Banning Religious Harassment: Promoting Mutual Tolerance or Encouraging Mutual Ignorance?

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“Ronny approved of religion as long as it endorsed the National Anthem, but he objected when it attempted to influence his life. Then he would say in respectful yet decided tones, ‘I don’t think it does to talk about these things, every fellow has to work out his own religion,’ and any fellow who heard him muttered, ‘Hear!’”

(E.M. Forster, A Passage to India)

1. Introduction

When lawmakers introduce equality legislation to encourage mutual tolerance between different religious and secular groups they must find a way of promoting respect for the rights of groups to exist and express their beliefs, without necessarily requiring respect for the beliefs themselves. The achievement of this balance in the law prohibiting religious harassment has proved a difficult task for legislators.

In the United Kingdom in 2005, the House of Lords removed a clause from the Equality Bill which would have extended protection against religious harassment beyond the employment sphere. This reflected experiences in the USA, where guidelines which defined religious harassment in the same way as harassment on other grounds met with such criticism that they were dropped. In more recent proposals to overhaul discrimination law, and seemingly learning from its 2005 experiences, the UK Government announced that it would not extend the reach of religious harassment provisions. Weeks earlier, however, the European Commission had adopted a proposal for a Directive which would require Member States to provide this very protection. This article explores why religious harassment provisions cause such controversy and considers how UK legislators can approach this issue in order to avoid the problems faced in the past.

Broadly, the article argues that just as with other grounds, highly insulting slurs directed against people on the grounds of religion or belief should be prohibited in certain areas. A ban on direct discrimination on the grounds of religion would be of little use if a service provider were to carry out her discrimination, not by refusing to serve a person of a particular religion, but by making the service experience so unpleasant that the service user’s position becomes untenable. It explains, however, that the sweep of harassment provisions, when applied to religion and belief, can be far broader than this and far broader
than when applied to other grounds, if not carefully drafted. The second part of this analysis will examine the scope of the British definition of religious harassment and the type of activity it prohibits.

In Britain, broadly the same definition of harassment applies to all protected grounds, but it has particular implications in relation to religion and belief. There are good reasons to aim for uniform protection across the main protected grounds. However, the grounds have their own specificities which militate against uniform treatment in all respects. The third part of the article will identify the specificities of religion and belief which mark it out as a ground requiring different treatment under equality legislation, particularly with regard to provisions outlawing harassment.

The fourth and fifth parts explore the close relationship between religion and belief and the fundamental rights to liberty of conscience and expression. It explains why these human rights demand caution in legislating to protect people against religious insult and to restrict religious expression. Reference will be made to the requirements of international human rights law, particularly European human rights law. Analysis of the compatibility of British provisions with human rights law is used to draw lessons as to the appropriate scope of legislation banning religious harassment.

The member states of the European Union are already obliged to outlaw religious harassment in employment and related fields. It was in the context of a proposal to extend protection against religious harassment to education, the disposal and management of premises and the carrying out of public functions that the UK government was forced to back down in 2005. It had itself decided not to provide protection against religious harassment in relation to goods, facilities and services. The proposed EC Directive would offer protection in all those fields. The fifth part of the article will consider whether governments are justified in affording different treatment to religious harassment in different areas of activity.

2. What Is Religious Harassment?

The implications of a prohibition of religious harassment can only properly be understood if the scope of such provisions is explored. Regulation 5 of the British Employment Equality (Religion or Belief) Regulations 2003 defines harassment in the following way:

"(1) a person ("A") subjects another person ("B") to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of -
(a) violating B's dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect."8

In applying harassment provisions relating to all grounds, the British courts have applied a subjective standard in determining whether conduct is unwanted and whether or not it causes an intimidating, hostile, degrading, humiliating or offensive environment or violates a person's dignity:

"Because it is for each individual to determine what they find unwelcome or of-
fensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.”

According to Lucy Vickers, it is the terms “humiliating” and “offensive” which allow claimants to argue that conduct constitutes harassment even where others would not consider it so. The term “dignity” has also been much criticised for its vagueness, which leaves it open to diverse interpretations.

This means that it is very difficult to refute a claim that conduct has violated an individual’s dignity. Subject to the reasonableness test in Regulation 5(2), if the victim finds conduct offensive or feels that her dignity has been violated on the grounds of religion, it will constitute harassment. On this basis a person can harass another without having any idea that her behaviour is likely to do so.

The reasonableness test enshrined in Regulation 5(2), which is intended to rule out claims from oversensitive victims, is of little impact in relation to religion. “Religion” is a broad and undefined ground and British equality law forbids discrimination not only on religious grounds, but also on the ground of someone’s belief or lack of belief. A wide range of belief systems and philosophies could potentially therefore claim the protection of a prohibition on religious harassment. Even adherents to the same faith can have different understandings of its requirements. Judges will find themselves in great difficulty trying to establish what is reasonably offensive on the grounds of every religion and it is inappropriate that they should attempt to do so. Lord Nicholls of Birkenhead has said:

“[E]mphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual... Religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.”

The personal and subjective nature of belief means that, just as a court cannot determine that a practice or belief is outside the ambit of a particular religious creed, it is impossible to say what is “reasonably” offensive or humiliating to a person of a particular religion. Regulation 5(2) specifically requires particular regard to be had to the perception of the victim and this must be correct. It would be highly inappropriate for judges to elaborate the doctrine of a religion or belief system in order to determine what is reasonably offensive according to it. Indeed, “the defining aspect of most religious views is their lack of susceptibility to proof or reason”. If courts and tribunals are to respect the subjectivity of religious feeling they must also avoid imposing their own or majority views as to the level of offence a comment is likely to cause. The Parliamentary Assembly of the Council of Europe has noted that,

“...there are considerable differences both between religions and within them, in what is considered religiously insulting behaviour or action. What makes the situation difficult is that even though on an abstract theological level religious insults can often be relatively easily identified, in practice the understandings, responses and reactions to
such insults do not follow a consequent logic, but are rather intertwined with many other issues. For instance, the reactions to Salman Rushdie’s book *The Satanic Verses* among the many Muslim and ethnic communities were remarkably different. The same happened again in regard to the *Jyllands-Posten Muhammad* cartoons controversy.”

Vickers too highlights a lack of common understanding regarding the likely effects of conduct related to religion, which leads to difficulty in applying an objective standard in cases of religious harassment. On this basis the reasonableness test, when applied to religion, offers little scope for the introduction of objectivity, other than in the case of patently inoffensive conduct.

The conduct need only have the “effect” in question and so a perpetrator will not be able to escape liability by pointing out her innocent intentions. Whether the speaker intended to create a hostile environment, was merely careless, or was even unaware that this would be the result of her words, her speech will constitute harassment if it, in effect, does so. There is no requirement that the offensive conduct be directed at the victim of discrimination and harassing “conduct” can include a broad range of behaviour; including assault, speech, or the display of signs or objects. Harassment is not limited to the “obvious” case of abuse of a religious person by a non-believer. It might also be carried out by a believer against the non-religious, people of a different religion, or people of the believer’s own religion, perhaps those who do not live according to the speaker’s own interpretation of the faith. Importantly, particularly harmful conduct need only occur once in order to satisfy the definition of harassment.

The prohibition of religious harassment in the Religion and Belief Regulations was intended to implement the European Community Employment Directive (the Directive). National authorities do, of course, have a choice as to the form and methods of transposition, so long as they give effect to the substance of the Directive. However, in one respect the Religion and Belief Regulations provide more limited protection than is required. Under the Religion and Belief Regulations a victim must show that she engaged in the harassing conduct *on the grounds of religion*, whether her own or her victim’s. Under the Directive, conduct should be prohibited where it relates to religion and violates dignity or creates the relevant environment, whether or not the person’s actions are motivated by religion. A person who discusses abortion with a colleague, not because of her own or her colleague’s religion or belief, but because she is interested in her colleague’s views, is not acting on grounds of, or because of, religion. If, however, her colleague holds religious beliefs in relation to abortion which conflict with the views she has expressed, her words may well create an offensive environment “related to” religion. Amendment or interpretation of British law in line with the Directive will broaden further the scope of religious harassment by catching the discussion of secular subjects, which are offensive to religious people, but where the discussion is in no way motivated by religion.

The British definition of harassment is broad and in relation to religion it loses all objectivity. This situation is exacerbated by the particular features of religion and belief as a ground, discussed in the following section, which mean that discussion of almost any subject could potentially cause religious offence and those affected by a prohibition will struggle to know whether they are at risk of doing so.
3. What Makes Religion Special?

Unlike membership of other protected groups, adherence to a religion or belief implies affinity with a set of ideas and opinions. This has significant implications for the scope of religious harassment provisions. Negative discussion of the tenets of a religion or belief system might well create a hostile environment, and therefore be caught by the British ban on religious harassment, where the speaker acts on the grounds of religion or belief. This hurdle would be satisfied, for example, where the speaker is motivated by her own religious beliefs or because she knows that discussion of the subject will be offensive to her listener. Some of the ideas linked to a religion will be theistic. The assertion or denial of such beliefs could be said to create a hostile environment for others. The expression of approval of Richard Dawkins’ book, *The God Delusion*, may well offend those who believe in God. A unilateral declaration of faith or the display of a poster praising God’s love might create an intimidating environment for those who do not. Religious teachings and non-religious beliefs are not, though, restricted to matters of spirituality. Believers will also hold strong views on secular subjects, such as the consumption of alcohol, sexual behaviour, the use of violence, etc., as a result of their beliefs. Discussion, criticism, or ridicule of these views or behaviour related to these beliefs will be restricted where the speaker acts on the grounds of religion or belief. A person might be motivated by her religion to criticise the "secular" behaviour of a colleague which conflicts with her beliefs, such as the conduct of sexual relationships outside of marriage or the use of contraception. Mocking approval of war in order to upset a pacifist colleague might equally fulfil the definition. The scope for causing offence on grounds of religion or belief is enormous.

There is an important distinction between denigration of a person because of her religion and denigration of the ideas, doctrine or dogma associated with her religion, which is not reflected in the legislation outlawing religious harassment.

The range of religions and beliefs protected under discrimination legislation, each with their own creeds and doctrines, presents huge potential for conflict between belief systems and thus huge potential for harassment. One person’s creed is another’s blasphemy. Atheists might object to all religious expression. Religious diversity can bring mutual enrichment, but is also a potential source of social division and tension. Like no other ground, equality legislation in relation to religion must encourage tolerance not only of people, but also their ideas. For this reason religion demands a specific approach under the law of discriminatory harassment. Mutual respect among different people might best be achieved through the suppression of abuse and insult, but mutual tolerance of ideas is more likely to be achieved through open debate.

Unlike other protected groups, religions and belief systems seek to recruit new followers. Adherents to certain religions consider themselves bound by their faith to spread the word and convince others to join their faith or to change their behaviour. Under British legislation, attempts by a speaker to convert others to his or her religion or belief will be prohibited if the target of such attempts considers that her dignity is thereby violated or if they create an intimidating or hostile environment. Atheists might consider a workplace adorned with posters spreading the word to be offensive. A Muslim might find her doctor’s surgery intimidating if she is repeatedly urged to attend church by the receptionist.
Some argue, controversially, that, unlike the other grounds, which are immutable personal characteristics, religious and other beliefs are chosen. On that basis, they contend that an attack on a person’s life Choices, their chosen religion, just as their chosen career, is not as harmful as an attack on the very essence of their being and does not require the same protection. Further, since beliefs are chosen and subject to change, they should be open to criticism and debate in order that the “right” beliefs are chosen by the majority of people in society. The Venice Commission has stated:

“The Commission observes that when it comes to freedom of expression, there appears to be a difference between racist insults and religious insults: while race is inherited and unchangeable, religion is not, and is instead based on principles and values which the believer will tend to hold as the only truth. This would seem to admit as lawful a wider scope of criticism in respect of a religion than of disrespect in respect of a race.”

Such arguments are of course open to challenge. Those adhering to a religion or belief might well argue that their beliefs define their identity in a way that race and gender do not, and are far more important to their sense of self. An attack on those beliefs will therefore be extremely harmful to their right to be who they are and to live according to their identity. They would surely argue that a faith or belief of the type to gain protection under discrimination legislation is not chosen through a process of analysis, but is rather an inherent faith gained through divination. Such beliefs can only be changed at such cost that they should be considered “constructively immutable”.

There are practical reasons why religion and belief should be treated differently as a ground. Unlike most other protected characteristics (though similar considerations apply in relation to sexual orientation and disability) a person’s religion or belief is, in itself, invisible. Further, a person’s beliefs are highly personal and private and may not be readily divulged. It is therefore possible to cause offence on religious grounds without knowledge of a listener’s sensibilities.

The difficulty of identifying the sensibilities of an audience and the broad range of potentially offensive subjects, make it difficult for even the most careful person to avoid liability. These considerations make a prohibition of religious harassment, as defined in Britain, unworkable. The following section will explain that these factors will also make it unlikely that such religious harassment provisions are compatible with human rights law.


Article 10(1) of the European Convention on Human Rights (ECHR) provides:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) is in similar terms. The prohibition of discriminatory harassment, irrespective of the ground in question, requires a balance to be struck between the right to freedom of expression and the right to be free from discrimination.
To ban harassment restricts certain types of speech, in order to protect a victim's right to be free from discrimination. States are, however, permitted to interfere with the right to free speech in order to protect the rights of others. In Europe, it is generally accepted that when the two rights are placed in the balance, the public interest in protecting the victims of discriminatory harassment outweighs the right of discriminators to free speech. It would, however, be wrong to assume that because this conclusion is correct in relation to other grounds, it is correct in relation to religion.

The conflict between religious harassment provisions and freedom of speech will only arise if the right to free speech is engaged. In a decision which has been described as “the paradigmatic example of balancing” the Canadian Supreme Court emphasised that, “[a]ny potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved”. If the type of speech caught by a prohibition on religious harassment is such that it does not enjoy the protection of free speech provisions there will be no interference with that right and the prohibition will not be subject to scrutiny under human rights law.

The European Court of Human Rights (ECtHR) has repeatedly stressed that Article 10 ECHR protects the right to impart “not only ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population”. Sedley J. has said that, “[f]reedom only to speak inoffensively is not worth having”. However, the right to engage in offensive speech has been held, in view of Article 17 ECHR, not to extend to hate speech. The ECtHR's decision in Norwood v. United Kingdom is particularly relevant to a discussion of religious harassment:

"The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 ...

"Where words, signs, etc., are used with the intention of stirring up religious hatred, we cannot imagine circumstances in which such behaviour would fall outside Article 17."

Similarly, the United Nations Human Rights Committee has stated that Article 20(2) of the ICCPR, which requires States to prohibit hate speech, is “fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities”. This suggests that a prohibition of harassment affecting only that discriminatory speech which constitutes hate speech would not interfere with the right to freedom of speech. Most speech made unlawful by a prohibition of religious harassment would, however, gain the protection of the right to freedom of expression and its restriction will, therefore, require justification.

Article 10(2) of the ECHR allows states to
interfere with the right enshrined in Article 10(1), so long as the restrictions are proscribed by law, they pursue a legitimate aim, including the protection of the rights of others, and the interference is necessary in a democratic society, that is, it corresponds to a pressing social need and the measures taken are proportionate to the legitimate aim pursued.

The ECtHR considers protection of the religious sensibilities of others to be a legitimate reason to limit the rights of others. In Wingrove v UK it held:

“The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner ‘as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented’...

“This is an aim which undoubtedly corresponds to that of the protection of ‘the rights of others’ within the meaning of paragraph 2 of Article 10 (art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.”

Protection against religious discrimination is likely to meet with similar approval as a legitimate aim.

The requirement that any interference with the right in Article 10(1) be proscribed by law is intended to ensure legal certainty as to the scope of the restriction. It is not sufficient that the relevant interference be the subject of legislation. Individuals must also be able to determine the extent of the restriction. An individual must be able to foresee, to a reasonable degree, the consequences which any given action may entail. This condition is important because it allows individuals to exercise their remaining Article 10 rights in the confidence that they are not falling foul of the restriction. If laws of uncertain scope were considered legitimate restrictions on the right to free speech, those wishing to ensure compliance would censor their speech to the maximum possible extent required by the law. Unclear provisions would therefore have a significant chilling effect on exercise of the right. Britain’s statutory prohibition of discriminatory harassment sets out in law a restriction on the right to speak freely. The largely subjective nature of the test of harassment, when applied to religion, and the broad and uncertain scope of subject matters which could be considered “offensive” or to undermine “dignity”, make it far from clear, though, that it meets the legal certainty test.

The vagueness of the definition will also be relevant to application of the proportionality test. In considering whether a restriction is proportionate, the ECtHR will consider whether the restriction was drafted so as to minimise interference with the right. The scope of the British prohibition of religious harassment is expansive and unclear. This might be expected to undermine claims that it is proportionate. However, the ECtHR has shown latitude in similar cases. In Kokkinakis v Greece it rejected the claim that the very existence of a provision criminalising proselytism breached Article 9 ECHR, even though the contested provision was vague and “such as to make it possible at any moment to punish the slightest attempt by anyone to convince a person he is addressing”
so long as its application was restricted to “improper proselytism”. Further, in Win-grove v UK” [t]he Court recognises that the offence of blasphemy cannot by its very na-ture lend itself to precise legal definition. Na-tional authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence”. It seems that in legislating to prohibit religious har-rassment States will enjoy a wide margin of appreciation in assessing what is necessary to protect domestic religious sensibilities, so long as courts and tribunals can be relied upon to apply the provisions appropriately. In Britain, courts are required, so far as pos-sible, to interpret harassment provisions to be consistent with the rights protected by the Human Rights Act 1998. This might, on the basis of these cases, save the provisions from breach of international human rights law. It is, though, infinitely preferable to ex-clude inappropriate consequences in legisla-tion than to rely on the restraint of judges, given the chilling effect that is likely to result from the mere existence of broadly drafted provisions.

In considering whether a restriction on the right to freedom of expression is propor-tionate, the ECtHR has emphasised that the value of the restricted speech will be determina-tive. Given the importance of political speech to a democracy, matters of public interest are afforded the highest level of protection. It is particularly difficult to justify interference with such speech. Neither racial nor religious direct insults serve the public interest and a ban on these is unlikely to be difficult to justify. However, the definition of religious harassment explored in Part 1 potentially restricts not only intentionally insulting speech, but also criticism of the tenets of a faith, criticism of the views of a religion in re-lation to secular subjects and even, potentially, discussion of secular subjects for reasons unrelated to religion, which nevertheless of-fend on religious grounds. A prohibition of religious harassment which is drafted so as to catch this “political” speech is the factor most likely to render the prohibition dispro-portionate.

It is true that certain political speech is po-tentially caught by prohibitions on racial or gender harassment. The scope of these pro-hibitions is, though, far less broad. It is pos-sible to think of only a very limited number of subjects which do not constitute direct insults or abuse but which would neverthe-less have the effect proscribed by harass-ment provisions. Discussion of a belief that women should not be in the workplace but should stay at home might well be offensive on grounds of sex. Expression of a negative attitude towards immigration or approval of a foreign policy decision to go to war with a certain country might be considered to create a hostile or intimidating environment on grounds of race. These are rare examples, though, when compared to the range of sub-jects which would fall foul of the British ban on religious harassment. Further, while the reasonableness test is likely to save those ac-cused of racial or gender harassment from liability, its limited impact in religious dis-crimination cases means that claims of reli-gious harassment related to political speech are more likely to be successful.

The banning of politically valuable speech will only be justifiable where a state can point to particularly important reasons for doing so. The low threshold of harm in Brit-ish religious harassment cases and the sub-jective nature of the test, such that a claimant
need only show that she found the speech “offensive”, means that such weighty reasons will certainly not be present in all cases in which liability for religious harassment will arise. This point was illustrated in a recent case. The author of an article which linked a Papal encyclical to the origins of the Holocaust had been convicted of defamation. The ECtHR held that:

“Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian.”

On this basis it held that the conviction did not meet a pressing social need and therefore violated Article 10 ECHR. The article was politically valuable. Offence felt by Catholics at the negative portrayal of their religious doctrine was an insufficient reason to justify its restriction. Similarly, in Klein v Slovakia, a case concerning the conviction for defamation of a journalist who criticised an archbishop, the Court held that:

“Contrary to the domestic courts’ findings, the court is not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith.

“The fact that some members of the Catholic Church could have been offended by the applicant’s criticism of the archbishop and by his statement that he did not understand why decent Catholics did not leave that church since it was headed by Archbishop J Sokol cannot affect the position...”

For the above reasons, and despite the tone of the article..., it cannot be concluded that by its publication the applicant interfered with other persons’ right to freedom of religion in a manner justifying the sanction imposed on him. The interference with his right to freedom of expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. It thus was not ‘necessary in a democratic society’.”

Where a ban on religious harassment restricts the criticism of ideas or persons linked to a religion of belief, rather than the religion or religious people themselves, it is likely to fall foul of the proportionality test and the need to show a pressing social need. The cases also suggest that the intentions of the speaker will be highly relevant to whether the restriction of her speech is proportionate.

In addition to making it possible to justify interference with free speech, Article 10(2) specifies that the right to free expression carries with it certain responsibilities. In this regard, the ECtHR has said:

“As paragraph 2 of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others...

“[T]he Court observes that the English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the Eng-
lish courts have indicated (see paragraph 27 above), *it is the manner in which views are advocated* (emphasis added) rather than the views themselves which the law seeks to control.\textsuperscript{59}

The ECtHR suggests that individuals do have a right to question and criticise the beliefs of others, but are under a responsibility to do so in a way which avoids unnecessary offence. A definition of harassment which is restricted to reflecting this responsibility – that is by excluding unintentionally offensive speech – might, on this basis, be legitimate.

Notwithstanding the wide margin of appreciation that Contracting States are normally afforded when regulating speech pertaining to religion, the compatibility of a broadly drafted ban on religious harassment with the right to freedom of expression is questionable. The British definition is too vague to allow confident exercise of the right and too wide in scope to be considered a proportionate means of protecting others from discrimination. The value of the speech caught by the prohibition means that particularly weighty reasons are necessary to justify its restriction, which are not met in the case of religious harassment. These features do not apply in the same way to harassment on other grounds.

This analysis of the compatibility of British religious harassment provisions with the right to free speech points to several lessons for legislators. A prohibition could legitimately prohibit the most serious forms of religious harassment, which are expressed in a gratuitously offensive manner, so long as this is done in a way which provides greater legal certainty as to the scope of the restriction. This should preserve politically valuable speech and avoid the chilling effect of a prohibition which is both broad and vague.

5. Competing Rights: Religious Harassment and Freedom of Conscience

The most significant factor requiring religious harassment to be treated differently from harassment on other grounds is the need to take into account the fundamental right to freedom of religion. Article 18(1) of the ICCPR provides:

> “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 9(1) of the ECHR is in similar terms.\textsuperscript{60} Both those seeking to express their views and those who claim a right to be free from harassment enjoy the right to religious freedom. The right comprises a right to hold a belief and the right not to hold a belief.

Victims of religious harassment will point to their right to “have or adopt a religion of his choice” in support of their claim that the law should protect them from abuse or insults on the basis of their religion, or aggressive attempts to convince them to abandon their faith or lack of faith. The argument would be that there is no genuine freedom to hold a belief, or not to hold a belief, if the lives of those who do so are rendered untenable.\textsuperscript{61} This argument appears to find support in international human rights law. Article 18(2) of
the ICCPR states that no-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Similarly, the ECHR has held that Article 9 of the ECHR includes a right to be free from “improper proselytism”. Overzealous attempts to convert someone should, on this basis, legitimately be prohibited. Further, in Otto Preminger Institut the ECtHR concluded that the convention imposes a positive obligation on states to secure the peaceful enjoyment of the right to freedom of religion, which can imply a duty to regulate the expression of opposition to religious beliefs. The court said:

"Those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to them. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to holders of those beliefs and doctrines."

Again, the Court emphasises the States’ obligation to regulate the manner in which potentially offensive speech is expressed, rather than the expression of that belief itself, as the essential element to protecting the religious sensibilities of victims of harassment under Article 9.

The right to religious freedom can, though, also be relied upon by those faced with liability for religious harassment. Freedom of conscience encompasses not only a right to hold a belief, but also the right to manifest one’s religion or belief, in worship, teaching, practice and observance. A ban on religious harassment, if not appropriately tailored, will greatly inhibit the manifestation of religion.

An explanation of the scope of the right to manifest religion and belief will illustrate the potential conflict.

It has been argued that, “freedom to practice one’s religion or belief must be understood as protecting, in principle, every act of the individual when he obeys the dictates of his own conscience”. Again, this reflects the subjective nature of religion. If the right to religious freedom is to be of value, it should not be subject to majoritarian views as to how religious beliefs are properly manifested. This view is supported by the House of Lords in Williamson. The right to manifest religion and belief does not, though, “cover each act which is motivated or influenced by a religion or a belief”. In Arrowsmith v. the United Kingdom the ECtHR held that the distribution of leaflets which were critical of government policy, though motivated by a pacifist belief, was not a manifestation of that belief. Many decisions as to whether speech relating to religion constitutes a “manifestation” of religion, will, therefore, depend on the particular beliefs and what behaviour they require, but several general comments can be made.

The right to manifest religion certainly does include a right to try to convince others of that belief:

“Bearing witness in words and deeds is bound up with the existence of religious convictions... freedom to manifest one’s religion... includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’, failing which, moreover,
'freedom to change [one’s] religion or belief', enshrined in Article 9 (art. 9), would be likely to remain a dead letter.'^68

And yet when proposing to introduce a ban on religious harassment outside of the workplace, the UK Government admitted that it would restrict the right to proselytise:

"Posters which are clearly aimed at converting others to a particular faith, rather than celebrating a faith, could be considered harassment if they were deliberately brought or put in a situation to deal with B’s religion... On balance, we believe it is right that people attending public functions should be able to do so free from fear of unwelcome proselytisation."^69

Declarations of faith will clearly constitute the manifestation of religion, including the display of religious artefacts or the wearing of religious dress. It is less clear that criticism of the way of life of others, that is criticism either of their religious beliefs, their lack of belief, or their secular life choices, will be protected by the right. This will depend on whether the facts of the case show that this amounts to expression of a belief. This certainly will be the case when the acts are required by religion^70 or are an integral part of proselytism. General Comment 22 on Article 18 ICCPR makes it clear that, "[i]n accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Again, the right to be free from religious hate speech can legitimately be protected.

The right to manifest religion will, then, be engaged in relation to a great deal of speech caught by the British prohibition on religious harassment. Again, though, this right is not absolute and interferences can be justified.^72 Similar considerations will apply in the justification of restrictions on religious harassment as those explained above in relation to the limitation of freedom of expression. The UK could successfully argue that its ban on religious harassment pursues a legitimate aim, but the vagueness and broadness of the definition is likely to satisfy neither the requirement of legal certainty nor the requirement of proportionality. This will be particularly so to the extent that it restricts declarations of faith or non-aggressive attempts to convert others or change their behaviour. The restriction of behaviour which is mandated by a person’s religion will involve a significant infringement of their dignity;^73 yet there is nothing within the definition to ensure that such activity will only be prohibited when it is particularly harmful.

Religious harassment must be considerably more narrowly defined than it currently is under British legislation if it is to avoid unlawful interference with the fundamental right to freedom of religion. It must be drafted so as to restrict only that speech which is of such severity and expressed in such a manner that it would cause significant harm to the listener, particularly if it constitutes the restriction of an activity which a person considers herself bound by her faith to engage in.

It seems likely that international human rights law would allow only a lightweight prohibition of religious harassment. However, when conflicting human rights are balanced against each other it is particularly important to carry out a contextual analysis. There is merit, therefore, in considering whether the conclusions reached above apply equally to all fields of activity usually subject to discrimination law.
6. The Importance of Context

Context can be relevant to the question of whether it is proportionate to ban religious harassment in several respects. The context can determine the relative weight of both the speaker’s right to do so freely or to manifest her religion and the victim’s right to be free of discrimination. It can also determine the impact that the harassment is likely to have on an individual. The area of activity in which harassment takes place can also be significant from a practical point of view as it may determine the extent to which those potentially liable for harassment are able to take steps to avoid causing offence.

One might distinguish between “open” and “closed” environments in considering whether harassment should be prohibited. An environment is open if individuals can choose freely whether or not to expose themselves to it. Generally, it will be less important to ban harassment in open environments because a victim can escape the discriminatory behaviour. This distinction has been made by the Strasbourg court. It has sought to achieve a balance between Article 9 ECHR and conflicting rights by holding that a person who can take steps which will avoid any conflict between his beliefs and sources of interference with those beliefs but does not do so cannot complain of an interference with his freedom to manifest his beliefs. This may be correct as a principle, though I would respectfully contend that the Strasbourg court misapplied the principle when it identified the employment context as an open environment.

The categorisation of an activity as either giving rise to open or closed environments should take account of how essential it is to take part in the activity and whether it is easy to switch between different environments. The more important a particular activity is to participation in society, the more “closed” it will be. Most people must work. Any suggestion that a person is free to avoid religious harassment by becoming unemployed is a fallacy. Where there are barriers to switching between environments, this will reduce the extent to which those environments can be considered “open”. To change employer is not a straightforward matter. Once again, the idea that an individual could easily distance herself from harassment by changing jobs is misconceived. It is right, then, that there should be a high level of protection against discrimination in closed environments.

On the other hand, many places where goods, services and facilities are offered are more open environments. To partake of many commercial goods, facilities and services is a matter of choice. Further, the nature of commercial goods, facilities and services is that they are subject to competition. Customers are not usually locked-in to one supplier and so alternative sources are readily accessible to consumers. If the environment in one restaurant, bar or shop is hostile because of the display of religious objects or the playing of religious music, there are likely to be others which are not so offensive.

It is not, though, possible to categorise all goods, facilities and services in this way. While many commercial goods, facilities and services might well be considered non-essential, this is not true of public services. Provisions outlawing discrimination by public authorities will not apply to discrimination regulated by another provision of the discrimination legislation. Therefore, where a public authority is providing goods, services or facilities, its actions will be regulated under corresponding provisions and will not
fall within the scope of the public functions provisions. The provision of health services would, therefore, be subject to provisions outlawing harassment in the provision of goods, facilities and services, yet this service is undoubtedly essential. Further, there are barriers to accessing alternative health care “environments”. In the UK, the provision of health services is dominated by the local National Health Service (NHS) provider. There are relatively few alternative providers of healthcare and accessing their services is expensive. This makes the NHS provider a comparatively closed environment and suggests that the highest level of protection against discrimination should be applicable in this context. The British Humanist Association has stressed that while the cost to free-speech of anti-harassment provisions generally outweighs the benefits of such legal protection, this is not the case in relation to public services. On this basis the UK Government should be wary of classifying activities as giving rise to “open” or “closed” environments on the basis of dividing lines it has created in existing discrimination legislation.

The proportionality of a ban on harassment will depend in part on the harm that is likely to result from discriminatory speech if it is allowed to continue. Where the nature of a particular activity is such that it typically gives rise to hierarchical relationships, harassment in such an environment, by a person with authority, would potentially have great impact upon its victims. If an employer were to urge an employee to stop her sinful behaviour, or, conversely, to abandon her irrational religious beliefs, this would arguably impede the freedom of an employee to maintain, or at least manifest, her own religion or lack of belief. The employer’s position of authority will exert considerable pressure on an employee to comply with instructions, even where they are not directly related to work. The providers of commercial goods, facilities and services are, on the other hand, rarely in a position of formal authority over consumers and their religious or other beliefs are unlikely to influence those of their customers. In contrast, doctors, police officers and teachers have obvious sources of influence and authority. This factor has influenced the reasoning of the ECtHR. In Larissis the Court found that “the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.” This factor may, therefore, legitimately be taken into account in deciding whether or not to protect against religious harassment in a particular activity.

Certain environments produce ongoing relationships, whereas others give rise to brief moments of contact, which are not necessarily repeated. In the employment context prolonged contact between employees and their employer and colleagues provides the opportunity to acquire knowledge of a person’s religious sensibilities. This makes it easier for people in the workplace who might otherwise cause religious offence to modify their speech and avoid liability for religious harassment. The contact between “harasser” and “victim” in service delivery is far more likely to be transient and to occur on a single occasion. Those engaged in the supply of ser-
vices will not have sufficient knowledge of the sensitivities of their clients to be able to adjust their speech accordingly. They would be best advised to avoid all potentially offensive speech, with significant chilling effect. This might suggest that it is more reasonable to prohibit harassment on the grounds of religion and belief in the employment context than in the provision of goods, facilities and services. However, there are countervailing arguments which suggest that the tort of religious harassment might just as easily be constituted in the employment context. Since a victim will normally need to point to an accumulation of offensive speech in order to show that she has been harassed, harassment is more likely to occur in the extended contact in the employment sphere than in relation to goods, facilities and services. An employer could be liable for harassment constituted over a period of time, by a series of mildly offensive comments, made by different employees within earshot of one offended employee. In order to avoid liability an employer would be forced to ban all discussion related to any potentially offensive subjects. The duration of relationships does not, therefore, appear to justify a distinction between the different fields in the treatment of harassment as currently drafted.

In certain environments, it will be particularly important to ensure freedom of speech and the right to manifest religion. Case law in Canada suggests that context can be relevant to whether an activity is at the core of a right, in which case it should be protected at the expense of more peripheral activities of a competing right. In education, which is aimed at the discovery of the truth and discussion of ideas, legislators should be hesitant in imposing restrictions on these freedoms. In contrast, the Ontario Superior Court has held that,

"[T]he further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion."

Similarly, the Ontario Human Rights Commission has argued that "secular service providers that hold personal religious beliefs cannot claim that the performance of their job functions is an expression of their deeply held religious beliefs." This may well be true of some faiths and if true of all, would suggest that religious harassment could legitimately be prohibited in the provision of commercial goods, facilities and services. However, this reasoning asserts an objective view of what is central to the manifestation of religion and appears to conflict with the remarks made above which argued that such decisions are very much personal and subjective matters. It ignores the fact that for many religions, their religious beliefs permeate every aspect of the lives of believers and require them to conduct themselves in accordance with their faiths in all areas of activity. In such cases, prohibition of religious harassment in the provision of goods, facilities and services will constitute a significant interference with religious freedom.

If governments were to prohibit religious harassment in certain fields and not others, this should only be to exclude the provision of commercial goods, facilities and services from the scope of the ban. It is important that essential public services and the activities of public authorities are subject to the maximum level of protection available under equality legislation. However, a better outcome would be for a more narrowly tailored prohibition of religious harassment to apply
equally in all environments subject to discrimination legislation.

7. Conclusion

The definition of religious harassment employed in British legislation is too broad, too subjective and too vague. It must be tightened and clarified if it is not to breach the fundamental rights to freedom of speech and freedom of conscience. It should be limited so that it catches only severe insults against people because of their religion, belief, or lack of belief, and excludes perceived insults against their religious ideas and opinions, unless these are expressed in a "gratuitously offensive" manner. In particular, it should not penalise “political” speech. Provisions banning religious harassment must not inhibit proselytism, unless it is “improper”.

Some might argue that the response to this analysis would be to repeal provisions banning religious harassment and not to legislate in this area in the future. Provisions prohibiting direct discrimination on the grounds of religion will address offensive speech where this constitutes less favourable treatment of a person on the grounds of religion. The criminalisation of religious hate speech will prevent the most reviling insults against a religious group. Aggressive and persistent proselytism may fall foul of public order offences which prevent or punish insulting and abusive behaviour in public places.

Alternatively, these objectives could be met by requiring a victim to show that the speaker intended to cause the proscribed effect. In the context of a protected activity, if there is evidence that a person intends to create an offensive or hostile environment, it is right that this should be prohibited where it is tantamount to direct discrimination. Where speech is so objectively offensive that it is bound to have the prohibited effect, the requisite intention can be inferred. Declarations of faith and the display of religious articles will not convey any malicious intent and so will not fall foul of such a ban. Discussion of the tenets of a religion, or secular subjects, will not be caught unless the manner in which the criticism is expressed is sufficiently insulting to infer intention. Attempts to convert others will intend to proselytise and not to harass.

In any event, harassment which reaches the requisite level of severity for its prohibition to be legitimate should be outlawed in all areas in which direct and indirect discrimination is prohibited.

Whichever approach is taken, the most important conclusion of this discussion is that legislators should not continue to apply the same definition of harassment to religion as to all other grounds. Lucy Vickers agrees that religion requires different treatment, but argues that, thanks to the openness of terms such as “dignity”, “reasonably” and “in all the circumstances”, the definition can be interpreted and applied in a way that avoids its potential pitfalls. This approach does not, though, overcome the fundamental problems outlined above. It is based on the very fact that the terms which make up the definition are so vague that they can be used to support opposing sides of the same argument. This does nothing to recommend its continuing use, but rather confirms that it provides insufficient legal certainty. The chilling effect of such a vague definition on freedom of speech and manifestation of religion is unacceptable.

Even worse, the openness of the terms to varying and subjective interpretations will inevitably lead to litigation and encourage, rather than heal, divisions within society.
The former Attorney-General of India, Soli Sorabjee comments in relation to India’s religious hatred legislation are instructive:

“Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other’s religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.”85

1 Paola Uccellari is Parliamentary Legal Officer at the Odysseus Trust. This article resulted from research commissioned to her by The Equal Rights Trust in 2007.


7 Statutory Instrument No. 1660.

8 Regulation 5.

9 Reed & Bull Information Systems Limited v Stedman [1999] IRLR 299, para. 28. These comments related to the notion of harassment developed under direct discrimination provisions but reflect interpretation of the statutory prohibitions.


12 See section 44 of the Equality Act 2006.

13 Regina v. Secretary of State for Education and Employment and others ex parte Williamson and others [2005] 2 All ER 1, para. 22.


See Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. Article 2(3) provides: “Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”.

In one respect the definition in the Directive is narrower than that under the Religion and Belief Regulations. The Directive definition requires that the conduct has the purpose or effect both of violating the dignity of the victim and creating an intimidating, hostile, degrading, humiliating or offensive environment.

The provision in the Equality Bill 2005 which would have extended protection against religious harassment excluded conduct based on the harasser’s religion and so would have caught only conduct related to the religion of others. Section 47(2)(a) provided, “[I]n subsection (1) ‘religion or belief’ means a religion or belief of B or of any other person except A.” However, this provision dealing with religious harassment was removed in its entirety from the Bill and there is no such restriction in the Religion and Belief Regulations.

Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, footnote 15, para.5.


Hare, footnote 25, p. 540.

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe’s advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of constitutions that conform to the standards of Europe’s constitutional heritage.


See Dworkin, footnote 24.

Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203, para. 13.


It provides: “Everyone shall have 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, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Article 10(2) of the ECHR provides: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Article 19(3) of the ICCPR makes similar provision.

Vickers, footnote 16, p. 587.


Trinity Western University v. College of Teachers (British Columbia) 2001 SCC 31.

Handyside v UK (1976) 1 EHRR 737, para. 49.

39 Article 17 provides: "Nothing in this Convention may be interpreted as implying for any state, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

40 Application Number 23131/03 (16 November 2004) para. 2.61.

41 It provides: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."


43 See note 33.


49 The case related to Article 9, but is nevertheless relevant to a consideration of proportionality in this context.

50 Kokkinakis v Greece (1993) 17 EHRR 397, see the partly concurring opinion of Judge Pettiti.

51 Kokkinakis, footnote 50, para. 48.

52 Wingrove, footnote 45, para. 49.

53 Section 3.

54 Matters of public interest are considered to be equivalent to pure political speech by the ECtHR in Thorgeirson v Iceland (1992) 14 EHRR 843.

55 Wingrove, footnote 45, para. 58.

56 Vickers, footnote 16, p. 588.


59 Wingrove, footnote 45, paras. 52-60.

60 Article 9 (1) ECHR provides: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

61 Vickers, footnote 16, p. 584.

62 Kokkinakis, footnote 50, para. 48.

63 Otto Preminger Institut v Austria (1995) 19 EHRR 34, para. 47.

64 Martínez-Torrón, Javier and Navarro-Valls, Rafael. “Facilitating Freedom of Religion and Belief: Perspectives, Impulses and Recommendations from the Oslo Coalition”, cited in Moon, Gay and Allen QC, Robin. “Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards A Better Understanding of the Rights, And Their Im-

65 Williamson, footnote 13, para. 32.


67 Ibid.

68 Kokkinakis, footnote 50, para. 31.


70 In Williamson, footnote 13, Lord Nicholls said: “If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice.”


72 Article 9(2) provides: “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.”

73 Vickers, footnote 16, p. 603.

74 The ECtHR found that an employer’s terms and conditions which prevented time off for religious worship caused no interference with the right to freedom of religion in Stedman v UK (1997) 23 EHRR CD 168. See also Kalac v Turkey (1997) 27 EHRR 552.

75 Rix L. J. also doubts the validity of this line of jurisprudence, arguing that “[t]he rulings are difficult to square with the supposed fundamental character of the rights. It hardly seems compatible with the fundamental character of Article 9 that a person can be told that his right has not been interfered with because he is free to move on, for example, to another employer, who will not interfere with his fundamental right, or even to a condition of unemployment in order to manifest the fundamental right.” See R (on the application of Williamson and others) v Secretary of State for Education and Employment [2003] 1 All ER 385; [2002] EWCA Civ 1820.

76 Religion and Belief Regulations, Regulation 2(3).


84 Vickers, footnote 16, p. 601.