

# Discrimination on Grounds of Religion and Belief

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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:

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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:

*[W]here, 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.<sup>2</sup> 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,<sup>3</sup> 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.<sup>4</sup>

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 *transubstantiation*) or whether it is *both* the actual body of Christ and a wafer (the Lutheran doctrine of *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 *discrimination* claim.

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

4 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, July 2008, Articles 1 and 2.

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,<sup>5</sup> 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.,<sup>6</sup> (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,<sup>7</sup> “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:

*[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.*<sup>8</sup>

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.

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6 Depending on the material scope of the legislation.

7 See, for example, Vickers, L., *Religion and Belief Discrimination – the EU Law*, European Commission, 2006.

8 *Ibid.*, p. 38.