ESRs.

Although relatively few states have incorporated enforceable ESRs into their constitutions (more usually they are “directive principles of social policy”) progressive equality legislation is increasingly available. Using this legislation to realise ESRs can have special benefits. It can be enforced against non-state actors (increasingly involved through privatisation in the provision of public services). Most states outlaw both direct and indirect discrimination. International law imposes positive duties to ensure equality, and some national legislation requires pro-active steps by the state to eliminate discrimination and promote equality. In the UK we have the Public Sector Equality Duty.17 This has been of considerable value, despite some limitations, in the current period of austerity by stopping or delaying cuts in public services where it can be shown that the authority failed to give due consideration to the impact on one or more groups with protected characteristics. Some countries require affirmative action, in others such as the UK it is voluntary. This can enhance the realisation of ESRs. Equality legislation has particular enforcement mechanisms to ensure access to justice unfortunately, this is no longer the situation in the UK with the imposition since 2013 of crippling tribunal fees, resulting in an 80% drop in case load).

There are many examples, both in the case law of international bodies and courts, and in domestic law, of the use of the equality principle to achieve ESRs. The claim may be based on direct discrimination on a prohibited ground such as race or gender, or indirect discrimination because of a practice or policy which puts members of a particular group at a disadvan-


17 Equality Act 2010, Section 149.
tage which cannot be justified on objective grounds. It may also be based on a failure to take appropriate positive action.

The classic case is, of course, *Brown v Board of Education*.\(^\text{18}\) The US Supreme Court ruled that the provision of racially segregated schooling for black children was a violation of the 14\(^{th}\) Amendment (equal protection of the laws) to the US Constitution, even in cases where the physical facilities in white and black schools were substantially similar. The Court found that the effects of segregation had adverse psychological effects, engendering feelings of inferiority of black people and depriving them of the benefits of mixed schools. The Supreme Court’s decision not only led to desegregation in schools, but helped to shape the civil rights movement. This was achieved without any explicit recognition of the right to education or other ESRs in the US Constitution. The *DH case*\(^{19}\) and *Croatian schools case*\(^{20}\) are examples of where the right to education and the principle of equality were used against indirectly discriminatory practices which excluded Roma children from ordinary schools. Examples can also be found in other Roma cases on the rights to family life, to housing and of migrant workers not to be expelled initiated by the European Roma Rights Centre in 2010 and 2011 before the European Committee of Social Rights (ECSR). The ECSR found a catalogue of systemic direct and indirect discriminatory violations of these rights by France. The decisions affirm that account must be taken of the needs of vulnerable ethnic groups by decision making bodies. The ECSR has used the principle of equality to achieve inclusive education for children suffering from autism, even in the absence of specific legislation on disability discrimination.\(^{21}\) In Canada, the Supreme Court held that the failure to provide interpreters for deaf hospital patients (thus increasing risks of misdiagnosis and ineffective treatment) was a violation of the right to equality in Article 15 of the Canadian constitution.\(^{22}\) These examples, in addition to various others are available in the Trust’s Guide and the online compendium of cases.

There is a great debate as to whether discrimination law does or should prohibit discrimination on what has been variously labelled as “socio-economic disadvantage”\(^{23}\) or “poverty”. Some advocate for a specific prohibition of discrimination based on “socio-economic status”. One objection to this is that it would benefit the rich as well as the poor (for example, property owners subjected to a mansion tax). Socio-economic status has not been recognised as a basis for discrimination in international law (although “social origin” is) nor in the most progressive jurisdictions. More promising is the notion of “socio-economic situation” such as living in poverty or being homeless, which can lead to stigmatisation and stereotyping. There are several cases in which this has been linked to a prohibited characteristic to support a

\(^{18}\) *Brown v Board of Education* 347 US 483 (1954).

\(^{19}\) *DH and Others v the Czech Republic*, (Application No. 57325/00), 13 November 2007.

\(^{20}\) *Oršuš and Others v Croatia*, Application No. 15766/03, 16 March 2010.


\(^{22}\) *Eldridge v British Columbia Attorney-General* [1997] 3 SCR 624.

\(^{23}\) See above, note 17, Section 1 (not brought into force).
finding of unlawful discrimination. The main advantage of being able to rely on “socio-economic disadvantage” is that it is inclusive. For example, if it is found that a particular practice is indirectly discriminatory on grounds of sex because it has a disproportionate impact on child-bearing women, this may exclude poor men with responsibility for children or the elderly. However, in practice, if a rule or practice with a disproportionate impact on poor women is declared to be unlawful, that rule or practice will have to be scrapped or modified and this is likely to benefit poor men as well. The principle of equality may have a “ratchet effect”, once minimum standards of rights has been achieved for one disadvantaged group, the state must apply this on a non-discriminatory basis (for example, Article 14 of the ECHR).

The Trust’s Guide argues that “equality is at the heart of ESRs. It is the historically and socio-economically most disadvantaged groups who do not enjoy ESRs.”24 The equality law approach advocated in the Guide, provides us with a way to outmanoeuvre the traditional objections to the judicial enforcement of ESRs, whether political, philosophic, ideological, market-based or institutional. It calls in aid a principle that is the foundation stone of human rights proclaimed 66 years ago today in the UDHR. That is a principle to which all democratic states play at least lip-service. Our task is to use that principle as part of a more general political and legal strategy, to counteract the widening inequality and growing inequality in modern societies.

Joanna Whiteman who drafted the Guide under the guidance of Virginia Mantouvalou and Dimitrina Petrova, and with advice from a group of experts, is to be congratulated for producing an excellent guide for litigators in this exciting and promising field.

24 See above, note 16, p. 117.
Walking through Kyiv’s Independence Square – the “EuroMaidan” as it had become known – in February 2014, it was strange to consider that this was a good time to discuss equality law reform in Ukraine. The square was filled with military-style tents and surrounded by man-made barricades; on a stage, religious leaders led services of mourning for those killed in protests which had ended only weeks earlier; the iconic Christmas tree – requisitioned by the protestors as a symbol of their struggle – still dominated the scene. President Yanukovych, whose refusal to sign a European Union-Ukraine Association Agreement the previous November had sparked months of mass protest in this square, had vacated office less than a fortnight before. The country was still in a visible state of shock, convulsing with the after-shocks of the protest movement, the brutal state response and the sudden, unexpected flight of Yanukovych. A new government was in place, but the spectre of conflict in Crimea and the Donbas region was already clear on the horizon.

Yet as the dust settled, civil society organisations were once again mobilising to lobby for improvements to Ukraine’s anti-discrimination legislation. In their view, the appointment of a firmly pro-European government had opened a new window of opportunity for reform, only a few months after the door had been firmly shut when Yanukovych refused to sign the Association Agreement. In the aftermath of regime change, these organisations had identified a crucial moment to press their case.

This experience illustrates the close relationship between the process of equality law reform in Ukraine and the country’s negotiations with the European Union about greater integration. In the last five years, Ukraine has passed two laws seeking to improve the system of protection from discrimination: the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, adopted in 2012 and the Law of Ukraine “On Amendments

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1 Jim Fitzgerald is Head of Advocacy and Richard Wingfield is Advocacy Officer at the Equal Rights Trust. Since 2012, the authors have been involved in implementing an Equal Rights Trust project – Empowering Civil Society to Challenge Discrimination against LGBTI persons in Ukraine, with the financial support of the European Union. Some of the legal analysis contained in this article will be expanded upon in depth in the forthcoming Equal Rights Trust country report on equality and non-discrimination in Ukraine to be published later this year as an outcome of this project. The contents of this article are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Union or the Equal Rights Trust.
to Certain Legislative Acts of Ukraine on Prevention and Combating Discrimination”, adopted in 2014 to amend the 2012 Law. The main catalyst for both pieces of legislation was the previous and current governments’ desire to comply with conditions of the Ukraine-European Union Association Agreement.

The authors have had the privilege to be close observers – and sometime participants – in the process of anti-discrimination law reform which has taken place in recent years. This article sets out our reflections on both the outcome of that process and on the process itself. The article begins with part one, an overview and assessment of the constitutional and legal framework on non-discrimination in Ukraine prior to the adoption of the 2012 Law. It then examines, in part two, the process whereby the 2012 Law was enacted, and assesses the Law against international best practice standards. Part three looks at the amendments introduced in 2014, once again examining the reform process before assessing the extent to which the amendments addressed gaps, inconsistencies and other problems with the 2012 Law. Finally, part four draws together our reflections on the anti-discrimination law reform process which Ukraine has undergone in recent years, posing questions about how this process has influenced the legal framework on non-discrimination.

1. Prior to 2012: A Patchwork of Protections

Prior to the adoption of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” in 2012, the framework of legal protection from discrimination in the country was limited, inconsistent and patchy. The principal protections were found in three instruments, all of which continue in force today: the Constitution of Ukraine and two ground-specific anti-discrimination laws, the Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine” (1991) and the Law of Ukraine “On Equal Rights and Opportunities for Women and Men” (2005). Together, these instruments provided a level and scope of protection for the rights to equality and non-discrimination which fell well below the standard required by the international treaties to which Ukraine is party.

a) Constitution of Ukraine

The Constitution of Ukraine was adopted in 1996, five years after the country declared independence amidst the breakup of the Union of Soviet Socialist Republics. It replaced an earlier Constitution which had been adopted in the Ukrainian Soviet Socialist Republic in 1978. The most important provision from the perspective of the rights to equality and non-discrimination is Article 24, which provides:

Citizens shall have equal constitutional rights and freedoms and shall be equal before the law.

There shall be no privileges or restrictions based on race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence, linguistic or other characteristics.
Equality of the rights of women and men shall be ensured by providing women with opportunities equal to those of men in public, political and cultural activities, in obtaining education and in professional training, in work and remuneration for it; by taking special measures for the protection of women’s health and occupational safety; by establishing pension benefits; by creating conditions that make it possible for women to combine work and motherhood; by adopting legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers.

Article 24 thus contains three separate provisions: a right of citizens to equal constitutional rights and freedoms and to equality before the law (in paragraph 1); a right to non-discrimination (or, rather, a prohibition of “privileges and restrictions” on certain grounds) (in paragraph 2); and a requirement that the state take steps to ensure equality between women and men (in paragraph 3). Taken together, these three provisions provided a basic – though severely limited – constitutional protection for the rights to equality and non-discrimination.

On a positive note, the Constitution provides both a right to equality – which is not limited to a list of specified grounds or characteristics – and a right to non-discrimination. However, the right to equality provided in Article 24(1) is severely limited in its scope. It has two elements – a right to be equal in the enjoyment of other rights and freedoms set out in the Constitution and a right to equality before the law. The Declaration of Principles on Equality – an instrument of international best practice, which has been endorsed by the Parliamentary Assembly of the Council of Europe2 – recognises a right to equality which is far broader in scope than Article 24(1). Principle 1 of the Declaration of Principles on Equality states:

The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.

Whilst Article 24(1) guarantees equality in respect of constitutional rights and freedoms and equality before the law, it omits well-established notions which are reflected in the Declaration of Principles on Equality, such as equality in dignity and the equal protection and benefit of the law.3 Moreover, it contains no freestanding right to equality in parallel to the concept

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3 See, for example, the Universal Declaration of Human Rights, Article 1, which states that “[a]ll human beings are born free and equal in dignity and rights” and the International Covenant on Civil and Political Rights, Article 26, which states that “All persons are (...) entitled without any discrimination to the equal protection of the law”.

of participation on an equal basis with others in any area of economic, social, political, cultural or civil life. Dimitrina Petrova, in a legal commentary on the Declaration of Principles on Equality, has stated that the element of “equal participation” set out in Principle 1 “goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right”.

In contrast, the right to equality in Article 24(1), providing for a right to “equal constitutional rights and freedoms”, takes a subsidiary approach, requiring a connection to another constitutional right or freedom before the right to equality “kicks in”. This said, it should be noted that the Ukrainian Constitutional Court has applied the right to equality in a number of cases since 1996, primarily as an additional means of protection where legislative distinctions between persons are drawn on grounds not listed in Article 24(2) – the right to non-discrimination – or when the distinction is more abstract.

The right to non-discrimination provided in Article 24(2) is arguably more problematic than the right to equality provided in Article 24(1), falling well short of Ukraine’s obligations to prohibit discrimination under international law. The Article provides no definition of “discrimination”. Indeed, paragraph 2 does not even use the word “discrimination”, instead simply prohibiting “restrictions or privileges” which are based on one of the prohibited grounds. Moreover, the scope of prohibited conduct in Article 24(2) is much narrower than the range of acts which would be considered as discrimination at international law. Various UN Treaty Bodies – including most recently the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) – have indicated that states must prohibit direct discrimination, indirect discrimination and harassment in order to meet their obligations to prohibit discrimination under international instruments. The Declaration of Principles on Equality also calls for each of these forms of discrimination to be prohibited.

Yet Article 24(2) can, at best, be regarded as providing protection for a narrow form of just one of these forms of prohibited conduct – direct discrimination. The definition of “direct discrimination” used by the Principle 5 of the Declaration – and echoed by both CESCR and CEDAW – is far broader in scope than a simple prohibition on “restrictions and privileges”. It reads:

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8 See above, note 6.
Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.

Moreover, it is extremely difficult to envisage how the phrase “privileges or restrictions based on” a listed ground could be interpreted to prohibit indirect discrimination. The definition of indirect discrimination in the Declaration – which again is closely mirrored by both CESCR and CEDAW⁹ – reads as follows:

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.¹⁰

Whilst it is possible that “restrictions” could materialise indirectly against persons due to their possession of a particular characteristic, the term “restrictions” is far narrower than “disadvantage”, thus precluding prohibition of all forms of indirect discrimination. Further, the use of the word “based on” implies that the only “restrictions” which would be prohibited by Article 24(2) are those which explicitly reference a protected characteristic, rather than those which have the effect of disadvantaging those with a particular characteristic. Finally, it is difficult, if not impossible, to interpret “privileges and restrictions” as prohibiting harassment, defined in Principle 5 as a situation where “unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

The personal scope of Article 24(2) is also problematic. The provision explicitly lists race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence and language as protected characteristics. This contains some, but not all, of the grounds upon which discrimination is prohibited under Principle 5 of the Declaration of Principles on Equality, omitting descent, pregnancy, maternity, civil, family or carer status, birth, national origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward

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⁹ Ibid.
¹⁰ See above, note 7.
illness. With the exception of carer status and genetic or other predisposition toward illness, each of these grounds is protected in international instruments to which Ukraine is party.  

This said, Article 24(2) provides an “open-ended” list of grounds, through the term “or other characteristics,” allowing for further characteristics to be recognised by the courts.  

To date however, the Constitutional Court has not determined any further characteristics to be implied as “other characteristics”. Indeed, the court’s practice is inconsistent and worrying in itself, with the courts in some cases explicitly stating that “age” could not be a protected characteristic.


12 See Principle 5 of the Declaration of Principles on Equality which provides that, in addition to being prohibited on the explicitly listed characteristics, “Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”

13 See, for example, Decision of the Constitutional Court of Ukraine of 16 October 2007 No. 8-pn/2007.
Article 24(3) is the Constitution’s only provision including measures which appears aimed at providing for “positive action”, though it can only be said to succeed in the narrowest sense. The paragraph sets out a list of measures which the state is required to take in order to ensure “equality of the rights of women and men”:

- Providing women with opportunities equal to those of men in public, political and cultural activities, in obtaining education and in professional training, in work and its remuneration;
- Taking special measures for the protection of women’s occupational safety and health;
- Establishing pension benefits;
- Creating conditions that make it possible for women to combine work and motherhood;
- Providing legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers.

While a number of these elements are unproblematic, the provision does raise two serious concerns. The first is that some aspects appear to reinforce negative stereotypes about women’s capabilities and role in society. For example, whilst women require adjustments in their work conditions during pregnancy and the post-natal period – and indeed this is explicitly required by the Convention on the Elimination of All forms of Discrimination against Women – women do not by definition have any particular occupational safety requirements which differ from those of men. Thus, the provision permitting such special measures appears to legitimise the adoption of measures which restrict women’s ability to freely choose the means of their employment, a right which is guaranteed by both the International Covenant on Economic, Social and Cultural Rights and the Convention. Indeed, there are provisions in the Code of Labour Laws which restrict both women who are pregnant and those with young children from undertaking certain forms of work, even where they are willing and able to do so. Similarly, the provisions regarding the creation of “conditions that make it possible for women to combine work and motherhood” and the provision of “legal protection, material and moral support of motherhood and childhood” may reinforce stereotypical notions about the parental roles and responsibilities of men and women.

The second problem is that Article 24(3) is inadequate both as a positive action provision for women, and as a positive action provision more broadly. CEDAW has stated that states party to the Convention on the Elimination of All Forms of Discrimination against Women are required to “take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures”.

14 Convention on the Elimination of All Forms of Discrimination Against Women, Articles 11(2) and 12(2).
15 International Covenant on Economic, Social and Cultural Rights and the Convention, Article 3; Convention on the Elimination of All Forms of Discrimination against Women, Article 11.
16 See, in particular, Articles 174 to 177.
ures”. Article 24(3) is manifestly too narrow and specific to meet this obligation. Moreover, though paragraph 3 requires measures to be taken to ensure gender equality, no measures are required in relation to equality between persons on the basis of other characteristics – a gap which means that the Constitution falls short of its obligations under both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example.18

b) Ground-Specific Legislation: Disability in 1991 and Gender in 2005

As a party to the ICCPR and the ICESCR, Ukraine is obligated to go beyond simply prohibiting discrimination in its Constitution, and to enact legislation specifically directed at prohibiting discrimination.19 However, until 2012, Ukraine had made only limited progress towards addressing this obligation, enacting only two pieces of legislation focused on the needs of two groups exposed to discrimination – persons with disabilities and women – each of which was also limited in its material scope.


The Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine”, passed by the Verkhovna Rada in 1991, can be considered Ukraine’s first attempt at legislation which seeks to address the needs and disadvantages faced by a group of people exposed to discrimination. However, while the Law has subsequently been amended to address some of its most serious deficiencies, when first enacted, it suffered from two serious deficiencies.

First, it contained only a single provision on discrimination: Article 2 stated simply that “disability discrimination is prohibited and punishable by law” with no further elaboration. Instead, the Law provided for certain types of social protection and concessions for persons with disabilities in various fields of life. Moreover, these benefits and concessions were framed as entitlements or social policy obligations, rather than as rights claimable by persons with disability.

17 See above, Committee on the Elimination of Discrimination Against Women, note 6, Para 9.

18 Human Rights Committee, General Comment 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 5; See above, Committee on Economic, Social and Cultural Rights, note 6, Para 9.

19 Article 26 of the International Covenant on Civil and Political Rights requires states parties to prohibit discrimination in “the law”; in respect of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has stated that “Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2” (Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, Para 37).
Addressing, in part, this deficiency, a new provision was inserted into the Law in 2014 to provide that “discrimination on the basis of disability”, would have the meaning as in the Convention on the Rights of Persons with Disabilities (CRPD) and the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine”. Unfortunately, these definitions are not the same. The CRPD defines “discrimination on the basis of disability” in Article 2 as:

\[
\text{[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.}
\]

The Law of Ukraine “On Prevention and Combating Discrimination in Ukraine”, however, does not have a distinct definition of “discrimination on the basis of disability” but has a general definition of discrimination in Article 1, paragraph 2 as:

\[
A \text{ situation in which an individual and/or group of persons, because of their [characteristic] or other features, whether real or imputed, experiences a restriction in the recognition, enjoyment or exercise of a right or freedom in whatever form prescribed by this law, save where such a restriction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.}
\]

Whilst there are some similarities between the two definitions, there are also a number of differences: the definition in the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” provides for a general justification of different treatment whereas the definition in the CRPD does not; the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” goes on to define five particular forms of discrimination, each with its own definition, unlike the CRPD; and the CRPD includes “denial of reasonable accommodation” as a form of discrimination whereas the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” does not. The Law does not specify which definition is to be preferred, risking confusion in the Law’s interpretation and difficult in assessing compliance with the Declaration. (For an assessment of the compliance of the provisions of the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” with the Declaration, see below).

As such, it is difficult to assess the added benefit of the prohibition of discrimination on the basis of disability in the Law. As noted below, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” prohibits discrimination on the basis of disability in a wide range of fields of activity. The only conceivable benefit is that it is possible to argue that the definition of discrimination in the Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine” should be the one contained within the CRPD which, in some ways, is stronger than that in the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, particularly in that it contains no general justification of different treatment and include denial of reasonable accommodation as a form
of discrimination. However, as noted above, the Law does not make clear which of the two definitions should be used.

The second deficiency of the Law, as originally adopted, was that it reflected an outdated approach to disability. The definition of a person with a disability in Article 2(1) of the Law reflected both the “medical model” of disability focused on the physical disability as the cause for disadvantage and the Soviet approach which defined disability in respect of fitness to work. Article 2(1) stated:

\[
\text{[A] person with a persistent disorder of bodily functions caused by disease, trauma or congenital defects, leading to disability and the need for social assistance and protection.}
\]

In 2010, Ukraine ratified the CRPD and, two years later, amended the Law in order to improve its compliance with the requirements of the CRPD. The definition of a person with a disability was amended: whilst the new definition focused on barriers with the environment faced by persons with disabilities as the cause of disadvantage it retained the emphasis on the state’s duty to support and protect the individual, thus representing only a partial move towards the “social model”:

\[
\text{[A] person with a persistent disorder of body functions that can, when interacting with environment, result in limitation of the person’s life activity, due to which the State must provide conditions for the person to exercise his/her rights on an equal basis with others and must secure its social protection.}
\]


The Law of Ukraine “On Equal Rights and Opportunities for Women and Men” was adopted by the Verkhovna Rada in 2005 and came into force on 1 January 2006. The Law sets out its purpose boldly as:

\[
\text{[A]chieving equality of women and men in all spheres of society through legal equal rights and opportunities for women and men, the elimination of gender discrimination and the use of temporary special measures aimed at addressing the imbalance between women and men to exercise equal rights, granted to them by the Constitution and laws of Ukraine.}
\]

Article 6 is only the provision of the Law which provides a substantive prohibition on discrimination, stating simply that “discrimination based on sex is prohibited”. “Discrimination on grounds of sex” is defined in Article 3 as:

\[
\text{[A]ction or inaction that results in a distinction, exclusion or benefit on the basis of sex, and if it limits or prevents the recognition, enjoyment or exercise of equal human rights and freedoms for women and men.}
\]
This definition mirrors that of Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of in some respects and probably reflects the fact that the Law was introduced in part in response to recommendations from the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) in order to ensure compliance with the CEDAW.\textsuperscript{20} However it has also been criticised by the CEDAW Committee which has stated that “it does not explicitly encompass indirect discrimination, in conformity with article 1”.\textsuperscript{21} Indeed, the Law neither prohibits nor defines different forms of discrimination.

Article 6 provides for a number of exceptions to the general prohibition:

- Special protection of women during pregnancy, childbirth and breastfeeding;
- Compulsory military service for males;
- Differences in retirement age for men and women;
- Specific requirements for the protection of women and men related to the protection of their reproductive health; and
- Positive action.

As with Article 24(3) of the Constitution, some of these exceptions reflect negative stereotypes about the role and position of women in society. The provision limiting the application of the right to non-discrimination to exclude compulsory military service for males, clearly permits direct discrimination on the basis of sex. It does so by making requirements of men that are not made of women. Similarly, differences in retirement age for men and women are also clearly discriminatory and reflective of stereotypes or prejudices about the roles of men and women.

Furthermore, while the fact that the Law permits positive action is to be welcomed, it is noteworthy that positive action is considered an exception to the principle of non-discrimination, rather than as an obligation, required to give effect to the right equality. As noted above, Principle 3 of the Declaration of Principles on Equality provides that “[t]o be effective, the right to equality requires positive action”, while the CEDAW Committee has noted that parties to the Convention on the Elimination of All forms of Discrimination against Women are required to take special measures where appropriate.\textsuperscript{22}

c) Summary

Thus, it is clear that the legal framework on discrimination and inequality before 2012 was inadequate to meet Ukraine’s international legal obligations to respect, protect and fulfil the rights to equality and non-discrimination. The Constitution of Ukraine provided strictly limi-


\textsuperscript{22} See above, Committee on the Elimination of Discrimination Against Women, note 6, Para 9.
ited rights to equality and non-discrimination, with minimal provision for position action. The right to equality was limited to a subsidiary right while the right to non-discrimination provided protection only from some – but not all – forms of direct discrimination, and is too restrictive to prohibit indirect discrimination or harassment. The list of grounds on which discrimination was prohibited was limited and while the Constitution provided an open-ended list, this had not been successfully used to expand the list of protected characteristics. Only two groups of persons vulnerable to discrimination benefited from any protection from discrimination beyond that provided in the Constitution: persons with disabilities and women. Yet as we have seen, both of the laws aimed at addressing the situation of these two groups suffered from severe deficiencies, providing only minimal protection from discrimination.

2. 2012: Towards Comprehensive Protection

In 2012, the system of legal protection from discrimination in Ukraine improved radically, with the enactment of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” (the 2012 Law). While imperfect, with many inconsistencies, omissions and limitations, the 2012 Law nevertheless represented a step-change in the protection from discrimination in Ukraine, marking a decisive move towards comprehensive protection from discrimination.

In contrast to the conventional legislative process, the adoption of this Law came about neither from the government’s commitment to legislate on the issue nor as a consequence of sustained campaigning by those it would benefit. Rather, the Law was enacted solely for the purpose of complying with one of the criteria set down in the EU-Ukraine Visa Liberalisation Action Plan to allow for easier access for Ukrainian citizens the European Union. A draft was submitted to the Verkhovna Rada by the government in May 2012. The Law was adopted, unamended, in September 2012, and came into force shortly thereafter.

The process by which the Law was adopted was widely criticised, both before and after its enactment. The Coalition on Combating Discrimination – an umbrella organisation comprising many non-governmental organisations across Ukraine – expressed concern, in particular, over the speed at which the Law was adopted and the failure to consider expert opinion. As the Coalition set out in a statement issued shortly after the Law’s enactment:

"The Law was drafted by the Ministry of Justice without any consultations with civil society and NGOs. When the Law was submitted to the Parliament, NGO managed to provide comments and suggestions to the Parliament Committee on Human Rights, National Minorities and International Relations. The Committee established a working group to discuss NGOs comments. Ombudsman office also actively participated in the working process and presented its comments to the draft law. On the initiative of the Ombudsman the Law draft for send to the Council of Europe (ECRI) for comments. The Committee speakers clearly promised to continue work on the Law draft taking into account NGOs, Ombudsman recommendations. But despite these previous negotiations, despite the fact that ECRI made a commitment to pro-"
vide their analysis of the Law draft by September 17, 2012 (the Committee was informed on this), the draft was urgently submitted for the second hearing and voted by the Parliament on September 6, 2012. NGOs comments, suggestions to continue work on the draft and proposal to include several missing aspects to make the Law effective were completely ignored by the Committee and the Parliament.23

Largely as a result of this flawed process, the 2012 Law retained a number of serious gaps, deficiencies and weaknesses. These problems were first highlighted by the Council of Europe in 2012 in its review of the draft Law24 and then, after the Law was enacted, raised by both the UN Human Rights Committee (the HRC) in 201325 and the UN Committee on Economic, Social and Cultural Rights (the CESCR) in 2014.26

The 2012 Law included both a general definition of “discrimination” in Article 1(2) and definitions of four prohibited forms of discrimination. In Article 1(2), discrimination was defined as:

[D]ecisions, actions or inactions, which are directed to establish restrictions or create privileges to an individual and/or a group of persons on grounds of race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, marital and property status, place of residence, language or other characteristics (hereinafter – certain attributes) if they preclude the recognition and exercise of human and citizen’s rights and freedoms on equal grounds.

There were two significant problems with this definition of discrimination, both of which were highlighted by the Council of Europe’s Experts in their analysis of the Law. First, international law and best practice dictates that discrimination should be defined as either “direct” or “indirect” and clear and unambiguous definitions for both have been developed, utilised and widely accepted internationally. The Council of Europe argued that a separate definition of discrimination risked creating confusion and inconsistencies in inter-

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pretation.\textsuperscript{27} Secondly, the definition of discrimination provided in Article 1, paragraph 2, referred to “decisions, actions or inactions, which are directed to establish restrictions or create privileges”. Use of the word “directed” appeared to require intent for discrimination to be established\textsuperscript{28} contrary to international best practice, as indicated in the Declaration of Principles on Equality, which provides that “[a]n act of discrimination may be committed intentionally or unintentionally”.\textsuperscript{29}

As noted, this general definition of discrimination appeared alongside Article 6 which prohibited four specific forms of discrimination: direct discrimination, indirect discrimination, incitement to discrimination and harassment. The Law defined \textit{direct discrimination} in Article 1(6) as:

\begin{quote}
[\textit{D}ecisions, actions or inactions which result in instances whereby an individual and/or group of persons are treated less favourably based on certain attributes than other persons in a similar situation.]
\end{quote}

Comparing this definition of direct discrimination in with the definition in Principle 5 of the Declaration of Principles on Equality,\textsuperscript{30} two significant weaknesses can be identified. First, it used the present tense as opposed to the terminology used in Principle 5 – “is treated less favourably than another person or another group of persons is, has been, or would be treated. As such, the definition in the Law excluded from its scope both historic and pre-emptive claims. Secondly, the definition did not include the second situation in Principle 5’s definition, namely “when, for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”. As such, it failed to provide protection “in situations where a person suffers harm because of their possession of a particular characteristic, but is unable to identify another person who benefits or does not suffer the harm because of the absence of such a characteristic”.\textsuperscript{31}

Article 1(3) of the Law defined \textit{indirect discrimination} as:

\begin{quote}
\end{quote}

\textsuperscript{27} See above, note 24, Para 11.
\textsuperscript{28} \textit{Ibid.}, Para 6.
\textsuperscript{29} See above, note 7.
\textsuperscript{30} Principle 5 provides that “Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.”
[D]ecisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices which are formally the same, but during their exercise or implementation restrictions or privileges in respect of an individual and/or a group of persons appear or may appear on grounds of certain attributes, unless such decisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices are objectively justified by the aim of ensuring equal opportunities to an individual or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.

There is a broad international consensus on the core definition of indirect discrimination. Principle 5 of the Declaration of Principles on Equality sets out the following definition:

*Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.* \(^\text{32}\)

This definition has been adopted by, *inter alia*, the CESCR in its interpretation of Article 2(2) of the ICESCR.\(^\text{33}\) The first half of the definition used in the 2012 Law was broadly in line with this definition. However, as the Equal Rights Trust highlighted when reviewing the Law in 2013, the second half of the definition appeared to have been badly drafted:

*[T]he terminology of the exception in Article 1(3) appears to confuse justifiable indirect discrimination with positive action. It creates an extremely high threshold of justification, such that a very large number of provisions, criteria or practices which would not be considered discrimination in any other jurisdiction would have to be defined as indirect discrimination in Ukraine. Therefore, ERT believes that the definition in Article 1(3) creates an unrealistic burden on all potential defendants, risks confusion and misinterpretation, and potentially injustice if the definition is not amended.* \(^\text{34}\)

Reviewing the 2012 Law in June 2014, the CESCR criticised the definitions of both direct and indirect discrimination in the 2012, expressing concern that the Law did not “provide for a definition of direct and indirect discrimination consistent with article 2, paragraph 2, of the

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32 See above, note 7.


34 See above, note 31.
Covenant”. Nonetheless, it should be noted that, unlike the treatment of direct and indirect discrimination, the definition of harassment, provided in Article 1(7) of the Law, was consistent with international and European Union standards.

Despite prohibiting discrimination on grounds of disability, one key omission in the 2012 Law was the absence of any reference to reasonable accommodation. As a party to the Convention on the Rights of Persons with Disability, Ukraine is required to prohibit discrimination on the basis of disability, which is defined in Article 2 as including “all forms of discrimination, including denial of reasonable accommodation”. Although, as noted above, the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine” makes reference to the definition of discrimination found in the Convention, it does not explicitly recognise failure to make reasonable accommodation as a form of discrimination. Thus, neither the 2012 Law nor the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine” clearly set out failure to make reasonable accommodation as a form of prohibited conduct – a major shortcoming of the legal framework.

Article 1(2) of the 2012 Law expressly listed a large number of grounds on which discrimination should be prohibited: race; colour; political, religious or other beliefs; sex; age; disability; ethnic or social origin; nationality; family and property status; place of residence and language. These largely corresponded to the grounds listed in Article 24 of the Constitution, with four further grounds included: age; disability, nationality and family status. Missing, however, were various grounds recognised as requiring protection under Principle 5 of the Declaration of Principles on Equality, specifically descent, pregnancy, maternity, civil or carer status, birth, national origin, economic status, association with a national minority, sexual orientation, gender identity, health status, genetic or other predisposition toward illness. In August 2013, the HRC expressed its concern over the failure explicitly to include sexual orientation and gender identity as protected grounds.

It should be noted however that Article 1(2) did include the phrase “or other features”, thus providing an open-ended list of grounds and enabling courts to provide protection on grounds not explicitly listed. In its 2013 analysis of the Law, the Equal Rights Trust welcomed the use of an open-ended list, but expressed concern at the lack of qualifying criteria for determining the admission of new characteristics. The Trust argued that in the absence of such criteria “the Law lacks certainty as to which further groups having certain characteristics are likely to be recognised and protected by the courts among rights-holders, duty-bearers and

35 See above, note 26, Para 7.
36 See above, note 25, Para 8.
37 See Principle 5 of the Declaration of Principles on Equality which provides that, in addition to being prohibited on the explicitly listed characteristics, “Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”
those responsible for the Law’s implementation and enforcement”. However, there have subsequently been some positive signs in this regard: in 2014, the High Specialised Court of Ukraine for Civil and Criminal Cases wrote a letter to all lower courts stating that Article 1, paragraph 2 (as well as other pieces of legislation which use the phrase “or other features”) includes sexual orientation, however there has been no further judicial recognition of further grounds as being included within the phrase “or other features”.

In other respects, the personal scope of protection provided in the 2012 Law fell short of international law and best practice. Thus, the 2012 Law prohibited neither discrimination by association nor discrimination on the basis of perception, whereas Principle 5 of the Declaration of Principles on Equality provides for both. In addition, the Law did not explicitly provide protection from discrimination based upon a combination of characteristics (multiple discrimination). Principle 5 of the Declaration of Principles on Equality requires that multiple discrimination be prohibited, while both CESCR and the CEDAW Committee have interpreted the instruments which they are responsible for interpreting as requiring protection from discrimination arising because of the intersection of two or more characteristics. Given the inconsistent approach of the Ukrainian courts when approaching the question of the personal scope of non-discrimination provisions, it is clear that an explicit prohibition of multiple discrimination would have been preferable.

Together, Article 6(2) and Article 4(1) together set out the 2012 Law’s scope. The former provided that discrimination was prohibited where it was carried out by state authorities, authorities of the Autonomous Republic of Crimea, local governments and their officials, legal and natural entities. The latter set out the fields of activity in which discrimination should be prohibited, namely “social relations”, followed by an illustrative list of areas in which discrimination would be unlawful. This appears largely consistent both with Principle 8 of the Declaration of Principles on Equality, which requires discrimination to be prohibited in “all areas of life regulated by law”, and with Article 26 of the ICCPR, which the HRC has stated “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”. One exception is that the Law did not prohibit discrimination in legislation

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38 See above, note 31, Para 35.

39 See Principle 12 of the Declaration of Principles on Equality which provides that: “Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground.”

40 See above, note 6, Committee on Economic, Social and Cultural Rights, Para 17; Committee on the Elimination of Discrimination Against Women, Para 18.

41 The Ukrainian term could also be interpreted as “public relations”.

42 See, for example, Principle 8 of the Declaration of Principles on Equality which provides that “The right to equality applies in all areas of activity regulated by law.”

itself: under Ukraine’s constitutional and legal framework, discriminatory legislation is only prohibited if it violates the Constitution.

Article 6(3) of the Law addressed positive action, stating that such measures would not to be considered as a form of discrimination in four cases:

- Special protection by the state of certain categories of persons that require such protection;
- Measures aimed at the preservation of the identity of particular groups of people, where such measures are necessary;
- Subsidies to particular groups of people in cases provided for by the law; and
- Special requirements, provided for by the law, in respect of the exercise of certain rights of persons.

In its 2013 analysis of the Law, the Equal Rights Trust was highly critical of this provision, highlighting two significant weaknesses:

First, positive action is permissible rather than obligatory. Second, positive action is only permissible where it is aimed at eliminating inequality “in the opportunities (...) to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”. This severely limits the situations where positive action measures may be taken, restricting its application to only those situations where access to Constitutional and legal rights is at issue. This definition excludes positive action measures being taken in other areas of life where legal or de facto inequality exists.44

In respect of the procedural elements of anti-discrimination law, the 2012 Law had both strengths and weaknesses. Article 14, making provision for access to justice for victims of discrimination and prohibiting victimisation largely reflected the standards set out in the Declaration of Principles on Equality. However, the provisions on remedies, sanctions and burden of proof all presented both legal and practical problems. Article 15(1) of the 2012 Law limited remedies in discrimination claims to compensation for material and moral damage – a much narrower range of remedies than international law and best practice would dictate. Indeed, in their periodic reviews of Ukraine, both the HRC and the CESCR recommended that the Law be amended to provide for “effective and appropriate” remedies.45

A further problem related to liability and sanctions in discrimination claims. Article 16 provided that “[p]ersons guilty of violation of legislation on preventing and combating discrimination shall bear responsibility in accordance with the laws of Ukraine.” The “laws of Ukraine” include the Criminal Code of Ukraine, which, at Article 161, establishes an offence of, inter alia:

44 See above, note 31, Para 80.
45 See above, note 25, Para 8, and note 26, Para 7.

Direct or indirect restriction of rights or direct or indirect privileges on grounds of race, colour, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language or other features.

The application of criminal liability for discrimination was criticised as inconsistent with the requirements of equality law. As the Equal Rights Trust pointed out in its critique of the Law, there are a number of reasons for limiting liability in discrimination cases to civil liability:

First, discrimination does not require intent and may, indeed, be entirely unintentional, whereas a key principle of criminal law is the presence of mens rea, i.e. that the person had an intention to commit the offence (or was at least negligent or reckless). In cases where the discrimination was entirely unintentional, criminal liability would not be appropriate. Second, a key evidentiary requirement in discrimination cases is the reversal of the burden of proof (...). Third, the focus of criminal proceedings is on punishment of the offender, whereas a key purpose of anti-discrimination law is to provide the victim with an effective remedy.

Finally, the 2012 Law contained no provisions on regarding the reversal of the burden of proof in civil proceedings on discrimination cases, whereas Principle 21 of the Declaration of Principles on Equality provides that:

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.

The failure to include a provision for the shift of the burden of proof was another of the concerns raised by the CESCR in its review of Ukraine’s implementation of the ICESCR.46

3. 2014: Another Step Forward?

The adoption of the 2012 Law was met with criticism from a number of actors, who together highlighted many of the deficiencies and inconsistencies in the Law which are discussed in part 2 above. Efforts to amend the Law began almost immediately after its entry into force, with both the government and civil society putting forwards proposals for amendments. Much of this effort focused on the Eastern Partnership Summit, to be held in November 2013, at which it was hoped that Ukraine and the European Union would sign an Association Agree-

46 See above, note 26, Para 7.
ment, one of the conditions of which would be ensuring legislative compliance with the European anti-discrimination directives.

As early as February 2013, a Draft Law (the 2013 Draft) was submitted to the Verkhovna Rada by the government of Mykola Azarov. In the period to November 2013, parliamentarians, civil society and international actors engaged in discussion about the need to reform and amend the 2012 Law and about the merits of the 2013 Draft. Ukrainian civil society organisations, under the banner of the Coalition on Combatting Discrimination, advocated throughout for the 2012 Law to be progressively amended, focusing in particular on the need to provide explicit protection from discrimination on the basis of sexual orientation and gender identity. In August, the UN Human Rights Committee informed Ukraine that it:

\[5\]should further improved its anti-discrimination legislation to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards. The State Party should explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination and provide victims of discrimination with effective and appropriate remedies.\[57\]

The authors observed many of these developments first hand. Between March and November 2013, we, together with our colleagues at the Equal Rights Trust, participated in eight different workshops and meetings to support advocacy for improvements to the Law. A few weeks before the Eastern Partnership Summit, the Trust convened a high-level seminar on equality law reform in Kyiv and issued a detailed Legal Analysis of the 2012 Law and the 2013 Draft, setting out recommendations to bring Ukrainian anti-discrimination law into line with international standards.

Ultimately however, the 2013 Draft was never adopted. While equality advocates had expressed concern that the European Union might proceed to sign an Association Agreement with Ukraine before the country brought its anti-discrimination legislation into line with European Union standards, other factors were in play. At the summit in Vilnius, President Yanukovych refused to sign the Association Agreement, plunging the country into chaos as pro-European activists took to the streets of Kyiv in protest at his decision. In the months which followed, any form of legal reform was off the agenda as Yanukovych tried and ultimately failed to quell the protest movement.

Following the victory of the protestors and Yanukovych’s flight from the country, the new, explicitly pro-European government of Arseniy Yatsenyuk moved quickly to improve links with the European Union. As part of this process, a new Draft Law to amend the 2012 Law was introduced into the Verkhovna Rada in March 2014 (the 2014 Law). This Law, adopted two months later, made a series of amendments to improve the 2012 Law, though in an echo

47 See above, note 25.
of the 2012 process, the speed with which it was enacted meant that a number of the inconsistencies highlighted by civil society and international actors were not remedied.

Through the 2014 Law, the general definition of “discrimination” in Article 1(2) of the 2012 Law was amended to read:

A situation in which an individual and/or group of persons, because of their race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, nationality, family and property status, place of residence, language or other features, whether real or imputed, experiences a restriction in the recognition, enjoyment or exercise of a right or freedom in whatever form prescribed by this law, save where such a restriction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

With this amended provision, one of the two concerns over the definition from the 2012 Law (the inclusion of a standalone definition of “discrimination” in addition to definitions of specific forms of discrimination) is not addressed. However, the second concern (that of inclusion of the term “directed” in the definition) was addressed, with the new definition making no requirement that discrimination be intentional.

As before, the general definition in Article 1(2) is complemented by further definitions of specific forms of prohibited conduct (now five): direct discrimination, indirect discrimination, incitement to discrimination, assistance in discrimination and harassment. The 2014 Law amended the definition of “direct discrimination” in Article 1(6) to read:

A situation in which an individual and/or group of persons is treated less favourably than another person and/or group of persons in a similar situation, because of a specific characteristic, save where such treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

However, this new definition addressed neither of the concerns raised about the 2012 Law. Instead, the new definition arguably introduces a new weakness, namely a general justification of direct discrimination where the treatment “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. This puts the definition further into conflict with Principle 5 of the Declaration of Principles on Equality, which provides for such a general justification only in cases of indirect discrimination.  

Ironically, given that the Law was revised with the purpose of bringing it closer to EU standards, the amendment also brings it out of step with the EU anti-discrimination directives which also only allow for a general justification in cases of indirect discrimination (with a partial exception for direct discrimination on the basis of age: of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 6.

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The definition of “indirect discrimination” in Article 1(3) was also amended by the 2014 Law, now reading:

A situation where, as a result of the application of formally neutral or legal rules, evaluation criteria, rules, requirements or practices for an individual and/or group of persons put them in a less favourable position, because of a specific characteristic, than other individuals and/or groups of persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This new definition addressed the concern identified with the original definition provided in the 2012 Law, amending the justification for indirect discrimination to bring it in line with that found in Principle 5, the European anti-discrimination Directives and in the interpretation of the non-discrimination provisions in the ICESCR and other international instruments.

The 2012 Law was also amended to prohibit a further form of discrimination, assistance in discrimination, defined in paragraph 51 as “any deliberate assistance in the commission of acts or omissions directed at causing discrimination”. This is the only form of discrimination which does not stem from EU anti-discrimination law, and nor is it prohibited by Principle 5, although similar provisions can be found in the national legislation of certain states, and can thus be considered a positive step.

One of the amendments introduced by the 2014 Law was the inclusion of the concept of reasonable accommodation, though not to any significant extent. The scope of the 2012 Law – set out in Article 4 – was amended slightly to include amongst the list of fields falling within the scope, “labour relations, including the application of the principle of reasonable accommodation by the employer”. However, the amendments did not have the effect of introducing failure to make reasonable accommodation as a form of prohibited conduct, leaving it unclear as to how this provision will provide any enforceable requirement that employers provide such reasonable accommodation.

The 2014 amendments did not address any of the problems identified with the list of grounds which are explicitly stated – no further grounds were added, but the list remained open-ended, thus enabling legal challenge to introduce further grounds not listed to receive protection. In respect of discrimination by association and discrimination by perception, the new definition of discrimination introduced in Article 1(2) appears explicitly to exclude the former and to include the latter. In respect of discrimination by association, use of the word “their” before listing the characteristics, would appear to exclude discrimination by association (although the word “their” is not included in the definitions of direct and indirect discrimination, risking confusion and inconsistent interpretation). Inclusion of the words “whether real or imputed”,

49 See, for example, section 112 of the United Kingdom’s Equality Act 2010 which provides that “A person (A) must not knowingly help another (B) to do anything which contravenes [the Act]”. 

however, after the list of characteristics thus provides explicit protection from discrimination by perception. It remains unclear from the revised definition of discrimination in Article 1, paragraph 2, whether discrimination based on the protected characteristics includes discrimination based upon a combination of characteristics (multiple discrimination).

The scope of the Law, as set out in Article 6, paragraph 2 and Article 4, paragraph 1, was amended, though only slightly. Article 6, paragraph 2 was amended to provide that discrimination is prohibited where it is carried out by state authorities, authorities of the Autonomous Republic of Crimea, local governments and their officials, legal entities of public and private law and natural persons. Article 4, paragraph 1 was amended to provide that the 2012 Law applied to “the relationship between legal entities in public and private law, the location of which is registered on the territory of Ukraine, as well as individuals on the territory of Ukraine”. The specific scope of the 2012 Law set out in Article 4, paragraph 1, however, remained the same, save that after the term “labour relations”, the words, “including the application of the principle of reasonable accommodation by the employer” were added. As noted above, however, it is not clear whether this will actually make any difference in practice.

The provision on positive action in Article 6, paragraph 3, remains unamended, thus retaining the concern of providing that such measures are permissive rather than mandatory, and considered an exception to the prohibition of discrimination rather than a necessary element of the right to equality.

The provisions on access to justice were also amended slightly. Article 14, paragraph 1, was amended to provide that a person who believes that he or she been discriminated against may file a complaint with the state authorities, the authorities of the Autonomous Republic of Crimea, local governments and their officials, the Verkhovna Rada of Ukraine on Human Rights and/or court order by law, thus broadening the range of bodies to whom a complaint of discrimination can be made.

Article 14, paragraph 2, which prohibits victimisation, was amended slightly, but continues, importantly, to provide that use of the Law cannot be the basis for prejudice and may not cause any adverse consequences for the person who took advantage of this right or any other persons.

The available remedies for victims of discrimination set out in Article 15, paragraph 1 have not been changed: compensation for material and moral damage. As such, the available remedies continue to fall far short of what is required by Principle 22 of the Declaration of Principles on Equality:

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.
Article 16 was amended to provide that persons found guilty of violating the legislation on preventing and combating discrimination bear civil, administrative and criminal liability. This amendment may have been made as a result of a recommendation by the Human Rights Committee in 2013 that “[the Law] should also ensure that those responsible for discrimination bear administrative, civil and criminal responsibility in appropriate cases.” However, the explicit inclusion of criminal liability for discrimination means that concerns over criminal liability which were raised in respect of the 2012 Law remain unaddressed.

Finally, the amending legislation also amended Article 60 of the Civil Procedure Code to provide for a reversal of the burden of proof in discrimination cases, bringing it into line with Principle 21 of the Declaration of Principles on Equality.

4. Conclusion: More Questions than Answers

Less than a year after the Verkhovna Rada passed amendments to the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, it arguably premature to draw definite conclusions about the legal reform process and the impact which this process had on the shape of the legal framework on equality and non-discrimination in Ukraine. However, our experience in the last two years has raised a number of serious questions which we believe merit further consideration.

One fact is clear. Equality law reform in Ukraine has been driven almost entirely by the European Union, or, more accurately, by Ukraine’s attempts to illustrate compliance with the European Union anti-discrimination Directives. It seems reasonable to conclude that without the influence of the European Union, Ukraine would almost certainly not have introduced anything approaching modern, comprehensive anti-discrimination legislation. On balance, this is an undeniable positive: the 2012 Law and the amendments made to it in 2014, despite the problems identified, have resulted in significantly enhanced and increased legal protection from discrimination. Without these reforms, victims of discrimination on grounds other than gender and disability would have severely limited means of securing redress. As advocates of improved protection from discrimination, we welcome any effort to expand the scope of such protections.

However, our experience has led us to be concerned about a number of the “side-effects” of a legal reform process which was largely driven by an external agent. The first and most obvious problem is that the process itself largely ignored the views of those working with, and on behalf of, groups exposed to discrimination in Ukraine. A consistent complaint from the Coalition on Combating Discrimination and others has been that civil society was marginalised and excluded from a process which was almost entirely top-down. Whether for this or other reasons, there was a failure to address some of the gaps and inconsistencies in the draft which had been highlighted by civil society actors, meaning they have remained in the enact-

50 See above, note 25, Para 8.
ed law. In addition, the government’s failure to engage civil society actors in the reform process means that many organisations which would otherwise have increased their knowledge were left uninformed both of the law’s content and its utility in practice. In meetings with civil society over the last two years, there has been a palpable sense of a missed opportunity to engage activists in the process of improving legal protections and bringing the law into effect.

The failure to consult and engage with civil society actors was, in part, attributable to the speed at which the legislation was adopted and amended, and the lack of effort made to subject drafts to any real scrutiny. The 2012 Law was adopted by the Verkhovna Rada in great haste with minimal consultation, leaving inconsistencies within it which might have been addressed had time been taken to heed the views of experts, such as those from the Council of Europe. To take a single example, the inclusion in the Law of a general definition of discrimination which was inconsistent both with international standards and with the Law’s own definitions of direct and indirect discrimination, could have been remedied had the Verkhovna Rada waited to receive the comments of Council of Europe experts before enacting the Law.

The speed with which the legislation was adopted and amended might also reflect an apparent lack of interest in its content by the deputies of the Verkhovna Rada. This is exemplified by the fact that many of the problems with the original Law which had been highlighted by organisations such as the Equal Rights Trust were not addressed when the Law was amended in 2014. Thus, for example, the 2014 Law includes a definition of direct discrimination which retains problems identified in the 2012 – and indeed introduces new weaknesses. This highlights the serious issue of a legislature passing legislation in haste to satisfy the requirements of an external agent rather than taking the time and effort properly to scrutinise the proposals before it.

The speed with which both the 2012 and 2014 Laws were adopted appears to have also resulted in problems in embedding the new anti-discrimination legislation within the wider Ukrainian legal system. For example, in a number of meetings with Ukrainian lawyers in 2013, concerns were raised about how provisions requiring the shift of the burden of proof in discrimination proceedings – which all acknowledged were required both by international law and to ensure the effective functioning of the law in practice – could be introduced in anti-discrimination legislation without significant amendments to laws on civil procedure. It is not clear whether these concerns have been fully and properly addressed through the 2014 Law. Further, the failure to consider how court procedures and available remedies and sanctions would need to be adapted has left lawyers and judges in the difficult position of trying to utilise legislation which does not fit neatly within the existing framework.

More broadly, we are concerned that the enactment of equality legislation only as a means to the end of greater European integration contributed to the lack of genuine support for the new law amongst the Ukrainian polity and the public at large. As noted above, the notion of non-discrimination was not alien to Ukraine before 2012. While imperfect, the
Constitution of Ukraine prohibits discrimination and guarantees equal rights, and before 2012 there was legislation in force aimed at addressing disadvantage affecting both women and persons with disabilities. The new anti-discrimination law could have been framed as building upon these existing protections and as being in line with Ukrainian values, thus enabling a greater sense of appreciation for the protections offered by the law. Instead, the law was framed by the government as a demand from Brussels with which they complied only grudgingly. At best, this approach has limited the Law’s visibility, resulting in low levels of awareness of the rights and protections which the law has established, both amongst rights-holders and amongst duty-bearers. At worst, it may have fostered opposition to what has been presented as the imposition of new rights from “outside”. Indeed, opponents of the European integration process have seized upon the issue of protection from discrimination against sexual orientation as a means of discrediting both the European Union and the government.

Finally, it should be noted that while the objective of ensuring compliance with the European Union Equality Directives has led to a significant expansion in the scope of protection from discrimination in Ukrainian law, even perfect compliance with the Directives would fall short of Ukraine’s international obligations in respect of the rights to equality and non-discrimination. It is worth recalling that the Directives themselves are not without problems, not least in their limited personal scope and the absence of protection for a number of grounds in areas of life other than employment. Other countries which have introduced equality law in response to pressure from the European Union have adopted laws which replicate the weaknesses of the EU directives. In Moldova, for example, European negotiators agreed a grubby compromise, allowing the legislature to provide protection from discrimination on the grounds of sexual orientation only in the area of employment, thus complying de minimis with the Directives. Such a situation was only narrowly avoided in Ukraine.

As noted above, it is probably too early to draw firm conclusions as to how the reform process which was followed in Ukraine could have been improved and whether and to what extent this would have had an impact on the legislation itself. However, our experience indicates that there will be lessons to be learned as the European Union continues its efforts to integrate countries in its immediate neighbourhood, and so drives the process of equality law reform elsewhere in the region.
“There are many who subscribe to the view that the holding and manifestation of religious beliefs, in particular, amount to and/or underpin important collective goods, though there is more room for controversy in relation to this matter given the evils which may emanate from, or at any rate be perpetrated in the name of, religion.”

Aileen McColgan
Discrimination on Grounds of Religion and Belief

Aileen McColgan

There is no doubt that the holding and manifestation of religious and other beliefs attracts a significant degree of protection under international and domestic human rights regimes. That is unsurprising as the freedom to hold and to express and otherwise manifest fundamental views is of central importance to individual autonomy. In addition, there are many who subscribe to the view that the holding and manifestation of religious beliefs, in particular, amount to and/or underpin important collective goods, though there is more room for controversy in relation to this matter given the evils which may emanate from, or at any rate be perpetrated in the name of, religion.

The focus of this short paper is not on the question of whether and how freedom of religion and other beliefs ought to be protected within a traditional human rights framework, understood as a framework which protects individuals from unwarranted interference by the state. I am interested, rather, in the questions of whether and, if so, how religion and other beliefs ought to be protected more broadly, including from interference by private individuals, and whether (and, if so, to what extent) those with religious and other beliefs ought to be able to demand the accommodation of their beliefs whether by the state or by private actors. The jurisdictional context is that of the EU/UK but the question in which I am interested is a broader normative one concerning the level of protection which should be afforded to religious and other beliefs. Further, my primary interest is not with the scope given (or which should be given) to religious or other organisations to discriminate on grounds of religion or belief, rather with the entitlement of individuals to demand protection from such discrimination.

Since the inclusion of “religion or belief” together with “sex, racial or ethnic origin (...) disability, age or sexual orientation” within Article 13 of the Treaty Establishing the European Community (EC Treaty), in 1997, there has been a movement at EU level towards treating religion and other beliefs in like fashion to characteristics such as sex, ethnicity and disability when it comes to implementation of anti-discrimination provisions. Thus in 1999, the European Commission published a package of three proposals to combat discrimination under Article 13 of the EC Treaty. These consisted, respectively, of proposals for:

1 Barrister, Matrix Chambers and Professor of Human Rights Law, Dickson Poon School of Law, King’s College London.
1. a directive establishing a general framework for equal treatment in employment and occupation, which covered age, disability, race, religion or belief and sexual orientation in broadly similar terms (sex already being subject to relatively comprehensive coverage at EU level);

2. a directive implementing the principle of equal treatment of people, irrespective of racial or ethnic origin (note that race was to receive more protection than the other grounds, but the remainder were to be treated in broadly similar fashion); and

3. an Action Programme to run from 2001–2006, the purpose of which was to combat discrimination on the Article 13 grounds.

The proposed directives were implemented in 2000, partly as a result of Member States’ consternation at the rise of the hard right in Austria. Race was excluded from the Employment Directive (Council Directive 2000/78/EC) because it was covered more extensively by what came to be known as the Race Directive (Council Directive 2000/43/EC). The Employment Directive distinguished to a limited degree between the grounds it covered, direct as well as indirect age discrimination being subject to a justification defence, disability discrimination being more broadly defined and religious collectives being given somewhat more freedom to discriminate on grounds of religion and other beliefs than other bodies, or on other grounds. Article 4(2), which was the product of extensive lobbying by the churches, provides (in addition to the standard “occupational requirement” set out by Article 4(1)) that:

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.

This provision goes somewhat further than Article 4(1) of the Employment Directive, which provides a generally applicable exception to the prohibitions on age, disability, religion or belief and sexual orientation discrimination:
Where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out (...), a characteristic (related to a protected ground) constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

It serves, accordingly, to give religious organisations additional “wriggle room” to discriminate on grounds of religion or belief though not (according to the text of the first paragraph of Article 4(2) at least) on other grounds.

Much of the discussion which Article 4(2) provoked concerned the extent to which it would in fact provide religious organisations with the scope to discriminate on grounds of sexual orientation, restrictions on the behaviour of employees designed to “require individuals working for them to act in good faith and with loyalty to the organisation’s ethos” leaving room on their face to include prohibitions on (for example) same-sex sexual activity. Less was said about the fact that it permitted broader scope for discrimination on the basis of religion or belief to some organisations than to others. (In other words, only those organisations which are “churches” or “organisations the ethos of which is based on religion or belief” can take advantage of the scope afforded by Article 4(2) for discrimination.) For the most part, however, the protection accorded by the Employment Directive is accorded in like fashion whether the ground is age, disability, religion or belief, or sexual orientation.

As indicated above, my interest in this paper is not with the freedom to discriminate provided to organisations, religious or otherwise, rather with the protection afforded to individuals in relation to their religious or other beliefs other than through the mechanism of religious freedom provisions such as Article 9 of the European Convention on Human Rights (ECHR) and Article 10 of the EU Charter of Fundamental Rights. The main source of such protection is in anti-discrimination provisions (in Britain, the Equality Act 2010).

The UK followed the lead provided by the Employment Directive by enacting legislation designed to implement the prohibitions on employment-related age, religion or belief and sexual orientation discrimination (disability discrimination having been regulated prior to the passage of the Employment Directive). More recently, the UK extended the scope of religion or belief discrimination legislation to cover education, access to goods, facilities and services, housing, membership of associations and public functions. In so doing, the UK continued the trend of treating religion or belief broadly similarly to grounds such as sex, sexual orientation and ethnicity. Many European States adopted a similar approach, exceptions as of September 2013 included Germany (which provided scant protection beyond employment in respect

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2 This occurred both in Great Britain, by means of the Equality Act 2006 and, more recently, the Equality Act 2010, and in Northern Ireland by the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.
of belief,\textsuperscript{3} Norway (which protected religion or belief more broadly than age or sexual orientation) and Denmark (which protected belief and sexual orientation more broadly than age or disability). The 2008 proposal for a Directive extending protection on grounds of age, disability, religion or belief and sexual orientation beyond employment, progress on which has stalled as developments at Member State level have continued, similarly treats religion or belief as equivalent to the other protected characteristics.\textsuperscript{4}

It is far from obvious, however, why so many jurisdictions treat religion and other beliefs as a characteristic broadly similar to characteristics such as disability, sexual orientation, sex and ethnicity. There are ways in which religion or belief is an obvious bed-fellow to these characteristics; where a woman is denied employment because she wears a head scarf which identifies her as Muslim, or a man is refused service because he is wearing a Kippah, the wrong which is done is similar to that which occurs when a person is denied employment or services (relevant exceptions aside) because she is Asian, or a woman, or because he has been diagnosed with cancer or HIV. But there are other ways in which protection from discrimination on grounds of religion and (in particular) belief functions in an entirely different way from protection against other forms of discrimination.

Take for example a situation in which a dispute arises between individuals as to an aspect of religious doctrine; a Roman Catholic and a Lutheran fall out about whether Christ is present in, or represented by, the Eucharist or, indeed, whether the Eucharist is only and exclusively the actual body of Christ (the Roman Catholic doctrine of \textit{transubstantiation}) or whether it is \textit{both} the actual body of Christ and a wafer (the Lutheran doctrine of \textit{consubstantiation}). The Roman Catholic is the employer of the Lutheran, and following a protracted dispute which is unresolved and which leads to a crisis in relations (both taking their religious faith very seriously, and being at once unwilling to accept the rationality of, or otherwise to respect, the other’s view and being adamant that their own view must be respected, if not agreed with), the Lutheran is sacked.

On the one hand, that dismissal may not be a fair one (this will depend on considerations such as the behaviour of the Lutheran, the procedure followed by the Roman Catholic, the nature and size of the undertaking and the extent to which the continued employment of the Lutheran would have exposed his employer to close contact with him). What is much less clear, however, is whether that dismissal should even in theory be capable of triggering a successful \textit{discrimination} claim.

\textsuperscript{3} As distinct from religion, see generally McColgan, A., \textit{National protection beyond the two EU Anti-discrimination Directives}, European Network of Legal Experts in the Non-Discrimination Field, European Commission, 2013, Chapter 1.

We may well wish to protect Muslims and Jews, Lutherans and Catholics (together with those of other religions and no religions at all) from being discriminated against simply by reason of their identification (real or imaginary) with groups defined by reference to religion (or its absence). Reasons to accord such protection include the fact that religious or other belonging (or perceived belonging) are often proxies for ethnicity (as in Northern Ireland is the case of Catholics and Protestants, and as has been the case in Britain with Muslims, at least until relatively recent events cast them as a group vilified on grounds of religion as well as a proxy for Asian).

Even where this is not the case, the close relationship between religion and ethnicity will often have the effect that disadvantages suffered by reason of that religion will have a significant impact on ethnic sub-groups. The prevalence of Sikh men in the construction trade and the recognition of the impact which would be felt by that community if Sikh men were to find themselves unable to continue to work as builders was the reason behind the exemption granted by the Employment Act 1989 of turban wearing Sikhs from the requirement to wear safety helmets on construction sites. More broadly, where religious or cultural norms (such as dress codes or celebration of particular patterns of prayer, holy days and festivals) are widespread within minority communities, and where the failure to accommodate such practices prevents or deters participation by members of those communities in wider society, there is a strong imperative to secure the accommodation of those practices. This is not to say that individuals must invariably have the right to dress as they please (or as they feel constrained by religious or cultural norms to dress), or that there must be a right to time off for religious or cultural observance, rather that there is a case for a duty of reasonable accommodation designed to facilitate and encourage minority participation.

The protection of religion *qua* religion (more so belief *qua* belief) gives rise to very different issues, however. If we are to be respected as autonomous individuals, we must be accountable for the beliefs which we hold, espouse and act upon. And we must be prepared to bear the reasonable costs of those beliefs. As above, the holding and manifestation of religious and other beliefs attracts protection (absolute and qualified respectively) in respect of penalties imposed by the state, together with a limited degree of protection against penalties imposed by the private individuals (this as a result of the positive obligations, again of limited nature, imposed on states). But there is no human rights principle which requires that I be allowed to have my cake and eat it (this by being entitled to protection against all the consequences of my religious or other beliefs), any more than there is a human rights principle which entitles me to the job of my choice if I have exercised my right as an individual to have a tattoo on my face. Thus, for example, and despite some extension in recent years of the jurisprudence on Article 9 of the ECHR, if my understanding of the requirements imposed by my religion (or simply my world view) is that I may not (as a woman) work outside my home, or that I may

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5 See *Sahin v Turkey*, Application No. 44774/98, 10 November 2005 (accepting that a headscarf ban amounted to an Article 9 interference), *Eweida and Others v UK*, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2013 (accepting that a prohibition by a private employer on the wearing of a crucifix by an employee breached Article 9).
not work in the same space as men, or on a Thursday, or that I must present myself publicly (if at all) enveloped in floor length robes and a tall hat, or in full face paint, I will likely have to bear the costs of those beliefs in terms of my career progression; I will find little succour in Article 9. And if my belief system is such that I regard myself as entitled to deference from individuals of particular ethnic groups, or caste categories, or from men, Article 9 will not avail me.

As I attempted to make clear above, there may well be good reason to accommodate religious and cultural beliefs and practices to avoid exacerbating minority disadvantage. But I would suggest that we should take care to distinguish between this pragmatic approach and one which is premised on the conclusion, or assumption, that religious or other beliefs merit accommodation because they are religious or other beliefs. Even leaving aside the difficulties posed by the claims of the religious to exceptional treatment when it comes to the protection of others from discrimination on grounds of sexual orientation and gender in particular, the prohibition of discrimination on grounds of religion or belief is capable of imposing significant burdens on private bodies as well as upon the state. Freedoms of employers and service providers etc., (including, for example, freedom of association and expression) are limited and, at least where indirect discrimination is regulated or duties of reasonable accommodation imposed, administrative and other costs are imposed. The question must be asked, accordingly, what good is being pursued which justifies the cost that anti-discrimination provisions impose?

Given the atrocities perpetrated in the name of religion it is difficult to sustain an argument that religion itself, as distinct from freedom to hold and manifest religious views, is a public good. It is impossible to argue that “belief” is such a good, since “beliefs” may be banal, pernicious or discriminatory as they may be progressive, tolerant or life enhancing. And whereas, as Lucy Vickers has argued, “respect for religious freedom and religious equality can (…) be demanded as an aspect of upholding minority rights”, there is a leap between this and the assertion that:

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\text{[W]ithout endorsing the views themselves, respect is due to the religious views of others because otherwise one fails to respect the choices they have made about their view of the good.}^{8}
\]

It might equally be argued that, while appropriate as a starting point for discussion, the answer to whether “respect is due to the religious views of others” is dependent entirely upon the content of those views, and that religious beliefs are not to be distinguished from other beliefs in this regard. And if, as I would argue, this is the case, the argument for protection against discrimination of religion (or belief) qua religion (or belief) is simply unsustainable.

\begin{flushleft}
6 Depending on the material scope of the legislation.
8 Ibid., p. 38.
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Driving while Bahá’í:¹
A Typology of Religious Discrimination

Nazila Ghanea²

Abstract

Artin is a six-year old child. He and his 15 year old cousin Gina are being brought up single-handedly by his paternal grandmother. It is not premature death, natural disaster or a life of crime that has led to this situation. Artin’s parents are serving prison sentences due to their religious beliefs. His uncle is also serving a five-year prison sentence on grounds of his religious belief (his aunt Fereshteh Sobhani³ died of cancer a few years ago). The fate of his parents and uncle offer something of a relief considering his paternal grandfather, Rahim Rahimian,⁴ was executed in 1984, again on the grounds of his religious belief when his father and uncle were just 14⁵ and 12 years old respectively. Thanks to the Iranian authorities, his grandmother, Mrs Afagh Khostravi-Zand,⁶ was widowed in her thirties and became the sole carer for the three and 12 year old grandchildren since 2011-2012, all due to “crimes” stemming from their Bahá’í beliefs.

1. Overview

Artin’s parents, Kamran Rahimian and Faran Hesami, received four-year prison sentences for teaching at the Bahá’í Institute of Higher Education (BIHE). Bahá’ís are not generally in the business of setting up their own universities. They only set the BIHE up because four years into the Islamic Revolution of 1979, and by the time its first cultural revolution, Bahá’ís had been systematically excluded as both students and faculty of universities throughout the

¹ A spin on the American expression “Driving While Black”, an expression of the increased likelihood of police stopping blacks while driving compared to whites, i.e. of engrained prejudice against a particular target group.

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³ Iranian women do not change their surnames on marriage.


country, whether publically funded or private. This followed the execution, imprisonment, torture and economic devastation sharply targeting hundreds of Bahá’ís in Iran purely on grounds of their religious belief, with the simple option of “convert to escape death” extended by state agents. They were also purged and terminated from the whole Iranian civil service, forcing thousands of Bahá’ís into the private sector, though even there they were not left in peace. By a stroke of creativity, the Bahá’í community in Iran decided to set up its own self-help university, with an ingenious collaboration between the dismissed Bahá’í faculty and the dismissed students. That university remains active today, but has paid a high price. In addition to prison sentences against dozens of its academics and administrators, the threats against its students, the meagre BIHE facilities have been repeatedly raided and threatened, through numerous efforts over decades to close it down. Instead of bowing out, its collaborators have multiplied and spread, reducing in-person classes to remotely coordinated online seminars, and with reinforcement by a global faculty.

The intergenerational discrimination suffered by families such as that of the Rahimians, has led the UN Special Rapporteur on freedom of religion or belief to describe the situation of the Bahá’ís today as “one of the most obvious cases of state persecution in the world today” in the unrelenting “cradle-to-grave” attacks they are forced to endure. This describes the

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8 As Buck explains “[I]n the years immediately following the 1979 revolution, clerics ordered the arbitrary arrest of Baha’is and the torture and execution of over two hundred of them (particularly members of Bahá’í administrative bodies, often with demands that their families pay for the bullets used to kill them). Other actions taken against Baha’is include confiscation of property, seizure of bank assets, expulsion from schools and universities, denial of employment, cancellation of pensions (with demands that the government be reimbursed for past pension payments), desecration and destruction of Baha’i cemeteries and holy places, criminalizing Baha’i activities and thus forcing the dissolution of Bahá’í administration, and pronouncing Bahá’í marriages as illegal acts of prostitution. In addition, there were relentless propaganda campaigns aimed at inflaming anti-Baha’i passions to instigate mob violence and crimes against Bahá’ís. There are many documented instances of this state instigated incitement to violence.” Buck, C., “Islam and Minorities: The Case of the Baha’is”, Studies in Contemporary Islam, Vol. 5.1–2, 2003, p. 93.


multipronged, state-led and state-orchestrated discrimination unleashed against the largest non-Muslim religious community in Iran. Bahá’ís are not geographically affiliated to particular regions in Iran, they are from diverse ethnic backgrounds and there is no kin-state relationship as there are no Bahá’í states. Bahá’ís are not originally migrants from another state of origin, they do not wear distinctive dress that makes them stand out, do not reject their Muslim or other compatriots and they do not even insist on formal state recognition, but they do seek respect of their human rights in line with their compatriots. The history of their Faith\textsuperscript{13} reaches back just 171 years and was founded in Iran.

2. The Inadequacy of Studies of the “Massively Violating”

Before turning to sketching a typology of the discrimination against the Bahá’ís in Iran, it is worth noting the acute asymmetry in the academic study of discrimination on the basis of religion or belief (henceforth “religious discrimination”). This asymmetry flows from the fact that states that have the most egregious violations prove the least academically satisfying to study. Such states do not have the ground breaking national (and rarely even, regional) cases, they do not produce the new legal developments that academics like to delve into, they do not allow individual petition and therefore do not even lead to individual communications at the UN. Detailed academic field research of these egregious violations of freedom of religion or belief are generally not funded, primarily because they are not feasible due to the serious risks that arise. In the academic literature on religious discrimination, egregious state violators of human rights only produce a faint hint of the vast gap between the normative human rights ambition and their reality on the ground. It is for this reason that the academic literature on religious discrimination clusters around what, in the global scale of things, we might term the “moderately violating” or “marginally violating” states. As a consequence, many academics consider the academic literature of the “massively violating” states as being somewhat crude and academically simplistic, primarily because it cannot build on a rich body of literature. They then dismiss it as being “advocacy” rather than “real” academic work. Legal scholars can be particularly dismissive because they do not find it academically satisfying and nuanced enough. The ironic consequence is that there will always be much more academic interest in, and scholarship on, the “moderately” and “marginally” violating rather than the “massively” violating. As a consequence, there is a dearth of academic studies addressing the discrimination against the Bahá’ís in Iran. At least in political science, there may be some appetite for such work within a historic prism, the highlighting of the political forces and characters, or framed within a comparative approach highlighting the democratic deficit. In the article below, an attempt will be made to situate the religious discrimination against the Bahá’ís in Iran within the broader academic literature, even though it proves something of an uncomfortable fit. For the reasons explained, although there will be some reference to the legal literature, most recourse will be to political science literature.

\textsuperscript{13} That is, along with its “twin revelation”, the Bábí Faith.
Another reason that the academic interest in the case of the Bahá’ís in Iran is limited, even in the political science literature, is that Bahá’ís have not responded violently to their persecution. Their treatment has not led to the emergence of separatist claims (the literature claims that “separatist minorities are likely to suffer from higher levels of repression and discrimination”)\(^{14}\) or has resulted in radicalism, or terrorism.\(^{15}\) This too makes it a less interesting topic of academic study. Furthermore, there was a long standing reluctance by Iranian Studies and Middle Eastern Studies to focus on human rights matters until there was a shift in attitude triggered by the Arab Spring. Iranian Studies did not seriously entertain the study of Bahá’ís as a mainstream topic until recently.\(^{16}\) Legal research interest is also hampered by the lack of comprehensive and easy access to court documents in the Middle East and the additional language barrier.

### 3. Sketching a Typology

Let’s now turn to the features of the Bahá’í case, in a typology we may draw out of discrimination in general and religious discrimination in particular. Clearly discrimination “can take many forms and vary in intensity.”\(^{17}\) One way of defining “religious discrimination” is to refer to “state restrictions on religious practices and limitations on freedom of religion or belief”\(^{18}\) on the one hand, and social hostilities on the other. Another two-pronged definition is, on the one hand, discrimination against a person/persons on grounds of religion or belief; and, on the other, describing discrimination that (allegedly)\(^{19}\) stems from particular religious or belief positions but with regard to others. The parallels for the latter in racial or gender discrimination would describe ideas of racial and male superiority and the discrimination that may flow from this. Since race and gender do not constitute “comprehensive worldviews” in the same way as religion, and since they are not “partnered” to the state in such distinct ways as official state-religion relationships, race and gender do not have the same potential coercive risks to discriminate as broadly as religious discrimination. Even in the case of patriarchy,

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\(^{16}\) “Intellectual Othering and the Bahá'í Question in Iran” was the first international mainstream academic conference dedicated exclusively to the question of the Bahá’ís. It was held at the University of Toronto by The Toronto Initiative for Iranian Studies in cooperation with The Foundation for Iranian Studies in July 2011, details online, available at: http://iranianstudies.ca/bahai/_img/ConferenceProgram-IntellectualOthering-30Jun32011.pdf.

\(^{17}\) See above, note 14, p. 194.


\(^{19}\) It is not the aim of this article to examine which laws are in line with religious legislation and which are not, whose interpretation is valid and whose is not.
the scope of the resulting discrimination – though overlapping – is comparatively narrower.\(^{20}\)

Sometimes the patriarchal regime itself is imposed either through state or community norms in the name of religion.\(^{21}\) However, it is:

\[
[C]lear \text{ from the lack of homogeneity among religions, as well as within them, that some of the patriarchal religious norms, defended on religious freedom grounds, are not agreed upon by the different faiths or even by the various branches within each.}^{22}\]

“Religious discrimination” can therefore describe both the targets of discrimination and the rationale given for discrimination against others, for example through coercive religious regulations, imposition of laws, and restrictions imposed on others on grounds of the perpetrator’s religion or belief. It targets both those who are discriminated due to their (actual or perceived) religion or belief affiliation and those who become victims of discrimination due to the coerced religious positions of the perpetrator. The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief defines the latter – “intolerance and discrimination based on religion or belief” – as:

\[
[A]ny \text{ distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.}^{23}\]

Discrimination that flows from the perpetrator’s religion or belief is usually referred to as “discrimination or violence in the name of religion”\(^ {24}\) in order to clearly distinguish it from

\(^{20}\) Practices fuelled by patriarchy and defended in the name of culture including the following outlined and Raday: “a preference for sons, leading to female infanticide; female genital mutilation (FGM); sale of daughters in marriage, including giving them in forced marriage as child brides; paying to acquire husbands for daughters through the dowry system; patriarchal marriage arrangements, allowing the husband control over land, finances, freedom of movement; husband’s right to obedience and power to discipline or commit acts of violence against his wife, including marital rape; family honor killings by the shamed father or brothers of a girl who has been sexually violated, whether with consent or by rape; witch-hunting; compulsory restrictive dress codes; customary division of food, which produces female malnutrition; and restriction of women to the roles of housewives or mothers, without a balanced view of women as autonomous and productive members of civil society.” Frances Raday, F., “Culture, Religion, and Gender”, International Journal of Constitutional Law, Vol. 1, 2003, p. 670.

\(^{21}\) Ibid., p. 672.

\(^{22}\) Ibid., p. 675.

\(^{23}\) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/RES/36/55, 25 November 1981, Article 2(2).

\(^{24}\) Special Rapporteur Jahangir refers to this as “discrimination and violence in the name of religion or belief (i.e. based on or arrogated to religious tenets of the perpetrator).” Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief: Asma Jahangir, UN Doc. A/HRC/13/40, 21 December 2009, p. 1.
discrimination based on the religion or belief of the victim. The two strands can, of course, overlap in cases where the perpetrator’s religion or belief is used to allegedly justify violations against targeted subjects due to their religion or belief affiliation. This is the case in relation to the Bahá’ís in Iran. The discrimination is targeted against them on grounds of the religion of the Bahá’í victims. The discrimination is also perpetuated in the name of the state religion and takes place in a state that subjects many to discrimination and violence, violating numerous rights. Freedom of opinion and expression, freedom of assembly and association, the right to life, the prohibition of torture, minority rights and participation in public life are just a few of the rights violated. Tamadonfar suggests that:

In Iran, this effort [the Islamisation of the law] is so pervasive that the government has taken the position that only the laws that it enacts in codified or statutory forms constitute binding statements of the principles of Islamic law in its territory.

In addition to the human rights violations affecting many in the name of the state religion, Bahá’ís face additional restrictions in relation to these already restricted rights, again as allegedly required by the state religion.

4. The Scope of Religious Discrimination

A simplistic correlation is sometimes drawn between religious discrimination and infringements to freedom of religion or belief. This is because freedom of religion or belief appears as the most obviously related right. However, just as in the case of gender and racial discrimination, the range of rights that may be violated on grounds of religion or belief also go far beyond that single right. Religious discrimination can, of course, result in a whole host of human rights violations – including the right to life, the prohibition of torture, equality before the law – and a number of other rights, economic, social and cultural as well as civil and political. The scope of the discrimination against the Bahá’ís in Iran is quite staggering. Not only was the persecution government instigated, but it has been perpetuated and has deepened over 36 years, permeating laws and policies: constitutional, educational, civil service, employment, administrative law, family law, inheritance, labour market, military, criminal law, burial, health law, press law, prison law, intelligence and the judiciary, etc.

The extent and embeddedness of the discrimination is reminiscent of Reisman's observation in relation to another context, warning that a "type of acculturation" can result from "the cascade of


27 Ghanea, N., Human Rights, the UN and the Bahá’ís in Iran, Kluwer Law/Martinus Nijhoff and George Ronald, 2002.
atrocities". Future studies should examine the implications in greater detail. Such studies should also calculate the number of civil servants, intelligence personal, cyber hackers/attackers, etc. paid for by the national purse in Iran, committed exclusively to attacking and destroying the Bahá’ís. An estimation of the resources dedicated to this activity over the past 36 years would no doubt be astounding. Even taking both prongs of the definition of “religious discrimination”, the term is rarely used to describe such a broad range of violations, over so many decades, which is why the term “religious repression” or “religious persecution” may be more apt.

5. State Religious Exclusivity

The literature strongly concurs with regard to the far greater risks of discrimination in cases of a strong state-religion relationship. Fox, James and Li refer to this as “state religious exclusivity” or SRE, defined as “state support for a single religion to the exclusion of all others”. They observe that:

[R]eligious exclusive states base at least part of their regime in unpluralistic concepts, thereby increasing the likelihood that they will reject pluralism in other contexts. Endorsing one religion usually entails supporting it in some exclusive manner and correlates highly with religious discrimination. Thus, to the extent that a state separates itself from religion, it should engage in less discrimination.


29 On the inconsistency of the terms being used to describe the gravity of violations, even when only accessing expert regional and UN human rights bodies, the Geneva Academy observes: “Having examined the practice of a range of expert human rights bodies, what conclusions can be drawn? First of all, they do not use a uniform terminology. ‘Gross’, ‘flagrant’, ‘grave’, ‘serious’, and other qualifiers (‘egregious’, ‘massive’) are often used interchangeably and sometimes cumulatively. (...) International bodies sometimes draw on other bodies of law (such as [international humanitarian law]) to strengthen legal claims that a given violation of human rights is ‘severe’ or ‘grave’. (...) The analysis undertaken for this report suggests that expert human rights bodies apply several criteria when they distinguish ‘serious’ violations, though their use is often implicit and no set of criteria has been formally agreed. ‘Serious’ violations are determined by:

- The character of the right.
- The magnitude of the violation.
- The type of victim (vulnerability).
The impact of the violation.”

Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 6, What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty, August 2014, p. 34.

30 See above, note 14, p. 190.

31 Ibid., p. 191.
They recognise the religious exclusivity of Saudi Arabia and Iran as “extreme”, noting in the case of Iran that it “supports a single version of Islam but tolerates some, but not all, other religions, which are given a second-class status”,32 and that this discrimination and repression also restricts Iran’s:

Shi’i Azerbaijani minority as well as several Sunni Muslim minorities. Pakistan, a Sunni Muslim state, restricts the Baluchi, Mohajir, Pashtun, and Sindhi minorities – all of whom are also Sunni Muslims. (…) Both of these states restrict some religious minorities such as the Christians and Bahai in Iran and Ahmadis in Pakistan to a greater extent than non-religiously distinct minorities.33

Ghanem focuses on ethnic minorities. He critiques scholars who have failed to adequately factor in regime type when examining discrimination against minorities, stating that this has a distorting effect. He elaborates the “ethnocracy” or “ethnocratic regime” which employs “democratic procedures while ensuring the hegemony of a particular portion of the population”.34 In such a regime, minority groups cannot enjoy equality and have “limited participation in the nation’s politics, society, economy, and media”.35 According to Ghanem:

The guiding principles of an ethnocratic state guarantee the dominance of the majority and marginality of the minority, as follows:

- A dominant ethnic group takes control of the machinery of state.
- Ethnicity (and/or religion), rather than citizenship, becomes key to the distribution of resources and power, undermining the ‘demos.’
- There is a gradual ethnicization of politics, which is organized by ethnic classes.
- The result is repeated instability.

The ethnocratic logic provides the analytical basis for understanding societies in which the political regime gives sweeping preference to one group over others.36

The ethnocratic regime is:

[F]ounded on the presumed superiority of the dominant group, is not interested in integrating the minority into the larger society. Rather, its aim is to maintain the distinctness of the ruling group and to impose on the (immigrant or native)

32 Ibid., p. 190.
33 Ibid., pp. 205–206.
36 Ibid., p. 365.
minority inherent rules of discrimination and segregation that anchor favoritism for the hegemonic group.\(^{37}\)

In order to camouflage their quest for superiority and to perpetuate control, such governments often resort to fear mongering against particular target groups in order to perpetuate the longevity of their rule.

6. Creative Scapegoating

The track record of the Islamic Republic of Iran, of politicising and arming the public with numerous justifications for scapegoating minorities, is not unique to the Bahá’ís, though it is very pronounced with regard to them. Regarding Jews in Iran, Shahvar emphasises that:

\[\text{[I]n spite of its repeated public announcements in differentiating between ‘Jews’ and ‘Judaism’ (the religious dimension), on the one hand, and ‘Zionism’ and ‘Israel’ (the political dimension) on the other, the Islamic regime in Iran not only fails to make such a differentiation, but actually often identifies the two as one.}\(^{38}\)

Jaspar notes the ideological utility of collapsing anti-Semitism and anti-Zionism:

\[\text{[T]he maintenance of Khomeini’s overt anti-Semitic and anti-Zionist ideology may constitute a means of safeguarding the continuity principle amid important social and political change in Iran. (...) [T]he ‘Jewish threat’ to continuity is actively accentuated by the regime.}\(^{39}\)

In the Bahá’í case, too, the government has sought to fuse theology and politics with accusations of promiscuity, espionage and threat,\(^{40}\) to concoct a wide base for mobilising Bahá’í

\(^{37}\) Ibid., p. 366.

\(^{38}\) Shahvar, S., “The Islamic regime in Iran and its attitude towards the Jews: The religious and political dimensions”, Immigrants and Minorities, Vol. 27.1, 2009, p. 82. This intended obfuscation of the historical, theological and political falls on fertile soil as “the existing anti-Semitic feelings among the Shi’i population are based not only on religious grounds (regarding Jews as infidels, impure and enemies of Islam and his Prophet), but also on political and economic grounds (as collaborators with the Shah and in control of the economy). These anti-Jewish sentiments can also be discerned on the very same grounds at the external level: Jews were the agents and ‘fifth-columnists’ of Israel, Zionism and the West; in control of world’s economy and media; and oppressor of other Muslims (Palestinians and Lebanese). Jews under the Islamic regime in Iran (or under similar regimes throughout the Muslim world) are, therefore, damned. The most they can expect is to be tolerated as ‘second rate citizens’, and as ‘Zionist Jews’ they are viewed as ‘the enemy of both the state and the people’”, Shahvar, p. 105. “Elsewhere Khamenei even suggested that the Zionists closely collaborated with no less than Nazi Germany, adding that the ‘exaggerated numbers’ of Holocaust victims were fabricated to solicit world sympathy for the Jews,” Shahvar, p. 97.


\(^{40}\) See above, note 27.
hatred.\textsuperscript{41} The shifting discourse\textsuperscript{42} around this opportunistic obfuscation, is the very reason why much of the scholarship on different types of discrimination utilises discourse-analytical approaches to examine ideologies and social practices. As the case of Iran’s painting of the Bahá’ís illustrates, it is through discourse that “discriminatory exclusionary practices are prepared, promulgated and legitimised”.\textsuperscript{43} Discourse analysts “relate the discriminatory linguistic features to the social, political and historical contexts of the analysed ‘discursive events’”.\textsuperscript{44} Counter-actions or responses to discrimination also make use of discourse to “criticise, delegitimise, and argue against”\textsuperscript{45} such discriminatory positions and practices.

The fact that major international events impact the treatment of minorities is well recognised in the literature. For example, Sheridan and Gillett note that:

\begin{quote}
[S]ignificant world events do impact on racial and religious prejudice and on discriminatory actions, and that in the current work, religion was more important than ethnicity in indicating which groups were most likely to experience racism and discrimination post-September 11. Major world events that occur in one country have implications for social groups living in another country. (…) The attacks carried out on September 11, 2001 by al-Qaeda, a radical Islamic organization, activated discrimination against other members of the Islamic faith. These results highlight links between world events and intergroup relations, and suggest that norm violators should be aware that the harm they inflict upon other groups can impact members of groups perceived to share their values, even in geographically distant places.\textsuperscript{46}
\end{quote}

The situation of Bahá’ís, Jews and Christians in Iran raises a more dominant concern with the fabrication or exaggeration of associations with international “events”. In the case of the Bahá’ís, the most persistent alleged linkage is with Israel,\textsuperscript{47} so much so that Iran expert Nikki

\begin{thebibliography}{99}
\bibitem{42} See above, note 27.
\bibitem{44} \textit{Ibid.}, p. 1.
\bibitem{45} \textit{Ibid.}, p. 2.
\bibitem{47} The Founder of the Bahá’í Faith, Bahá’u’lláh, suffered his fourth exile to the prison city of Acre/Acca in 1868 and passed away there in 1892. Acca, which was a penal colony of the Ottoman Empire, later situated in Palestine. This city found itself within the boundaries of the State of Israel in 1948. Considering its significance as the place of the passing of the Founder, in due course the administrative centre of the Bahá’í community – the Bahá’í World Centre – built up in the nearby city of Haifa.
\end{thebibliography}
Keddie noted that more Bahá’ís than Jews in Iran have been accused of being Zionists. Of course both claims are spread without any evidence and are purely intended to whip up hatred, but this nevertheless underscores the depths of the desire to endanger Bahá’ís.

7. Non-recognition and Discrimination

The mere fact that discrimination results from a strong state-religion relationship or SRE does not necessarily imply that all discrimination is state-led, state-orchestrated and state-main- tained in the same way that occurs in the case of the Bahá’ís in Iran. Gurr uses the term “group discrimination” to distinguish the discrimination imposed on minorities “as a matter of public policy”. Fox, James and Li emphasise the type of discrimination that is “the result of intentional behaviour”, in our case it comes with a documented, sustained, and high level of state intentionality behind it.

Christians, Jews and Zoroastrians are singled out in the Constitution of the Islamic Republic of Iran as the only recognised religious minorities. This follows the Islamic terminology’s distinction between the abode of peace (Dar al-Islam or Dar al-sulh) and the abode of war (Dar al-harb), and the Qur’anic status offered to protected minorities who are “People of the Book” (Ahl al-Dhimmah) due to their mention in the Qur’an. The Bahá’ís, though constituting the largest non-Muslim religious minority community in Iran, are not “People of the Book” (i.e. recognised in the Qur’an) as their religion post-dates Islam by some 1,200 years. Shahvar describes that the:

[E]ssence of this [Ahl al-Dhimmah] approach is the possibility of living and subsisting under the patronage of the Islamic regime, albeit subject to discrimination as compared to the Muslim population.


50 See above, note 14, p. 193.


53 See above, note 38, p. 86.
The controlled, concessionary, second-class status\textsuperscript{54} is described by the Iranian authorities as a privilege. The discriminatory treatment against the three “Recognised Religious Minorities”\textsuperscript{55} has led to thousands of them leaving the country\textsuperscript{56} and a regular obligation for the five parliamentary representatives of the Iranian Majlis being “wheeled out” to swear their superlative gratitude to the Iranian Government for their treatment.\textsuperscript{57} In this regard it is worth drawing from the study of Tol and Akbaba. They examine whether civilisational ethnoreligious minorities are discriminated against more compared to non-civilisational minorities. As they explain:

\textit{Since our focus is on how Western and Islamic civilizations treat ethnoreligious minorities, we recoded the civilizational identity of the majority group as Western, Islamic or Non-Western/Non-Islamic (i.e. other).}\textsuperscript{58}

They find that Islamic civilisations “discriminate more against non-civilizational minorities than against civilizational ones”\textsuperscript{59} and identify the heightened sense of threat as one of the reasons for this.\textsuperscript{60} They give the following illustrations of the distinction:

\textit{An example of a civilizational ethnoreligious minority, i.e. an ethnoreligious minority that belongs to a different civilization than the majority, would be Turks in Germany. An example of a non-civilizational ethnoreligious minority, i.e. an ethnoreligious minority that belongs to the same civilization as the majority, would be Bahá’ís in Iran.}\textsuperscript{61}

Though incorrectly including Bahá’ís as amongst the category of “Muslims who do not belong to the sect of the majority”\textsuperscript{62} nevertheless their observations are pertinent:

\textsuperscript{54} See above, note 52.


\textsuperscript{56} For example, Shahvar notes that “[A]ll those limitations, restrictions and discrimination brought the majority of the Jewish community in Iran, estimated before the 1978–89 Revolution at between 80 to 100,000 to emigrate, leaving behind only some 25 to 30,000, still considered to be the biggest Jewish community in the entire Muslim world”. See above, note 38, p. 90.

\textsuperscript{57} “As to those Jews who stayed behind, they had to adjust to their inferior status, concentrate more on their own personal and community affairs, and to show, from time to time, their ‘solidarity’ and ‘loyalty’ to the clerical regime.” \textit{Ibid} and note 52.


\textsuperscript{59} \textit{Ibid.}, p. 177.

\textsuperscript{60} \textit{Ibid.}, They define an ‘ethnoreligious minority’, p. 175 as one “when at least 80 per cent of that group’s members are of different religious denominations than that of the dominant ethnic group”, p. 168.

\textsuperscript{61} \textit{Ibid.}, p. 162, footnote 2.

\textsuperscript{62} \textit{Ibid.}, p. 175.
Islamic civilizations discriminate against non-civilizational minorities more than civilizational ones. This is an interesting finding that contrasts with Huntington’s predictions. Could some of the non-civilizational minorities constitute a threat for Islamic civilizations? Muslims who do not belong to the sect of the majority may be perceived as especially threatening or offensive, thus justifying even higher levels of discrimination. For instance, ethnoreligious minorities such as Ahmadis in Pakistan and Baha’is in Iran are both non-civilizational minorities in Islamic states and they all face very high levels of systematic religious discrimination with religious discrimination (...) The Qur’an recognizes Judaism and Christianity as dhimmis, or ‘people of the book’. It considers them earlier and imperfect forms of Islam itself and views them as containing a genuine if distorted divine revelation. Therefore, in the early years of Islam, Christian and Jewish communities were allowed the tolerance of the Islamic state. They were allowed to practice their religions and enjoy a measure of communal autonomy. However, Islam has had great difficulty in accommodating monotheistic religions that emerged from within the Muslim community after the advent of Islam. Heterodox Muslims, such as the Baha’is and Ahmadis, are considered by some orthodox Muslims to be heretical offshoots of Islam and are often subject to severe restrictions. Their followers cannot be dismissed ‘either as benighted heathens, like the polytheists of Asia and the animists of Africa, nor as outdated precursors, like the Jews and Christians, and their very existence presents a challenge to the Islamic doctrine of the perfection and finality of Muhammad’s revelation’. In an interview in 1979, Ayatollah Khomeini was asked about the position of religious minorities in a future Islamic republic. He said that their rights would be respected and that the new republic would guarantee their protection and freedom. When asked specifically about the Baha’is, he asserted that they were harmful and would not be accepted. Both in the official rhetoric and public opinion in Iran, Baha’is are portrayed as apostasy from Islam and are subject to severe discrimination. The decision of an Iranian court illustrates the point. In 1993, a court in Iran found two Baha’is guilty of holding meetings in their homes, and engaging in other Baha’i activities. The court quoted Ayatollah Khomeini’s pronouncement that ‘the privileges of the people of Dhimmi [protected infidels] do not apply to the Baha’is’.63

Whilst non-recognition itself raises discrimination concerns,64 in the case of the Bahá’ís the documentation by the state, delineating the intent to destroy the Bahá’ís, far overshadows it. There are hundreds of documents confirming dismissals of Bahá’ís from civil service jobs, rejections of pensions, demands to repay pensions paid over decades, confiscation of properties, rejection of business licences, refusal of university entrance, even threats to life purely and simply due to Bahá’í belief. Two further documents, however, stand out for laying out

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63 See above, note 58, pp. 175–176.

the comprehensive and disquieting approach of the Iranian government to the Bahá’ís. The first is the 1991 Secret Memorandum that was leaked to the UN by the UN Special Rapporteur on the human rights situation in the Islamic Republic of Iran in 1993. Signed by the Supreme Leader of the Islamic Republic of Iran Ayatollah Khamenei and entitled “the Baha’i question”, the Revolutionary Cultural Council sets out the policy objective of destroying the roots of the Bahá’ís both inside and outside the country, to block their progress and diminish their influence whether through denial of employment, positions of influence or even higher education. The second was released by the UN Special Rapporteur on freedom of religion or belief in March 2006. The Command Headquarters of Armed Forces in Iran, in a confidential letter dated 29 October 2005, instructed the Ministry of Information, the Revolutionary Guard and the Police Force on behalf of the Supreme Leader Ayatollah Khamenei, to identify all the Bahá’ís in Iran, monitor their activities, and in a highly confidential manner to collect information about them.

8. The Response: Constructive Resilience

The response to religious persecution will often be through national courts and procedures, with regional courts providing subsidiary protection and international norms and procedures offering some oversight through the assistance of an independent judiciary and an independent civil society. In the case of the Bahá’ís in Iran, however, their demeaning legal-theological status as “those whose blood can be shed with impunity”, and impure persons who have no constitutional or criminal law status, means that national courts have largely failed to protect them. Furthermore, there is no regional human rights system that has Iran within its purview. In relation to international oversight mechanisms, no in-

65 See above, note 9, p. 6.
68 The same is held with regard to Jews, as Shahvar explains: “The Shi`is have interpreted the Qur’a`nic saying ‘the unbeliever is impure’ literally, and they therefore believe that contact with infidels makes the Muslim impure (najes). Thus, Muslims refrain from any physical contact with them, especially eating or drinking from any dish touched by the unbeliever, or food cooked, prepared or sold by them.” See above, note 38, p. 86. A consequences of this presumed impurity is that “after the establishment of the Islamic Republic (...) certain categories of shopkeepers (mainly those who sold foodstuffs) among the Jews and other religious minorities were required to post signs on their shop, identifying the owners as non-Muslims – a practice reminiscent of Nazi Germany”. Ibid., p. 88. See also Ghanea, N., “Phantom Minorities and Religions Denied: Muslims, Bahá’ís and International Human Rights”, Shia Affairs Journal, Vol. 1, 2009, available at: http://www.researchgate.net/publication/233970479_Phantom_Minorities_and_Religions_Denied_Muslims_Bah%27s_and_International_Human_Rights.
individual petitions to the UN treaty body have been possible due to the fact that Iran has not allowed for the relevant procedures to apply. However, the Special Procedures, oversight processes of the UN Human Rights Council, resolutions of both the Human Rights Council and General Assembly, diplomatic channels and Universal Periodic Review are actively utilised to channel condemnations of Iran’s human rights record, including its treatment of the Bahá’ís in Iran.

Despite the challenges of oversight, the ongoing violations against the Bahá’ís in Iran have not led them to demand separatism, resort to violence or terrorism. This flies in the face of studies that draw a connection between denial of rights and the drive by minorities to such claims. In relation to minorities and terrorism, for example, one research study examined four areas: political participation and representation, economic status, and religious and language rights. Of these, it found that “socioeconomic discrimination against minorities is the only consistently significant and highly substantive predictor of terrorism” and recommended “a reconsideration of more nuanced or targeted measurements of political opportunities available to all segments of society and economic status or inequality as root causes of terrorism”. Bahá’ís in Iran suffer from all of these violations, and violations of their socioeconomic rights are particularly severe. However, they have not responded through violence and terrorism.

Some, like Gurr, have misconstrued the reaction of the Bahá’ís in Iran as political passivity. Gurr observes that:

Nonviolent politics is not a sovereign remedy for all disadvantaged minorities and hopeful ethnonationalists. In some countries and situations, nonviolent ethnic movements are very likely to fail. (...) In Iran, the Baha’is’ doctrine of political passivity has not protected them from persecution by Islamists. Indeed, throughout most of the Islamic world, the rights of non-Muslims and members of ‘heretical’ sects are restricted by religious doctrine and public policy.

69 Iran has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. However, it has not allowed for individual petition under any of these treaties.

70 See above, note 27.


73 Ibid., p. 542.

It may be that this stance has not crushed the robust policy of the Iranian government against the Bahá’ís, but it has widened the support base in favour of the Bahá’ís. In the years since 1979, even senior Shi’a Ayatollah and other senior clerics have, over time, stood up for respect of their basic human rights as citizens. A few prominent expressions of support have come from Ayatollah Montazeri in 2008, Ayatollah al-Sadr in 2011 and Ayatollah Abdol-Hamid Masoumi-Tehrani in 2014. These have been joined by numerous civil society expressions of support by prominent Iranians both inside and outside Iran. Ghanem puts emphasis on both the type of minority and type of regime in impacting responses, and recognises that in the case of ethnocratic regimes, bent on the presumed superiority of a dominant group against others, the effectiveness of minority demands for equality is shaped by “the minority’s social and demographic power, the strength of its group identity, and its ability to maintain a united front against the ethnic majority”. The stance of the Bahá’ís is not against the “ethnic majority”, they have no religious position or policy “against” Shia Muslims or ethnic Persians. However, their position remains strongly “for” justice for all. Instead of Gurr’s description of “political passivity”, the stance of the Bahá’ís may be better described by borrowing Tønder’s understanding of “active tolerance”, a stance that can mobilise tolerance “against inequality and repression”. With their constructive resilience, Bahá’ís in Iran are subverting the Iranian government’s objective to destroy them, to crush them and to drive them out.

Looking ahead, we can again turn to Habermas to note the gap between non-discrimination and active tolerance. Whereas numerous Iranians within and outside Iran are increasingly joining the rallying cry of putting an end to the discrimination against the Bahá’ís in Iran – not least as a key litmus test for an inclusive Iran – what will it take for that call to bridge over to “active tolerance”? Habermas recognises non-discrimination as providing a shared standard for “the moral and the constitutional reasons for toleration”. He also notes that:


77 See above, note 34.

78 See above, note 34, p. 366.


The end of a form of discrimination does not always signify the beginning of tolerance toward the person whom is no longer discriminated against (...) [as this may] only reveal the covert persistence of the old prejudices. In such a situation, ‘tolerance’ would simply be the expression of patronizing benevolence and would not be on a par with the reciprocal toleration of different religious doctrines as is mandatory in a liberal state.  

Distinguishing “mere toleration of outsiders, who are nevertheless considered inferior, and toleration based on mutual recognition and mutual acceptance of divergent worldviews”, he underscores the latter as allowing "religions and democracy to coexist in a pluralistic environment". The constructive resilience of the Bahá’ís in Iran perhaps resembles a response of “active tolerance” to oppression by the victim. By not being satisfied with a patronising benevolence towards their shortcomings, the victims are playing a role in pointing towards the beginning of an active tolerance by all and towards all. The stance of the Bahá’ís in Iran instead is, in the midst of an increase in persecution, one of focusing on building the groundwork for a different culture of coexistence along with likeminded compatriots.

To Habermas this calls for a differentiation between the religious community and the larger political community, as the “political order no longer obeys the religious ethos.” He goes on:

This results, among other things, in the renunciation of violence and the acceptance of the voluntary character of religious association. Violence may not be used to push forward religious beliefs inside or outside the community. Religious doctrines that once provided the state with a sacred source of legitimation cope with an imposed depoliticization.

The depoliticisation of the dominant religion(s), the inclusion of religious minorities in the political community and religious pluralism:

[K]indles and fosters sensitivity to the claims of discriminated groups in general. (...) When the relationship between a dominant religion and the state and its political culture is severed, space is created for the liberties of religious minorities.

83 Ibid., p. 11.
84 Ibid., p. 2.
85 Ibid., p. 6.
86 Ibid.
87 Ibid., pp. 8–9.
Conclusion

The religious discrimination against the Bahá’ís in Iran depicts an extreme example of religious discrimination which is systematic, extensive, state-orchestrated and inter-generational. It is an unusual form of discrimination in that it allows for an “opt out” through coerced conversion. As in other cases of massive violations, its academic study has been largely neglected, though some disciplines have started tackling overlapping issues. The two-pronged definition of religious discrimination helps explain its form, and the literature on state-religion relationships, state religious exclusivity, the ethnocratic logic and the scapegoating rationale, helps us understand its durability. The response of the Bahá’ís to their persecution can be considered as a response of “active tolerance” - refusing to let the prejudice of the oppressor tarnish their world view and focusing instead on the ground works of an alternative.

Justice means giving every individual the opportunity to make use of all of their capabilities. Freedom means the potential and capacity of a human being to grow, evolve, and prepare for change, in line with the values of humanity, without any exceptions among mankind, and without regard to anything which serves to differentiate us, such as ethnicity, race, nationality, gender, religion, or education. (...) I wish that Artin and all the other children, regardless of the family they grew up in and the beliefs they grew up with, could have the chance to learn and to gain knowledge. I wish that, in trying to seek the truth, they could make an informed decision about their beliefs, so that their actions could be the product of those beliefs. 88

88 See above, note 5.
Religion, Belief, Education and Discrimination

Richy Thompson

Introduction

The United Kingdom is unusual amongst the Organisation for Economic Co-operation and Development (OECD) member states in having state-run religious schools. In England and Wales, one third of state-funded schools are legally designated as having a “religious character”, and these include Church of England, Church in Wales, Roman Catholic, Jewish and Methodist schools, and since 1998, Muslim, Hindu and Sikh state schools have also opened, as well as an increasing number of Christian schools of no specific denomination.

The three areas of principal interest to us are admissions, employment and the education provided (whether through the curriculum, as with religious education, or outside of it, as with collective worship). The author will provide an overview of the domestic landscape of schools and of relevant equalities and human rights obligations, then deal with each of these three areas of interest in turn, before offering some concluding thoughts. The focus will primarily be on England and Wales.

1. An Overview of the Landscape of Schools

There are several different types of state-funded “faith school”, as the institutions are commonly known, namely “voluntary aided”, “voluntary controlled” and “foundation” schools – all types of “maintained school” (so called because they are maintained by the local authority in which they are located). In addition, there are “academies” (including “free schools”),

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3 There are other areas we might also consider, such as uniform policies, the teaching of pseudoscience, and sex and relationships education, but for reasons of brevity we will just focus on these three.
which are legally independent schools and do not fall under the thumb of their local authority, but are entirely state-funded through a contract agreed directly with central government known as a funding agreement, which in turn commits them to following some of the laws that maintained schools must follow.  

These different types of faith school and schools with no religious character follow different rules with respect to funding, governance, land and building ownership, religious education (RE), collective worship, admissions and employment policies. The maintained schools must follow the national curriculum and are only allowed to employ teachers who hold qualified teacher status, while the academies and free schools do not have to do either of these things. Maintained schools must also legally designate as having a religious character in order to have any sort of religious ethos. Academies and free schools do not have to follow the national curriculum, are allowed to hire teachers who do not hold qualified teacher status, and can have a religious ethos without formally designating as having a religious character.

Ninety three percent of all schools are state-funded. Of the 7% that are private, over three-quarters are legally designated as being religious. Many, if not most, of the others also have a religious ethos, although precise figures are not maintained.

As of January 2014, 37% of state-funded English primary schools (i.e. ages 4–11) and 19% of state-funded English secondary schools (i.e. ages 11–18) are religiously designated, with a fairly small number having a religious ethos but no designation. They educate 29% and 18% of all state school pupils, respectively. About 54% of religiously designated state schools are voluntary aided, 34% are voluntary controlled (almost all of which are primary schools), 1% are foundation and 11% are academies or free schools (most of which are secondary schools). The number of academies and free schools has been rising rapidly since the Academies Act 2010 allowed existing maintained schools to “convert” to academy status, particularly amongst secondary schools, where some 46% of religious schools are now academies or free schools, compared to 8% four years earlier. The Act also created free schools, a type of brand new academy of which there are now several hundred.

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4. The term “academy” legally encompasses what are known as “converter academies”, “sponsored academies” and “free schools”, although in general parlance is used to refer to the first two. The terms “state-funded school” and “state school” refer to academies (including free schools), as well as to maintained schools. The term “independent school” refers to both academies (including free schools) and to private schools not in receipt of state funds.


6. Figures are calculated from the Department for Education’s annual school census, and are available to download from Edubase (registration required), available at: http://www.education.gov.uk/edubase/.

In Wales, 15% of state schools are religiously designated, of which 63% are voluntary aided, 36% are voluntary controlled, and just 12 are foundation. There are no academies or free schools in Wales.\textsuperscript{8}

Below I present a series of tables outlining the different rules that different types of school must follow with respect to funding, governance, land and building ownership, national curriculum, religious education, collective worship, admissions and employment policies. I will expand upon and define relevant terms in the subsequent sections of the article.\textsuperscript{9}

\textit{Table 1: Funding, governance and land and building ownership rules for different types of state school}

<table>
<thead>
<tr>
<th>TYPE OF SCHOOL</th>
<th>FUNDING</th>
<th>GOVERNORS</th>
<th>LAND AND BUILDING OWNERSHIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community schools (not religious)</td>
<td>From local authority.</td>
<td>Appointed along secular lines.</td>
<td>Owned by local authority.</td>
</tr>
<tr>
<td>Voluntary Controlled schools designated as religious</td>
<td>From local authority.</td>
<td>One quarter appointed by the relevant religious authority.</td>
<td>Normally owned by a charitable foundation run by the relevant religious authority (apart from the playing fields which are normally vested in the local authority).</td>
</tr>
<tr>
<td>Voluntary Aided schools designated as religious</td>
<td>All running costs and 90% of building costs from local authority; remaining 10% from the religious authority.</td>
<td>More than half appointed by the relevant religious authority.</td>
<td></td>
</tr>
<tr>
<td>Foundation schools designated as religious</td>
<td>From local authority.</td>
<td>The foundation usually appoints about one quarter of the school governors but in some cases it appoints the majority of governors.</td>
<td>Owned by the governing body or by a charitable foundation run by the religious authority.</td>
</tr>
</tbody>
</table>

\textsuperscript{8} Figures are calculated from Welsh Government, \textit{Address list of schools}, 13 January 2015, available at: http://wales.gov.uk/statistics-and-research/address-list-of-schools/?lang=en.

\textsuperscript{9} The tables are drawn from the BHA’s table of “Types of school with a religious character”, available at: http://www.humanism.org.uk/wp-content/uploads/schools-with-a-religious-character.pdf, apart from the private schools rows, which have been added by the author for this text.
**Table 1 (continued from p. 73)**

<table>
<thead>
<tr>
<th>TYPE OF SCHOOL</th>
<th>FUNDING</th>
<th>GOVERNORS</th>
<th>LAND AND BUILDING OWNERSHIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Academies and Free Schools designated as religious</td>
<td>From central government. Before 2010, academy sponsor invested 10% or up to £2m of start-up capital costs (whichever is greatest) with remainder of funding from central Government. Often the sponsors’ fee went unpaid, and sometimes were eventually waived altogether. Nowadays, no sponsor is required to invest any money.</td>
<td>If sponsored, the sponsor can appoint all the governors. If converting to academy status from another type of school, the governing body, foundation or trust will form the academy trust and then appoint the governing body. In the case of a brand new free school, the organisation setting it up can appoint all governors. Governing body must include at least two parents and the principal. If with a &quot;faith ethos&quot;, governors may be appointed for religious reasons.</td>
<td>Land typically leased by local authority or diocese to the academy trust for 125 years at peppercorn rate. Otherwise, the school’s land and buildings are owned by the academy trust.</td>
</tr>
<tr>
<td>Academies and Free Schools with no religious designation (but may have a 'faith ethos')</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private schools designated as religious</td>
<td>No state funding.</td>
<td>The owners of the school appoint all the governors. These may be along religious lines.</td>
<td>Owned by the owners of the school.</td>
</tr>
</tbody>
</table>

**Table 2: Curriculum and collective worship rules for different types of state school**

<table>
<thead>
<tr>
<th>TYPE OF SCHOOL</th>
<th>NATIONAL CURRICULUM</th>
<th>RELIGIOUS EDUCATION</th>
<th>COLLECTIVE WORSHIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community schools (not religious)</td>
<td>Must follow.</td>
<td>Set every five years by local Agreed Syllabus Conference (ASC) and overseen by Standing Advisory Council on RE (SACRE). Must be non-confessional. Inspected by Ofsted.</td>
<td>“Wholly or mainly of a broadly Christian character” but subject to SACRE approval may be changed to another faith, multi-faith or spiritual.</td>
</tr>
<tr>
<td>Voluntary Controlled schools designated as religious</td>
<td>Must follow.</td>
<td>As set by ASC and hence non-confessional – unless parents request RE for their children is taught in accordance with the trust deeds and faith of the school. Inspected by person chosen by the governing body (not Ofsted).</td>
<td>Must be “in accordance with the tenets and practices of the religion or religious denomination.”</td>
</tr>
<tr>
<td>TYPE OF SCHOOL</td>
<td>NATIONAL CURRICULUM</td>
<td>RELIGIOUS EDUCATION</td>
<td>COLLECTIVE WORSHIP</td>
</tr>
<tr>
<td>-------------------------------------------------------</td>
<td>--------------------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Voluntary Aided schools designated as religious</td>
<td>Must follow.</td>
<td>Set by governors in accordance with the tenets of the faith of the school (i.e. the trust deeds), unless parents request non-confessional RE for their children as set by ASC. Inspected by person chosen by the governing body (not Ofsted).</td>
<td>Must be “in accordance with the tenets and practices of the religion or religious denomination.”</td>
</tr>
<tr>
<td>Foundation schools designated as religious</td>
<td>Must follow.</td>
<td>As set by ASC and hence non-confessional – unless parents request that RE for their children is taught in accordance with the trust deeds and faith of the school. Inspected by person chosen by foundation governors (not Ofsted).</td>
<td>Must be “in accordance with the tenets and practices of the religion or religious denomination.”</td>
</tr>
<tr>
<td>Academies and Free Schools designated as religious</td>
<td>Does not need to follow, but must teach a “broad and balanced curriculum” including English, Maths and Science.</td>
<td>If the academy is a former foundation or voluntary controlled school, non-confessional unless parents request faith-based RE for their children. Otherwise, set by governors in accordance with the tenets of the faith of the school, unless (for schools opened from 2012 onwards) parents request non-confessional RE for their children as set by ASC. Inspected by a person chosen by the Academy (not Ofsted).</td>
<td>Must be “in accordance with the tenets and practices of the religion or religious denomination.”</td>
</tr>
<tr>
<td>Academies and Free Schools with no religious designation (but may have a “faith ethos”)</td>
<td>Set by governors but must be non-confessional. Many schools choose the syllabus set by the ASC, although there is no requirement to and many don’t. Inspected by Ofsted.</td>
<td>“Wholly or mainly of a broadly Christian character” but subject to government approval may be changed to another faith, multi-faith or spiritual.</td>
<td></td>
</tr>
<tr>
<td>Private schools designated as religious</td>
<td>Does not need to follow, or teach a broad and balanced curriculum.</td>
<td>Can choose whether or not to have any RE and whether or not it will be confessional.</td>
<td>Can choose whether or not to have any collective worship and what its nature will be.</td>
</tr>
</tbody>
</table>
### Table 3: Admissions and employment rules for different types of state school

<table>
<thead>
<tr>
<th>TYPE OF SCHOOL</th>
<th>ADMISSIONS</th>
<th>EMPLOYMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community schools (not religious)</td>
<td>Determined by local authority; cannot discriminate on religious grounds.</td>
<td>Cannot discriminate on religious grounds.</td>
</tr>
<tr>
<td>Voluntary Controlled schools designated as religious</td>
<td>Determined by local authority; most cannot discriminate on religious grounds although a quarter of authorities let some do.</td>
<td>Are required to use a religious test in appointing, remunerating and promoting a fifth of teachers (and in appointing other staff if an “occupational requirement” is demonstrated). These teachers must be able to teach religious education. The head teacher can be included in this.</td>
</tr>
<tr>
<td>Voluntary Aided schools designated as religious</td>
<td>Determined by governors “in consultation” with local authority; can discriminate against all pupils on religious grounds if oversubscribed.</td>
<td>Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion.</td>
</tr>
<tr>
<td>Foundation schools designated as religious</td>
<td>Determined by governors in consultation with local authority; can discriminate on religious grounds if oversubscribed.</td>
<td>Are required to use a religious test in appointing, remunerating and promoting a fifth of teachers (and in appointing other staff if an “occupational requirement” is demonstrated). These teachers must be able to teach religious education. The head teacher can be included in this.</td>
</tr>
<tr>
<td>Academies and Free Schools designated as religious</td>
<td>Determined by governors; can discriminate on religious grounds though with academies that do not replace a pre-existing state school, also known as free schools, can only do so for up to 50% of intake.</td>
<td>Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion. If converting from voluntary controlled or foundation to academy status, existing staff are protected from discrimination. Teachers do not need to hold Qualified Teacher Status.</td>
</tr>
<tr>
<td>Academies and Free Schools with no religious designation (but may have a 'faith ethos')</td>
<td>Determined by governors; cannot discriminate on religious grounds.</td>
<td>If with a “faith ethos”, can use a religious test in appointing, remunerating and promoting some staff if a “genuine occupational requirement” is demonstrated. Teachers do not need to hold Qualified Teacher Status.</td>
</tr>
<tr>
<td>TYPE OF SCHOOL</td>
<td>ADMISSIONS</td>
<td>EMPLOYMENT</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>-------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Private schools</td>
<td>Can discriminate against all pupils on religious grounds, whether or not oversubscribed.</td>
<td>Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion.</td>
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2. The Relevant Legal Framework

The UK has signed up to a range of international laws and treaties, many of which are relevant to this paper. Some, such as the UN Convention on the Rights of the Child (UNCRC), are not incorporated into UK law directly, but are nonetheless binding on the state. Furthermore, 2014 laws in Wales and Scotland require ministers to have regard to the UNCRC when exercising their functions. A similar law in England requires the Office of the Children’s Commissioner for England (the statutory body responsible for promoting and protecting the rights of children in England) to have regard to and monitor the implementation of the UNCRC.

Other European laws are incorporated directly into UK law. The European Convention on Human Rights (ECHR) is incorporated into domestic law through the Human Rights Act 1998, the UK’s human rights law. The Human Rights Act also requires that other domestic legislation is, “[s]o far as it is possible to do so, read and given effect in a way which is compatible with the Convention rights.”

There are also a number of European Union directives that deal with equality and non-discrimination, in particular the Employment Equality Directive (the Directive). These are incorporated into UK law by the Equality Act 2010, the UK’s domestic legislation that prohibits discrimination, harassment and victimisation on the basis of a range of protected characteristics, including religion or belief. The Act prohibits both direct and indirect discrimination (the latter being defined as discrimination that is not in itself because of a protected characteristic, but nonetheless results in individuals who share a protected characteristic being at

10 Something that the coalition Rights of the Child UK (ROCK) campaigns for. The BHA is a member of ROCK.
11 Rights of Children and Young Persons (Wales) Measure 2011.
a disadvantage to those who do not share it, where this discrimination cannot be said to be a proportionate means of achieving a legitimate aim).\textsuperscript{16}

As we shall see, there is a tension within these domestic and international laws and treaties between the freedoms that religious schools in the UK enjoy and the wider equality and human rights obligations. First, faith schools, like all schools, must follow the Equality Act 2010. However, a number of exceptions are written into the Act to permit wider discrimination by religious schools on the basis of religion or belief than would be permitted for other schools. The author will argue that these exceptions are broader than what is permitted by the Directive. There are also a number of other ways in which faith schools discriminate that are problematic under the Act, in particular around admissions.

Second, Article 2 of Protocol 1 of the ECHR provides that:

\textit{No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.}

The author will argue that the second requirement of this Article is not being met for parents who are not religious.

Finally, the author will question whether children’s rights under the UNCRC are being ensured by the state, or if religious schools interfere with these rights.

3. Admissions

a. Overview

The admissions authorities for state schools are legally obliged to follow the School Admissions Code, which lays down a number of requirements that they must follow in devising their admissions procedures.\textsuperscript{17} If a state school is undersubscribed, then it must admit any applicant who applies for a place (except if it is a grammar school).\textsuperscript{18} However, if a state school is oversubscribed, then its admission authority is entitled to rank applicants in accordance with pre-published oversubscription criteria. For “community” schools (the main type of state school with no religious character) and voluntary controlled schools, the admission au-

\begin{footnotesize}
\begin{itemize}
\item[16] Equality Act 2010, Section 19.
\item[18] Which means that grammar schools can require all admitted pupils to meet a minimum academic standard.
\end{itemize}
\end{footnotesize}
Authority is the local authority in which the school resides; for voluntary aided and foundation schools, the admission authority is the governing body of the school; and for academies and free schools, the admission authority is the academy trust.

The Equality Act 2010 prohibits discrimination by a school:

- in the arrangements it makes for deciding who is offered admission as a pupil;
- as to the terms on which it offers to admit the person as a pupil;
- by not admitting the person as a pupil.  

However, an exception to the Act means that this does not apply to religiously designated schools with respect to religion or belief, and similar exceptions are written into the School Admissions Code. Such religious discrimination is very unusual internationally – a 2012 OECD report only identified the UK, Republic of Ireland, Estonia and Israel as allowing state schools to do this. Research by the Fair Admissions Campaign (FAC) only adds some provinces in Canada and a few private schools in receipt of some state funding in Germany to this list, and, in addition, in the Netherlands private faith schools in receipt of state funding can loosely require that pupils and parents support the vision and mission of the school.

In practice what religious selection usually means is giving priority to those who attend worship regularly (for example, once a week for two years), or those who have been initiated into the faith (for example through baptism). But priority can also be given on other grounds as well (for example, one voluntary aided Charedi Jewish school requires pupils to dress modestly and have no TV or internet in the home).

This doesn’t just mean that schools are able to discriminate in favour of their own faith: it also means that they can discriminate in favour of other faiths. This is justified by the Government in its guidance by pointing out that:

19 See above, note 16 Section 85.

20 Ibid., Schedule 11, Para 5.

21 See above, note 17, Paras 1.9 i) and 1.36 and Para 6 of the Appendix.


24 This being Yesodey Hatorah Senior Girls’ School in north London. The school’s admission arrangements are available at: http://najos.org/schools/yhs.
It would, for example, allow a Church of England school to allocate some places to children from Hindu or Muslim families if it wanted to ensure a mixed intake reflecting the diversity of the local population.\textsuperscript{25}

However, in practice what is much more common is for schools to prioritise other denominations over other faiths, or other faiths over those of no faith – for instance, a Catholic school might first prioritise Catholics, then other Christians, then those of other faiths, and then take any other applicant.

As a result of these exceptions and the delegation of authority for admissions, most voluntary aided, foundation, academy and free schools that are designated with a religious character religiously discriminate in their oversubscription criteria (although free schools are only allowed to select up to half of places on the basis of faith), while most voluntary controlled schools do not. In 2011, the Accord Coalition surveyed local authorities and found that only one quarter of them allow voluntary controlled schools to religiously discriminate.\textsuperscript{26} In 2013, FAC examined the oversubscription criteria of every state-funded religious secondary school. It found that if all the schools were all oversubscribed, then their admissions policies dictate that 72\% of their places would be religiously selected, while 28\% would be allocated without reference to faith. From this FAC estimated that 1.2 million school places across England and Wales are subject to religious selection when oversubscribed. FAC also noted a great degree of variation between different faiths, with virtually all Catholic, Jewish and Muslim secondaries (none of which are voluntary controlled) being fully selective; while Church of England secondaries, some of which are fully selective, some partially selective and some not selective at all, on average select about half of their pupils on the basis of faith.\textsuperscript{27}

\textbf{b. Religious selection and international laws and treaties}

There is clearly a tension here between the freedom of faith schools to discriminate in this way and the ECHR. In practice, Article 2 of Protocol 1 does not mean that the state has to fund any particular sort of religious school – but it does mean that the state must offer secular education to those who want it. As Amnesty International put it:


This article guarantees people the right of access to existing educational institutions; it does not require the Government to establish or fund a particular type of education. The requirement to respect parents’ convictions is intended to prevent indoctrination by the state. However, schools can teach about religion and philosophy if they do so in an objective, critical, and pluralistic manner.28

On the other hand, Alice Donald, in a paper published by the Equality and Human Rights Commission, notes that:

According to [Bob] Hepple (...) an unresolved issue is whether the fact that the law allows publicly funded schools to use faith-based admissions criteria is compatible with Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) (the right to education) and Article 14 ECHR (prohibition of discrimination). Sooner or later, Hepple argues, the government is likely to be called upon to provide evidence to support a defence that this discrimination because of religion or belief is necessary and proportionate in a democratic society for the protection of the rights and freedoms of others under Article 9(2) ECHR.29

Indeed, during its legislative scrutiny of the Equality Act 2010, the UK Parliament’s Joint Committee on Human Rights commented:

We do not find persuasive the argument that it is necessary to allow faith schools to discriminate in their admissions on grounds of religion and belief in order to avoid a breach of the parents’ rights under Article 2 Protocol 1 of the European Convention. Another argument is that discrimination is necessary in order to maintain the distinctiveness of religious schools and so maintain the plurality of provision which, it is argued, is required by both Article 9 and Article 2 Protocol 1. This argument is weakened by evidence which suggests, in relation to Church of England schools, that plurality of provision has been preserved even where those schools do not have faith-based admissions criteria. It carries more weight in relation to other faith schools, however. In consequence, the exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn in this Bill.30

Compounding this is the fact that the UNCRC pulls in the opposite direction to the status quo – the Convention seems to guarantee the right to a broad religious education that prepares children for “responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups”\(^{31}\) – something we will return to when we come on to the curriculum.

5 out of the 9 primary schools in our local area select pupils on the basis of religious affiliation. These religious schools gain the highest attainments, the best Ofsted reports and are all over-subscribed. The good non-religious schools are also over-subscribed, and we will need to move house to be within the cut-off distance of one of these schools. Schools should not be allowed to select pupils on the basis of the religious practices of their parents. And certainly should not be allowed to dominate an area. – email received by FAC from a parent in Birmingham, September 2014.

c. Religious selection and direct discrimination on the basis of race and gender

Then there is the question of other protected characteristics. Faith schools are allowed to discriminate in terms of who they admit on the basis of religion, but they are not allowed to discriminate on the basis of the other protected characteristics in the Equality Act 2010. Direct discrimination is not permitted, and this most notably was found by the Supreme Court in the case of JFS, a voluntary aided Jewish school in north London, in 2009, as the school gave priority to pupils who had a parent who was “halachically Jewish” (i.e. met the Orthodox Jewish definition of who is Jewish). According to Orthodox Jewish law, anyone whose mother is halachically Jewish is themselves halachically Jewish whether or not they practise the religion, while anyone else is not unless they convert. Since conversion is a burdensome process, and since Judaism is considered by UK law to be a race as well as a religion, this was found to constitute direct discrimination on the basis of race.\(^{32}\) In December last year, following objections by FAC, the Office of the Schools Adjudicator (OSA), the tribunal responsible for upholding the Schools Admissions Code, decided that neither membership of an Orthodox synagogue, nor requiring parents to have a ketubah (Orthodox Jewish marriage certificate), are permissible criteria in schools’ admission arrangements, as both similarly require the applicants’ parent or parents to be hallachically Jewish. The two schools concerned were also found to be directly discriminating on the basis of gender, as a result of different internal arrangements for boys and girls being reflected in the schools having slightly different admission arrangements for each gender.\(^{33}\)

\(^{31}\) Convention on the Rights of the Child (UNCRC), Article 29.

\(^{32}\) UK Supreme Court, \textit{R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others} [2009] UKSC 15.

d. Religious selection and indirect discrimination on the basis of race and social class

Indirect discrimination is only permitted by the Equality Act 2010 where it is a “proportionate means of achieving a legitimate aim”.

In 2013, Dan Rosenberg and Raj Desai explored this point and speculated that a religiously selective school might be found by the OSA to be indirectly discriminating on the basis of race, disability or sexual orientation: race because religion and ethnicity often correlate, so discriminating in favour of the former also leads to discrimination on the basis of the latter; disability because requirements to attend religious worship are burdensome and it might not be possible for disabled parents or children to meet that burden; and sexual orientation on the basis that a same-sex couple or transgender individual might not be able to fulfil requirements to attend religious worship if the places of worship specified are not tolerant towards them.

The School Admissions Code has fairly analogous provisions for racial groups, disability and special educational needs, and, uniquely (given that it is not a protected characteristic in the Equality Act 2010), for social groups:

Admission authorities must ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs.

The question, of course, is when an admission procedure which disadvantages certain protected groups, is a proportionate means of achieving a legitimate aim. In 2014, FAC took up Rosenberg and Desai’s challenge and objected to a number of Church of England and Roman Catholic schools’ admission arrangements on the basis of their ethnic and socio-economic make-ups being different from those of the pupils living in their vicinities. Some of these cases are still ongoing. In decisions already taken in some of the cases focused on race, the OSA has found that selecting those of a particular faith could be a proportionate means of achieving a legitimate aim, with the legitimate aim being educating those of the faith of the school and the proportionate means of achieving it being prioritising those of the faith in admissions. However, adjudicators have written, while maintaining a religious ethos in a school is a legitimate aim, religious selection cannot be a proportionate means of achieving it as those Church of England schools that do not religiously select in their ad-

34 See above, note 16, Section 19.


36 See above, note 17, Para 1.8.
missions policies show that it is possible for a school to maintain a religious ethos without religious selection.\textsuperscript{37}

Earlier in 2014, Canon Slade Church of England School in Bolton was found by the OSA to be disadvantaging unfairly those of a particular social group in having oversubscription criteria that required parents to attend worship for an extraordinary 11 years in order to maximise their chances of gaining a place.\textsuperscript{38} Later that year, the London Oratory School, a Catholic Academy in west London, was also found by the OSA to be disadvantaging unfairly those who are worse off and not white. This followed on from a 2013 objection submitted by the British Humanist Association (BHA), and was in part a consequence of a number of other aspects of the school’s admissions arrangements being found to be in breach of other aspects of the School Admissions Code, such as the requirement for parents to participate in voluntary activities for a period of three years that could include providing practical support for the Catholic Church.\textsuperscript{39} With that said, these cases cannot be considered to be “test cases” of the sort described in the preceding paragraph, as both hinged on the school doing something unusual in its admission arrangements. The outcome of FAC’s outstanding cases remains to be seen.

In general, the evidence suggests that religious selection causes socio-economic selection. As well as surveying how religiously selective English secondary schools are, FAC also compared schools to their local areas in terms of their socio-economic make-ups, as measured by pupils’ eligibility for free school meals. It found that:

Comprehensive secondaries with no religious character admit 11\% more pupils eligible for free school meals than would be expected given their areas. Comprehensive Church of England secondaries admit 10\% fewer; Roman Catholic secondaries 24\% fewer; Jewish secondaries 61\% fewer; and Muslim secondaries 25\% fewer. There is a clear correlation between religious selection and socio-economic segregation: Church of England comprehensives that don’t select on faith admit 4\% more pupils eligible for free school meals than would be expected, while those whose admissions criteria allow full selection admit 31\% fewer.\textsuperscript{40}

\textsuperscript{37} With respect to Church of England schools not religiously selecting, see, for example, the positions of the Church of England Dioceses of London, Oxford and Lincoln, as cited at http://fairadmissions.org.uk/our-supporters/what-others-say/. With respect to the possible legitimate aims of maintaining an ethos and educating those of the faith, see for example OSA, determination ADA2594: St Bonaventure’s RC School, July 2014, Para 73, available at: https://www.gov.uk/government/publications/st-bonaventures-rc-school.


\textsuperscript{40} See “Groundbreaking new research maps the segregating impact of faith school admissions”, above, note 27.
It also found that religiously selective schools make up about one half of the 100 schools least representative of their areas in terms of having fewer pupils who speak English as an additional language than live locally; as religiously selective schools make up one sixth of all schools, this means they are vastly overrepresented amongst the very least inclusive of immigrants.41 This corroborates research by academics like Rebecca Allen and Anne West, who in 2011 found that:

[H]igher-income religious families are more likely to have a child at a faith school than lower-income religious families (...) Significantly, within the groups of both Church of England and Roman Catholic families, children from top quartile households are statistically significantly more likely to attend faith schools, though the differences are not very large (9 versus 8% for Church of England families and 52 versus 47% for Roman Catholic families).42

A number of other sources make the correlation between religious selection and the socio-economic privilege of schools’ intakes look more like causation. For instance, research by the Sutton Trust has found that 6% of all parents, including 10% of upper middle class parents, said that they had “[a]ttended church services [when they otherwise wouldn’t] so that [their] child(ren) could enter a church school”.43 Six percent may not sound like much, but when compared to the fact that only 4–5% of parents attend church on any given weekday,44 it becomes clear that this is a significant trend. On top of that, the Church of England’s own, unique research into what leads their churches to grow found that:

The results for church growth are interesting. Here the Church school has a key role (...) The most direct impact on attendance may be felt in areas where a pop-

41 Ibid.


ular C of E school is over-subscribed. Some churchgoing is clearly motivated by a desire to qualify for school admission (…) Middle class suburbs with church schools (…) offer great opportunities [for growth].

The researchers even wrote that "[b]eing connected with an over-subscribed school is helpful, if not easy to engineer!"

And while ethnicity is more complicated, due to the fact that not all religions are largely mono-ethnic, FAC has nonetheless also seen that a greater degree of religious selection by Christian schools leads to fewer Asian pupils being admitted. Asian families are much less likely to be Christian, but nonetheless may well want to send their children to Christian schools. Religious selection, where it occurs, prevents that.

On top of this, Barnardo's have reported that:

[S]ervices in Bradford and Luton have found themselves advising increasing numbers of newly arrived eastern European families in recent years. While these families are often devout Catholics and wish their children to attend a faith school, they can struggle to meet the priority admissions criteria for local Catholic secondary schools. In Luton for example, some have only recently arrived or have moved around the city and therefore have not had consistent enough attendance at a particular church to be able to gain the required reference from a priest;

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47 What about other, non-Christian, religious schools? BHA research has found that "the majority of Sikh, Muslim and Hindu state-funded schools have no ‘white British’ pupils at all, while the rest have only one or two at most. At the same time, most Jewish state schools have no ‘Asian’ pupils at all. By comparison, the average Muslim, Hindu and Sikh school is situated in an area where a third of the local population is ‘white British’, whereas Jewish schools are in areas where 12 percent is ‘Asian’." BHA, "Religious schools most racially segregated state schools, new findings show", 18 October 2013, available at: https://humanism.org.uk/2013/10/18/religious-schools-racially-segregated-state-schools-new-findings-show/.

However, this appears to be more an issue of parental preference than oversubscription criteria erecting barriers, as even where these schools have somewhat open admissions policies (for example, free schools having 50% open admissions), such segregation still occurs. One head of a Muslim school told the *Mirror*, "We want non-Muslim girls’ – it’s just that none have ever applied." Penman, A., "Blackburn Islamic faith school causes controversy despite great exam results", *The Daily Mirror*, 18 October 2013, available at: [http://www.mirror.co.uk/news/uk-news/tauheedul-islam-girls-high-blackburn-2465895](http://www.mirror.co.uk/news/uk-news/tauheedul-islam-girls-high-blackburn-2465895). Conversely, it is clear that there is a demand from non-Christian parents to have their children attend Christian schools. Unpublished FAC research shows that the more religiously selective a Church of England secondary school is, the less inclusive it will be of the local Asian population.
others are denied admission because they failed to gain entry (particularly if they arrived mid-year) into a Catholic primary school which operates as a "feeder" to the secondary school.48

This shows that religious selection is particularly problematic when it comes to immigration. Barnardo’s cite patterns of attendance and feeder schools. It is also easy to imagine that complex admission arrangements are harder to navigate when there are language barriers, and immigrants might also be less likely to have baptism certificates which are often required.

e. The opposite problem: parents wishing to avoid religious schools

Frequently parents find themselves unable to access their local schools, or the best school in their area, due to religiously selective admissions policies. But one final issue worth discussing is the converse problem, namely that parents often end up having their child allocated a faith school by the state against their wishes. There is no clearly established legal right for parents to not have their child allocated a faith school by their local authority, and my inbox attests to the fact that this frequently occurs when faith schools are under-subscribed, or have open admissions policies. Whether this is legal is a difficult question. The Government would argue that the fact that parents have the ability to opt their children out of any religious education and collective worship provided means that a parent allocated a faith school is not being discriminated against under Article 14 and Article 2 of Protocol 1. However, such opt-outs are plainly frequently inadequate, especially given how many faith schools like to talk about how their religious ethos permeates all aspects of the school life, possibly with religious elements incorporated throughout the curriculum.49 We will return to this issue later on, but for now note that the School Admissions Appeals Code says:

*The Human Rights Act 1998 confers a right of access to education. This right does not extend to securing a place at a particular school. However, admission authorities and appeal panels need to consider parents’ reasons for expressing a preference when they make admission decisions and when making decisions on appeals. These reasons might include, for example, the parents’ rights to ensure that their child’s education conforms to their own religious or philosophical convictions (as


49 For example, in the Catholic Education Service’s policy document it is written that “A Catholic school’s ‘ethos’ may be understood to be the outward signs and the personal experiences of the teachings of Christ and the Catholic Church in the totality of daily life in a Catholic school.” Stock, M., Catholic Education Service, *Christ at the Centre: Why the Church provides Catholic schools*, The Incorporated Catholic Truth Society, 2013, available at: http://www.secularism.org.uk/uploads/christ-at-the-centre.pdf. Many more examples can be found simply by searching on Google: https://www.google.co.uk/search?q=christian%20ethos%20permeates%20school&rct=j.
far as is compatible with the provision of efficient instruction and the avoidance of unreasonable public expenditure).  

f. Summary

We have seen over the course of this chapter that there are a range of tensions to do with admissions to religiously selective schools. Such selection is permitted by the Equality Act, but may not be compatible with the ECHR right to education and prohibition on discrimination. There are also related issues with Jewish schools being found to be directly discriminating on the basis of race and gender. And there are unresolved questions about religious schools indirectly discriminating on the basis of ethnicity, social background, and perhaps other factors too, with evidence suggesting that religious discrimination causes such ethnic and socio-economic selection. We expect upcoming OSA decisions to shed some light on whether such indirect discrimination is lawful. More generally the author hopes that future governments might restrict, and ultimately outlaw, religious selection by state schools.

4. Employment

a. Overview

We now turn to employment and once again we must start by considering the statute. The Directive prohibits discrimination by employers against employees on the basis of a number of protected characteristics, including religion or belief. However, Article 4 provides an exception to this in the case where a “genuine occupational requirement” (GOR) can be claimed, namely where:

[B]y reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

and, for “churches and other public or private organisations the ethos of which is based on religion or belief”, “where (...) a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement” – but only if legislation permitting such discrimination has existed for longer than the Directive itself.  

The Equality Act 2010 recreates this law, similarly prohibiting discrimination, and also providing an exception for “occupational requirement[s]” where “the application of the requirement is a proportionate means of achieving a legitimate aim”.

51 See above, note 15, Article 4.
52 See above, note 16, Schedule 9, Part 1.
However, unlike in the Directive, there is an exception to this exception, which excludes four sections of education legislation from the Equality Act entirely.\footnote{Ibid., Schedule 22, Para 4, The four sections are School Standards and Framework Act 1998, Sections 58(6)–(7); 60(4)–(5); section 124A; and 124AA.} These sections of the School Standards and Framework Act 1998 permit voluntary aided schools, academies, free schools and private schools to give:

\[P\]reference (...) in connection with the appointment, remuneration or promotion of teachers at the school, to persons – (i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4), or (ii) who attend religious worship in accordance with those tenets, or (iii) who give, or are willing to give, religious education at the school in accordance with those tenets.\footnote{Quoted is School Standards and Framework Act, Section 60(5)(a). This and Sections 124A(2) and 124AA(6) extend the same provisions to all religiously designated schools.}

It similarly provides that:

\[R\]egard may be had, in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.\footnote{Ibid., Section 60(5)(b). This and Sections 124A(3) and 124AA(7) extend the same provisions to all religiously designated schools.}

They also permit voluntary controlled and foundation schools to behave in an identical manner for up to one fifth of teaching staff (and for academies that were voluntary controlled or foundation schools before converting to academy status, a similar limit is applied).\footnote{Ibid., Section 58(1)–(3).}

**b. Genuine occupational requirements examined**

It seems clear that if it were not for the exception to the GOR legislation, schools with a religious character would not be able to require all teachers to share the faith of the school. Schools that teach faith-based religious education would certainly be able to claim a GOR for the head of their RE department, and might also be able to claim a GOR for the headteacher and other senior teaching posts. Some schools might argue that they require a certain proportion of teachers to be of a certain faith, in order to ensure the religious ethos of the school. But surely it goes beyond GOR to permit every voluntary aided school to require every single teacher to share the faith of the school.

The evidence clearly shows that schools go beyond what is permitted by GOR. For instance, the clear policy of the Catholic Education Service for England and Wales (CES), the agency...
of the Catholic Bishops’ Conference of England and Wales that is responsible for education, is that “the posts of Headteacher, Deputy Headteacher and Head or Coordinator of Religious Education are to be filled by baptised and practising Catholics”; for other “Teacher posts – Applicants are advised that schools/colleges are entitled to give priority to practising Catholic applicants.” For non-teaching posts, discrimination is explicitly limited to where a GOR can be demonstrated:

Applicants are advised that schools/colleges (in England only) are entitled to give priority to practising Catholic applicants where it can be demonstrated that it is a proportionate means of achieving a legitimate aim (commonly known as a “genuine occupational requirement”).

Similarly, the CES’s policy is that:

The Bishops require that the Headteacher or Principal, Deputy Headteacher or Vice-Principal, and Head of RE/RE Co-ordinator must be practising Catholics. Preferential consideration should also be given to practising Catholics for all teaching posts and for non-teaching posts where there is a specific religious occupational requirement, i.e., chaplaincy post. In England and Wales statutory provision allows for such preferences to be made.

The meaning is clear: the CES believes that every teacher in every Catholic school can be required to be a practising Catholic, and furthermore that preferential consideration should be given to practising Catholics for every teaching post. The fact that it is not required that Catholics fill every teaching post, and that only preferential consideration is given to practising Catholics for these posts, shows that it cannot be said to be a GOR that the posts are filled by Catholics.

It is easy to find examples of this kind of discrimination happening in practice. A cursory glance at a recruitment website reveals several in just a couple of minutes.

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58 See Stock, M., above, note 49.

59 See for example St Bede’s School, “Person Specification: Head of Mathematics” which states as desirable, “Personally committed and practicing Christian, member in good standing of any denomination served by the school”, available at: https://docs.google.com/document/d/1VfB57yrx6MKI_hsZVCaj3ciobmSwCf-hVgo6iXF2GBc/edit?usp=sharing; St Gregory’s Catholic College, “Person Specification: Head of English”, which states as desirable, “Practicing Catholic”, available at: https://www.tes.co.uk/Upload/Attachments/TES/041DCF0001/Head%20of%20English%20-%20Person%20Specification%20April%202014.pdf; St. Monica’s R.C. High School, “Person Specification: Head of ICT”, which states, “The Governors particularly welcome applications from Practicing Catholics but all applications will be considered,” available at: https://docs.google.com/a/humanism.org.uk/document/d/1bj-CPBu0jsZIjU9y8uW2udxTikXOAyUhjoCzYoOlco/edit; Holy Family Catholic Primary School, letter to prospective candidates titled
It is also clear that this broad freedom of faith schools to discriminate is, or perhaps was, the UK Government’s understanding of the law. The following exchange in parliament between an opposition Member of Parliament and the Minister of State for Schools attests to this fact:

Mr Jim Cunningham: To ask the Secretary of State for Education by what mechanism he will ensure that the selection and appointment of teachers in academy faith schools is compatible with the provisions of the Equalities Act 2010 [stet].

Mr Gibb: All new academies, as with existing academies, will be governed by the employment provisions contained in the School Standards and Framework Act 1998 (SSFA). The SSFA permits faith schools, including faith academies, to discriminate on religious grounds in relation to certain staff and its provisions are preserved under the Equality Act 2010. Faith academies, in line with voluntary aided schools, may apply religious criteria to the appointment of teaching staff but not to non-teaching staff unless there is a genuine occupational requirement for them to be of a particular faith.  

Furthermore, the Government’s Equality Act guidance, last revised in May 2014, states that:

Voluntary-aided schools may apply religious criteria when recruiting or dismissing any member of their teaching staff (...) Religious criteria may not be applied

"Important information on equal opportunity", which states that, “Some teaching posts include specific responsibility for providing leadership and direction in the religious life and Catholic identity of the school and in these cases there will be a requirement that the successful candidate is a baptised and practicing Catholic. In other appointments, where two or more candidates for teaching posts are equally strong in the context of the criteria for appointment, preference may be given to a candidate who is Catholic," available at: https://docs.google.com/a/humanism.org.uk/document/d/1x3pRDiTZ_albqEy91Br_dVADPgzGIyUL-VNEzUXbAEo/edit. Such practice is widespread – many more similar examples are easy to find. Thirteen more are given at BHA, “European Commission re-opens investigation into whether UK ‘faith’ school laws break European employment laws as UK Government shifts position”, 20 February 2015, available at: https://humanism.org.uk/2015/02/20/european-commission-re-opens-investigation-whether-uk-faith-school-laws-break-european-employment-laws-uk-government-shifts-position. See also “Written Answers: Monday 12 July 2010”, House of Commons Hansard, 2010, Column WA111, available at: http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100712w0001.htm#10071230000823.
to any other posts in a [voluntary-aided] school unless there is a genuine occupational requirement.  

Similar exceptions from the GOR law apply in Scotland and Northern Ireland. With respect to Northern Ireland, this is expressly permitted by the Directive itself, which says:

In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

However there is no similar permission for derogation for England, Wales and Scotland. There are similar issues in some other countries as well, but in 2012 the European Commission (EC), told the European Humanist Federation that the only complaints received had been from the UK.

c. European Commission formal investigation

As a result of these problems, in April 2010 the BHA submitted a formal complaint to the EC, alleging that UK law does not correctly implement the Directive, instead allowing discrimination too broadly. In July 2012, the EC took the matter up as a formal investigation. In March 2013, the EC asked the UK Government a number of questions, to which the Government responded in June.

In its response, the Government set out a different position from the one publicly stated. It argued that:

[If] a teacher brought a claim against a school (on the basis that the school, as an employer, had discriminated against them in their remuneration, for example), then the court or tribunal would consider the legislation in this wider context.

61 See above, note 25, Paras 8.17 and 8.19.
62 See above, note 15, Article 15.2.
There is a well-established principle in English and European law that legislation, to the extent possible, must be construed as being consistent with the requirements of European law. If that is not possible, it is to be dis-applied to the extent required for consistency with European law. Bearing this in mind, section 60(5) (a) [of the School Standards and Framework Act 1998, which permits religious discrimination against teachers] could and would, if necessary, be construed and applied by a court or tribunal as permitting preferential decisions on grounds of religious belief, only to the extent that such decisions were consistent with genuine, legitimate and justified occupational requirements.\footnote{UK Government, \textit{Conformity of various UK laws with Article 4 of Directive 2000/78/EC: The observations of the United Kingdom Government}, June 2013 as quoted in \textit{Ibid.}, Para 11.}

There are several things worth noting about this. First, this is a different position from the one publicly taken by the Government, which by distinguishing non-teaching posts as requiring a GOR, makes it clear that religious discrimination in teaching posts is free from that restriction. Second, it is contrary to the position taken by the CES and most faith schools – understandably, given the public position taken by the Government – the consequence of which is that the vast majority of teachers applying for or considering applying for jobs at faith schools, unaware of the fact that UK law is broader than EU law, will be discriminated against without even realising this discrimination is unlawful.

Third, it means that the exception from GOR in the Equality Act 2010 has no point or effect, which leads to the question why it was included in the legislation at all. Fourth, it is not clear that a court or tribunal dealing with a relevant case would behave in the manner the UK Government claims to expect. Indeed, in its portion of the UK Government’s response, the Scottish Government cited a 2012 Employment Tribunal case in which the claimant, a supply teacher, lost, but in the author’s opinion, would not have done, had GOR laws been considered, which they were not. The fact that they were not considered reflects the lack of awareness.\footnote{Employment Tribunals (Scotland), \textit{McShane v Glasgow City Council}, Case No: S/105844/2010, available at: https://humanism.org.uk/wp-content/uploads/3800-12-JUST-UK-Response-Annex-1.pdf.}

And finally, as the BHA pointed out in its response in July:

\begin{quote}
[I]t is not considered acceptable by the European Court of Justice for a national Government to inadequately implement a Directive, instead relying on domestic courts to resolve the difference. In Infringement No 2006/2450, [footnote omitted] the European Commission ruled:

“As the Commission pointed out in the letter of formal notice, the European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal

The Commission then goes on to state “that in relation to a common law legal system a Court of Appeal judgment with precedent value may constitute an adequate transposition of a provision of a Directive.” But in this case we do not have any such judgment.68

However, in March 2014 the EC wrote to the UK Government saying that:

[We] have come to the conclusion that you have provided sufficient clarifications as regards the narrow interpretation of this legislation in line with the Directive. These points are based on complaints which concern the legislation itself and not individual cases. Since we have no evidence of incorrect application of the laws at stake, the clarifications you have provided are considered sufficient. However, we reserve the right to re-assess this position in case we in the future receive evidence of incorrect application, for example complaints concerning individual cases of incorrect application.69

This is in spite of the Scottish Tribunal case noted above and the ease with which it is possible to find individual job recruitment advertisements following UK law but not the Directive. The EC did not inform the BHA of its decision until October 2014,70 and only provided the BHA with the reasoning in December 2014. In light of the individual examples cited earlier in this paper, the BHA asked the EC to re-open the case, which it agreed to do in January 2015.

d. Discrimination on grounds other than religion

Finally, to provide wider context, it is worth noting that there are other ways that schools can discriminate against staff. Marriage and civil partnership are not protected characteristics for the purposes of the Directive, and there have been several high profile incidents of Catholic schools dismissing senior staff for getting divorced, having affairs, having pre-marital relationships, and so on.71 In Spain, teachers of confessional religious education in state schools

68 See above, note 63, Para 13.
69 European Commission, Note for the attention EU pilot contact point of the United Kingdom, March 2014.
are employed by the Catholic Church. In one 2012 case, the bishop refused to renew the employment contract of a priest who chose to get married; the priest challenged this decision at the European Court of Human Rights, but it was decided that the Church’s freedom of religion trumped the priest’s right to a private life under Article 8. Additionally, last year, three Muslim state schools where the pupils are single-sex were found to be claiming GORs on the basis of gender when hiring staff (two were identified by the BHA, one by someone else). The schools were told by the Government that this is unlawful and ordered to stop doing so.

e. Summary

It seems clear that the Directive means that religious schools do not have the legal freedom to religiously discriminate against more than just a few teaching staff. But a straightforward reading of UK law suggests that they can require every teacher to be of a certain religion. The UK Government has in the past confirmed this and the CES has adopted this position as well. As a consequence it is unsurprising that many schools have discriminated in this manner; even though the EC case has shown that even in the Government’s view, such discrimination is unlawful. The apparently meaningless exception in the Equality Act which seemingly permits such discrimination should be repealed.

5. Education

a. Overview

We are principally concerned with two areas of education, namely RE and collective worship.

By law, every state school in England and Wales has to make “provision for religious education for all registered pupils at the school”. At maintained schools without a religious character, and voluntary controlled and foundation schools with a religious character, such RE is overseen by a local authority body known as a “standing advisory council on religious education” (SACRE) and must follow a “locally agreed syllabus”, set at least every five years by another local authority body (often with an identical membership) known as an “agreed syllabus conference” (ASC). Agreed syllabuses must “reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain”, but must not:

74 Education Act 2002. The relevant sections are Section 80 for England and Section 101 for Wales.
75 Education Act 1996, Section 375.
Provide for religious education to be given to pupils at a school to which this paragraph applies by means of any catechism or formulary which is distinctive of a particular religious denomination (but this is not to be taken as prohibiting provision in such a syllabus for the study of such catechisms or formularies).\(^{76}\)

At voluntary aided schools with a religious character, such RE must be “in accordance with the tenets of the religion or religious denomination” of the school.\(^{77}\) The funding agreements of academies and free schools also require them to teach RE, and allow them to set their own syllabus. For academies and free schools with no religious character, and faith academies that converted from being voluntary controlled or foundation schools, the syllabuses must be set “in accordance with the requirements for agreed syllabuses”; while for other academies and free schools with a religious character, the RE must be “in accordance with the tenets of the Academy’s specified religion or religious denomination.”\(^{78}\)

In addition, the Equality Act 2010 precludes discrimination by a school “in the way it provides education for the pupil”,\(^{79}\) although there is an exception to this for schools with a religious character,\(^{80}\) and for the content of the curriculum (so as not to make it illegal to teach about, for example, works of fiction in English with racist, sexist or homophobic portrayals of characters).\(^{81}\)

Every school in England and Wales also has to have a daily “act of collective worship”.\(^{82}\) For schools with a religious character, this has to be “in accordance with the tenets and practices of the religion or religious denomination” of the school.\(^{83}\) For schools with no religious character, this has to be “wholly or mainly of a broadly Christian character.”\(^{84}\) Schools can apply for a “determination” to lift the requirement that the worship is Christian (if, for example, the school considers it would be more appropriate for some or all pupils to attend daily worship in line with another faith), but the requirement to have an act of worship cannot be lifted entirely.\(^{85}\) It is not legally possible for a school to have assemblies that are wholly or mainly secular, let alone humanist. Again, there is an

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\(^{76}\) See above, note 54, Schedule 19.

\(^{77}\) Ibid., Schedule 19.


\(^{79}\) See above, note 16, Section 85.

\(^{80}\) Ibid., Section 89.

\(^{81}\) Ibid., Schedule 11, Para 5.

\(^{82}\) See above, note 54, Section 70.

\(^{83}\) Ibid., Schedule 20.

\(^{84}\) Ibid.

\(^{85}\) Ibid.
exception written into the Equality Act 2010 to ensure that collective worship does not fall afoul of the legislation.\textsuperscript{86} We believe the UK is the only country in the world to require all pupils to take part in a daily act of worship, with the default assumption that this worship is Christian.\textsuperscript{87}

\textbf{b. The place of non-religious worldviews in RE}

Several issues arise from this. One is the place of non-religious worldviews such as Humanism in the RE curriculum at schools with no religious character, as well as the place of religions that are not deemed to be “principal” (a term generally understood to mean Christianity, Islam, Judaism, Hinduism, Sikhism, and Buddhism). This article will address the question of non-religious worldviews, and at this stage we will deviate from considering issues to do with faith schools. The BHA believes the most appropriate place for teaching about non-religious worldviews to occur is in RE, because all the contemporary justifications for the subject of RE in schools (other than when such teaching is confessional) logically also apply to teaching about non-religious worldviews.\textsuperscript{88}

The law, on the face of it, only refers to the teaching of “principal religions”. But since the relevant domestic legislation was passed, the Human Rights Act 1998 has also been passed. Legal advice the BHA has obtained from David Wolfe QC explains that this Act\textsuperscript{89} and subsequent case law such as the \textit{Folgerø} case (a Norwegian case that essentially established that the state must be neutral on matters of religion or belief in the school curriculum),\textsuperscript{90} taken together, mean that prior references in law to “religion” should, as much as possible, be read as “religion or belief”.

This matches most international guidance on the matter; for example the Office for Democratic Institutions and Human Rights-Organization for Security and Co-operation in Europe’s Toledo Guiding Principles on teaching about religions and beliefs in public schools,\textsuperscript{91} the Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination,\textsuperscript{92} and the Council of Eu-

\textsuperscript{86} See above, note 16, Schedule 11, Para 6.


\textsuperscript{89} In particular, see above, note 14, Section 3(1).

\textsuperscript{90} European Court of Human Rights, \textit{Folgerø and Others v. Norway}, Application No. 15472/02, 29 June 2007.

\textsuperscript{91} Organization for Security and Co-operation in Europe, \textit{Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools}, November 2007.

rope’s Recommendation of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education. Such inclusion was specifically recommended in the UN Special Rapporteur on freedom of religion or belief’s last report on the UK.

This legal advice and these recommendations have implications not only for RE curriculums, but also for the composition of ASCs and SACREs, which at the moment have a group for “religions and denominations” reflecting “the principal religious traditions in the area” (other than the Church of England who in England get their own separate group). It has been the subject of some debate as to whether humanists can be full members of that group, or are limited to co-option onto SACREs in a non-voting capacity (ASCs do not provide for the possibility of co-option). The vast majority of SACREs in England now have a humanist as a member. An increasing number have full members, but there is still some uneasiness, with most humanists being co-opted, and half a dozen only being observers (SACRE meetings are public meetings which anyone is entitled to attend), unallowed to speak without the chair’s permission. One SACRE (Birmingham’s) actively campaigns against Humanism being on locally agreed syllabuses and humanists being members of the SACRE. Birmingham SACRE even successfully threatened the Government over this matter when it was producing new guidance in 2009. The SACRE has also had long-running difficulty over the place of the Ahmadiyya Muslim Community, with the other Muslim representatives refusing to grant membership to an Ahmadi Muslim under the title “Ahmadi Muslim”.

With regard to the curriculum, locally agreed syllabuses have increasingly become inclusive of non-religious worldviews. The last major survey on the matter found that over three quarters of locally agreed syllabuses include Humanism to some extent. With progressively more inclusive national guidance published in recent years, that inclusion has become deep-


95 See above, note 76, Section 390 for Standing Advisory Councils on Religious Education (SACRE) and Schedule 31, Para 4 for Agreed Syllabus Conferences.


97 Ibid.

er, and in 2013 the RE Council for England and Wales published a new Curriculum Framework for Religious Education in England, endorsed by the Government, which covered key stages 1–3 (ages 5–14) and put Humanism on an equal footing to the principal religions.

However, since then the Government has introduced new General Certificate of Secondary Education (GCSE), AS level and A level subject content for religious studies in England (these being the primary qualifications for students aged 14–18, and religious studies courses being de facto the way that schools meet their statutory obligations to teach RE). The subject content allows for systematic study of the principal religions, and has annexes at GCSE level prescribing content for the six “principal religions”. But it does not allow for the systematic study of non-religious worldviews such as Humanism. This was in spite of the BHA producing an analogous annex at the request of Department for Education officials and alongside the RE Council and others having campaigned to have Humanism included. Disappointingly, however, since this campaign launched, the Government amended guidance for schools which had recommended they “[u]se teaching resources from a wide variety of sources to help pupils understand a range of faiths, and beliefs such as atheism and humanism” by deleting “and beliefs such as atheism and humanism”.

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c. The adequacy of opt-outs

So: breadth of the curriculum is one issue. Another issue relates to parental rights to have their children educated in line with their own beliefs, and the adequacy of opt-outs. In order to ensure that parents’ rights under Article 2 of Protocol 1 of ECHR are not infringed by RE or collective worship, whether in a school with no religious character or a faith school that a child has been allocated to against its parents’ wishes, parents have the right to “wholly or partly excuse” their child “from receiving religious education given at the school” and, in the case of pupils who are not yet in the sixth form, “from attendance at religious worship at the school”. In addition, a child who is in the sixth form (i.e. in the two final years of school education when aged 16–17 or 17–18) may choose to opt-out of religious worship. 104

These opt-outs are infrequently taken up, both because of low awareness of them and because of concerns about opted out children being victimised. In addition, schools do not have to arrange any alternative activity for opted out children. Although parents are allowed to take their children out of school “to receive religious education of a kind which is not provided in the school during the periods of time during which he is so excused”, 105 this is normally quite impractical and requires parents to have the time and expertise to do this. In the BHA’s experience, many opted out children end up having to sit outside in the hallway, or alone in an empty classroom. In addition, children often inadvertently miss out on inclusive parts of assemblies, or other important parts of the day, such as school notices. This is in spite of the Folgerø case concluding, in the words of W. Cole Durham, Jr.,

\[\text{Even there, one of the points that became clear from the Norwegian cases is that not any opt-out program is sufficient. This needs to be handled in a sensitive way. One of the children in the Norwegian cases was granted an opt-out, but it involved sending her to another room for the class period. This treatment was just the same as punishment of other students for bad behavior. An opt-out structure that can easily be interpreted as a punishment is certainly not satisfactory.}\] 106

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104 See above, note 54, Section 71, as amended by Education and Inspections Act 2006, Section 55.
105 Ibid.
At the end of year service, not attended by my children, the school handed out certificates for completion of their first year at school. My daughter was supposed to get hers later at the class picnic. That evening she burst into tears and said that as she had not gone to the service, she did not get her certificate. My daughter is 5 years old. It was then the summer holidays so I had no way of complaining and thought I would see if the next year started well; it could have been an innocent oversight. It is now 3 days into the start of the school year and my children have just told me that they are still going to assembly every day.

Do you have any suggestions as to where I go from here? I do not want an ugly confrontation at school but I also believe that if I was the follower of ANY religion, this would not be happening to me; I would be protected by law. As I am without a religion, I do not seem to have any rights over my children’s spiritual well being.

– email received by the BHA, September 2011.

Such issues are commonplace – the author is contacted by parents dealing with proselytising in school which they consider to be inappropriate, or issues to do with opt-outs, almost every day. They are even more acute with respect to faith schools, which often like to talk about how their religious ethos permeates through the whole of school life. This makes opting out all but impossible.

**d. Children’s rights**

Finally, we turn to the issue of children’s rights. The UNCRC provides children with “the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers”, and says that children have the right to be prepared for “responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups”. This seems to go against the notion of faith-based schooling, a point that is reiterated by other parts of the Convention:

*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (…)*

*States Parties shall respect the right of the child to freedom of thought, conscience and religion. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Freedom to manifest one’s religion or beliefs may be subject*
only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.\textsuperscript{107}

Complementing the UNCRC is the ECHR-related case law known as “Gillick competence”, establishing that once a child obtains sufficient understanding and intelligence to be mature enough to make up their own mind on the matter, a child’s right to make their own decisions overrides their parents’ rights over them.\textsuperscript{108} The Gillick case that led to the case law had to do with sexual health, but there is no reason why it should not also apply with respect to religion or belief as well.\textsuperscript{109}

This raises two problems. First, particularly at secondary schools, is that Gillick-competent children may be forced by their parents to attend a faith school against their own wishes. This raises wider questions about the right of school choice and the appropriateness of faith schools.

Secondly, regardless of whether the school a child attends is religious or not, it is clearly the case that many young people attain Gillick competence in matters of religion or belief before the age of 16, and therefore the age at which opt-out rights transfer from parent to child – and then only for worship – is too late. This is not just an issue with RE and collective worship, but also sex education, where the age at which the transfer occurs is currently 19. Indeed, the previous (Labour) Government proposed, in the Children, Schools and Families Act 2010, to lower this age to 15. However, the Government failed to pass the Bill before the “wash-up” period at the end of Parliament when only legislation that has the consent of all major parties gets through. All the major parties supported wider reforms in the bill around sex and relationships education and personal, social, health and economic (PSHE) education, which would have seen PSHE added to the national curriculum. A new primary national curriculum was also being introduced. However, the Opposition (Conservatives) refused to support the lowering of the opt-out age to 15, instead only supporting 16. The Government’s legal advice was that this would be incompatible with Gillick competence, and so as a consequence decided that it had to strip the entirety

\textsuperscript{107}See above, note 31, Articles 13, 29, 12 and 14.


\textsuperscript{109}This is not to say that parents of children who are not yet Gillick-competent have the right to state-funded religious schooling in line with their own faith. As we discussed in the admissions chapter, Article two of Protocol one of the ECHR provides no such right, instead merely mandating that the state does not interfere. What we are saying here is that until children are Gillick-competent, Article two of Protocol one of the ECHR provides parents with the right to bring children up in line with their own faith; after that, the right transfers to the child. And even then, parents’ rights over children who are not yet Gillick-competent are limited by the UNCRC, as set out earlier in this section.
of the curriculum reforms out the bill. As of writing, PSHE is still not a statutory part of the curriculum.

e. Private schools and opt-outs

Finally, while we have not discussed private schools at great length, it is worth noting that no law exists with respect to RE and collective worship at private schools, other than that those registered as religious are also exempted from provisions in the Equality Act 2010. This means that private schools can choose not to provide RE and collective worship. However, most private schools in England and Wales are religious. Furthermore, there are no opt-out rights for parents or pupils. The rationale for this is that if parents are unhappy with the religious education or worship being provided, they can remove their children from the school entirely and instead have them attend a state school, where their opt-out rights should be ensured. However, this option is clearly not open to a young person whose views differ from those of his or her parents – even one who is in the sixth-form and would have the right to opt out of worship if attending a state school. The Government has indicated to the BHA an unwillingness to address this issue.

f. Summary

We have seen that the UNCRC and Gillick competence, taken together, lead to serious questions about the very existence of religious schools, particularly at the secondary level. But more straightforward, narrower questions can be asked about the breadth of the RE curriculum (in particular the place of non-religious worldviews), the adequacy of opt-outs, the fact that for Gillick-competent children it should be children, not parents, who are opting out, and the fact that no rights at all are provided to children’s schools. The author hopes that a future government will deal with these narrower questions soon.

Conclusion

We have seen that there are many areas where the intersection between religion or belief and education in English and Welsh state schools leads to tensions between domestic law

110Department for Children, Schools and Families, "Statement on the Children, Schools and Families Bill", 7 April 2010, available at: https://web.archive.org/web/20100413095457/http://www.dcsf.gov.uk/news/index.cfm?event=news.item&id=statement_on_the_children_schools_and_families_bill. See also Balls, E., "Letter to Michael Gove on the Children, Schools and Families Bill", 7 April 2010, which states, "your insistence that parents should have a right to withdraw their children until they reach the age of 16 – the age at which they are in many respects considered adults – makes it impossible for us to proceed. Both British and European case law do not support an opt-out up to the age of 16. As I explained when we discussed yesterday, that amendment would have meant that the bill would not have been compliant with the ECHR. Your insistence that the age limit must be increased to 16 would have made the entire bill non-compliant with UK and European law and, therefore, our lawyers advised me that, as Secretary of State, I had no choice but to remove all the PSHE provisions," available at: https://web.archive.org/web/20100411203246/http://www.edballs.co.uk/index.jsp?i=4812&s=1111.
and practice and international equality and human rights obligations. In all these areas, the status quo is unpopular: by more than four to one, UK adults are against religious discrimination in state school admissions.\textsuperscript{111} By more than seven to one, they are against religious discrimination in state school employment.\textsuperscript{112} Most oppose state-funded faith schools per se.\textsuperscript{113} Very few parents consider religion to be an important factor when picking which schools to send their children to.\textsuperscript{114} Most do not think the laws requiring collective worship should be enforced.\textsuperscript{115}

Progress in addressing these issues is inexorably slow – many of the issues we have explored arise from unique exceptions to general prohibitions on discrimination written into the Equality Act 2010. Further, it is remarkable that the problematic aspects of the School Standards and Framework Act 1998 with respect to faith school employment were first tabled as amendments to the then bill by a bishop in the House of Lords.\textsuperscript{116}

It is clear that progress towards eliminating discrimination and advancing equality in these areas has been much slower than in many other areas of UK life. The cause of this lies plainly in the fact (with which this article started) that one-third of state-funded schools are religious. These schools constitute an extremely powerful lobby, as do the major national religious organisations. This is compounded by the fact that the biggest organisation, the Church of England, has the most moderate schools, but frequently defends the practice of other faith schools.


However, the proportion of the population that is not religious has been steadily rising for many years. As of last year the Church of England has more children in its schools doing collective worship every weekday than it has parishioners on its pews on any given Sunday – its own research has shown that church growth is strongest when there is an oversubscribed school nearby. The trend against discrimination and against religious privilege is strong, assisted by frequent reports of abuses (for example of admissions procedures) by religious schools. The European Commission is still considering the unwarranted exceptions to the UK’s employment equality laws. The status quo is steadily becoming less tenable and it can only be a matter of time before politicians stop seeing these issues as a can of worms too contentious to tackle and decide that they have to face up to them and introduce reforms.

117 As can be seen through NatCen Social Research’s *British Social Attitudes Survey*, available at: http://www.britsocat.com/ (free registration required).

118 As can be seen by comparing figures from the Department for Education’s annual school census, the most recent of which is from January 2014, see above, note 7; with the Church of England’s annual *Statistics for Mission*, see above, note 44.

Religion and the Workplace

Lucy Vickers¹

Introduction

Whilst freedom of religion is well established as a fundamental right internationally and within Europe, the extent to which it should be enjoyed in the workplace is still the subject of some debate. There are two main areas of contention: one involves religious workers in secular organisations and the extent to which religious individuals can expect an organisation to accommodate their religious needs; the other concerns the interests of religious organisations and the extent to which they should be governed by equality laws. Questions which arise include: can religious employees expect to be allowed time off work for prayer or other religious observance; and can religious organisations require that staff hold particular religious beliefs in order to work for the organisation? A particular area of concern is how to deal with the tension that can arise between equality grounds, such as where religious equality and sexual orientation equality seem mutually irreconcilable. Although legal protection for religion at work can be seen in many states, the UK example is used below, to illustrate the areas of tension which arise surrounding religion and belief at work.

1. Religion at Work

Debates concerning the issue of religion and the workplace have been fairly prominent in recent years with a number of high profile cases receiving significant media attention, including the cases of Ms Eweida,² who was refused permission to wear a cross at work by her employer, British Airways; and Ms Ladele,³ who was dismissed from her role as a registrar for refusing, for religious reasons, to conduct civil partnerships.

In the summer of 2014, in response to increasing debate regarding religion and belief, the UK’s Equality and Human Rights Commission (EHRC) launched a call for evidence from individuals and organisations about how religion or belief has affected experiences in the workplace as well as the provision of goods and services. This call for evidence forms part of the EHRC’s three year programme of work, Shared understandings: a new EHRC strategy

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² Eweida and Others v the United Kingdom, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

to strengthen understanding of religion or belief in public life.\textsuperscript{4} The EHRC is interested in how religion or belief has affected the experiences of job applicants, employees or customers, whether people are aware of their legal rights, whether they feel the current law is effective and whether they have direct experience of discrimination on grounds of religion or belief.

The findings from the call for evidence were published in March 2015.\textsuperscript{5} They present a very mixed picture, although there is certainly evidence of some contention. In some respects, the evidence suggests little cause for concern: a recurring theme from the respondents is that the law is clear and effective, with many examples of religious issues being dealt with respectfully and appropriately within workplaces. However, at the same time, many respondents report examples of perceived discrimination on grounds of religion in terms of recruitment, work conditions and harassment. This somewhat mixed picture is corroborated by the findings of a study by Weller et al.,\textsuperscript{6} reporting in 2013, showing that despite a decade of legal protection in the UK, employment remained an area in which unfair treatment on grounds of religion or belief was experienced. Nonetheless, the Weller study, as with the report on the EHRC’s call for evidence, also shows that over the last decade, many workplaces have developed policies and practices in which the needs of an increasingly diverse work force are being met.

Both sets of research findings share common threads; first religion and belief are seen to create few problems in the workplace, with many respondents feeling either that workplaces are and should be neutral places in which religion is viewed as a private matter, or feeling that religion was dealt with respectfully at work. Equally, both sets of research findings have demonstrated areas of concern, with the matters of dress codes, working time, accommodating objections to certain work tasks and balancing freedom of religion with other equality rights identified as issues which require guidance. Moreover, the EHRC call for evidence revealed significant levels of concern from religious organisations in their capacity as employers, relating to the extent to which they can themselves discriminate when recruiting in favour of staff who share their religion.

While these areas of difficulty may be experienced by a minority of employees and employers within the overall economy, nonetheless they represent some strongly held views. This is perhaps unsurprising. Of course, for many believers, as well those with no belief, the issues are not particularly fundamental: conflicts between religious belief and the needs of the workplace may be minor or non-existent. Yet for others, belief or non-belief is more central to their sense of identity, will determine many aspects of their lives, and will not yield to other


\textsuperscript{5} Mitchell, M. and Beninger, K. with Donald, A. and Howard, E., Religion or Belief in the Workplace and Service Delivery, EHRC, 2015 at p. 6.

\textsuperscript{6} Weller, P., Purdam, K., Ghanea, N. and Cheruvallil-Contractor, S., Religion or Belief, Discrimination and Equality, Bloomsbury, 2013.
interests. Clearly this latter group of believers are likely to have more difficulty in reconciling religion and work, and those with strong non-religious views are unlikely to be content with significant levels of religious accommodation at work. Thus, although the numbers involved may be small, it remains important to assess whether the current legal framework can meet the concerns identified. In what follows, the legal framework is outlined, and some analysis is offered regarding the potential for the current law to achieve this.

2. Legal Protection for Religion at Work

A preliminary question that arises when considering the interaction of religion and work is whether the workplace is a forum in which religion has any traction at all. As suggested by some respondents to the EHRC call for evidence, it is arguable that religion should be regarded as a personal and private matter, with no special treatment at work. On this basis one might expect that the general protection for religious freedom would not apply in the workplace, but instead that religious freedom would be provided by the freedom of staff to resign from their jobs.

Indeed, this minimalist approach to religious protection at work was taken until recently, with negative conduct related to religion or belief given no special treatment, but dealt with as part of standard disciplinary processes. However, two changes in the legal framework have led to a significant shift in approach. First, the EU Directive 2000/78 introduced anti-discrimination protection on grounds of religion and belief in the context of employment and occupation, currently implemented in the UK by the Equality Act 2010. Secondly, in January 2013, the European Court of Human Rights (ECtHR) recognised in Eweida and Others v the United Kingdom that rights to religious freedom in Article 9 of the European Convention on Human Rights (ECHR) can be exercised in the context of the workplace when it held that dismissal amounted to a prima facie infringement of the right.

These legal developments show a greater recognition of the significance of the workplace as a setting in which religious freedom and equality should be enjoyed. This is, in part, due to the fact that for many workers it is not possible to separate religious practice from work, as religious practices such as dress codes or practices of prayer cannot simply be dropped during working hours; and due also to the fact that it is often minority religious practices which are less easily compatible with standard working rules, so that a refusal to accommodate religious practice at work can have very unequal impact as between different religious groups.

8 See Mitchell, M. et al, above note 5.
9 See above, note 2, Para 83.
10 Those of minority religion report higher levels of religious discrimination in the workplace than majority faiths, see Weller, P. et al, above, note 6.
Of course, other interests may well conflict with religion at work, such as the economic interests of the employer, the equality interests of service users, customers and other employees, and the rights of non-believers to be free from the influence of religion. Thus, any right to religious freedom at work will need to be held in balance with these other interests.

The legal frameworks that operate for the protection of religious rights at work are human rights provisions, which protect individual and group freedoms; and equality law, under which religion and belief is a protected characteristic. The complementary nature of these two forms of protection for religion and belief can be illustrated by the UK legal framework in which religion is protected under Article 9 ECHR via the Human Rights Act 1998; and in the Equality Act 2010, which implements the EU Equality Directive 2000/78. The Human Rights Act 1998 requires that domestic law be interpreted as far as possible to comply with the ECHR, and so it can be expected that the Equality Act 2010 should be interpreted to accord with the jurisprudence of the ECtHR.

Article 9 ECHR recognises that freedom of religion includes the right to manifest religion “either alone or in community with others”, so that the right applies to religious groups when they act as employers, as well as to religious individuals. The right has tended to be engaged with regard to manifestations of belief; in particular, the wearing of religious symbols, time off work and conscientious objection to certain work tasks. At the same time, religion and belief is protected at work by the Equality Act 2010 which protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief.

Direct discrimination occurs where a person is treated less favourably on grounds of religion or belief and would include where employers refuse to employ religious staff altogether, or employ those of one religion on more favourable terms than those of a different religion. Although direct discrimination cannot be justified, an exception exists where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes an occupational requirement for the job in question, and it is proportionate to impose that requirement, any resulting discrimination will be lawful.11 An additional and rather wider exception exists where the employer is an organisation with a religious ethos, such as hospices, or charities with a religious ethos. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious work requirement.12 This is the case even though sharing a religious belief may not be an essential requirement for carrying to the core duties of the job, and the provision allows religious employers to require loyalty from their staff towards the religion.

Indirect discrimination occurs where a provision, requirement or practice puts persons of a particular religion or belief at a particular disadvantage compared with others. It can be justified where there is a legitimate aim for the requirement and the means of achieving the

11 Equality Act 2010, Schedule 9(1).
12 Ibid., Schedule 9(3).
aim are appropriate and necessary.\textsuperscript{13} Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means to meet a legitimate aim.

Common conflicts in the workplace involve dress codes, which interfere with religious employees’ right to manifest religion; employees who require time off for prayer or other religious observance; those who wish to be excused from particular duties; and those who feel restricted in their freedom to share religious views at work.\textsuperscript{14} Cases have arisen involving all these issues and the extent to which the competing interests at stake are adequately balanced is considered in turn below.

\textbf{a. Dress codes}

In the employment context, one of the most common tensions that can arise between the needs of a business and the religious requirements of staff relate to dress codes.\textsuperscript{15} For example, some workplaces impose restrictions on the wearing of religious symbols such as headscarves or turbans, to accord with a workplace uniform; alternatively, dress codes may require female staff to wear skirts or otherwise breach religious dress codes. A uniform imposed by the employer can be treated as an example of neutral practice, which has an indirectly discriminatory effect, and which can only be lawful if justified as a proportionate means of achieving a legitimate aim. In determining its proportionality, the domestic court should consider whether a restriction on dress interferes with Article 9 ECHR rights.

The case of \textit{Azmi v Kirklees Metropolitan Borough Council}\textsuperscript{16} may usefully illustrate how a dress code can be justified as a proportionate means to achieve a legitimate aim. Azmi was a teaching assistant who was dismissed for refusing her employer’s instruction to remove her niqab when assisting in class. She was unsuccessful in her claim of direct and indirect discrimination.\textsuperscript{17} The Court accepted that the refusal to allow a face covering put Azmi at a particular disadvantage when compared with others. However the Court held that the \textit{prima

\begin{itemize}
  \item \textsuperscript{15} \textit{Azmi v Kirklees Metropolitan Borough Council} [2007] ICR 1154.
  \item \textsuperscript{16} She also claimed victimisation and was successful due to inadequacies on the part of the employer in dealing with her case.
\end{itemize}
facie indirect discrimination was justified. The restriction on wearing the niqab was proportionate given the need to uphold the interests of the children in having the best possible education. A similar approach, based on balancing competing interests can be seen in the case of *Eweida and others v UK*,\(^ {18}\) where two of the cases involved dress codes. In the first case, the Court found in favour of the employee; in the second, the employer was able to justify the restriction. Eweida, a member of the check-in staff for British Airways was refused permission to wear a cross over her uniform. Here the chamber of the ECtHR held that the restriction was not proportionate. Factors which lead to this decision included the fact that other forms of religious dress such as headscarves and turbans were allowed; and the argument that the employer needed to maintain its corporate image was not very strong when weighed against Eweida’s freedom of religion. In comparison, Chaplin, a nurse, was required to remove the cross that she wore on a chain around her neck, for reasons related to health and safety, and the Court held these reasons were sufficient to outweigh the employee’s religious interests.

A number of the high profile cases relating to religion and belief have involved dress codes, and dress codes are a common way for religion and belief to be manifested in the wider environment. Nonetheless, it seems from the EHRC call for evidence and other research that the law in this regard is reasonably well understood.\(^ {19}\) Although cases still arise at times, in the main, few major issues arise for religious employees or employers with regard to uniforms. Elsewhere in Europe, restrictions on religious dress at work are widely imposed, particularly in the public sector.\(^ {20}\) However, in the UK religious requirements are routinely accommodated in terms of uniforms and dress codes at work, and it would seem that a reasonable balance has been struck between the interests of staff who wish to manifest religion at work, and the business needs of the employer. Where there is no good reason to the contrary, staff may wear religious symbols: where employers can provide good reasons, such as health and safety requirements or the requirements of effective service delivery, for restrictions on religious symbols at work, such restrictions are likely to be proportionate.

**b. Time off for religious observance**

The refusal by an employer of a request for time off for religious observance will put religious individuals at a disadvantage compared to those who do not need time off, and so any such refusal will need to be justified, by taking the balancing approach discussed above. The balancing approach can be seen in the following two cases, where different outcomes were reached, despite the initial similarities of the cases, illustrating how fine a balance is sometimes required. The first case\(^ {21}\) involved a Jehovah’s Witness, who was refused permission

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18 The case was brought in the UK as *Eweida v British Airways* [2010] EWCA Civ 80. It was then joined with others in an appeal to the European Court of Human Rights and heard as *Eweida and Others v the United Kingdom*, see above, note 2.

19 See Mitchell, M. et al, above, note 5.

20 See above, note 15.

for time off work on Sundays, making it impossible for her to attend worship. Her claim of
discrimination on grounds of religion and belief was upheld, the tribunal deciding that the
requirement to work on Sundays was not justified because there were other employees who
could have covered the Sunday shift without difficulty. In contrast, in Mba v London Borough
of Merton22 a care worker who was also obliged by her employer to work on Sundays was
unsuccessful in claiming religious discrimination. The Court was unanimous in deciding that
the refusal to allow Mba time off on the Sunday was, on its facts, a proportionate response by
the employer. The employer had endeavoured to arrange the rosters so as to allow her not to
work on Sundays while it was possible to do so, and this had been achieved in for nearly two
years. However, the management needed workers available every day, and ultimately there
was no viable or practical alternative but to require her to be available to work on Sundays.

The difference in outcome of these two cases demonstrates that an approach based on pro-
portional balancing of interests leads to reasoning which is highly sensitive to the facts of
each case. This can mean that results are difficult to predict, leaving staff and employers
unclear about how to deal with requests for time off for religious observance. However, al-
though more clarity would almost certainly be welcomed, it is hard to see how that might be
achieved. Clarity in terms of a set number of days for religious observance still may not sat-
isfy all religious demands unless the number of days were to be set very high, in which case
the needs of businesses may well suffer. Instead, a proportionate response which can allow
for flexibility by staff and employers probably remains the most satisfactory legal response.

c. Conscientious objection to work tasks

A third area of contention in the law on religious discrimination and work relates to con-
scientious objection to work tasks. Relatively simple examples of tasks from which staff may
ask to be excused involve tasks such as selling alcohol or handling meat products. Such re-
quests will be dealt with similarly to those relating to uniforms or time off work. Where pro-
portionate, employers may refuse requests of this type, but a refusal when it would be easy to
allow the request may be indirectly discriminatory. For example, it would be proportionate to
refuse to accommodate a butcher who refused to handle meat; but a request from a butcher
to be exempt from occasional requests to handle alcohol should probably be accommodated
if other staff can cover the task.

More complex have been cases where the refusal of a task has been on grounds which them-
selves are discriminatory, and it is here that the concern was expressed the most strongly in
the call for evidence.23 Cases have arisen in several jurisdictions involving marriage registrars
who wish to be exempted from carrying out civil partnerships. These cases too are treated as
cases of indirect discrimination; the requirement to carry out the civil partnership is a neu-
tral requirement which causes disadvantage to the particular religious employee because he

22 Mba v London Borough of Merton [2013] EWCA Civ 1562.
23 See Mitchell, M. et al, above, note 5 at pp. 144 and 159.
or she cannot comply for religious reasons. However, the UK courts have found the refusal to accommodate a request for exemption to be a proportionate means to achieve the legitimate aim of equal treatment on grounds of sexual orientation. For example, one of the cases heard with Eweida before the ECtHR was Ladele v Islington Borough Council. Ladele sought to be excused from carrying out civil partnerships on the basis of her religious beliefs, but permission was refused. The Court of Appeal held that the refusal to accommodate Ladele’s request to be exempt from carrying out civil partnerships was justified as the employer was entitled to rely on its policy of requiring all staff to offer services to all service users regardless of sexual orientation.

This decision remains highly contentious, with many seeing it as emblematic of an embedded conflict between religion and sexual orientation equality. In effect, however, the case is no different from other indirect discrimination cases; the employer’s requirement that Ladele perform civil partnerships was potentially indirectly discriminatory as it put her at a disadvantage, but it was justified as a proportionate means to achieve equality on other grounds. This outcome was upheld by the ECtHR on a similar basis: the restriction on her religious freedom was justified as proportionate means to protect the equality rights of others. Whilst it is possible to imagine a different outcome of that balancing exercise (and indeed the Court of Appeal was clear that it was not criticising the decision by other councils to accommodate similar requests to Ladele’s) the legal approach to the question does seem to be the most appropriate. As with the other indirect discrimination cases, it is based on the balancing of competing interests to achieve a proportionate outcome, and has the potential to be sensitive to the individual facts of the case.

d. Promotion of religion or belief in the workplace and harassment

In some cases, staff have been involved in the promotion of religion of belief in the workplace, including through the distribution of literature and prayers. Such activity can be viewed by the religious staff member as the manifestation of religion, or the exercise of religious freedom. However, other members of staff may object, seeing such activity as breaching the neutrality of the workplace, or even as amounting to harassment. As with the other manifestations of religions discussed above, any restrictions imposed by employers on such behaviour are likely to be found to be indirectly discriminatory unless they are justified; with the rights of others to a religiously neutral workplace often providing the justification. In terms of harassment, simple conversations about religion or belief are unlikely to be covered, but if they persist once it has been made clear that they are unwelcome, it is possible that they could come within the definition of harassment: the religious employee will have engaged in unwanted conduct with the effect of creating an intimidating or offensive environment for the other person. Although the right to manifest religion does cover proselytising, any such

24 See above, note 3; then heard with Eweida and Others v the United Kingdom, see above, note 2.
25 See above, note 11, Section 26.
right is not absolute, and is limited where it is improper.\textsuperscript{26} Proselytising will be improper if it interferes with the rights of others to be free from harassment at work, and the fact that rights to religious freedom are engaged, need not prevent a finding of harassment.

The question of whether religious staff can share their religious views, particularly when those views involve negative views regarding homosexuality, is one that has concerned a number of religious groups.\textsuperscript{27} In some cases, speech regarding religious attitudes to homosexuality may be viewed as harassment, and such speech may be restricted at work. In such cases, freedom to debate religious doctrine will need to be balanced against the need to protect the dignity of other workers.

Cases involving disciplinary action for speech related to sexuality have been treated as indirect discrimination. For example in \textit{Apelogun Gabriels v London Borough of Lambeth}\textsuperscript{28} a worker claimed that he had been dismissed for distributing “homophobic material” to co-workers. Gabriels had organised prayer meetings for Christian staff which were held (by permission) on council premises. He then distributed some verses from the Bible which were critical of homosexual activity to members of the prayer group, and some other co-workers. Other staff members found them offensive and complained. Gabriels was dismissed for reasons of gross misconduct and claimed that this was discriminatory on grounds of religion. The Tribunal hearing the case found that the dismissal was lawful; the material was offensive to gay and lesbian people and although it had not been targeted at these staff, this nonetheless meant that any indirect discrimination involved in his dismissal was justified. In a second case, a Christian worker was dismissed after posting her beliefs about homosexual practice on the Lesbian and Gay Christian Movement’s website, using her work computer outside working hours (a practice that was permitted by the employer). The Tribunal dismissed the claim of religious discrimination: any indirect discrimination was justified.\textsuperscript{29} As with the harassment issue, these cases will largely be determined on the basis of a review of the proportionality of any restriction on speech, and will need to be considered in the light of the interests of gay colleagues whose dignity may be undermined by such speech.

\textbf{e. Summary}

These cases illustrate the approach of UK domestic courts in addressing the tensions which can arise between competing equality interests. In summary, religious staff can expect that their religious practices or beliefs will be accommodated at work so long as there remains a reasonable balance between the needs of staff and the needs of their employers. Whilst there is no legal duty of accommodation for religion in the UK workplace, the way in which indirect

\begin{footnotesize}
\begin{itemize}
\item[27] The Christian Institute; EHRC call for evidence, see Mitchell, M. et al, above, note 5 at p. 55.
\item[29] Haye v London Borough of Lewisham (ET/2301852/09, 16 June 2010).
\end{itemize}
\end{footnotesize}
discrimination works is broadly similar: a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate can be justified. Such an approach to indirect discrimination has some judicial backing, with the acceptance that failure to make reasonable accommodation may be evidence that an employer’s refusal to change its requirements are disproportionate.30

Whether or not the creation of an explicit duty of accommodation would improve the protection of religion and belief at work remains the subject of much debate.31 What is clear however, is that the current legal framework effectively allows religious staff to reconcile their religious needs with the demands of the secular workplace, using a proportionality assessment to allow for the facts and context of the case to be taken into account. Although this can make the outcomes difficult to predict, this approach does allow for careful analysis of the different factors which can be at stake in any particular case, such as the operational requirements of the business, health and safety concerns, or the equality needs of staff and clients. Whilst there may be disagreement about the outcome of individual cases, it is difficult to find any other approach which could be more responsive to the variety of interests at stake apart from this balancing proportionality based approach.

3. Religious Organisations as Employers

A second area of concern identified in the EHRC call for evidence relates to religious organisations which act as employers. The number of organisations and range of activity is large, with religious organisations providing services including education, care homes, hospices, night shelters, adoption services, drop-in centres, youth work etc. In some cases the employers are religious organisations such as churches; in other cases they may be small private businesses which the business owner seeks to run along religious lines. The tension that can arise in this context with regard to religion and belief involves the extent to which religious employers can exercise their religious freedom via their employment practices. Issues which have arisen include whether they can impose religious requirements on staff such as requirements that staff be loyal to the religion’s teaching. Such requirements will involve discrimination against those of a different religion or none, and in some cases, the requirements will also result in discrimination on other grounds, for example a requirement of celibacy imposed on any staff who are not heterosexual. These cases involve the religious interests of employers, often groups of religious individuals, seeking to manifest their religion or belief in community with others through the medium of work, as set against the equality interests of staff.

30 “I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases” per Lady Hale in Bull v Hall [2013] UKSC 73, Para 47.

Under the ECHR, Article 9 is reasonably clear that the autonomy of religious groups should be respected; they should be able to determine their own leadership, for example.\(^{32}\) This means that courts will be loath to restrict a religious organisation in its choice of clergy and so religious requirements imposed on priests or other religious leaders would be likely to be lawful. However, where the work is less directly involved in religious practice, religious requirements will be scrutinised more carefully. For example, in Obst \textit{v Germany} and Schüth \textit{v Germany}, the ECHR had to decide whether the dismissal of a broader category of church employee for breaching religious teaching was lawful.\(^{33}\) In both cases staff had been involved in extra-marital relationships. In both cases, the ECtHR recognised the right of the employer to require loyalty to Church teaching from these staff. However, they held that the religious interests of staff needed to be balanced against the rights of the staff in question, in terms of their privacy rights and rights to family life, but also in terms of other factors of relevance to the case, such as the ease with which they might find other work.\(^{34}\) Thus the rights to religious freedom of the employer were recognised, but needed to be balanced against other competing interests.

A similar process can be seen in the context of the exceptions to the Equality Act 2010 contained in Schedule 9. An exception exists where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes an occupational requirement for the job in question, and it is proportionate to impose that requirement, any resulting discrimination will be lawful.\(^{35}\) This will cover the employment of religious leaders and teachers and will allow, for example, a hospital to require that its chaplain be Christian. An additional and rather wider exception exists where the employer is an organisation with a religious ethos, such as hospices, or charities with a religious ethos. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious work requirement.\(^{36}\) Its application can be seen in the Employment Tribunal case Muhammed \textit{v Leprosy Mission} where a Muslim finance administrator applied for work in a Christian charitable organisation. One of the criteria for the role was that the incumbent “be a practising Christian committed to the objectives and the values” of the organisation. Mr Muhammed’s application was unsuccessful, and he claimed discrimination on the ground of religion. The Tribunal held that being a Christian was an occupational requirement of the role. In particular it drew attention to the fact that Christian beliefs were at the core of the employer’s activities and that employing a non-Christian would have a very significant ad-

\(^{32}\) See for example, Hasan and Chaush \textit{v Bulgaria}, Application No. 30985/96, 26 October 2000, Para 62; and Serif \textit{v Greece}, Application No. 38178/97, 14 December 1999.

\(^{33}\) Obst \textit{v Germany}, Application No. 425/03, 23 September 2010; Schüth \textit{v Germany}, Application No. 1620/03, 23 September 2010. The cases were brought under Article 8, but religion and belief pervade the reasoning of the Court, so they are discussed here.

\(^{34}\) The Court reasoned that the organist would find it difficult to find other work; the PR Director less so.

\(^{35}\) See above, note 11, Schedule 9(1).

\(^{36}\) \textit{Ibid.}, Schedule 9 (3).
verse effect on the maintenance of that ethos.\(^\text{37}\) Thus, as long as there is some religious element to the staff role, even where the work is not inherently religious in nature, the court may find religious requirements are proportionate.

However, the occupational requirement exception does not make discrimination on other grounds lawful. Thus, for example, a requirement to be Christian to work in a Christian bookshop may be lawful, but it will not be lawful if that requirement also discriminates, albeit indirectly, on grounds of gender or sexual orientation.\(^\text{38}\) The only exception to this rule is in the narrowly drawn exception which applies to the appointment of clergy or their equivalent, allowing this to be limited in terms of gender and sexual orientation in order to comply with religious teaching.\(^\text{39}\)

The provisions which enable religious employers to create religiously homogeneous workplaces as long as there is no discrimination on other grounds, help to resolve the tension identified above between maintaining religious freedom and upholding equality interests. In effect religious employers are able to create workplaces which share a religious ethos, even where the work is not directly religious in nature. In this way, the freedom of religious groups is maintained. However, if direct discrimination on other grounds such as sex or sexual orientation results, such a practice will be unlawful. If indirect discrimination results, it would need to be justified.

**Conclusion**

Whilst it can be argued that religion is a private matter which has no place at work, such an approach relies on too functional a view of work and the work environment. Few see work as based purely on the economic transaction of the contract of employment. Instead, for most individuals, work is a forum in which a significant aspect of life is lived: it is where people meet others, engage with wider society, gain economic benefit, undertake personal and professional development, and to an extent where they express aspects of their personality. Viewed in this way, it seems clear that religion should not be excluded from the workplace. However, it has also to be recognised that protecting religious freedom at work can lead to tension; tension between equality rights and tension between religious and other interests such as the economic interests of employers. Moreover, the response to the EHRC call for evidence and Weller's research\(^\text{40}\) demonstrate that, along with education where very significant


\(^{38}\) This could occur, for example, if the religious requirement was imposed by a group that was opposed to the employment of women. Alternatively, a requirement to share the particular religious ethos of a group could discriminate against gay Christians if the group believes that homosexual sexual activity is wrong, and the gay Christian is in a (non-celibate) relationship.

\(^{39}\) See above, note 11, Schedule 9(2). See *R (on the application of Amicus – MSF and others) v Secretary of State for Trade and Industry and others* [2004] IRLR 430.

\(^{40}\) See Weller, P. et al, above, note 6.
tensions exist, the workplace is the forum in which many wider tensions between religion and secularism are played out.

The legal frameworks which engage these tensions have developed mechanisms to address them based on the concept of proportionality. This approach involves contextual analysis of the competing interests at stake in any case. It also involves engaging in a degree of metaphorical weighing and balancing of these interests, to ensure that any restrictions on religious freedom are imposed for a legitimate aim and are proportionate to that aim. Such an approach involves careful, fact sensitive decision making by the courts, taking into account and being responsive to the circumstances and context of each case.

This approach is far from being perfect. It can lead to difficulties in predicting the outcome of cases, and certainly the outcome of decisions is unlikely to please everyone. Nonetheless, it is suggested that this approach remains the most effective way to uphold religious interests in the context of the workplace. If certainty were to be required, it would likely involve very little by way of protection; after all, the alternative, that is a rule that religion will be normally be protected at work, would never be granted because of the strength of the competing interests of employers to economic freedom, and to equality interests of staff and service users.

In particular, it would always be unlikely for religious rights to be granted much more by way of protection because of the fact that the right to manifest religion at work remains at all times a contingent right. This is both because the right to manifest is in any event a qualified right, liable to restriction in order to uphold the rights of others, and additionally because workplace rights are ultimately protected by the residual right to resign. As a result, it is submitted that the balancing approach provides the best solution to the tensions that inevitably arise in connection with the protection of religion in the workplace. Where proportionality is used thoughtfully, we should be able to reach some sort of equilibrium or balance in our application of the law, as a way to hold in balance the right to freedom of religion and belief, and the right to equality, autonomy and dignity at work for all.
This article considers the evolution of two different frameworks within Northern Ireland designed to promote equality of opportunity and eradicate unfair discrimination in the fields of employment and housing. With respect to employment, the article will show that a reflexive regulatory framework, backed by individual rights, and in existence since the early 1990s successfully steered employment practices within the region in a direction that had a measurable and positive impact in terms of addressing discrimination and under-representation in the Northern Ireland labour market. Within the field of public housing this article will show that a de jure commitment to eradicating unfair practices with respect to the planning and allocation of housing through a regulatory framework based on direct state action was undermined by another agenda within government which had security and counter-insurgency as its primary objective. This approach in effect steered the planning and provision of public housing in a direction that directly and indirectly discriminated against the minority Catholic community. A key factor in contributing to the success of the fair employment regulatory framework was the existence of monitoring data that featured prominently in debates about the extent to which equality goals and timetables were being realised and which allowed for independent empirical analysis. Similarly, one of the key factors in the success of the defensive planning agenda was the lack of hard data in the public domain highlighting practices that were both directly and indirectly discriminatory, and leading in some cases to patterns of inequality being viewed as a result of greater cohesion within the Catholic community, and a desire for self-segregation. This article concludes by arguing that if the reflexive regulatory framework that has been in place with respect to the promotion of equality within the field of housing and urban planning since 1998 is to have any hope of success then it is imperative that data relating to patterns of housing inequality are published widely in the same way that data on employment equality has become part of the equality landscape in Northern Ireland. The article concludes by arguing that

1 Tim Cunningham is completing a PhD at the Transitional Justice Institute, Ulster University on Human Rights and Urban Planning and prior to that worked for the Belfast-based human rights NGO the Committee on the Administration of Justice (CAJ) for ten years as their equality programme officer. He would like to thank Joanna Whiteman of the ERR and the anonymous reviewer for their very helpful comments on this article, and his PhD supervisors, Prof. Fionnuala Ni Aolain and Dr. Kris Brown who reviewed an earlier version of this piece.
the findings from Northern Ireland highlight more generally the way in which urban planning practices can serve to discriminate, both directly and indirectly, against minority communities and calls for a greater level of engagement between equality and discrimination law theorists and practitioners within the field of urban planning.

1. Background

Protection against discrimination on grounds of religious belief within Northern Ireland goes back to the establishment of the State itself with the 1920 Government of Ireland Act prohibiting the Northern Ireland Parliament from discriminating in the areas where the Parliament had power to legislate, as well as prohibiting both preferences and disabilities on account of religious belief when executive power was exercised. Until the repeal of the Act in 1973 this constitutional safeguard was invoked only once in relation to religious discrimination. These formal protections were, however, expected to be merely the “tip of an iceberg” of constitutional and political conventions designed to provide a new political order for the region, based on “tolerance, restraint, and mutual respect”. Notwithstanding the aims of those involved in the establishment of the Northern Ireland State, overt religious discrimination against the minority Catholic population became a feature of life in the region from the early 1920s until the late 1960s. Serious rioting followed a number of protests by a burgeoning civil rights movement demanding an end to discrimination, and the introduction of fair housing and job allocation for Catholics in the late 1960s which in turn led the Government of Northern Ireland at the time to establish a commission of inquiry to investigate the causes and nature of these disturbances. The subsequent report of the inquiry (the “Cameron report”) concluded that:

2 Government of Ireland Act 1920, Section 5.
3 Ibid., Section 8(6).
4 Londonderry C.C. v McGlade [1929] NI 47.

Upon the immediate and precipitating causes of the disorders which broke out (...), was a rising sense of continuing injustice and grievance among large sections of the Catholic population in Northern Ireland (...) in respect of (i) inadequacy of housing provision by certain local authorities (ii) unfair methods of allocation of houses built and let by such authorities, in particular; refusals and omissions to adopt a ‘points’ system in determining priorities and making allocations (iii) misuse in certain cases of discretionary powers of allocation of houses in order to perpetuate Unionist control of the local authority.\(^8\)

The report also found that there had been many cases in which councils had withheld planning permission, or caused needless delays to a housing project where they believed that the construction of that project would be to their electoral disadvantage.\(^9\) In relation to employment the report also referred to:

> [C]omplaints, well documented, of discrimination in the making of local government appointments, at all levels but especially in senior posts, to the prejudice of non-Unionists and especially Catholic members of the community.\(^10\)

Subsequent civil disorder within Belfast was considered by another committee of inquiry set up by the Hon. Mr. Justice (later Lord) Scarman which was restricted to looking at the detail of the events relating to the disturbances rather than investigating the wider causes of the trouble. The “Scarman Report” did however provide some important material on the patterns of displacement resulting from the violence that erupted finding that of 1,820 displaced households (i.e. those forced to move as a result of violence and intimidation), 1,505 (82.7%) were Catholic, and 315 (17.3%) were Protestant.\(^11\) Overall, the number of Catholic households at the time in Belfast was almost 29,000, with 88,000 Protestant households, meaning that 5.3% of Catholic households overall were displaced, compared with 0.4% percent of Protestant households.\(^12\) This pattern was to be repeated over the next few years so that between 1969 and 1973, in the face of rioting, bombings and shootings, an estimated 60,000 Belfast residents were forced to leave their homes, moving from vulnerable and destabilising interface areas to neighbourhoods where their community was dominant.\(^13\) A fur-

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ther report published by the Northern Ireland Community Relations Commission recorded a minimum of 8,000 households moving between 1969 and 1973 with Catholics again disproportionately affected (38% of Catholic movers mentioned sectarian violence as a reason for moving while 14% of Protestant movers did likewise).\textsuperscript{14} This report concluded that the minority religious community (Catholics) were not only more likely to have had to make a house move because of the violence in Belfast than Protestants, but that “Professional” and “White Collar Catholics” were just as likely to have had to make a “troubles” move as their co-religionists in the manual occupation categories,\textsuperscript{15} a phenomenon which the authors of the report attributed to the fact that middle class Catholics were the least segregated group and therefore more likely to be isolated (or to perceive themselves as isolated) when violence in the city broke out.\textsuperscript{16} It is also important to note that the destination of those fleeing their homes differed significantly between the two communities with Protestants tending to move out to the newer housing areas on the city’s margins and Catholics crowding into the west of the city and the older housing in North Belfast.\textsuperscript{17}

It was in the context of this explosion of violence, population movements, clear evidence of overt religious discrimination on the part of local councils, the Stormont Government itself, and a rising sense of grievance on the part of the Catholic community that the UK Government instigated a programme of reform.\textsuperscript{18} This article compares and contrasts two different regulatory frameworks that were subsequently adopted by the UK Government to eradicate discrimination and promote equality of opportunity in the labour market, and in the provision of public sector housing. By comparing these two different approaches, this article will argue that important lessons can be drawn for attempts to eradicate discrimination and promote equality within Northern Ireland more generally, the most important of which is the need for a robust equality monitoring process in order to measure the extent to which measures that have been adopted are effective. The article will also argue that the experience of Northern Ireland provides important lessons about the conditions necessary for ensuring the success of reflexive regulatory frameworks more generally, as well as highlighting the need for equality and non-discrimination law to consider more generally urban planning policies and practices in terms of shaping patterns of inequality and discrimination.

\textsuperscript{14} Darby, J., \textit{Intimidation in Housing}, Northern Ireland Community Relations Commission, 1974.

\textsuperscript{15} Ibid.

\textsuperscript{16} Ibid.


2. Regulating Employment Equality in Northern Ireland

In 1972 the UK Government established a Working Party to examine discrimination in employment practices in the private sector in Northern Ireland.\textsuperscript{19} The Fair Employment (Northern Ireland) Act 1976 incorporated the major recommendations of the subsequent report of the Working Party making direct discrimination on religious or political grounds unlawful, and creating a new Fair Employment Agency (FEA) responsible for receiving and investigating complaints of discrimination, and for conducting investigations on the extent of equality of opportunity.\textsuperscript{20} In addition, a new Northern Ireland Constitution Act in 1973 established the Standing Advisory Commission on Human Rights (SACHR) to advise the Secretary of State on the adequacy and effectiveness of the law in preventing discrimination on the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground.\textsuperscript{21}

Concern at the perceived inadequacies of these measures continued through the mid-1980s fuelled by a number of factors, including the publication in July 1985 of statistics\textsuperscript{22} showing marked differences between the characteristics of the Protestant and Catholic sections of the community in Northern Ireland in such areas as employment and housing, which underlined the fact that in spite of the reforms introduced in the early 1970s substantial inequalities between the two groups remained.\textsuperscript{23} The SACHR asked the Policy Studies Institute (PSI) to undertake a programme of research in order to establish whether equality of opportunity existed between the two communities in the areas of employment, economic wellbeing and housing.\textsuperscript{24} The final PSI reports were published in four parts under the general title “Equality and Inequality in Northern Ireland” with parts one, two, and three dealing with differences between Catholics and Protestants in employment and unemployment; employment policies and practices in the workplace; and people’s attitudes towards discrimination and inequality.\textsuperscript{25} These were published at the same time as a major report by SACHR on fair employ-

\begin{itemize}
  \item \textsuperscript{20} Fair Employment (Northern Ireland) Act 1976.
  \item \textsuperscript{21} Northern Ireland Constitution Act 1973, Section 20.
  \item \textsuperscript{22} Continuous Household Survey: Religion PPRU Monitor 2/85, June 1985.
  \item \textsuperscript{24} Ibid, Para 1.8.
  \item \textsuperscript{27} See above, note 25.
\end{itemize}
ment, in October 1987.\textsuperscript{28} Crucially, the 1987 report into employment inequality embraced a regulatory framework designed to address both individual and group justice, with the former evidenced by recommendations for enhanced measures of redress for claims of individual unfair discrimination through the creation of a new Fair Employment Tribunal (FET)\textsuperscript{29} and the latter by recommendations that employment differentials between the two communities should be reduced and that affirmative action measures to address under-representation in certain cases should be part of the overall framework for promoting employment equality between the two communities.\textsuperscript{30} These reports paved the way for the passage of another, much tougher Fair Employment (Northern Ireland) Act in 1989 which retained elements of the formal, anti-classification approach to non-discrimination that had been enshrined in the earlier Fair Employment (Northern Ireland) Act of 1976 but which also incorporated elements of the more substantive or group justice approach towards addressing inequality by adopting the objective of creating more integrated workplaces.\textsuperscript{31} In order to achieve this objective, the 1989 Act contained a number of innovative and highly controversial measures that included: the introduction of compulsory workforce monitoring, requiring employers to measure the composition of their workforce and to submit periodic reviews of the composition of their workforce to a new statutory enforcement agency, the Fair Employment Commission (FEC); and the requirement on employers to make a determination as to whether or not they were achieving “fair participation” in their workplace.\textsuperscript{32} Where “fair participation” was not deemed to be happening, the 1989 Act allowed for limited affirmative action measures to be undertaken in order to ensure “fair participation.”\textsuperscript{33}

The SACHR subsequently carried out a further review of employment equality in the mid-1990s that looked at the experience of the operation of the Fair Employment (Northern Ireland) Act 1989 and of the Fair Employment (Northern Ireland) Act 1976 publishing another report in 1997 entitled “Employment Equality: Building for the Future”.\textsuperscript{34} As with the situation in the 1980s, SACHR also commissioned external research to inform its work.\textsuperscript{35}

\begin{thebibliography}{99}
\bibitem{28} See above, note 23.
\bibitem{30} See above, note 23.
\end{thebibliography}
Furthermore, the Northern Ireland Affairs Committee directed its attention to matters relating to inequality in Northern Ireland, reviewing the operation of the Fair Employment (Northern Ireland) Act 1989 ten years after the Act had arrived on the statute books.\(^{36}\) The 1989 Act also of course generated a considerable volume of material itself in terms of findings from the courts and tribunals with the FET issuing a series of important judgments throughout the early 1990s on a number of matters relating to employment discrimination including for example sectarian harassment,\(^ {37}\) failure on the part of employers to ensure a “neutral working environment”,\(^ {38}\) failure by employers to take seriously sectarian threats to employees,\(^ {39}\) and the presence of flags and emblems which had the effect creating a hostile working environment\(^ {40}\) with the FET particularly active in developing the Fair Employment Code of Practice’s approach to a “neutral working environment” in relation to harassment cases.\(^ {41}\) In addition, from 1990 the FEC began work with employers on the implementation of affirmative action agreements, and each year the FEC published a summary of results of workplace monitoring by community background, all of which became the subject of debate and academic study.\(^ {42}\) In 2004, the Equality Commission for Northern Ireland\(^ {43}\) took the opportunity to commemorate the fact that almost 30 years had passed since the Fair Employment (Northern Ireland) Act of 1976 had appeared on the statute books by commissioning a number of essays published under the title “Fair Employment in Northern Ireland: A Generation On”.\(^ {44}\) In other words, the decades since the passage of the 1989 Act were characterised by a substantive volume of work, from a wide range of sources, including statutory agencies, academics, and Parliament, assessing the extent to which the regulatory framework put in place had succeeded in ending religious discrimination and promoting equality of opportunity in the

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43 The Fair Employment Commission (FEC) was replaced by the Equality Commission for Northern Ireland by Section 73 of the Northern Ireland Act 1998.

Northern Ireland labour market.\textsuperscript{45} Moreover, a central feature of these debates was robust data monitoring that allowed for external scrutiny of Catholic and Protestant representation in the labour market.\textsuperscript{46} This data also allowed for empirical analysis of the impact of the fair employment legislation to be carried out which showed that the fair employment legislation had succeeded in creating more integrated workplaces and reducing discrimination on grounds of religion.\textsuperscript{47}

3. Equality, Non-Discrimination, and Housing in Northern Ireland

In terms of the regulatory framework put in place to eradicate unfair discrimination in public housing, the key development in the early 1970s was direct action on the part of the State with the establishment of a central housing authority, the Northern Ireland Housing Executive (NIHE), responsible for ensuring that all public authority house building and allocation was provided on the basis of an objective points system based on housing need.\textsuperscript{48} Again however, as with employment, data published in the mid-1980s had indicated that substantial differences with respect to housing provision between Catholics and Protestants continued\textsuperscript{49} and consequently the SACHR research programme included an examination of this issue. Following the publication of parts one to three of the PSI reports into employment, part four of the PSI’s report that dealt with housing was published in June 1989\textsuperscript{50} and was subsequently addressed in a second SACHR report in 1990.\textsuperscript{51}

The final PSI report was very clear that while the research that had been carried out into the issue of housing was a substantial improvement on that which had existed previously,


\textsuperscript{46} Every year a summary of annual workforce monitoring returns was published, first by the FEC, and subsequently by the Equality Commission for Northern Ireland (ECNI), see, for example, ECNI, \textit{Monitoring Report No. 20 – A Profile of the Monitored Northern Ireland Workforce: Summary of Monitoring Returns 2009}, 2010.


\textsuperscript{48} The Housing Executive Act (Northern Ireland) 1971.

\textsuperscript{49} See above, note 22.


resources available and lack of hard data did not allow for a conclusive answer into some of the broader questions relating to housing inequality. The report did however, publish some important findings showing the extent to which inequalities between the two communities in the area of housing remained. In relation to density of occupation for example, the PSI study found that although Catholic households tended to be substantially larger than Protestant ones, Catholics did not tend to occupy larger accommodation: in fact, the number of rooms occupied by Protestant households was, on average, slightly larger than the number occupied by Catholic households. In relation to overcrowding, measured in the PSI study by the bedroom standard, the final report found that, overall, 5% of Protestant households and 16% of Catholic households were overcrowded.

The report acknowledged that while there was a tendency for working class families to be living at a higher density of occupation than middle class families and that to some extent, the difference between Protestants and Catholics in density of occupation was associated with the social class distribution of the two groups, most of the difference remained when comparisons were made within socio-economic groups. Among tenants of the Housing Executive, the study found that 17% of Catholic households compared with 7% of Protestant households had fewer bedrooms than the standard. In addition, the proportion of Housing Executive tenants with extra space was higher among Protestant households (59%) than among Catholic households (45%). The report concluded therefore, that Protestant families within the public sector tended to have a higher quality of accommodation than Catholic families. Among those renting privately, the PSI study concluded that Catholics paid more than Protestants for poorer accommodation while in terms of access to housing the report found that within the Belfast urban area “Catholic applicants had a considerably lower chance of being re-housed than Protestant applicants” with an almost 2:1 disparity between the two communities. In terms of the operation of the points system for the allocation of housing, the report concluded that the findings of the research suggested that after taking account of housing need the disparity in chances of re-housing between Protestants and Catholics were inequitable, since Catholic applicants had a lower chance of being re-housed although they

52 See above, note 50, p. 5.

53 Bedroom Standard: Each household requires a given number of bedrooms, depending on the number of adults and children, and their composition in terms of age, sex and marital status, and their relationships to each other. Once the standard number of bedrooms required has been determined, the actual number can be compared with it, to show whether there is overcrowding or under-occupation. The exact definition of the bedroom standard is given in the annual report of the General Household Survey, published by HMSO.

54 See above, note 50, p. 15.

55 Ibid.

56 Ibid., p. 16.

57 Ibid., p. 17.

58 Ibid., p. 42.

59 Ibid., p. 43.
tended to display greater housing need. The report also concluded that a comparison between allocations and applicants seemed to show a clear disparity in the chances of being re-housed between those preferring Protestant and Catholic areas, in favour of the Protestant group, with the contrast increased rather than reduced when the comparisons took account of the household type and the level of housing need.

The PSI study concluded that: the public housing system did not succeed in delivering equal opportunities to Catholics and Protestants; there was unequal access; the two groups occupied housing of unequal quality; and the housing system itself tended to encourage segregation. The report also concluded, however, that there was no evidence from the findings of the study of direct or intentional discrimination, nor of indirect discrimination by the NIHE against Catholic applicants or tenants. Significantly though, the report stated that until this study had been undertaken, it was widely accepted that the public housing system was equitable, even though the NIHE had never produced any information about the results it delivered to Protestants and Catholics. The PSI study concluded that if the NIHE intended to secure equality of opportunity in the future for Protestant and Catholic applicants and tenants, the organisation had to move towards explicitly and openly monitoring the results of its policies and that a failure to do so would highlight the fact that legislation on religious and political discrimination in Northern Ireland did not extend to housing.

a. Monitoring Equality

Significantly, the finding by the PSI research that the public housing system did not succeed in delivering equal opportunities to Catholics and Protestants was absent from the 1990 SACHR Report. In fact, most of the data outlined above was also absent, in particular the finding that there was an almost 2:1 disparity in the re-housing chances of those preferring Protestant and Catholic estates, although the SACHR report did allude to allocations “being lower” in Catholic areas. The SACHR went to some lengths to highlight the fact that the PSI study had found no evidence of direct or indirect discrimination by the NIHE and this was in effect the theme that informed the overall conclusions of the report.

60 Ibid., p. 44.
61 Ibid., p. 45.
62 Ibid., p. 47.
63 Ibid.
64 Ibid.
65 Ibid.
66 See above, note 51, Para 2.18.
67 Ibid.
It is worth noting the two different approaches taken by the 1987 SACHR report into employment equality, which subsequently gave rise to the 1989 Fair Employment (Northern Ireland) Act, with that adopted by the later 1990 SACHR report into housing particularly in light of the fact that if anything, the evidence presented to SACHR showed even higher levels of inequality in relation to housing than employment. The one group justice measure that was taken up in the 1990 SACHR Report, however, was the need for monitoring by community background and this was to provoke a significant level of disagreement between SACHR and the NIHE. One of the key questions that the PSI study had addressed was whether the NIHE should move in future towards formally monitoring the results of its policies in order to measure the impact of these policies in terms of patterns of inequality between Protestants and Catholics. In this context, the PSI report distinguished between formal policy and informal practice pointing out that while it was the formal policy of the NIHE that the organisation was blind to religion, informally, and in practical terms, housing managers in Northern Ireland inevitably had to be constantly aware of sectarian divisions and to think in terms of housing developments as “Protestant”, “Catholic”, or “mixed”. The PSI study conceded that after a prolonged period of civil disturbance and population movement it was very difficult for housing managers to think or behave as though all housing was in principle openly available to all applicants and referred to previous work carried out by Singleton who found that:

Segregation of Protestants and Catholics has led to an implicit recognition of the inevitability of allocating dwellings on the basis of ‘two’ waiting lists, one Catholic and the other Protestant (...) The NIHE has in many instances had no option but to sort its waiting list into Roman Catholic and Protestants and provide separate housing sites in different parts of towns for the two groups.

The PSI research concluded that one consequence of residential segregation was that many new housing developments would be identified by housing managers as providing dwellings for either Protestants, or for Catholics, even at the planning stage, and that this was an important background to analysis of access to housing by the two groups. The question that the PSI report addressed therefore was not whether housing managers should be blind to religion – an issue that the authors of the report considered to be one which everyone knew could not be the case, but rather, whether the NIHE should formally acknowledge the need to assess the outcomes of policies on patterns of inequality for the two communities. The subsequent SACHR report conceded that since the publication of the PSI research, there had been a number of dis-

68 Ibid., Para 4.53.
69 See above, note 50, p. 4.
70 Ibid.
72 See above, note 50, p. 4.
73 Ibid.
Discussions on this issue between SACHR officials and both board and staff members of the NIHE and that SACHR had been advised that, although the NIHE had no plans to record information on the religious affiliation of its tenants and applicants, the NIHE would in future seek information on religion as appropriate in its sample surveys and other research work.\textsuperscript{74}

According to SACHR, the view within the NIHE was that systematic monitoring would create an erroneous impression that religious affiliation was part of the decision making process and that if it were required by Government to change its stance there would be hostile public reaction.\textsuperscript{75} SACHR concluded that while fully aware of these factors, it nonetheless remained of the opinion that while research of the kind which the NIHE envisaged might provide useful information on trends and patterns, it was unlikely to be an adequate substitute for the regular monitoring that SACHR considered necessary to provide the detailed statistics needed to help define and isolate those policies or practices which may be creating differences of outcome related to religious affiliation.\textsuperscript{76} SACHR also felt that regular monitoring would assist in research on the cumulative effect of other factors and might even prove more cost effective than relying on research samples.\textsuperscript{77} SACHR also took the view that the precise details of the particular monitoring system that ought to be adopted were a matter for both technical and public debate and accordingly recommended that the best process for monitoring the NIHE’s policies and practices be studied further.\textsuperscript{78} SACHR was in no doubt therefore that procedures for ensuring that the way the decision making process impacted on each of the two main communities should be introduced.\textsuperscript{79} As noted above, the 1987 SACHR report had been quite unequivocal in relation to monitoring in the area of employment, recommending that monitoring be used to identify the particular section of the community or tradition with which an individual was most closely associated. It recommended that employers record the perceived religious affiliation of employees and others, and not necessarily seek to ascertain their actual beliefs.\textsuperscript{80} This recommendation had of course, by the time that the 1990 SACHR report was published, been enshrined in law through the Fair Employment (Northern Ireland) Act 1989.

\textit{b. Different Approaches to Equality and Non-Discrimination}

In seeking to understand the more individual justice approach adopted by SACHR in 1990 there are a number of relevant factors to consider. Firstly, a number of key figures involved
in producing the 1987 report had departed from the organisation by the time of the 1990 report, including James O’Hara, the chair of SACHR at the time of the 1987 report, and Christopher McCrudden, who had played a key role in critiquing the work of the earlier FEA\textsuperscript{81} and was actively involved at the time in ensuring that the key findings of the 1987 report were translated into law via the Fair Employment (Northern Ireland) Act 1989. It is also important to note that the 1987 employment report contained a dissenting view, with three Commissioners dissociating themselves from some of the main findings and concluding that:

\textit{In no circumstances should the elementary mistake be made of confusing equality of opportunity with equality of result: two very different matters, both in concept and in practice.}\textsuperscript{82}

Essentially the dissenting Commissioners remained wedded to an individual justice or formal approach to equality and non-discrimination that rejected the need for monitoring data of any kind within employment and which considered that equality and non-discrimination law should focus simply on eradicating direct discrimination.\textsuperscript{83} The views of the dissenting Commissioners were in effect overruled by majority of the other SACHR Commissioners, so that the final report in 1987 adopted quite a group justice approach. However the dissenting note illustrates the differing perspectives on these matters within SACHR itself during this period.

There were also a significant number of commentators outside SACHR who attributed Catholic inequality to higher birth rates within that community, and other demographic factors, and who considered that addressing these inequalities should not be a matter for discrimination law.\textsuperscript{84} Crucially, the differing views on the individual versus group justice approaches to promoting equality, as with many other debates in the region, also played out as part of the wider “meta-conflict” about the constitutional status of Northern Ireland\textsuperscript{85} which of course served to increase the level of controversy that these debates gave arise to. It is also impor-


\textsuperscript{82} The “Dissenting View” appeared at the end of the final report of 1987 and recorded “specific dissent” with a number of key recommendations including those to do with workforce monitoring. In effect the three Commissioners concerned accepted much of what was in the report, however were not prepared to endorse other aspects of the findings. See above, note 23, p. 185.


tant to note that the MacBride campaign in the United States, operating from the mid-1980s, played a key role in shaping the employment debate in Northern Ireland and in particular persuading the Conservative Government under Margaret Thatcher of the need for a more group justice regulatory framework to promote equality and eradicate discrimination.\textsuperscript{86} Again, however, the MacBride campaign was exclusively concerned with employment – no equivalent external pressure was brought to bear in the area of housing. Moreover, a significant amount of political controversy was being generated within Northern Ireland at the time of the publication of the 1990 report about the proposals to enhance the legal framework around employment equality, not least with respect to the introduction of compulsory monitoring in the workforce as the legislation was beginning to come into effect. In addition, the 1990 report states that discussions were taking place between SACHR officials and those within the NIHE in order to try and persuade the NIHE to adopt a system for monitoring the impact of policies on equality of opportunity.\textsuperscript{87} In this context, SACHR may well have considered that a “softer” approach in their final report may have been more effective in terms of persuading the NIHE towards their thinking on this issue and that publishing data which the NIHE were clearly sensitive about would have been counterproductive. The likelihood is that all these factors played a role in shaping the final content of the 1990 report, however, what one can state with certainty and the benefit of hindsight is that the period between publication of the final PSI report on housing inequality in 1989 and the publication of the second SACHR report in 1990 proved a watershed in how inequality between Catholics and Protestants in Northern Ireland was framed. In effect, the publication of the second SACHR report in 1990 marked the point at which debate about housing inequality disappeared from legal, academic, and political consideration.

From 1990 onwards, discrimination and inequality between the two communities in Northern Ireland as a subject of political, non-governmental, and academic focus related \textit{de facto} to labour market policies and practices, a situation that persists largely to the present day. Moreover, as the next section will also show, a narrative also emerged at that time, which has also remained until the present day, that discrimination in the area of public housing had been addressed and that the problem facing policy makers was how to manage a situation in which two communities chose, of their own volition, to live apart in separate areas.

4. Planning, Housing, and Conflict Management

The open and public nature of the fair employment debate since the early 1990s, with regular scrutiny of robust workforce monitoring figures detailing patterns of inequality, and findings of discrimination by courts and tribunals, in many ways could not be more of a contrast to


\textsuperscript{87} See above, note 51, Para 4.53.
the debates surrounding patterns of housing inequality and the role of urban planning in shaping these patterns. In order to fully understand the extent to which these debates have differed, it is necessary to consider a number of documents recently uncovered from the Public Record Office for Northern Ireland which show the extent to which the security agencies used the concept of “defensive planning”\textsuperscript{88} as a counter-insurgency strategy and the ways in which this process discriminated both directly and indirectly against members of the Catholic community in Northern Ireland across several decades. The origins of this strategy can be traced back to October 1970 when the then Government of Northern Ireland established a Joint Working Party on Processions in order to examine areas of confrontation and provide recommendations towards future government policy on how best to spatially manage the emerging conflict. Significantly, the final report of this Working Party (marked “secret”) concluded that:

\begin{quote}
We would consider it essential to provide in the re-development [of the city] for the maximum natural separation between the opposing areas (...) [P]rudence would point to the wisdom of some sort of physical “cordon sanitaire” (...) [T]he Urban Motorway Project is of considerable significance (...) [T]he effect will be to create a wide (in places as much as 100 yards) cleared belt to the west side of the City Centre.\textsuperscript{89}
\end{quote}

The Working Party considered that the Ministry of Home Affairs, the government department responsible for security and law and order at that time, should be given an opportunity to consider:

\begin{quote}
[A]ny plans for substantial development or re-development (both for housing and for industry and commerce) at an early stage, consulting the security forces and other departments where necessary.\textsuperscript{90}
\end{quote}

In relation to housing redevelopment, the report stated:

\begin{quote}
Plans for housing adjacent to the main lines of confrontation between the two communities, where not already approved, should be revised to provide more open space, particularly on either side of the new natural barrier.\textsuperscript{91}
\end{quote}

The report concluded that:

\begin{itemize}
\item \textsuperscript{90} \textit{Ibid.}, Para 41.
\item \textsuperscript{91} \textit{Ibid.}, Para 42(b).
\end{itemize}
There may be no alternative to increasing rather than discouraging segregation of the two communities through the creation of natural barriers.\footnote{Ibid., Para 49.}

The subsequent implementation of this strategy can be traced by examining additional documentary sources from the 1980s. Of particular interest are the activities of another hitherto secret entity called, the Standing Committee on Security Implications of Housing Problems in Belfast (SCH) that reveal much about how the policy of defensive planning in Northern Ireland was implemented. The SCH comprised a number of government agencies including the Belfast Development Office, which was at the time the main agency within government responsible for urban development, and the Department of the Environment (DOE), the government department responsible for planning, housing and urban affairs. Significantly, the SCH also contained representatives from the Northern Ireland Office (NIO), the government department responsible for law, order, and security as well as representatives from the security forces i.e. the then police force for Northern Ireland the Royal Ulster Constabulary (RUC) and the British Army. The RUC and British Army representatives on the SCH were among the most senior figures within the police and military establishment in Northern Ireland at that time - with the RUC represented by Deputy Chief Constable (DCC) McAtamney and Assistant Chief Constable (ACC) Chesney and the British Army represented by Brigadier Crowfoot (39\textsuperscript{th} Infantry Brigade, British Army HQ) who chaired the meetings.\footnote{Letter from Eddie Simpson, Assistant Secretary, Housing and Urban Affairs, Department of the Environment (DOE) on 6 May 1981.}

In terms of the activities of the SCH, examination of the minutes of a meeting dated Thursday 19 February 1981 indicate that the Draft Belfast Housing Plans were presented and that the plans were “fully discussed and comments sought from those present”.\footnote{Minutes of a meeting of the Standing Committee on Security Implications of Housing Problems in Belfast (SCH), Thursday 19 February 1981.} In the course of this meeting, Mr. John Semple (DOE) explained that the Draft District Housing Plan for the whole of Belfast had been in preparation since the previous summer (i.e. from mid-1980) and that the DOE had themselves identified a number of security implications arising from the plan and were now seeking the views of the security authorities on these and any other potential difficulties\footnote{Ibid.}. The meeting ended with agreement that:

\begin{quote}
[T]he immediate priority was for the Police and the Army to examine the proposals in greater depth and alert DOE to any points of security interest which might need further consideration.\footnote{Ibid., p. 3.}
\end{quote}
In a subsequent letter from ACC Chesney to Eddie Simpson, Assistant Secretary, Housing and Urban Affairs (DOE) on 26 February 1981, ACC Chesney indicated that the Belfast Draft Housing Plan, introduced at the meeting of 19 February 1981 had been subsequently discussed with the RUC and 39th Infantry (British Army) and that his letter contained the combined views of both parties, i.e. the police and the army, in relation to the proposals. This letter outlined a range of issues across Belfast that the security forces considered needed to be addressed and gives an indication of the degree to which the security forces were involved in the planning of housing in the city at that time. The submission for example stated that proposed new housing for members of the Catholic community in West Belfast should be delayed, and welcomed the fact that land which was available for new housing in North Belfast would instead be used for commercial development, thereby eliminating a potential security problem that might arise were housing to be provided on the site which would be occupied by members of the Catholic community. In the south of the city, the submission expressed concern about the changing demographics of the Lower Ormeau Road (i.e. that the area had become more Catholic) and the security implications that might arise as a result of any additional housing development within the area, which it was felt might lead to increased opposition among Catholic residents to traditional Protestant marches in the area.

The minutes of the SCH meetings also provide some interesting insight into the problems that arose for the security forces with respect to the Poleglass housing development on the outskirts of the city that was designed to alleviate the over-crowding and housing need within Catholic West Belfast. The location of the site of the Poleglass development, outside Belfast and within the boundaries of the staunchly Unionist-controlled Lisburn Borough Council (LBC), created particular difficulties not least given that the Protestant and Unionist elected representatives controlling LBC did not welcome the addition of a large number of Catholic, Nationalist, social housing tenants as additions to their constituency. At a meeting of the SCH on 30 June 1980 a number of problems in the Poleglass housing complex were considered with Mr. John Semple reporting on the non-co-operation of LBC in providing services and facilities to the area. At a further meeting of SCH on 19 February 1981, it was noted that LBC continued to oppose and obstruct the new housing, which included stalling over the granting of pub licences. Significantly, at this meeting DCC McAtamney intervened and stressed the “high importance to the provision of pubs in the area as the demand for such facilities was otherwise likely to be met by clubs with paramilitary associations.” This intervention illustrates another important dynamic that existed within security policy at the time: denying the opportunity for organisations like the Provisional IRA to gain income through the operation of illegal drinking clubs in a particular area “trumped” concerns about offending the wishes

97 Letter from ACC Chesney to Eddie Simpson, Assistant Secretary, Housing and Urban Affairs on 26 February 1981.
98 Ibid.
99 Minutes of a meeting of the SCH on 30 June 1980.
100 Ibid.
of Unionist councillors who were hostile to the very existence of the Poleglass development and its Catholic residents per se.

5. Defensive Planning and Patterns of Inequality

The above decisions clearly had a significant impact on patterns of inequality in relation to housing, which becomes apparent when considering the nature of housing need in Belfast and the demographic changes that took place within the city during the 1970s. A useful starting point is a document produced by the Corporate Planning Department of the NIHE in 1980 outlining housing plans for the city, which highlights the differing housing needs of the two communities within Belfast at that time.\textsuperscript{101} This document states:

\begin{quote}
[A]s a generalisation (…) Protestant areas tend to have a crude surplus of dwellings which leads to the abandonment of less popular dwellings (…) waiting lists are small (…) vacant land and dwellings aid clearance in Redevelopment Areas.\textsuperscript{102}
\end{quote}

The document went on to find that within Catholic areas:

\begin{quote}
[T]here are very few dwellings available for allocation; over-occupation is common; there is a shortage of available space for new building; most allocations are made to people in the priority groups; clearance in Redevelopment Areas is very slow and difficult and there is a high incidence of large families with dependent children in Catholic areas.\textsuperscript{103}
\end{quote}

Clearly this document illustrates the impact that the mass population movements of the early 1970s, outlined in the introduction, had on the housing needs of the two communities within the city.\textsuperscript{104} With Protestants tending to move out to the newer housing areas on the city’s margins and Catholics crowding into the west of the city and the older housing in North Belfast, this clearly led to a marked increase in housing need for members of the Catholic community – as indicated above. In other words, the patterns of housing need between the two communities were totally different, with housing need much more acute within the Catholic community due to a much lower availability of vacant land within Catholic areas on which to build new housing. It was against this backdrop therefore that security assessments were made which, as shown above, sanctioned the use of vacant land in North Belfast for commercial development rather than housing, delayed the construction of new housing in West Belfast, and which viewed with concern the further expansion

\textsuperscript{101} Corporate Planning Department, Northern Ireland Housing Executive, \textit{Draft Introduction to the Seven Districts Housing Statements}, ENV/21/1/39/A, 1 October 1980.

\textsuperscript{102} \textit{Ibid}, Para 3.4 (i).

\textsuperscript{103} \textit{Ibid}, Para 3.4 (ii).

\textsuperscript{104} See above, note 11, 14, and 17.
of the Catholic community in south of the city. Clearly there are two common denominators in these security assessments, one of which was that housing should either not be built at all, or that housing construction should be delayed. The second common denominator was that in all these instances, the housing in question was needed for members of the Catholic community. It is important to point out that from the discussions of the SCH\(^\text{105}\) there is no evidence that the security forces were *intending* to discriminate against Catholics on grounds of their religion. Clearly, however, the effect of the security policy was not to build houses in a number of locations “but for” the religion of the occupants of the houses. In other words, the policy operated in a way that was directly discriminatory in line with the “but for” test of direct discrimination provided by the House of Lords in *James v Eastleigh Borough Council*\(^\text{106}\).

The view that security, rather than religious discrimination, provided the motive for the security forces is also supported by considering the minutes of the meetings of the SCH\(^\text{107}\) with respect to the Poleglass development. In this case, the discriminatory actions of the LBC, in terms of trying to frustrate the development happening at all, were overruled by a security agenda which wanted to the development to take place, and which aimed to ensure paramilitary organisations were not able to open drinking clubs in the area to raise funds for their activities. What was happening in effect was that the Catholic community were facing discrimination on the part of Unionist councillors, who didn’t want Catholics living in certain areas *per se*, and discrimination from the security forces who didn’t appear to have any overtly sectarian motive, but who operated a security policy which produced in some cases a similar outcome – i.e. less Catholic housing. One can of course also argue that overall security objective, as outlined in the original document from the early 1970s\(^\text{108}\) was indirectly discriminatory with respect to the Catholic population given that at the heart of the policy was a desire to segregate the two communities using vacant land and infrastructure as a “buffer”. In a context in which the Catholic community had significantly greater demand for housing, such an objective would clearly impact disproportionately on that community – given that this would clearly reduce the amount of land available for housing.

6. The Conflict, Planning and Housing Debate

What is significant, however, is that the secret activities of the SCH took place without any analysis or scrutiny by any outside agencies, including of course the SACHR. Again, it is important to emphasise that there is no evidence that members of the SACHR were aware of the SCH, or indeed had any role in suppressing investigations into these activities. As outlined above, there were a number of other factors that shaped the approach of SACHR to this is-

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105 See above, notes 97 and 99.
107 See above, note 99.
108 See above, note 89, Para 39.
sue. It does seem, however, that the decision of the SACHR not to publish data on key housing inequalities contributed more generally to housing inequality falling off the agenda for campaigners and researchers. Moreover, the fact that housing disappeared off the research agenda for the SACHR after 1990, more easily allowed for these kinds of practices to continue unchecked. Admittedly, debates about the extent to which the security forces were covertly involved in urban planning arose periodically in the press, largely as a result of alleged “leaks” of official documents\textsuperscript{109} which led to speculation over the years\textsuperscript{110} that the security forces altered road networks, influenced building plans and decided where new social housing developments could, and more importantly, could not be built.\textsuperscript{111} Significantly, however, most academic commentators, particularly those within the field of urban planning strongly refuted these arguments, stating that there was no evidence of security force involvement in the design and building of new housing estates or the manipulation of territory and community boundaries within the city and that regeneration initiatives and new housing in Belfast were influenced solely by community household surveys along with community consultation programmes.\textsuperscript{112} In fact quite a number of these observers have described the planning system in Northern Ireland as “colour blind”\textsuperscript{113} or even “autistic”\textsuperscript{114} and therefore impervious to outside influences such as those outlined above, arguing instead that a technocratic ethos developed within the planning system in Northern Ireland from the 1970s onwards in response to allegations of discrimination in the 1960s, and that this new ethos prioritised impartiality and neutrality. Murtagh for example argues that the Northern Ireland planning service imported technical values and practices from Britain and disregarded the particular problems

\textsuperscript{109}Letters from the DOE concerning alleged security force involvement in planning were leaked to The Guardian (13 March 1982), and to the Irish News (15 March 1982). Subsequent articles in the press concerning this matter are found in The Belfast Telegraph (15 March 1982); Built Environment (17 March 1982), The Belfast Newsletter (15 March 1982); The Irish News (23 March 1982); and The Guardian (6 April 1982 and 13 April 1982); For articles citing leaks see Cowan, R., “Belfast’s Hidden Planners”, Town and Country Planning, June 1982; Hillyard, P., “Law and Order” in J. Darby (ed.), Northern Ireland: The Background to the Conflict, Appletree Press, 1983; Faligot, R., Britain’s Military Strategy in Ireland: The Kitson Experiment, Brandon, 1983.


\textsuperscript{114}Ellis, G., “The City of the Black Stuff: Belfast and the Autism of Planning”, in McEldowney, M., Murray, M., Murtagh, B. and Sterrett, K. (eds.), Planning in Ireland and Beyond: multidisciplinary essays in honour of John V. Greer, School of Environmental Planning, Queen’s University, 2005, pp. 261–271.
that the conflict gave rise to so that planning within Belfast was “planning for anywhere”. It is also important to note that the official line from the Government has always been to deny that the security forces had any specific role in the planning process in Northern Ireland.

7. Housing Inequality, Group Injustice and Social Cohesion

It is also important to note that while there has been no shortage of literature highlighting the extent to which Belfast is characterised as a “divided city” and the difficulties that the NIHE have faced in terms of addressing housing need faced with the extent of that division,


most commentators have attributed the patterns of segregation within the city as arising from individual preferences.\textsuperscript{119} Brett is fairly typical of this kind of view, stating that:

\begin{quote}
The fact that the two communities largely prefer to live apart, in territories divided in many places by so-called “peace lines”, is very much to be regretted; the divisions will not begin to disappear until trust and confidence can be restored; but at least, bad housing is no longer a serious cause of unrest and violence.\textsuperscript{120}
\end{quote}

As well as being a renowned commentator on housing and architecture, Brett was himself Chairman of the NIHE during the period 1979 - 1984, and was on the board for several years before assuming the role of Chair.\textsuperscript{121} This was of course during the period covered by the examination of the minutes of the SCH (above) which shows that in several important respects, it is a mistake to consider that the communities “largely preferred to live apart” given that one community, i.e. the Catholic community, were adversely impacted upon by a range of factors including the actions of LBC, and the security forces. Several other commentators, particularly those from within the Protestant community, have attributed the segregated nature of social housing in Northern Ireland to a greater degree of social cohesion and solidarity within the Catholic community that originates from Catholic Church doctrine.\textsuperscript{122} From this perspective, Catholic communities are seen as being more “united”, “stronger” and “cohesive” than their individualistic Protestant co-religionists.\textsuperscript{123} This view has also been expressed by British government Ministers and used to justify the development of a strategy aimed at targeting financial assistance specifically towards working class Protestant communities in spite of the fact that objective data from government had shown the highest levels of deprivation to be within Catholic areas.\textsuperscript{124} In many ways these views are not dissimilar to comments in the 1970s and

\begin{flushleft}


\textsuperscript{121} \textit{Ibid}.


\textsuperscript{123} \textit{Ibid}.

\end{flushleft}
1980s from Unionist politicians that Catholic under-representation in the labour market was attributable to the lack of a Protestant work ethic and a greater willingness to claim benefits. Such arguments, prominent within the employment debates of the early 1980s are much less widespread now, in no small measure due to the high profile findings of discrimination in the workplace by the courts and tribunals received in the press, and the rise in the Catholic percentage of the workforce as a result of the fair employment framework.

It is clear however, that the lack of published data showing the level of overcrowding that continues to exist, and the extent to which secretive planning practices such as those outlined above served to concentrate the Catholic population within discrete territorial boundaries has contributed to the view that Catholics were voluntarily “self-segregating” to be perpetuated. It is important to note that there have, on rare occasions, been some attempts to raise concerns about continuing levels of inequality. This author was the main researcher on a report published in 2006 that showed the extent to which Catholics were disproportionately represented on housing waiting lists, particularly in North and West Belfast. However, the report was heavily criticised by the NIHE on the grounds that publication of such data could serve to “politicise” the housing debate as such data was “politically and highly sensitive and on occasion needs to be managed in a measured and sensitive way”. One of the difficulties for researchers working in this area, however, has been the lack of publicly available robust data which can be used to examine the extent to which discriminatory practices may, or may not, be continuing.

8. Regulatory Theory and Equality Outcomes

Somewhat paradoxically, in spite of the fact that housing inequality disappeared from public debate, there were some important developments to the regulatory landscape with respect to the promotion of equality within the areas of housing and urban planning more generally, fol-


126 Letter from Stewart Cuddy, Director of Corporate Services/Deputy Chief Executive, Northern Ireland Housing Executive, to Maggie Beirne, Director, the CAJ, 27 November, 2006.

127 Data for the CAJ report was obtained via the use of Parliamentary Questions. Such an approach while useful, is also cumbersome, takes time, and falls far short of the regularly published monitoring data available with respect to employment.
lowing the all-party political agreement reached in 1998. Following the publication of the SA-CHR report in 1997, the British Government passed the Fair Employment and Treatment Order of 1998, which among other measures extended protection against discrimination beyond employment to the provision of goods, facilities and services, which included housing. However, the new law was limited to providing individual complainants the right to pursue complaints of discrimination through the county court and some 17 years later there has yet to be a single case involving discrimination in the area of public housing128 with the overwhelming majority of cases coming through the courts and tribunals still relating to religious discrimination in the field of employment. In some ways this is unsurprising given that the problems identified here relate to covert policies and practices which impact adversely on groups, while the 1998 Order is framed in terms of redressing claims of overt discrimination against individuals.129

The Belfast Agreement reached following multi-party talks on the political future of Northern Ireland provided another opportunity for those campaigning for a more group justice based regulatory framework to be introduced across public policy areas, including housing and urban planning, and this was achieved through a commitment in the Agreement that legislation would be enacted requiring public authorities in Northern Ireland to impact assess their policies in order to determine whether or not equality of opportunity was being achieved.130 This requirement was given effect to via the Section 75 of the Northern Ireland Act 1998, which created a duty on public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity and regard for good relations on the grounds of religious belief, political opinion, and race.131 It applies to the functions of a relevant public authority, including functions such as planning and

128 There has been an occasional example of cases coming forward which relate to matters outside the workplace, for example, in County Court for the Division of Fermanagh and Tyrone, Mckelvey v Mc Dermott, 30 June, 2005. The County Court held that the sale of land had involved an act of unlawful religious discrimination.


housing.\textsuperscript{132} Again, the lack of open data has served to militate against a comprehensive assessment of the success of this new legislation in terms of addressing housing inequalities, particularly by outside organisations or individuals. Of particular interest in this context, however, is the decision-making framework that was adopted to achieve the defensive planning objectives from the 1970s. As the documents examined above show, the process for defensive planning required that in the first instance, the DOE themselves assessed plans for security considerations, which were then presented, via the SCH, to the police and the British Army, who in turn amended these plans in line with their own objectives. Certainly, from reading the original sources of the meetings of the SCH there is little doubt as to who had the final say with respect to any planning or design issues and who was in effect “steering” the work of the committee, i.e. the security forces. Clearly, however, rather than the security forces providing a final blueprint of how the city should look, existing and future plans were simply adapted and amended to coincide with a security agenda – thereby maximising the impact of the proposals, while at the same time maximising “deniability” on the part of the security agencies and their political leaders within the NIO who could legitimately claim that they were simply responding to the wishes of local communities as expressed in community consultation surveys, etc. This is clearly evidenced for example by the way in which the original document states that the Ministry for Home Affairs and the security forces should be offered the opportunity to consider at an early stage “any plans for substantial development or re-development (both for housing and for industry and commerce)”\textsuperscript{133} and that “opportunities to create natural divisions between difficult areas by means of road re-alignment should not be overlooked”.\textsuperscript{134} In other words, the objective was clearly to ensure that security considerations were in effect “mainstreamed” into the life-blood of the general planning system.

In this context it is important to consider some recent developments within regulatory theory\textsuperscript{135} regarding the promotion of equality of opportunity and in particular, the extent to

\textsuperscript{132} The other relevant mechanism in terms of oversight from the domestic courts in this context is of course judicial review – the procedure through which the High Court supervises the public law actions and inactions of public authorities and other bodies that are exercising statutory powers, performing public duties, and/or taking decisions on matters of public interest. While developments in judicial review have resulted in new principles that clearly have increased the scope for judicial invigilation of decision-making processes and outcomes, judicial review remains wedded to an historical “review, not appeal” doctrine that permits courts to assess only the legality of decisions and not their merits. See Anthony, G., \textit{Judicial Review in Northern Ireland}, Hart, 2008. See also for example, \textit{R v Secretary of State for Northern Ireland, ex p Finlay} [1983] 9 NIJB 1, Hutton J; \textit{Re Glor Na nGael’s Application} [1991] NI 117, 129, Carswell J.

\textsuperscript{133} See above, note 89, Para 41.

\textsuperscript{134} \textit{Ibid.}, Para 44.

which “reflexive” regulation can be used as an instrument for achieving regulatory objectives. Essentially reflexive regulation involves the replacement of direct state control with effective internal control by recognising the inner logic of individual social systems; the challenge however is to identify the structural conditions for the creation of an organisational conscience in order to provoke the system to move from its current state, to the one which is desired, and to ensure that these conditions are put in place. McCrudden has pointed to the success of the operation of the Fair Employment (Northern Ireland) Act 1989 and in his view the Article 55 review process of that Act, whereby employers sought to determine whether or not affirmative action measures were necessary in order to deliver “fair participation”, represented “classic” reflexive regulation.

Significantly, however, elements of reflexive regulation are also evident in the approach adopted by the security forces to defensive planning, where again, rather than delivering “command and control” type prescriptive outcomes for how the city of Belfast should look, the security forces in effect “steered” the planning system in the direction in which they wanted it to go – in this context towards greater segregation and separation of the two communities. Moreover, the “three conditions” which McCrudden considers necessary for successful reflexive regulation – namely, that those subject to the regulatory process have to examine what they are doing on the basis of evidence that is objective and comparable across the sectors in which they operate; that those subject to the regulation consider seriously alternative approaches that are available to them to take that will shift entrenched patterns of inequality which is able to be monitored by some external authoritative body; and some mechanism whereby those subject to regulation are required to engage with other stakeholders that will regularly challenge the set of assumptions that these bodies currently adopt, were also present. In the context of defensive planning in the 1970s and 1980s, external scrutiny and challenge was provided by the security forces, while the initial assessments, made on the basis of reviewing objective data on housing need etc. were carried out by the DOE. The regulatory objective of the defensive planning may have been quite different from that which took place with the fair employment legislation – i.e. segregation rather than integration, and concentrating inequality rather than promoting equality, but the mechanisms by which these objectives were achieved, were quite similar. In addition, one can definitively conclude that the planning system in Northern Ireland never was “autistic”, “technocratic” and impervious to outside influence. The key for the future is to ensure that the planning system is steered in a different direction towards objectives that better promote equality of opportunity.


137 See above, note 42; and see above, note 31, p. 170.
A similar reflexive framework is also evident in relation to urban planning under Section 75 of the Northern Ireland Act. Section 75 provides for the promotion of equality of opportunity via the use of Equality Impact Assessments and in essence adopts a reflexive regulatory approach that augments the individual rights approach enshrined in the Fair Employment and Treatment (Northern Ireland) Order 1998, and the consociational framework from the Northern Ireland Act. Certainly, Section 75 provides the three conditions that McCrudden has identified as being necessary for reflexive regulation to succeed. Moreover, there have been a number of other positive external developments that might assist with respect to re-configuring the planning system within Northern Ireland. Perhaps the most important development has been the establishment of a consociational power-sharing system of government for Northern Ireland that guarantees the minority Catholic population an equal share in the government of the region. As such, political representatives of the Catholic community now have a role in decision-making with respect to urban planning and housing policy at the highest levels. In addition, there have also been a number of other smaller, but not insignificant developments including the fact that the Equality Commission for Northern Ireland (ECNI) recently issued a tender for the production of a report on housing inequalities to inform the next Statement of Key Inequalities that the ECNI will issue. Significantly, previous statements of key inequalities covered employment, health, education, and economic wellbeing - but not housing. It would seem therefore, that some 25 years after the SACHR chose not to publishing housing inequality statistics that things have finally begun to change with respect to bringing data on housing inequality into the public domain and that the lessons from the fair employment regulatory framework vis a vis the importance of data are finally being applied to patterns of inequality within the provision of housing. It is important however that one is realistic in terms of acknowledging the scale of the challenge ahead, not least some recent announcements regarding redevelopments within the city of Belfast which would seem to indicate that the wider pattern of defensive planning that was laid down in the early 1970s is still being replicated. The insertion of a community facility and sports fields for example into the 27-acre site of the former Girdwood Army Base in North Belfast between the Catholic New Lodge and Protestant Lower Shankill area is evidence that the infrastructure “buffer” solution to occupying contested space is still alive and well – regardless of how this practice might impact on the provision of housing. The flagship Titanic Quarter redevelopment in East Belfast is further evidence of how the north and west of the city continue to be economically and socially segregated from the rest of the city – particularly when it comes to international


139 Section 76 of the Northern Ireland Act 1998 also states that it shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or cite another person to discriminate against a person or class of persons on grounds of religious belief or political opinion. For a discussion of the consociational role of the Northern Ireland Act in securing equality and human rights protection see McCrudden, C. and O'Leary, B., Courts and Consociations: Human Rights versus Power-Sharing, Oxford University Press, 2013.

140 Ibid.
investment.\footnote{O'Dowd, L. and Komarova, M., “Contesting Territorial Fixity? A Case Study of Regeneration in Belfast”, \textit{Urban Studies}, Vol. 48, No. 10, 2011, pp. 2013-2028; Morrissey, M. and F. Gaffikin, “Planning for Peace in Contested Space”, \textit{International Journal of Urban and Regional Research}, Vol. 30, No. 4, 2006, pp. 873–93.} Steering the planning system in the city in a different direction will clearly be no easy task. There can be no doubt that if this reflexive framework is to succeed, robust data on patterns of housing inequality must be at the heart of debates around a new way forward. The lesson from the previous decades in Northern Ireland is that it is insufficient for public authorities to gather data for their own use, or indeed, for the use of other decision-makers. As this article has shown, in relation to housing inequality, everyone from housing managers in the NIHE, to members of the security forces were aware of levels of housing need – but not those directly affected by that need or those who might have wished to intervene and do something to redress that need. The secrecy and subterfuge surrounding the publication of data on housing inequality has proven only one thing, namely, that the system of workforce monitoring in place since the early 1990s is a \textit{sine qua non} for addressing patterns of inequality in general, and for successful reflexive regulation in particular.

It is also contended that this lesson can be applied beyond Northern Ireland to other reflexive approaches to promoting equality and eradicating discrimination further afield, not least in Britain where McCrudden has previously highlighted the need for effective monitoring in the context of the UK equality duties legislation as one of the key preconditions for ensuring the success that legislation.\footnote{See McCrudden, C., above, note 136.} Certainly, this article would appear to vindicate this view.

Beyond the issue of reflexive regulation it is important to note that one of the key themes to emerge from this article is the extent to which urban planning policies and practices can play an important role in terms of discriminating both directly and indirectly against minority communities, particularly when those policies are pursuing a security objective and are aimed at containing a “suspect community”. It is important to remember, however, that Belfast is not the only city in Britain, or indeed Europe, with a minority community disproportionately experiencing social disadvantage and concentrated within discrete territorial boundaries. Moreover, since 9/11, the main security threat in the UK and indeed the wider EU is not perceived as emanating from Irish Catholic insurgents, but rather Islamic ones. Whether the kinds of covert planning practices evident in Belfast in the 1970s and 1980s have been adopted further afield is a matter of speculation. It is worth recalling, however, that the first example in modern history of the application of the practice of defensive planning in a European city was when Napoleon III encouraged his Prefect of the Seine, Baron Haussmann, to sweep away narrow streets and build broad boulevards in Paris to make it difficult for the revolutionary mob to erect effective barricades.\footnote{Bardon, J., \textit{A History of Ulster}, Blackstaff Press, 2001.} Similarly, in the past decade, many cities, including London, have embraced what Heathcote describes as a contemporary version of Haussmann’s militarisation, exemplified by the City of London’s Ring of Steel which Heathcote argues introduces “a language of fear, a system of control, that turns the last
bastion of ‘publicness’ into an airport security gate”.144 Certainly, with some notable exceptions, the issue of urban planning has not received a great deal of attention in Britain, or indeed, across the EU, from discrimination law practitioners or theorists.145 This is surprising, given that as Yiftachel has argued, urban planning, i.e. the public regulation and “production of space” is shown to serve as an instrument of social control, and like most other areas of public policy, it should thus be conceived as “double-edged”, being capable of both reform and control, emancipation and oppression.146 It would seem that the time has come for those interested in the theory and practice of equality to apply their skills in order to ensure that the more benign edge of the planning sword prevails.

“After extensive discussions with trade union representatives, and a lot of stress, I decided to resign. (...) I was relieved to be exiting a toxic situation, with people who had deliberately excluded and marginalised me. However, I felt sad that things had become so polarised, and kept asking myself, why didn’t they like me?”

“Sayed a”
Exiting a Toxic Situation

An Employee’s Experience of Covert Workplace Discrimination on the Basis of Religion

Testimony from the UK

The relationship between a person’s religion or beliefs and their workplace experience has been the subject of a number of high profile cases in the UK. Under the law, employers must go further than simply not discriminating themselves, they must also take steps when their employees are subjected to discrimination and harassment by, for example, other staff members. Employer rules and regulations have been considered on numerous occasions. In 2006, for example, an employment tribunal held that it was not discriminatory for a primary school teacher to be required to remove her face-veil in the classroom. In 2013, in Eweida and Others v the United Kingdom, the European Court of Human Rights held that it was a violation of freedom of religion under Article 9 of the European Convention on Human Rights for an employee working on an airline check-in desk to be prohibited from wearing a crucifix but, due to health and safety considerations, there was no such violation in the case of a nurse.

This month, the Equality and Human Rights Commission (EHRC) published the findings from a call for evidence it launched in August 2014 on religion or belief in the workplace and service industry. Amongst other things, it explored the direct and personal experiences of employees. A variety of views were represented and circumstances reported. It is clear from the evidence that, for many, discrimination on grounds of religion or belief still impacts on their employment. This is true both in terms of the person’s recruitment and promotion and their day-to-day experiences in the workplace, with employees reporting bullying and harassment at the hand of colleagues.

The Equal Rights Trust spoke with Sayeda (not her real name) about her experiences of religious discrimination and harassment when she was working for a public authority in the UK. From the EHRC findings, it appears that Sayeda’s case is not a one-off.
I am a charity director from London, with a legal background. I also happen to be a Muslim. While I am semi-practising, I am very liberal in my interpretation of Islam, and have never worn a headscarf or any other type of religious garment. I do not speak about my religion (or its links with politics on the macro level) to people, unless they have specific questions. This goes for people in the workplace as well as outside it.

In 2006, I commenced employment with a local authority in an administrative role. On the first day, I had a supervision meeting with my then Line Manager. We discussed personal presentation and she asked me how often I washed my hair. I replied that it was dry and I therefore did not wash it every day.

A few weeks later, a management referral was made for me to see the Occupational Health Advisor. My line manager wrote in her referral:

*S has eczema and reports that her scalp and face are particularly affected. S has reported that proprietary shampoos make the condition worse and therefore she does not wash her hair very often. This is causing a significant odour and is not conducive to working within the team room or with professionals and families. S would appreciate some advice on how to manage her condition and it would be appreciated if this could be done as a matter of urgency. S has only been in her position with the Council for one week.*
The Line Manager also ticked the box that said “this employee’s medical condition is likely to affect future attendance” and that “the problem was caused or made worse by work.” There was no reason for her to tick either of these boxes – I was not late to work or missing work nor did work cause any problem with my hair.

The Occupational Health Advisor was the next person to see me. She said that although I had clear signs of eczema, it was not causing a significant smell. I asked her whether this sort of issue could lead to the termination of my employment at the end of my probationary period. I was concerned that my employment would be terminated. Since I had obtained this job after three months of unemployment, the thought of having to search again so soon was almost too much to bear. She replied that it would not. The Line Manager confirmed this view when I e-mailed her to ask the same question afterwards.

I was then sent to various health experts, both occupational health and external GPs, who recommended different shampoos and scalp applications. I then received a threatening letter from Human Resources, saying that if I did not resolve this issue satisfactorily, my employment would be terminated at the end of the probationary period.

Seven months after I started, my probationary interview was finally held (a month late, out of mere tardiness on the Council’s part), but I passed it, as no additional complaints had been made. I had also completed a high volume of work to a very good standard. The day after this, I was told that another complaint had been made by a colleague. By this point, my Line Manager had changed, since the previous one had retired. I told the new one that I had no idea where these comments were coming from, as I prided myself on my good hygiene and had never had any complaints in my previous workplaces. She did not respond.

Why do I think this was religious discrimination? My colleagues were aware of my religion because of my Muslim name, ethnicity and the fact that I fasted during Ramadan. I believe that the smell issue was just a smokescreen to mask deeper prejudices. On one occasion, I helped to open the door for the most malicious colleague at an external building. She said that she was “scared” for both of us because there was a “stampede” of worshippers coming from the mosque opposite. The Team Administrator once said the same thing, asking me why building work on the mosque was so noisy, and why it was taking so long – as if I was somehow personally responsible! The bullying continued, and one of the senior chairpersons made jokey references to me not drinking alcohol when she brought back some rum cake from holiday.

The Senior Coordinator held a meeting with me and the new Line Manager, to put me forward for some work with another sub-department. He said I was a “bright individual” and that he wanted to offer me some more challenging work in order to “keep me for longer”. He was, however, concerned about the complaints the other team members had made about me (he told me he suffered from a nasal condition, so had to rely on accounts from others). He would veer between sympathy for me and capitulation to what the bullies were saying. I had expected him to have more accurate insights about the situation as a senior professional, and was disappointed that he did very little to help me.
The Team Administrator left in July. We had a team leaving lunch for her at a local restaurant. I felt excluded throughout, as if the team were ignoring my contributions and talking over me.

I was shouted at by a team member for not finishing my episodes on the local authority software program. I said that I was waiting for management authorisation on them; they could not be closed without this. I confided in the new Line Manager that the colleague in question might be threatened by my performance (she had described a recent assignment of mine as “almost too good”). The Line Manager said she would get involved if this individual tried to bully me again. Her behaviour improved in the short-term, so no further action was taken.

I received an accolade for my one-off clerking assignment with the sub-department. The Senior Coordinator forwarded this to the Chairperson and my Line Manager, but I did not receive a word of praise from them about this until I mentioned it to the Line Manager in a meeting two weeks later, where I was castigated for nearly sending out a different piece of work with a photocopying error.

Eleven months after I joined this workplace, a new team member started to talk about religion. She told me she thought the Muslim headscarf was “sexist” and asked why only women had to wear it. She then blamed me for another software-related issue, which turned out to be her own fault.
A week later, a highly distressing meeting took place between me, the Senior Coordinator, my Line Manager and two members of the team. One of them said I was “disgusting” and “not fit to do the work” because of a faded stain on my polo neck top and a small tear in the sleeve. The Senior Coordinator stopped her from making any more spiteful comments. I later asked him and the Line Manager to speak to this team member about her nasty behaviour, saying that I would be forced to take out a grievance if no action was taken (it was not).

A few days later, the Senior Coordinator and Line Manager had a meeting with me close to 5pm. The Senior Coordinator explained that he had spoken to the most malicious team member about her conduct, but that team member had said that she felt she was simply referring to a factual situation. He told me that I needed to take all necessary steps to resolve the smell issue, even if that meant hanging my coat in the wardrobe rather than letting it absorb cooking smells in the hallway. He clearly believed her, and ended up sanctioning me instead of her. They also asked me to improve my timekeeping in the mornings. (I had turned to arriving late and spending a little more time on the internet as a form of escapism; I was looking up details about the kinds of jobs I really wanted, where I could make a difference to people’s lives). I then received a letter notifying me of a preliminary fact-finding investigation against me, with the charge about my timekeeping brought up, as well as others that were not mentioned in the meeting.

Not long after this, I left the room one afternoon to have a private telephone conversation with a trade union representative. This was the only time she had available and we had been trying to get hold of each other for at least two days. I was put on hold for a long time, but when I did get through to her, we discussed the charges that would be brought up in my preliminary fact-finding investigation. I was only gone for twenty minutes, but when I got back, a new team member started screaming at me, asking where I had been because she had had to leave the room for an “emergency phone call”. This is despite the fact that she clearly saw and heard my mobile phone ring, and other members of the team did this all the time. She brought the Line Manager down to cover the desk and this exchange took place in front of her. I replied that other members of the team always took mobile phone calls – personal ones at that – but was told to take responsibility for my own actions by the Line Manager. The new team member finished the exchange by saying she “couldn't talk to me”. I apologised and said that I wouldn't do it again.

The next morning, another team member disappeared from the room for twenty minutes without telling anyone where she was going. When the Chairperson asked us where she had gone, in a starkly different approach, the new team member replied that she had “gone walkies”. This person would take sick days on a regular basis, sometimes every week, yet she got nothing but sympathy from the team as she was a single mother. However, my lateness (which was a direct result of the bullying, took place over a specific period and had a far lesser impact on productivity) resulted in a threat of a disciplinary hearing. I mentioned at the Fact-Finding Hearing that I had not been late for any of my previous jobs. I also thought it was strange that other members of the team routinely left at 4.30pm without telling the line manager (I often covered the desk in their absence). I therefore assumed that the periods of
time not covered by core hours (which are 10am–12pm and 2–4pm) were to be arranged by mutual agreement within the team.

After extensive discussions with trade union representatives, and a lot of stress, I decided to resign. I had been with the local authority for over a year, and the job was not what I wanted to do in the long term anyway. While I was genuinely interested in the subject matter of the work, it was fairly routine in nature, and I wanted something that would challenge me. More fundamentally, I was relieved to be exiting a toxic situation, with people who had deliberately excluded and marginalised me. However, I felt sad that things had become so polarised, and kept asking myself, “Why didn't they like me?” I am generally considered to be a likeable and easy-going person. Two days before I was supposed to leave, the most malicious team member opened a window in a symbolic gesture, accused me of disrespecting the team, and said I had “run out of excuses”. She said this in spite of the fact she knew that I was leaving.

I spoke to a race equality caseworker about this episode during my lunch hour. I would pass their office on the way to mine; they were also on the Council site, although they were financially independent from the Council. I soon learnt that there was very little in the way of free (or affordable) high quality support for people who had suffered employment discrimination. He said that he could not smell anything, and the smell issue was just a way for this individual to try and upset me before I left. He described it as “petty” and thought it was probably a smokescreen for hers (and the team’s) real issue with me, whatever that may be. I then had a few more meetings with my trade union representative, who gave me access to a solicitor. He helped to put everything in order in terms of my resignation. The solicitor actually encouraged me to take the local authority to an employment tribunal, but I was just starting out in my career and did not want to get a reputation as a “troublemaker”. I also knew that religious discrimination is difficult to prove in many of these cases. Because of the terms of the compromise agreement, I did not feel empowered to make a formal complaint.

Fortunately, I got a new job within a week of leaving, one that was more consonant with my long-term career goals. I had already interned for a human rights organisation, but this experience led to a greater resolve to pursue human rights as a paid career. I became an advisor to anti-discrimination organisations, and explained to them that covert workplace discrimination is the most insidious sort – it is often wrapped up in truly deceptive packages. I took part in some research on anti-Muslim sentiment in 2009, and discovered that several other Muslims had been bullied out of jobs in this way.

Statutory agencies like the Advisory, Conciliation and Arbitration Service and the EHRC need to do more to tackle this kind of insidious discrimination (and need to receive greater funding themselves). I would recommend a complaints system for individuals who do not want to take legal action against their current or former employers, so that the EHRC can investigate said complaints on their behalf. The local Race Equality Councils, by and large, do not exist anymore (and I do not see any evidence of them being replaced by local Equality and Human Rights Councils in my local area). There is a gap in quality advice provision and representation for victims of religious discrimination, somewhere between trade union reps (who can vary significantly in their competence levels) and unaffordable lawyers, which is not being met.
“What is undeniable is that freedom of religion remains, as Manfred Nowak has pointed out, the most controversial human right, engaging a number of other human rights as well. The permissible limitations offer a means to negotiate that engagement.”

Ahmed Shaheed
Religion and Equality

Human rights law both recognises the right to freedom of religion and prohibits discrimination on the basis of religious belief. The interaction between the right to freedom of religion and the right to freedom from discrimination remains a matter of vivid debate.

As the scope of the right to freedom from discrimination has been clarified over time as encompassing and protecting a wider range of characteristics, e.g. sexual orientation, religion is increasingly cited as a reason to discriminate against others. On the other hand, religious hatred and intolerance appears to be on the rise, with religious radicalisation increasingly being seen by many as a factor in the making of terrorism.

The Equal Rights Trust spoke with two experts to discuss the tension between religion and human rights law. Dr Ahmed Shaheed is the current Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, having previously twice held the position of Minister of Foreign Affairs of the Republic of the Maldives. Professor Eva Brems is an expert in human rights law and her recent research examines the experiences of women wearing the face veil, to gain an insider perspective. Amongst other courses, Professor Brems currently teaches a course on Islam and the Law at Ghent University, as does Dr Shaheed at the University of Essex.

Equal Rights Trust: You are widely recognised as an international expert in the field of freedom of religion, including in the context of non-discrimination. How did you become involved in this area of work?

Ahmed Shaheed: As is often the case, the first victims of radical Islam are Muslims themselves – especially those who uphold moderate and tolerant traditions. I majored in international relations in college and embarked on a diplomatic career at a time when more intolerant and fundamentalist religious perspectives began to challenge the moderate attitudes that I grew up with in my country, the Maldives. These views began to govern our public discourse and to permeate the Maldives’ institutions, which soon took a rather radical turn; embracing theocratic orientations and rejecting civil society demands for transparency, equality, tolerance for dissent, and rule of law.

This led me and a number of like-minded academics, human rights defenders, and political activists to lead a campaign that called for greater human rights safeguards against the
capricious and discriminatory practices that had come to characterise the Maldives’ public institutions. Religious freedom and its relationship with civil, political, and social rights, as well as its impact on gender equality were core issues that required redress and that continue to challenge my country and my work as a human rights defender today.

Experiences gained as a student, government official, diplomat, civil society activist, academic, and as a UN expert over the years have allowed me to examine the relationship between religion and human rights from various angles. Over the years, I’ve come to recognise that what has happened in my country is part of a broader global phenomenon that requires international attention and action, as much as it necessitates national debate and solutions. That is why I teamed up with organisations like the Universal Rights Group, a think-tank based in Geneva, to examine a range of human rights issues, including, as a primary concern, religious freedom.¹

Eva Brems: I like to think of myself as a generalist in the field of human rights law. Initially, I researched universality and diversity in human rights, looking specifically at cultural and religious challenges to promote an inclusive human rights vision in international relations. I then began to see how this inclusive interpretation could be applied at the domestic level within a multicultural context and, as issues such as the headscarf ban extended from France to Belgium in the early 1990s, I was further prompted to respond to human rights challenges in my environment. More recently, the issue of the face veil has seen a sudden political dynamic towards a ban which has been interesting to study. These and other issues, seen from a human rights angle, need to be studied further.

Equal Rights Trust: The relationship between freedom of religion and the rights to equality and non-discrimination is a complex one. How do you view the relationship between these rights?

Eva Brems: There is not just one relationship but many and sometimes I think they are alternative framings for the same issue – you can frame an issue as religious freedom,

¹ More information about the Universal Rights Group can be found at http://www.universal-rights.org/.
but this same issue might also be framed as non-discrimination. This is especially the case concerning minority religions. For example, consider the accommodation of religious freedom in the workplace. Depending on the legal framework you have in place, this could be framed in terms of discrimination on the ground of religion or as a violation of religious freedom. Another issue concerns conflicting rights between religious freedom on the one hand and discrimination on the other hand, for example, when discrimination occurs within the internal organisation of religion or when discrimination is motivated by or grounded within religious beliefs. Recently, this issue has gained significant attention, as can be seen with cases such as conscientious objectors to same-sex marriage.

A significant part of my research has looked broadly at conflicts in human rights, not just in the sphere of religion and discrimination. At present, there is no clear methodology for addressing issues of conflicts in international human rights law and even constitutional law. Instead, these issues are addressed on a rather ad hoc basis. For example, before the European Court of Human Rights you sometimes get requests for a wide margin of appreciation to be given to states where they decide to give priority to one right or the other. On the other hand, you also get claims before the same court that it should not give states this right and instead argue that anti-discrimination claims should carry more weight than religious freedom claims. Generally speaking, you cannot say one claim carries more weight than that other, especially where religious freedom claims could have been framed as anti-discrimination claims.

These are important and significant issues to be addressed as these are often very contentious issues in society. There is a lot of work to be done in this field and I think we have an interest in doing that work and it is important to avoid the impression of arbitrariness in solving these issues. From a legal perspective, it is a lot better if a consensus can be reached as to a clear approach that should be taken to solving these issues.

Ahmed Shaheed: International human rights law affirms the importance of equality and non-discrimination in applying legal protections for human rights. However, the law offers very little instruction for addressing tensions in the relationship between a number of rights where the exercise of certain rights come into conflict with protections for other rights. This is evident when the right to manifest religious beliefs is used to justify violations of rights to expression, assembly, or association, or to perpetuate discriminatory practices against women, girls, religious and ethnic minorities, and members of the LGBT community.
Thus, reducing tensions between both individual and communitarian rights to manifest rituals and practices and interests to strengthen protections against patriarchal attitudes and traditions that undermine equality and nondiscrimination undoubtedly constitutes one of the biggest challenges facing the modern human rights movement today.

Perhaps the process of reconciling tensions between the principles of equality, non-discrimination and freedom of religion must, therefore, first involve inclusive efforts to understand the potential for conflict, as well as a commitment to designing strategies for establishing a delicate balance between the views of actors that wish to preserve certain traditions, and of those that seek protection from the discrimination and inequality of such traditions and practices.

**Equal Rights Trust: Do you think religion as a ground of discrimination should be treated differently from other grounds?**

**Ahmed Shaheed:** International jurisprudence\(^2\) affirms that laws and practices that have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of all rights, by all persons, on an equal footing is prohibited. This includes those purported to be rooted in cultural traditions or religious beliefs. Challenges to this concept often represent deeply held beliefs and existential convictions that bring people meaning, or that help them to find a sense of place and order in the world, and that are, therefore, more resistant to external pressures for change.

Equality laws work to address discrimination and exist within a wider system of measures designed to address deep rooted social and economic disadvantages, where those disadvantages are linked to gender or membership of a particular group. Exempting religious groups from non-discrimination laws can work to reinforce the acceptability of stereotypes, discrimination or inequality and can nullify the intent of equality laws. Religious organisations should, therefore, not be completely excluded from legal accountability in relation to fundamental rights of non-discrimination.

The question is, of course, how to balance the rights of religious individuals or groups against the rights of others to equality and non-discrimination. The condition of proportionality may provide some guidance in the imposition of anti-discrimination laws or policies that promote a gender perspective.

Limitations on the exercise of religion must be prescribed in law, serve a legitimate aim, and be proportionate to the aim. One does observe that, while derogation from this right is permissible, it is more narrowly construed than other derogable rights, in that national security is not provided as a ground for derogation; and the rights of others that qualify for protection against freedom of religion are their “fundamental” rights. This is not the case with regard to the permissible limitations say, in regard to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), for example.

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\(^2\) Human Rights Committee, General Comment No. 22, UN Doc. CCPR/C/21/Rev.1/Add.4, 1993.
Religions usually make universalist claims and dominant religions often get tied up the political structures of states and may enjoy a special relationship to the constitution - as official religion or state religion - which may impinge negatively on the enjoyment of the rights of religious minorities. Likewise, where the state eschews any religion or all religions in the public square, there might be hidden discrimination. While the emerging concept of “reasonable accommodation” could address concrete situations of difficulties between dominant and minority interests, the concept clearly cannot be applied to justify the violation of human rights, such as gender equality or right to life or freedom from torture or from other harmful practices.

Eva Brems: Not all grounds of discrimination are treated in the same way. The example of quotas across many countries clearly demonstrates this. Some countries have certain gender quotas to fulfil, yet quotas for other grounds of discrimination such as ethnicity or disability are not considered. At a national level, in discrimination law, there is an obligation to provide reasonable accommodation for people with disabilities, but reasonable accommodation does not apply to some other groups protected under discrimination law. This difference in approach to different grounds of discrimination can be justified as the underlying realities are different. However, I personally support the use of the notion of reasonable accommodation in respect to the ground of religion given the freedom to practice your own religion is a human right, and limitations on religious practice should be as limited as possible.

Equal Rights Trust: Discrimination on the basis of religion continues to be an area of wide-ranging public debate. What do you observe to be the public perception of religious discrimination in your own country or in a country that you are highly familiar with? Do you think that religious hatred is increasing?

Eva Brems: Although Belgium’s majority religion is Catholicism, believers have become the minority and religion is not a significant part of most people’s lives. Increasingly, arguments based on religion enjoy very little credit with the public and authorities. Although this isn’t discrimination per se, it does involve negative stereotyping. For example, the media’s treatment of representatives of the majority religion, such as bishops, has been very critical.

Islamophobia has also become an important phenomenon; it has become justified in public opinion to see Islam negatively, especially since 9/11 and other terrorist attacks, and the rise of ISIS, all of which have seen negative connotations attached to Islam. I’m not sure whether it is on the rise as such or whether it is a new iteration of what we used to call racism. Previously in Belgian society, there was a dislike for people of Moroccan origin whereas now this dislike is framed differently and considered to be a dislike for Muslims. There is a particularly high level of intolerance and aggressive reaction towards visible displays of Islamic practices, which has not been the case in relation to other religious minorities or religions in general. If a school were to introduce Halal foods, in certain instances, the parents of other religions would be outraged, some restaurants refuse to serve women wearing a headscarf, and people would shun people who look like Muslims. These reactions, based partly on associations relating to fundamentalism and terrorism, have created an unpleasant atmosphere.
Ahmed Shaheed: Respect and tolerance for different religions in Iran, a country with which I am most familiar, is rooted in its long history of religious diversity and the recognition of a number of pre-Islamic religions. However, Iran, like most other multicultural societies, grapples with religious discrimination.

Perhaps, somewhat unique to Iran, is the country’s Constitution, which establishes Islam as the official religion and goes on to identify Zoroastrianism, Judaism and Christianity as the only other religions recognised by the State. Consequently, Iranians are left with a hierarchy that, in effect, gives preferential treatment to followers of the country’s official religion, and either nullifies or impairs the equal enjoyment of a wide range of civil, political, social, cultural, and economic rights by adherents of both recognised and unrecognised faiths.

It is difficult to say how strongly Iranian society as a whole may embrace the underlying discriminatory precepts of this hierarchy. However, it should be noted that the ongoing persecution of, and discrimination against members of the recognised and unrecognised faiths in Iran, such as the Baha’i, have been particularly rooted in a number of Iranian laws and policies, and have been perpetuated by government actions. These practices have resulted in the well documented persecution of new converts from Islam to Christianity, have given rise to the arbitrary arrest, detention, prosecution, and discrimination against Baha’is in academic settings and in the workplace, but do not predominantly appear to be the actions of non-government actors.

Equal Rights Trust: Gender equality and freedom of religion intersect at two different points – on one hand stereotypical gender roles are sometimes defended on the basis of religious belief; on the other, perceptions of women based on their religion or belief may also lead to intersectional discrimination. What is your view on the relationship between religion, gender and equality?

Eva Brems: I think this is somewhat of an understatement when you think that discrimination is actually being practised within religious organisations, and it is a feature of religious law as it is applied in many states. In the case of the Catholic Church for example, women as a group are excluded from central functions within this organisation. In the Netherlands, there is a religion-based political party, the Staatkundig Gereformeerde Partij (SGP Party), which does not put women forward as candidates in elections for religious reasons. In many European countries, religious law is applied both formally and informally in some cases with even some of the formal rules being discriminatory such that women don’t get the same rights, for example, in terms of inheritance and access to divorce.

It is important to keep in mind that achieving gender equality is always a cultural challenge. You have to get patriarchy taken out of legislation, out of the minds of people, and out of practices – you need to realise cultural change. Religion can be seen as part of culture, but a particularly hard nut to crack because of the way it is institutionalised and formally organised, whereas a lot of cultural traditions and perceptions are not written down and protected by people who have the function to protect the orthodoxy. At the same time cases should not be overstated – we should not project discriminatory intentions onto minority practices,
which is something that can be seen happening quite a lot now. I often hear Muslim women and girls’ frustration at being seen as embracing or even promoting women’s subordination because they wear religious dress. These insider perspectives are very important, and women and girls and other affected groups should be listened to in order to ensure they are empowered and taken seriously.

**Ahmed Shaheed:** A key conflict between non-discrimination and freedom of religion relates to gender discrimination and the role of women and girls in religious beliefs and communities. Patriarchal views grounded in religious discourses are frequently used to justify gender hierarchy or to violate a number of other rights of girls and women, including physical integrity rights. Likewise, homophobic views may be advanced on the basis of religious beliefs, and serve, on the basis of rights claimed under religious freedom, to perpetuate discrimination or to violate the human rights of others.

But whether a claim is advanced under religious freedom rights or cultural relativism, where such claims undermine the equal enjoyment of all human rights or cause harm to any of the rights of an individual, such claims have no legitimacy at all. Women’s rights often become a magnet for religion-based reservations, and of these, the right to equal rights in marriage and divorce is the lightning rod of faith-based reservations. And there is even greater faith-based resistance to recognising the right of LGBTI communities to the equal enjoyment of all human rights. But the human rights edifice must provide equal respect and protection to all, if it is not to become the berth of a select few or the tool of a tyrannical majority.

Similarly, violations resulting from stereotypes of women based on their religion or belief disproportionately affect women from religious minority communities. These women often comprise the most vulnerable of their societies and suffer from multiple or intersectional discrimination or other forms of human rights violations perpetrated by both adherents and non-adherents of their faiths. As a result, initiatives meant to promote gender equality and to protect the rights of women can leave whole populations of women on the margins.

Measures undertaken to combat religious discrimination must, therefore, be holistic in their approach to understanding the sources of discrimination and must pay special attention to inclusivity, avoiding the exclusion of these women from initiatives that promote and protect human rights on various grounds of the very stereotyped perceptions they are meant to confront and address.

**Equal Rights Trust:** The recent decision of the European Court of Human Rights in *S.A.S. v France* that the French blanket ban on wearing the full-face veil did not amount to a violation of freedom of religion was criticised by several NGOs. Are you familiar with the case and the discussion? If so, what is your view? What do you think should be the defining principles in deciding religious dress cases?

**Ahmed Shaheed:** While the Human Rights Committee has not expressed a general view on the ban on the full-face veil, European practice in this regard is quite clear: 45 of 47 countries
do not impose a blanket ban on the full-face veil. In this particular case, the ruling of the Court therefore appeared to give a wide margin of appreciation to the French authorities. The judgment of the court hinged on the alleged impact on the rights of others as a result of the practice by a minority of the full-face veil – the rights in question being linked to the ground rules of social communication in French society associated with the requirements of living together; and the negative impacts on those requirements from the non-disclosure of the face in public. The negative impact on the living space was seen as a public order interest and therefore linked to a legitimate aim of upholding democratic society where living together is essential for the expression of pluralism, tolerance and broadmindedness.

The question of whether or not the ban was proportionate to the aim sought, especially in regard to the restrictions of the rights of those affected, as well as potential exclusion of those affected was, in my view, abandoned by the Court by reference to its duty to exercise restraint where the margin of appreciation was applicable. It is clear from the reasoning that some of the very values for which protection is sought by the ban – pluralism, tolerance, living together – could in fact be undermined by a blanket ban. In fact, the joint partially dissenting opinion issued by Judges Nussberger and Jaderblom highlights a number of these issues - including whether the concept of living together could be cited as a legitimate aim under the Convention.

Eva Brems: I am very familiar with this case, and the Human Rights Centre at Ghent University actually played a third party role in it. I have also worked on the issue of the niqab in Belgium and France for a long time, carrying out interviews with women who wear or who wore a face veil so that women's perspectives can be brought into the discussions. However, these perspectives have been largely overlooked at the national level.

Overall, although the judgment had a couple of merits, it is a bad judgment. On the plus side, it dismissed two of the three arguments to justify this radical ban on face covering. Firstly, it dismissed the security argument based on proportionality reasoning, and secondly it dismissed the gender equality argument in a very careful and nuanced way. The latter is particularly important when you consider that the French and the Belgian constitutional courts readily accepted both the security and gender equality arguments on the basis of theoretical statements and unchecked assumptions without looking to evidence. Evidence based reasoning is important to make accurate assessments, to not simply say it is about women’s subordination, but to check what the motivations and impact are.

However, the judgment is problematic to the extent that it accepts that religious freedom can be restricted legitimately in pursuit of a newly invented “aim” of “le vivre ensemble” (living together). This is a very problematic concept and it doesn’t take much deconstruction to see what the concept is doing. The notion of “le vivre ensemble” allows the dominant groups to claim control over the entire public sphere and to use criminal law to ban things that are strange to them and which make them feel uncomfortable. So I think the notion is a cover for majority prejudice.

The European Court of Human Rights, or indeed any other court addressing these issues, should be able to see through this and should take a critical approach, deconstructing such
problematic concepts. It should not simply accept and use the whole philosophical rhetoric but rather check whether a restriction corresponds to a real need, what this need is, what response is required and is a less restrictive alternative available? Decent evidenced-based reasoning is needed and this is lacking in the aspect of the judgment which deals with “le vivre ensemble”.

Equal Rights Trust: On a related matter, religious symbolism has been the subject of several cases before the European Court of Human Rights. Do you think that the court has got the balance right? How great should the margin of appreciation be for states in restricting such symbolism?

Eva Brems: Firstly, the concept of what constitutes a religious symbol is not a clear one, particularly when talking about someone wearing something like a crucifix or headscarf. This is a practice to them but becomes a symbol in the eyes of someone else. In cases of religious symbols, the margin of appreciation is justifiable in principle. Member states have very different histories in terms of the relationship between the church and the state. I don’t have any big concerns with the outcome of the Lautsi v Italy in which the Grand Chamber of the European Court ruled crucifixes could be displayed in classrooms of state schools. However, I do have procedural concerns as there are clear suggestions that the court had given into outside pressure. In addition, I do have a problem with the reasoning – it is hard to square the decision with the court’s jurisprudence on headscarfs and so it is arguable that the majority and minority religions were not treated equally by the court.

When talking about the margin of appreciation of a state, I think it is important to look at what kind of harm we are talking about. In my opinion, the harm felt by someone being confronted with the symbol of another person’s religion is a lot smaller than the harm felt by someone who is not allowed to uphold a religious practice because others see in it a problematic symbol.

Ahmed Shaheed: Religious symbolism is regarded as belonging to the forum externum or manifestation of religion rather than to forum internum or inner convictions, and is therefore subject to limitation on specified grounds of public interest. It refers to both a positive right of religious freedom (the freedom to wear or display religious symbols voluntarily) and a negative right of religious freedom (the right not to be coerced into wearing or displaying religious symbols). In practice, this has proved to be contentious, with no clear consensus on where to draw the line, and the general approach has been that contentious cases are best addressed on a case-by-case basis.

Moreover, given the great diversity, even in the European context, not only in the relationship between religion and state, but also in societal attitudes towards religion, across time and space, it is clear that there is no consensus on the specific boundaries between religious symbolism and public interest, beyond certain core standards, as clarified at a general level by various international judicial and quasi-judicial bodies. The application of the doctrine of margin of appreciation under the supervision of the European Court recognises the need to
give a special weight to the domestic policy-maker in matters of general policy, where opinions within a democratic society differ widely.

Nevertheless, the European Court’s handling of religious symbolism has created a number of controversies, in the context of the margin of appreciation that has been granted for states in regard to religious symbolism. Controversies have arisen where the view was taken that neutrality requires the state to eschew association with any religion. Perhaps greater controversy has arisen where the view has been taken that boundaries may have been drawn based not on demonstrable facts, but on what appears to be speculation as to the cause, significance and impact of wearing certain religious symbols. A frequently heard argument is that limitations on certain types of religious symbolism are warranted by the need to protect the public against religious fanaticism. Here I tend to agree with Judge Tulkens’ statement in Sahin v Turkey that “the best means of preventing and combating fanaticism and extremism is to uphold human rights”.

In terms of what the scope of the margin should be for states, a useful framework was offered by Ms Asma Jahangir, UN Special Rapporteur on Freedom of Religion or Belief, when she proposed a set of aggravating indicators and neutral indicators to assess the legitimacy of restrictions on the manifestation of religious symbols. The former referred to those actions that typically were incompatible with international human rights law - an example would be if exceptions to the prohibition of wearing religious symbols were tailored to the predominant or incumbent religion or belief. Neutral indicators would be those that showed that the limitation was crucial to protect the rights of women, religious minorities and vulnerable groups or that the wearer required to be identified for a legitimate purpose, for example, on an identity card photograph or at security checks. By contrast, an action would not be neutral where limitations did not take into due account the specific features of the religions or beliefs in question.

Equal Rights Trust: The current Rapporteur on Freedom of Religion and Belief had stated: “it seems difficult if not impossible to conceive of the application of a concept of the Official Religion that in practice does not have adverse effects on religious minorities, thus discriminating against their members”. Do you agree?

Ahmed Shaheed: I agree with that statement. The negative consequences posed for religious minority rights where a particular religion or religions are elevated to official status present serious challenges to the promotion of respect for religious minority rights. Perhaps

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these consequences are most profound when the tenets of a particular religion become the foundation of the legal framework in the country or when it is used to qualify citizenship. Notwithstanding the clear negative impact that frequently results from the identification of a particular religion as the official religion of the state, international law does not require that states desist from such identification. What is incumbent upon the state, as clarified by the Human Rights Committee in General Comment No. 22, is that there is neither de jure nor de facto discrimination against religious minorities. Thus policies and practices that restrict eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths are violations of the prohibition on discrimination.\textsuperscript{5}

International standards also provide other specific safeguards to religious minorities, such as those provided in Articles 20 and 27 of ICCPR. Moreover, as stated by the Human Rights Committee, where states invoke the protection of public morals as a ground for limiting the manifestation of a religion or belief, such concerns cannot be based on principles deriving exclusively from a single religious tradition. The principle of reasonable accommodation may be a useful tool in improving the situation of religious minorities where conflicts of rights occur, but again in practice, where a particular religion is given the status of official religion, except where it is in practice only in a symbolic sense, minorities are open to varying degrees of hidden and/or open discrimination.

\textbf{Eva Brems:} Although I do agree with the statement, it should be rephrased to emphasise that having a state religion is an acceptable choice when placed within a human rights framework. This framework is needed when there are challenges between the state and official religions in regard to religious freedom and equality. Where official religions are in place, states have specific responsibilities in respect to religious freedom and the equal treatment of minority religions and non-believers. Adapting the statement in this way adds an important nuance.

\textbf{Equal Rights Trust: What are your views on religious schools? Do you think the existence of such schools within the school system is discriminatory or can be justified?}

\textbf{Eva Brems:} Religious schools can be justified from a human rights perspective, both on the basis of the freedom of education and religious freedom. Freedom of education includes the right not only to be a consumer of education but also to organise education as a collective right, and religious freedom also includes the right to teach the tenants of the religion. There is nothing wrong with the state recognising and facilitating this, as well as attaching conditions in respect to the curriculum, as long as it does not discriminate among different religions and non-religious schools.

It can be difficult for religious schools to accept children of different religions, as this can ultimately undermine the right to organise religious based education in certain contexts. In

\textsuperscript{5} Human Rights Committee, \textit{General Comment No. 22}, UN Doc. CCPR/C/21/Rev.1/Add.4, 1993, Para 9.
practice, many schools, especially those which follow the majority religion, accept children from all religions and many non-believers without being obliged to do so. Schools following minority religions have more to lose when they are obliged to take in non-believers as it can become extremely difficult to keep the religious character of the school intact. However, this can be justified with good reason, for example, when schools offer a certain curriculum which may not be available in another school or in that region. In these instances, the individual child’s right of access to the education of their choice would be more threatened than the damage done to the collective right if admitting a certain amount of pupils.

Schools which provide a neutral exposure to other diverse religions are particularly valuable. States which enforce curriculums introducing all religions to its students promote further tolerance and understanding in society and are compatible with religious freedom. In Belgium, there is a constitutional right for all recognised religions in public schools to teach their own religions, this sees Muslims go to Islamic class, Catholics to Catholic religion, Protestants to Protestant religion, and non-believers to the special ethics class etc., consequently in this system where there is no mutual dialogue, children lose an opportunity to be introduced to each other’s beliefs.

**Ahmed Shaheed:** The 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief makes it clear that every child:

\[
\text{shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.}\]

Religious schools perform an important function in propagating ideas, values, rituals, practices and traditions based on religions and in promoting tolerance and respect for diversity. Religion clearly plays a vital role in the lives of many individuals and is often seen as providing a moral compass and an ethical charter in the lives of individuals. Religious schools also serve the function of realising the internationally protected right to teach one’s religious ideas and values to others, as well as ensure that parents have the ability to provide education to their children in a religion or belief of their choice, with the best interest of the child as the guiding principle.

Here again, there is a positive right that every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his or her parents; as well as the negative right of not being compelled to receive teaching in a religion or belief against the wishes of his or her parents or legal guardians. The positive right does not necessarily mean that such schools need to be state-funded. But where public education includes

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6 Article 5(2).
instruction in a particular religion or belief, provision must be made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. Nevertheless, there is no conflict with the negative right where school instruction in subjects such as the general history of religions and ethics is given in a neutral and objective way. In actual fact, public education that provides a neutral exposure to diverse religions is crucial to promoting understanding, tolerance and mutual respect as well as to combating prejudice and stereotyping.

Nevertheless, where the curriculum and other policies and practices in faith-based schools are not integrated into a human rights framework, they could potentially undermine the universality and indivisibility of human rights, and could foster discrimination and fragmentation. Like all human rights, the operationalisation of the right to freedom of religion must also be accompanied by a commitment to the crosscutting human rights norms of equality, non-discrimination, participation, and accountability.

**Equal Rights Trust: Do you think that the limitations on the manifestation of freedom of religion contained in international human rights law lend themselves to discriminatory measures against religious minorities?**

**Eva Brems:** There aren’t any significant problems in the standards themselves, they are formulated in a classical way that can work very well. However, their interpretation can be problematic. When a right becomes less popular - as you see with religious freedom - there is a tendency to increase the scope of limitations, and this may require changing the mindset of bodies and individuals interpreting a right. If the European Convention isn’t used as guidance, arguments are often made that practising religion in public is absolutely not a part of religious freedom, and in public debate there is a strong denial that elements such as religious dress, not mandated by religion, are religious. I was a member of parliament when the face veil debate was voted and saw the complete denial in that debate that this had anything to do with religion.

**Ahmed Shaheed:** Although the caseload may appear to be dominated by allegations of violations of the freedom of religion of minorities, we should not forget that these limitations enable the protection of the fundamental rights of others where the religious practices may conflict with human rights. The purpose of those limitations is clearly not to give a preference to the dominant religious views or to sacrifice the rights of religious minorities. Those limitations are to be construed narrowly, to serve a legitimate aim in a democratic society, and be proportionate to achieving that aim. Moreover, the limitations may not be used to vitiate the rights of freedom religion in any of its meanings. In fact, given the universalistic claims made by many religions, and the patriarchal traditions in a number of them, the limitations serve the positive function of upholding other human rights such as gender equality. As Heiner Bielefeldt has pointed out, when there is goodwill on all sides, the principle of reasonable accommodation offers a promising tool to address concrete cases of difficulty. In my view, the permissible limitations on the manifestation of religion do not in themselves lend to discriminatory measures and the growing body of jurisprudence appears to deepen our understanding of the contours
of permissible limitations. What is undeniable is that freedom of religion remains, as Manfred Nowak has pointed out, the most controversial human right, engaging a number of other human rights as well. The permissible limitations offer a means to negotiate that engagement.

**Equal Rights Trust:** Do you think that the recent Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence will be a useful tool to tackle religious discrimination?

**Ahmed Shaheed:** The Rabat Action Plan is a unique and important achievement in that it provides a blueprint for states to navigate through the complex relationship between freedom of expression and protection from incitement. It in fact marks a unique milestone on the conversion of the debate on defamation of religion from a focus on protecting religions to protecting individuals, as demonstrated by the consensus achieved by resolution 16/18 of 2011, and provides a way to operationalise Article 20 of ICCPR. Although its primary focus is the relationship between freedom of expression and protection from incitement, the Action Plan identifies a number of steps that will increase tolerance, restraint and respect, and enhance protections for religious minorities. Blasphemy laws threaten the freedom of religion rights in many parts of the world, and are often associated with violent consequences. Clarification of normative standards, establishment of judicial safeguards and identification of domestic and international protective measures all have the potential, if implemented in the spirit of the Action Plan, to end discriminatory practices against minorities, improve religious freedom rights, apply a human rights framework for a decade-long demand to protect religions, and address societal prejudices and stereotypes.

**Eva Brems:** The Plan is valuable as part of an overall framework against discrimination and in order to combat advocacy of hatred. However, this kind of legislation, especially in criminal law, is not commonly applied and has rather taken a somewhat symbolic role. I think it’s a lot more crucial to change the everyday intolerance that falls outside of criminal or civil law. Discrimination is particularly damaging when found in the workplace, in education and so on as discrimination in these areas of life results in the exclusion of individuals from their opportunity to integrate in society and have a good life. Tackling everyday intolerance and discrimination requires sensitisation and social measures to enhance understanding and respect. To me, this is a higher priority than the hate speech issue.

**Equal Rights Trust:** Are there any ways you think the international human rights community could and should respond differently to combat religious discrimination?

**Ahmed Shaheed:** I believe the international standards have been well articulated, from the Universal Declaration of Human Rights to various subject specific treaties and from a range

7 Human Rights Council, Resolution 16/18, *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, UN Doc. A/HRC/RES/16/18, 2011.
of jurisprudence to soft law standards and principles. Beyond the formulation of normative standards, the Rabat Action Plan demonstrates a practical approach that could facilitate the operational interventions required to strengthen particular aspects of the debate on religious freedom. Strategies, policies and projects that seek to operationalise the right to freedom of religion must uphold the cross-cutting norms that are applicable to the implementation of all human rights: equality and non-discrimination, participation, accountability and provision of effective remedy.

Despite the breakthrough made by UN resolution 16/18 and the practical approach taken by the Rabat Action Plan, there appears to be a reluctance to engage at the international political level on issues of religious freedom. It is of course prudent to tread carefully on a subject that can raise a variety of sensitivities, yet in my view, intergovernmental forums like the United Nations could give greater impetus to discourses that promote tolerance, mutual respect and commitment to human rights protection. There have of course been numerous initiatives and steps taken to create interfaith harmony, from dialogues amongst civilisations to regional initiatives. But clearly, religious freedom is in my view an area where more talk and mutual exchanges would yield benefit. The alternative is to yield the initiative, by default, to those who take more intolerant positions. One of the aims of the Universal Rights Group for example is to seek more engagement, within a politically neutral space, on dialogues on religion and human rights, in the interest of promoting the universality of human rights.

**Eva Brems:** For human rights activists there is still a lot of work to be done in terms of building capacity within communities. In Belgium, there is surprisingly little litigation against bans on Islamic religious symbols and Islamic discrimination at work; the small Sikh community actually carries out more litigation than this rather important Muslim community.

There is also a great deal to be done in terms of changing minds, as ultimately the human rights system can only be sustainable if awareness is raised and people understand its importance. The media should also be targeted, particularly in terms of how it represents minorities. At a more local level, possibilities should be created to see discussion ensue between different religions. For example, most people have an opinion on the place of Islam and Muslims in society and what they should or should not do, yet most people do not know Muslims in their everyday lives, they do not have Muslim friends or colleagues and so they do not have the opportunity to meet or interact with other Muslims. I could talk for hours with my university students, citing human rights cases, laws and theory, but it would be far more effective if I introduced them to one of my PhD students who could relay her experiences, and they would realise how similar they are to her. Greater support to taking approaches which change minds and attitudes is needed.
S.A.S. v France, Joanna Whiteman
“Vivre ensemble”? S.A.S. v France
European Court of Human Rights, Application No. 43835/11

Joanna Whiteman

The European Court of Human Rights is rightly respected, revered and valued as an institution. Sometimes, however, even our most valued institutions get it wrong. The Court’s ruling in S.A.S. v France that France’s blanket ban of face covering in public complied with its human rights obligations was one such occasion. The decision has received widespread, albeit not universal, criticism amongst human and minority rights organisations and activists. In the author’s view, aside from having real and negative consequences for a group of Muslim women, the judgment was an opportunity lost. The time was ripe, especially in light of the ever growing wave of Islamophobia in Europe, for the Court to send a clear message that laws or policies which discriminate against minorities must pass the strictest scrutiny in order to be justified. Instead we have a judgment which not only “abandons” considerations of the proportionality of the ban by giving the state a wide margin of appreciation but, even more concerning, accepts that it is legitimate to restrict a minority religious right in the pursuit of the dubious aim of “living together” as a society. The decision is one of several recent rulings on equality issues in which the Court appears to have given limited consideration to Article 14.

1. Facts

In 2010, after much consideration and debate, France passed a law which prohibited people from concealing their face in public other than in a small number of exempted contexts including sports and festivities. As a consequence, it is unlawful for Muslim women to wear the full-face veil in public in France. The applicant in this case is a French national living in France who describes herself as a devout Muslim. She wears the niqab and burqa (two forms of full-face veil) out of choice, without any pressure, according to her religious faith, culture and personal convictions. In her application to the Court, she claimed that the ban violated a number of her rights under the European Convention on Human Rights (ECHR) including her rights to a private life (Article 8), freedom of religion (Article 9) and freedom from discrimination (Article 14).

1 Joanna Whiteman is Head of Litigation at the Equal Rights Trust. In preparing this case note she has benefited from the case summary of this judgment published by the Equal Rights Trust on 11 July 2014, which forms the basis for sections 1 and 2 of this note. However, all commentary in this note is the author’s own and cannot be taken to represent the views of the Trust. The author would like to thank Jade Glenister, Fawzi Barghouthi, Nicola Whiteman and Amal de Chickera for providing comments on a draft.

2 See Dr Shaheed’s comments about the abandonment of the proportionality consideration in his interview with the Equal Rights Trust, Equal Rights Review, Vol. 14, 2015.
2. Decision

By a 15–2 majority, the Court held that the law did not violate the ECHR rights of the applicant. The case raised a number of issues. However, of key importance for the Court was whether the restriction that the law placed on the applicant’s right to a private life (which includes personal choices as to her appearance as this relates to the expression of her personality) and right to freedom of religion was justified in accordance with Articles 8(2) and 9(2) ECHR. These Articles state respectively that:

8(2) There shall be no interference by a public authority with the exercise of [the right to a private life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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.

In order to make its determination, the Court focussed in particular on whether any of the state’s declared aims were legitimate and fell within Articles 8(2) and 9(2) and on whether the measures where necessary in a democratic society. In its assessment of the first consideration, the Court examined France’s four declared aims in passing the legislation, to:

i. protect public safety by making it possible to identify persons, which prevented danger to person and property and combatted identity fraud;

ii. protect the rights and freedoms of others by ensuring “respect for the minimum set of values of an open and democratic society” (le “vivre ensemble”) including a need for faces to be shown;

iii. promote gender equality as the requirement to wear a veil in public denies women individuality; and

iv. promote human dignity to which the face veil is an affront as it results in women being “effaced” in public.

The Court rejected the government’s purported aims of promoting gender equality and human dignity. In relation to gender equality, the Court did not accept the notion that the state could be promoting gender equality by banning a practice that was, in fact, defended and supported by women. In relation to human dignity, the Court stated that, although the clothing is perceived as strange by many, it is an expression of cultural identity which contributes to pluralism. Moreover, there is no evidence that, by wearing it, women offend the dignity of others. However, the Court accepted that the other two aims legitimately fell within the scope of Article 9(2). The first, protecting public safety, is explicitly referenced in Article 9(2).
With respect to the second, the Court held that an aim of ensuring “the respect for the minimum requirements of life in society” – or everyone “living together” – could, under certain circumstances, be linked with the legitimate aim of the protection of the rights and freedoms of others.

The Court went on to consider whether the ban was necessary in a democratic society in pursuit of the two accepted aims. It reiterated what it saw as the general principles concerning Article 9, which included the need for pluralism, tolerance and broadmindedness in a democratic society. It stated that the ECHR had a subsidiary role and that the direct democratic legitimacy of the national legislature meant the Court would give a wide margin of appreciation to the government when considering whether limitations on the right to manifest one’s belief were “necessary”.

The Court held that the blanket ban contained in the law could only be considered necessary for the protection of public safety where there was a general threat. This had not been shown to be the case and so the ban was not necessary in pursuit of the aim of public safety. However, applying a wide margin of appreciation, the Court accepted that the state may find it essential to give weight to interaction between individuals and “may consider this to be adversely affected” by people concealing their faces in public. France saw the protection of such interaction as being fundamental to pluralism, tolerance and broadmindedness and so the Court had a duty of restraint. Accordingly, the law fell within the restrictions permitted under the ECHR and there was no violation of Articles 8 or 9.

Disappointingly (for reasons discussed below), the Court’s judgment focussed on the case as being one which required detailed examination from the perspectives on Article 8 and 9 taken alone but not also in conjunction with the Article 14 right to freedom from discrimination. The majority judgment’s assessment of Article 14 was limited to a brief paragraph in which it noted that, although the ban could be seen as discriminatory given that the applicant “as a Muslim woman who for religious reasons wishes to wear the full-face veil in public” was “particularly exposed” to the ban in question and the sanctions which follow from a violation, this was not the case as the ban had an objective and reasonable justification for the reasons given during its consideration of Articles 8 and 9.

Judges Nussberger and Jäderblom delivered a joint partially dissenting opinion, in which they doubted that the concept of “living together” was a legitimate aim. They made some compelling arguments. The concept of “living together” was, they said, “far-fetched and vague”. It was unclear what rights of others were infringed by the law – it could “hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will”. In any case, it was difficult to argue that any rights of others outweighed the interference with the rights of those like the applicant. The judges accepted that the state

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3 Joint partly dissenting opinion of Judges Nussberger and Jäderblom, Para 5.
4 Ibid., Para 8.
must ensure tolerance but felt that “the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance”. They continued:

\[ B]y banning the full-face veil, the French legislature has done the opposite [to ensuring tolerance]. It has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension. 

Further, the dissenting judges did not agree with the majority that the state should be given a wide margin of appreciation. Among other things, in reaching that conclusion, they cited the broad consensus across member states, 45 out of 47 of which do not have such a ban. They also noted the significantly adverse consequences of the law for the affected women and their concern that the government had provided no explanation why less intrusive measures would not have sufficed. However, disappointingly, the judges did not dissent on the question of a violation of Article 14 taken together with Article 8 or 9 of the Convention and gave no explanation for this in their judgment.

3. Comment

At its heart, this is a case about discrimination. Not, as the French government would have us believe, a case about legislating to protect women from discrimination. But rather a case about a state’s discrimination against women members of a religious minority: Muslims in France.

Equality and non-discrimination recognise and indeed celebrate that human beings are different from each other; with different personalities, desires and identities. The right to equality requires that every member of this diverse population is respected equally and has an equal opportunity to participate in society. Gone are the days of pursuing “formal equality” – treating everyone the same. We now recognise the importance of “substantive equality” and the need to address any disparate impacts on different groups of the majority-defined structures in our society. Crucially, equality is not achieved by the majority dictating its terms. It demands that all voices are represented, with a particular focus on ensuring that the most marginalised are heard. In the author’s view, France’s ban on face covering falls far short of these equality standards.

The facts in the case and the government’s purported justifications for the ban raise a number of concerns from a discrimination perspective. Each concern raises questions about the nature of equality which demand detailed exploration. This Note only skims the surface of three of them.

Firstly, a closer look at the legislative history of the law illuminates the real motivation behind it. From the outset, there appears to have been a particular focus on fears of “Islamic

extremism” and “terrorism”. On the whole this focus is largely borne out of fear and prejudice rather than fact. The initial proposal for a law banning the full-face veil was rejected after expert opinions given to the government indicated that this was likely to breach human rights law. It was only after this advice that the law was expanded to cover all face-covering in public, with a handful of exceptions. The discrimination and prejudice which fuels the narrative of Islamophobia has been much discussed.7 And yet the signs of discriminatory motivation in the legislative history were not discussed by the Court. Indeed, in reaching its decision, the Court judgment emphasised that the law did not “expressly” refer to the full-face veil. In Europe we are constantly dealing with governments presenting approaches to “tackling extremism” which discriminate against the Muslim minority and we need to be ready to deconstruct these arguments and shine a light on their flaws.

A second tell-tale sign of the religious discrimination at the heart of this case is the discussion around gender equality. Given that this note is concerned with the equality dynamic in S.A.S., this discussion demands particular consideration. Much of the debate on the topic of the full-face veil in France, both from within the government and the mainstream media, falls into the dominant discourse that Muslim women need to be “saved” from the subjugation they face at the hands of Islam (or Islamic men).8 The fixation is often on how Muslim women dress with a presumption made that “just because Muslim women dress in a certain way, they are not agentic (sic) individuals or cannot speak for themselves”.9 Of course, women are used to being told how they should behave, look and dress. It is an unfair and discriminatory pressure which we face on a daily basis in a patriarchal society. As Nussbaum has pointed out, there is a suffusion in society of “other symbols of male supremacy which treat women as objects”.10 Are we “bikini-body ready?”; is it time for plastic surgery; after all our naked bodies are sexual. Arguing that banning the full-face veil is discriminatory does not equate to accepting discrimination faced by women due to patriarchy. Such discrimination is patently unacceptable. But our concern as equality activists should be that the reason the full-face veil is singled out as a unique “problem” to be addressed, is discrimination on grounds of religion. This inconsistency in approach betrays “a fear of the different that is discriminatory and unworthy of a liberal democracy”.11 It is a further example of restricting women’s freedom (going so far


8 For a powerful insight into the life of “the Muslim woman”; the “disjuncture” between the author’s experiences and public attitudes; and for a compelling critique of the dominant discourse around this “sad” and “subjugated” woman, see Abu-Lughod, L., Do Muslim Women Need Saving?, Harvard University Press, 2013.


11 Ibid.
as to criminalise them) and stifling their agency, apparently for their own protection: the antithesis of equality.\textsuperscript{12} Most lamentable, the restriction is felt by a particularly marginalised female minority – Muslim women – for whom multiple discrimination on grounds of sex and religious belief is an ever-present reality.

Thirdly and finally, the “problematic”,\textsuperscript{13} “far-fetched and vague”\textsuperscript{14} concept of “living together”, interpreted as it is by France, can be seen as a way to maintain structural inequality. Brems has stated that a little deconstruction illuminates the notion of “living together” as a “cover for majority prejudice”, allowing, as it does, dominant groups to “claim control over the entire public sphere”.\textsuperscript{15} Judges Nussberger and Jäderblom were rightly concerned that the ban did not pursue tolerance between the vast majority and a small minority but rather sought to remove tension.\textsuperscript{16} The source of tension that the state was seeking to remove from the public sphere resulted from prejudicial stereotype - from Islamophobia. The blanket ban removes the tension by effectively removing any signs of the troublesome minority population from the public space. And as the most easily targeted “sign” is understood to be the full-face veil, it is Muslim women who suffer, feeling torn for reasons of conscience between removing themselves from the public sphere and breaking the law.\textsuperscript{17} The right to equality, properly applied, is there precisely to protect minorities from such responses to prejudice. Prejudicial majority views about what is normal and necessary in society must be strictly scrutinised. As Brems explains, this demands that guardians of human rights, such as the European Court of Human Rights, should not “accept (...) philosophical rhetoric” but rather “decent evidenced-based reasoning”.\textsuperscript{18} Important questions were not asked. For example, what were the evidential bases for the state’s conclusion that face-to-face interaction was necessary? And on what basis did the state conclude that this face-to-face interaction was not, however, necessary in the context of sport and festivities? Perhaps as a result, the Court has overlooked the majoritarian dynamic behind the notion of “living together”, which is what makes it such a worrying tool for the marginalisation of a visible religious minority.

It is given the centrality of discrimination in the narrative of this case that it is so disappointing for Article 14 not to be central in the Court’s judgment and reasoning. This is not

\textsuperscript{12} A particularly odious example of this common narrative is the suggestion that one way to combat rape is for women not to get drunk. See for example “Police apologise for warning women they could be raped if they got drunk”, \textit{The Telegraph}, 3 August 2012, available at: http://www.telegraph.co.uk/news/uknews/law-and-order/9449990/Police-apologise-for-warning-women-they-could-be-raped-if-they-got-drunk.html.


\textsuperscript{14} See above, note 3.

\textsuperscript{15} See above, note 13.

\textsuperscript{16} See above, note 3.

\textsuperscript{17} Judges Nussberger and Jäderblom noted that “ample evidence” of this dilemma was provided to the Court in S.A.S., above, note 3, Para 21.

\textsuperscript{18} See above, note 13.
the first time that the Court has opted not to consider an equality case first and foremost from the perspective of Article 14. The right to non-discrimination contained in Article 14 is of critical importance as it is a right, in particular, for disadvantaged individuals who are usually situated at the margins of society. It is critical, in scenarios such as those in S.A.S., that we remain focussed on the minority status of the affected applicants. An Article 14 analysis can illuminate important aspects of why the law in question is what it is but also what its specific effects are and for whom. Most crucially, if properly applied, Article 14 ensures that we hold governments to the highest evidential standards when they take actions or pass laws which disproportionately impact on a minority.

For a background and discussion of other examples in addition to a tracking of patchy progress see O’Connell, R., “Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR”, Legal Studies, 2009, pp. 211–229.
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