



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?¹ 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 Ahmaddiya 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”,² 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,

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 fourth 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.³ 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!

3 In respect to the area of health, this question is dealt with in detail in: Petrova, D. and Clifford, J., *Religion and Healthcare in the European Union: Policy Issues and Trends*, Alliance Publishing Trust, 2009.

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.

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4 "In the real world", in geek jargon.