The Courts, the Churches and the Constitution Revisited [1]

Aidan O'Neill QC

Political Theologies of the English and Scottish nations

Britain is, at its (constitutional) core, a Protestant nation.[2] This is one of those historical and constitutional facts which is now so often ignored, forgotten or glossed over. But the historian Linda Colley ably illustrated in her book *Britons: Forging the Nation*[3] how the newly created United Kingdom was brought together by the explicit use of religious ideology. The 1707 Union and its Empire was consciously cemented by a new patriotism built on maritime prowess, the Protestantism of its peoples and a Parliamentary heritage, which betokened such fundamental principles as popular sovereignty, limited monarchy, separation of powers and respect for the fundamental rights and liberties of the individual subject.

In all these things, Great Britain (including its colonies in North America) was contrasted with the regimes of other rival powers of Continental Europe, notably the French and Spanish, whose constitutions were seen as embodying everything that was unBritish, namely: Popery, arbitrary and despotic Government and servility.

Although Linda Colley is correct to note that there was an ideology of a *shared* Protestantism united against the Papist common enemy which cemented the new British Union, it should also be borne in mind that, from an internal British constitutional perspective, there were quite different (ideal) types of Protestantism as between Scotland and England. Scotland's ecclesiastical settlement immediately prior to the 1707 was Presbyterian, republican and Calvinist. England's was Episcopal, monarchical and Erastian. The Anglican approach may be best captured up in the phrase: *rex in regno suo imperator est* - the king wielded supreme imperial authority within his own realm. The Scottish Presbyterian tradition is best captured by the Scottish Reformer Andrew Melville's pungent description of the king, James VI, as "God's Sillie vassal".

(1) *Rex Angliae in regno suo imperator est*

In the England of Henry VIII, the civil and intellectual turmoil associated with the ideas of the Lutheran Reformation was ultimately seen as providing a political opportunity for the secular ruler effectively to nationalize the Church within his territories. On Henry's view the supra-national and trans-national political claims of the Bishop of Rome could be repudiated but the existing ecclesiastical hierarchical structures and established doctrine still maintained. Instead of the Pope having any supervisory authority, the King could now arrogate to himself a position of supreme governor over the Church within his realm.

This was understood, by Henry VIII at least, to be more a political rather than any profound theological change, and the continuity of the newly nationalised Church *of* England with the pre-Reformation church *in* England was presumed. Instead of a usurpation or innovation, the Henrician transfer of power over the Church to the State authorities in England was presented as a profoundly patriotic and pious act; as a restoration of that same constitutional order which had prevailed in the Roman empire from the reign of Constantine I from the time of his formal recognition of Christianity in 325 CE as a lawful (and indeed favoured) religion within the empire. In Henry's mind the break with Rome was simply the English King regaining and using the full imperial power proper to his regal office.

Thus the Restraint of Appeal Act 1533 - which sought to end the Canon law right of appeal from the church courts in England to the Roman Rota - stated that "here by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that *this realm of England is an Empire*, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the *Imperial Crown* of the same". In the following year the first Supremacy Act 1534 explicitly tied the office of head of the English church to the English imperial crown, stating that the king and his successors "shall be taken, accepted and reputed the only supreme head in earth of the Church of England called *Anglicana Ecclesia* …. annexed and united to the *imperial crown* of this realm". In his new ecclesiastical settlement, Henry VIII could present himself as the heir to the Emperors Constantine and Justinian. Thus in *R v Dibdin* Darling J. could say that:

> "[T]he Church of England [is] a reformed Church acknowledging the King as being in all causes, ecclesiastical as well as civil, within his dominions supreme, and the King rules by and in accordance with statutes of the realm."[4]

(2) The King (of Scots) as "God's sillie vassal"

While the English King in the 1530s was engineering a breach with the Roman Church, his nephew James V, the King of Scots, was, by contrast, apparently consolidating his country's connections with the Roman See, notably in the re-foundation in 1532 of the Court of Session as the College of Justice, paid for in large part from the grant to the king of church revenues.[5]

But a revolution delayed is a revolution intensified; and when the Protestant Reformation did come to Scotland it was accompanied by a stern iconoclastic fury that resulted in so much destruction of the visual and material culture of the past. The Protestant Reformation and the official break from Rome took place in Scotland in 1560, almost thirty years after that of England, and resulted in a far more radical and revolutionary turn than the earlier English Reformation. It was an ideological reformation and conscious break from and repudiation of the practices and many of the doctrines of the unreformed Roman Church. It was inspired by the teaching of the French lawyer and Genevan exile, John Calvin.

Calvin based his ideas on the proper relationship of Church and State, not on the practice of the Emperors of Constantinople, but on the writings of the fifth century CE North African theologian Augustine, Bishop of Hippo. Scottish Calvinism took an entirely different approach to the Constantinian moment in the history of the Church from that which had been followed by the Henrician party in England. Rather than seeing this as a period in which Christianity captured the Roman Empire, it came to be regarded, instead, as the capture and annexation of Christianity by the Roman Emperors. The Constantinian moment represented, for the radical Reformation thinkers of the latter half of the sixteenth century and first half of the seventeenth century, a wrong turning.

Instead of having history repeat itself by allowing the Church once again to come under the dominion of an imperial Caesar, their vision was one in which Christianity would transform the polity, turning it from imperial autocracy back to the republican values of a commonwealth. Unlike models of Church-State relations

which adopted top-down approaches, delineating the relationship between God and Caesar from the view point of Caesar, the Calvinist model sought to work out the relationship between the two from the view point of the individual who was at one and the same time a citizen of the State and also a member of the Church. The Church was made up and governed by the assemblies of its members, just as the power of those entrusted with the governance of the State was understood as limited by the assembly of its people.

On this dualist "two kingdoms" model, Church and State authority co-existed equally in the one territory in co-operative dialogue and creative tension, neither subordinate to the other. Accordingly, in the course of the sixteenth and seventeenth centuries the Scottish Reformers sought a constitutional settlement within the Scottish nation - in line with Calvin's Geneva and, indeed, with the Roman church of late antiquity [6] - which carefully separated and distinguished between the co-existent powers and functions of the civil magistrate and those of the Church. The political theology of the reformed Scottish Church was one which emphasized the limitations of the secular power before the Church. Whereas in the England of the Tudors the King became Supreme Governor of the Church, in Scotland the sixteenth century reformers would, instead, wholly depose the King from the sphere of the ecclesiastical, rendering him as no more than, at best, an ordinary member of the Church, wielding no authority *ex officio* within it. In the words of the leading second generation reformer, Andrew Melville, in 1596, the King of Scots

> "was God's silly vassal … and that there are two kings and two kingdoms in Scotland. There is Christ Jesus the King, and His kingdom the Church, whose subject King James VI is - and of whose kingdom, not a king, nor a lord, nor a head, but a member he was." [7]

Political Theologies of the British Union

The negotiations leading up to the conclusion of the 1707 Union between England and Scotland sought to achieve the constitutionally entrenched preservation of the two nations' distinct ecclesiastical (and, implicitly, also their differing underlying constitutional) settlements. The "securing of the Protestant Religion and *Presbyterian Church Government* within the Kingdom of Scotland" was expressly declared to be "a fundamental and essential Condition of the said Treaty or Union in

all times coming". And it was similarly declared by the English Parliament that the preservation of the Anglican settlement in England also be made "a Fundamental and Essential part of any Treaty of Union" with Scotland.

In the United Kingdom, then, we have inherited and maintained two and wholly distinct political theologies. Thus the Church of Scotland Act 1921 now regulates the relationship between the Church and the State in Scotland. Its orthodox Scottish Calvinist ecclesiology is set out in the Schedule to the 1921 Act which contains the Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual. For the avoidance of doubt, Article 4 recognises and confirms the Church's "right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the Church" and specifically denies "the civil authority any right of interference with the proceedings or judgements of the church within the sphere of its spiritual government and jurisdiction." While the civil power had legal authority and a duty to concern itself about the interests of religion and the welfare of the Church and to provide for the advancement of the Church's interests and welfare in the temporal sphere, the civil power has no right or power to interfere within the internal workings of the Church itself.

But at times it seems as though the Erastian monist assumptions underpinning only the Anglican settlement have been regarded by the courts (and by our lawmakers) as the sole approach constitutionally open to them. It is suggested, however, that the rediscovery of the Calvinist two kingdoms tradition which was exemplified in the Reformation settlement of the Scottish church might provide a fruitful resource for the resolution of potentially problematic issues in our contemporary polity.

The presumption of Erastianism

In cases directly involving the Church of England, since the 1707 Union, the English civil courts have tended to apply orthodox English constitutional theory, emphasising the Erastian subordination of the established Church to the requirements of the State. For example in *King v Dibdin* the issue before the Court of Appeal was whether a Church of England clergyman could refuse to recognise the validity of a marriage contracted between a widower and the sister of his late wife

and so deny them Holy Communion. In holding that the clergy of the Church of England could *not* lawfully rely upon religiously based scruples in these matters, Fletcher-Moulton LJ observed:

> "No man has a right to become a clergyman of the Church of England who is not prepared to perform the lawful duties of that office. … [I]t is not in accordance with the practice of our Legislature that the rights of the laity in matters of such importance [as admission to Holy Communion] should be made dependent on the views of a particular clergyman, or even of the Church itself, except so far as those views are by law made binding on the laity." [8]

By the latter half of the twentieth century, the growing tendency of the courts – at least of England and Wales – was to seek to avoid becoming mired in matters of ecclesiastical sensitivity and/or theological controversy by finding ways of denying that they had any jurisdiction to enter into the "judicial no-man's land of religious doctrine and practice".[9] It may be that this 20th century uneasiness as to the propriety of the civil courts ruling on matters religious reflected the growing secularisation of public life in the UK, with the judges drawn from an increasingly unChurched class who - in contrast to their church-going and religiously literate Victorian and Edwardian forbears - felt uncomfortable with, and unqualified to sit in judgment on, religious matters.

The courts have remained ready to entertain disputes where there have been recognised justiciable decisions in areas of law in which they consider themselves to have expertise and to be within their institutional competence for example: the correct construction of an arbitration agreement; [10] or determining liability for non-domestic rates; [11] or determining whether an individual can get married in a particular building; [12] or resolving the questions of who had power to appoint and remove trustees in a dispute over the ownership, possession and control of property held on trust for religious purposes. [13] But in terms of those internal ecclesial or theological wrangles which cannot accurately or convincingly be translated into the language of civil law, the civil courts largely sought to keep their distance.[14]

Neo-Erastianism and equality law

The coming into force of the Human Rights Act 1998 ("HRA") and of the Equality Act 2010 appears to have changed things, however. Now, when faced with claims that a religious authority has acted incompatibly with an individual's Convention rights (or contrary the requirements of equality law), the courts seem more ready - indeed consider themselves duty-bound - to accept and exercise a jurisdiction as the constitutional guardians of fundamental rights and equality over the whole polity, including over religious bodies. And yet, against a background of a general intellectual secularisation and unChurching over the past (half-)century, civil judges no longer have the previous generations' religious sensibility and sensitivity. Instead - apparently unconcernedly - they would apply secular legal values and judgments (whether respect for fundamental rights or of the principle of non-discrimination) directly to the workings of even non-established churches or religiously-based bodies - or, indeed, religiously-motivated individuals - whether Anglican or not.

This post-HRA trend of applying Erastian principles to the internal workings of non-Anglican bodies was first seen in *Percy v Board of National Mission of the Church of Scotland*.[15] The House of Lords held by a majority (Lord Hoffmann dissenting) that an associate Minister in the Church of Scotland was engaged to carry out her duties by virtue of a contract with the Church; that she was therefore able to claim the normal statutory protections incidental to employment, including the right to bring a complaint of sex discrimination before an employment tribunal in relation to the circumstances surrounding her demission of office as a Minister; and that she was not obliged to go before the Church courts and exhaust her remedies there. The correctness of the Appellate Committee's legal analysis in *Percy* (in which they overturned the decision of the First Division of the Inner House of the Court of Session) may be doubted. It places great weight on the State's interest in outlawing sex discrimination, wherever it might surface, and arguably gives insufficient weight to the fact that the Church of Scotland Act 1921 is a constitutional statute which was intended by Parliament (in effect, to reverse the *Auchterarder* line of case law [16]) to facilitate the reunification of the Church of Scotland with those who had left the Scottish national church in 1843 by reaffirming the "two kingdoms" model as the proper basis for Church-State relations. Instead, the decision in *Percy* appears to

assume an Erastian/imperial model for the relations between Church and State. While this might apply in relation to the Anglican settlement in England, it simply does not do justice to the Calvinist/republican basis on which the reformed Scottish church was founded.

In any event, it appears that the UK Supreme Court has since retreated from (if not over-ruled) its decision in *Percy* in *Preston (formerly Moore) v President of the Methodist Conference* where by a 4:1 majority (Baroness Hale dissenting) the UKSC held that unless some special arrangement was made with a particular minister, the rights and duties of ministers of religion arose entirely from their status in the constitution of the church and not from any contract. Accordingly since the basis for the claimant's rights and duties were to be found in the constitutional provisions of the church and not in any arrangement of the kind that could be said to amount to a contract, the claimant was not an 'employee' for the purposes of section 230 of the Employment Rights Act 1996 and was not entitled to pursue a claim for unfair dismissal. Giving the leading judgment, Lord Sumption observed:

> "10 It is clear from the judgments of the majority in *Percy's* case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally: see, in particular, Baroness Hale at para 151. The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion." [17]

More controversially, perhaps, in *R (on the application of E) v JFS Governing Body*[18] the UK Supreme Court, by a 5:4 majority, took an Erastian approach in ruling that a Jewish faith school would not be permitted to apply Orthodox Jewish rabbinical standards as to who counted as a Jew in its admissions policies. Application of the requirement that a prospective pupil's mother was born a Jew, or had duly converted to Orthodox Judaism, was held by a bare majority of the court to constitute direct race discrimination. This majority opined that if the school had applied a purely faith/belief/practice criterion (for example, coming from an

observant house-hold) its admissions policies would have passed muster. But, instead, the majority considered that the school applied an admissions policy which was, effectively, to be seen as one based on the ethnicity of the mother of the pupil – albeit for religious reasons. In so doing the majority ruled that the school had acted unlawfully, in breach of race discrimination law. The fact that the policy in question embodied profoundly held religious beliefs instantiated in a long standing system of religious law was no justification for the majority of the court. Instead the *halakhah* requirements of Orthodox Judaism were subordinated to the demands of UK secular law on a classical Erastian model which assumes the superiority and applicability of secular fundamental rights norms over and against any contrary demands of religion. In *JFS* the Scottish Justice, Lord Rodger of Earlsferry, dissented from the decision of the majority and held that the school's policy that only children recognised as Jewish by the Office of the (Orthodox) Chief Rabbi were to be considered for admission constituted neither direct, nor unjustified indirect, discrimination on grounds of race or ethnicity. In his view the case was a strictly religious dispute between two rival religious authorities, the Office of the Chief Rabbi and the Masorti authorities, as to who was to be considered as Jewish. He complained (at para 227) that the decision of the majority "reduced the religious element in the actions of those concerned to the status of a mere motive"[19] and so misrepresented what they were doing when "the reality is that the Office of the Chief Rabbi, when deciding whether or not to confirm that someone is of Jewish status, gives its ruling on religious grounds".[20] In rejecting the pupil's claim of indirect discrimination he noted that the prospective pupil's "mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices".[21] He concluded that:

> "the aim of the school, to instil Jewish values into children who are Jewish in the eyes of Orthodoxy, is legitimate. And, *from the standpoint of an Orthodox school*, instilling Jewish values into children whom Orthodoxy does not regard as Jewish, at the expense of children whom Orthodoxy does regard as Jewish, would make no sense."[22]

The courts have also upheld the primacy of the principle of non-discrimination on grounds of sexual orientation in relation to access to services generally provided to the public, even against religious institutions' doctrinal objections (in the case of adoption services)[23] or individuals' contrary religiously based convictions (in a case involving renting a double-bedded room to a same sex couple).[24] These decisions

are justified under reference both to the principle of equality of respect (for same sex as for opposite sex sexual relationships) and as the recognition of the human rights of gay couples.

As a result, the relationship between the expression of religious beliefs and practice and equality and fundamental rights law has become somewhat fraught, a difficulty exacerbated by the implicitly Erastian approach which the English courts have inherited historically from the terms of their relationship with the Church of England but which they have then extended beyond the Anglican church and, all-unthinking, applied to other churches and religious bodies.

In the United State, by contrast, the courts developed what has become known as "the "ministerial exception" from anti-discrimination law. [25] This is a constitutionally based assertion – based on consideration of separation of Church and State – which allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers. The courts determine ministerial status under a primary duties test that considers whether an employee's job responsibilities render him "important to the spiritual and pastoral mission of the church". If so, the court will bar the employee's discrimination claim in order to protect church autonomy. [26] In what might be seen as adding legal insult to spiritual injury, women can be found by the courts to be "ministers" for the purposes of the application of the Ministerial exception, such as to deny them the protection of employment protection and equality laws, even in relation to religious bodies which would deny them the possibility of ordination. [27]

Currently the UK Parliament *concedes* to religious bodies some exemption from the full rigours of equality law. Thus Paragraph 2 of Schedule 9 to the Equality Act 2010 effectively sets out the UK's own statutory "ministerial exception" clause by making provision, in the context of "employment for the purposes of an organised religion", for the application of occupational requirements relative to sex, to issues of gender reassignment, to married/civil partnership status and to sexual orientation. Any requirement imposed on the expressly permitted grounds in paragraph 2 in relation to "employment for the purposes of an organised religion" need not be shown to be proportionate or necessary, or aimed at some legitimate end. Instead,

the statute requires only that the court be satisfied that the requirement or requirements in question is or are being applied "so as to comply with the doctrines of the religion" (the "compliance principle") or, because of the nature or context of the employment, to "avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers" (the "non-conflict principle"). But because this statutory "ministerial exemption" is seen to be a derogation from the underlying principles of equality law, it has been construed narrowly by the courts and applied only in accordance with its strict terms: see *Percy*. The UK ministerial exception is very much understood as an exception rather than as the expression of a fundamental right of respect for the autonomy of religious bodies and is certainly not an acceptance that religious motivated individuals can assert any kind of right to respect for their conscientious held beliefs.

Equality v. Human Rights law ?

This unwillingness by the courts to give much quarter to religiously based objections to anti-discrimination law itself raises issues concerning the fundamental rights of religious bodies, and religiously motivated individuals to practise what they preach. The question arises as to whether there might be a conflict in the demands of equality and human rights law?

Equality law is about the State changing society by legislating to instruct and educate institutions and individuals how they might act in their public interactions. It is about imposing positive obligations on, among others, employers, teachers and providers of goods and services to the public. It requires them to be: blind to differences in race, gender, age, sexuality; deaf to differences in religion or belief; and ready to make reasonable adjustments for the differently abled.

By contrast, human rights law is, classically, about limitations or "negative obligations" being imposed upon the State, to stop it from interfering in how individuals may choose to structure their lives. It is about carving out areas of freedom for individuals - privacy, expression, exercise of religion - which the State should not interfere in (except for very good reasons). Discrimination plays a subordinate role in human rights law. If the State does seek interfere in those

fundamental freedoms it has to do so only in a manner which does not discriminate on grounds of sex, race, age, religion, social status and the like.

The genesis of the two concepts is quite different, too. European human rights law arose after the Second World War in the wake of the horrors of Nazi Germany, when Nuremberg "laws" were used as an instrument of discrimination and oppression of (Jewish) German citizens. By contrast, equality law in the UK began with the enactment of the Race Relations legislation, first passed in the late 1960s on the model of US Civil Rights Act of 1964. The evil that that American federal legislation sought to remedy was not the oppressive use of State power against individuals, but the failure by the (federal) State to do enough to protect minority groups from the tyranny of the white majority.

So one could say that equality law arises from the State *not doing enough* to protect its citizens and those in its care; whereas, human rights law arises from the perception that the State is *doing too much*, in oppressing its citizens and those at its mercy.

On this analysis one might seek to use human rights law, concepts and dogma against the State-imposed requirements of equality law if those requirements are seen to overstep the boundaries of State action and cause a disproportionate interference in others' fundamental freedoms

The equality law based objection to allowing any such human rights based legally protected conscience/get-out clause from its provisions is that right thinking people simply do not want a society where, in particular, racist ideas and ideologies might gain traction and flourish. The analogy is then drawn from the obvious horrors of a society in which racism festers, to a society in which other breaches of equality principles may survive like viruses in the body politic, whether that be sexism, ableism, ageism, and more recently cis-sexism/trans-phobia and heterosexism/homophobia.

But the objection of those, usually religious, groups and individuals seeking a space for conscientious objection is that to proclaim all these various -isms which are

now covered by equality law as being of the same and equal worth is itself a contestable value judgment. In fact, they would say, there are as many disanalogies as analogies in this *omnium gatherum* and one should not so readily equate and conflate the now universally acknowledged evils of racism with what is often a religiously or conscientious based refusal to accept that there is no relevant difference between, say: the old and the young; or men and women; or born women and trans-women; or heterosexual and homosexuals that might justify, at least for the persons holding this belief, the possibility of different treatment among those categories (for example as regards marriage law).

And if one is serious about equality law also protecting religion or belief, then such protection cannot be one which banishes religious belief or practice to the *forum internum* with no place for any open expression in the public square. This is to condemn the religious to the very closet which equality law has done so much to liberate others from. Recognising the differences of approach between equality law and human rights law might at least allow a proper and genuine dialogue to open up between these holding divergent views on, say, marriage equality and religious liberty.

The Freedom of non-expression (even for businesses ?)

Many of these issues of principle have been brought to the fore by the current litigation in the case of *Gareth Lee v. Ashers Baking Company Limited*. This is a case which was brought with the backing of the Equality Commission for Northern Ireland at the instance of Gareth Lee against a limited company, Ashers Baking Company Limited, which was convened as a defendant together with its directors Colin and Karen McArthur. The plaintiff's case was that the defendants had acted unlawfully in turning away his order, after full pre-payment for it had been made to them, to supply him with a cake bearing the slogan in icing: "Support Gay Marriage – Queerspace born 1988". Although his money was refunded in full, the plaintiff sought £500 damages for injury to feeling, loss and damage sustained by him as a result of this refusal (although it is to be noted that he did manage to find another bakery able and willing to provide him a cake to his design). He also sought a declaration that his treatment by the defendants constituted unlawful discrimination by the defendants against him on grounds of his sexual orientation (contrary to the

Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006) and/or on grounds of his political beliefs in same sex marriage (contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998).

The directors of Ashers Baking Company Limited, Colin and Karen McArthur, are both committed Christians. Their contention is that it is not unlawful for them or their business to refuse to promote a particular moral or political cause to which they have a fundamental objection. They argue that legislation does not, on its ordinary and natural application require them to do so, but even if it did, the legislation would have to be construed compatibly with their Convention rights protecting freedom of thought, conscience and religion (Article 9 ECHR) as well as freedom of expression (Article 10 ECHR). [28]

After hearing argument from both parties, Presiding District Judge Brownlie sitting in the Northern Ireland County Court (2015 NICty 2, 19 May 2015) found in favour of the plaintiff, noting (at para 93):

> "If the Plaintiff was a gay man who ran a bakery business and the Defendants as Christians wanted him to bake a cake with the words "support heterosexual marriage" the Plaintiff would be required to do so as, otherwise; he would, according to the law be discriminating against the Defendants. This is not a law which is for one belief only but is equal to and for all.
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> The Defendants are entitled to continue to *hold* their genuine and deeply held religious beliefs and to manifest them but, in accordance with the law, *not to manifest them in the commercial sphere* if it is contrary to the rights of others.

The case is now coming before the Northern Ireland Appeal Court on an appeal from the decision of the Belfast County Court. The appeal is due to be heard in May 2016, following a last minute intervention from the Attorney General of Northern Ireland who is of the view that the matters raised might raise "devolution issues".

The facts of the case brought out in the *Lee v. Ashers Bakery* litigation could perhaps be analysed as one in which the defendants are being required to endorse an opinion – support for same sex marriage – which they do not in fact hold. Their refusal to endorse this opinion – to protect their negative freedom of expression –

has resulted in the State, in the form of the Equality Commission for Northern Ireland, funding court action against them. This freedom not to forced or required express support for a particular opinion or political position was, indeed, the very one which Sir Thomas More strove to uphold in declining to sign the Act of Supremacy declaring Henry VIII to be the Supreme Head of the Church of England. As the Strasbourg Court has explained:

> "Bearing witness in words and deeds is bound up with the existence of religious convictions."[29]

The issue of whether and how commercial companies can pray in aid religious liberty rights of freedom of religion under and in terms of Article 9 ECHR remains unclear.[30] There is, however, no doubt that legal persons (companies etc.), just as much as natural persons, may pray in aid the protections of Article 10 ECHR. [31] This states, so far as relevant that

> "*Everyone* has a right to freedom of expression. This right shall include the freedom to *hold opinions* …."

In protecting the right to *hold* an opinion the ECHR also protects what might be termed "negative freedom of expression", [32] which is to say a right not to be compelled to express or commit oneself to a particular view point (or to be forced to assent in or appear to give support to another's views) but, instead, to keep one's own counsel on a matter. [33] This might also be termed *the freedom of non-expression*. This "negative right of expression" can be seen to parallel the "negative right of association" which the European Court of Human Rights has found to be contained in Article 11 ECHR which, in protecting everyone's "freedom of association with others, including the right to form and join trade unions for the protection of his interests", also protects the right of individuals not to be forced to join trade union, or indeed companies not being required to join an employer's organisation. [34] As the Strasbourg Court has repeatedly stated:

> "Article 11 of the Convention encompasses not only a positive right to form and join an association but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association, and that State responsibility may be engaged by a failure to secure the effective enjoyment of those rights." [35]

The United Nations Human Rights Committee has observed as follows, under reference to Article 19 of the International Covenant on Civil and Political Rights (ICCPR):

> "9 … No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. *All forms of opinion are protected*, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with Article 19(1) ICCPR [which states that "everyone shall have the right to hold opinions without interference"] to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.
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> 10. *Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion.*"[36]

The following remarks of Lord Dyson in *RT (Zimbabwe) v Home Secretary* (which concerned the claims of political refugees from Zimbabwe who were refused asylum in the UK on the ground that they were in principle, able and willing to feign support for persecutory regime in their country of nationality) also seem apposite:

> "[T]he right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. …
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> 43 As regards the point of principle, *it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold.* One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour. George Orwell captured the point brilliantly by his creation of the sinister 'Thought Police' in his novel *Nineteen Eighty-Four*.
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> 44 *The idea 'if you are not with us, you are against us' pervades the thinking of dictators. From their perspective, there is no real difference between neutrality and opposition.*
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> …
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> 45 There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to

human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution." [37]

Does equality law trump human rights law ?

The crucial issue at stake in the *Lee v. Ashers Bakery* case is the proper relationship between equality law and human rights law. It is to be noted in this regard that the European Court of Human Rights has repeatedly stated that claimants cannot rely upon the Convention to found a right to same sex marriage – this matter is one upon which there is no Europe-wide consensus and therefore falls within the margin of appreciation of individual Contracting States. [38] Furthermore, there is no absolute Convention right not to be offended [39] which a claimant might rely upon nor is it "possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own".[40]

However, in *R (Core Issues Trust) v Transport for London* [41] Lord Dyson MR expressed his view that a Stonewall advertisement on the side of London buses bearing the slogan "*Some people are gay. Get over it!*" was intended to promote tolerance of homosexuals and discourage homophobic bullying and that this was a lawful aim consonant with the objects of the "Public Sector Equality Duty" imposed by section 149 of the Equality Act 2010, [42] and with the policy adopted by TfL. Lord Dyson noted that "Some people are gay" was a correct statement of fact and he considered that the phrase "get over it" was a graphic way of saying that people should accept the principles of tolerance in the 2010 Act. The claimant's proposed advertisement, by contrast, bore the slogan "*Not gay! Ex-gay, post-gay and proud. Get over it!*" by way of riposte to the "gay acceptance" message of Stonewall and was seen as countering that message and encouraging "gay rejection" by implying, in Lord Dyson's view offensively and controversially, that homosexuality can be cured. TfL therefore were found to have acted lawfully in refusing to carry the advertisement.

The *Core Issues Trust* case concerned limitations on the *positive* rights of free expression and in the decision of the Court of Appeal equality concerns there seemed to prevail over this fundamental right. If the focus in the case of *Lee v. Ashers*

Bakery were placed upon the defendants' Convention right to hold an opinion and their "*negative* rights of free expression" then it may yet be argued that it is the NI Equality Commission's duty to uphold and respect these fundamental (common law and Convention) rights in the exercise of its statutory functions and powers. And if and insofar as subordinate legislation (such as the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 or the Fair Employment and Treatment (Northern Ireland) Order 1998) *cannot* be interpreted in a manner compatible with the defendants' Convention rights then they fall to be disapplied as "not law" [43] as provided for under the Human Rights Act 1998. [44] If the law does not protect the fundamental right, within the commercial context of supplying services, to hold opinions nor guarantee any negative freedom of expression, then there would appear to be no defence to similar actions being taken against in any of the following scenarios which have been suggested:

(1) A Muslim printer refusing a contract requiring the printing of cartoons of the Prophet Mohammed
(2) An atheist web designer refusing to design a website presenting, as scientific fact, the claim that God made the world in six days
(3) A Christian film company refusing to produce a feminist/women's-gaze erotic film
(4) A Christian baker refusing to take an order to make a cake celebrating Satanism
(5) A t-shirt company owned by lesbians declining to print T-shirts with a message describing gay marriage as an 'abomination'
(6) A printing company run by Roman Catholics declining an order to produce adverts calling for abortion on demand to be legalised

The implications of *Lee v. Ashers Bakery* may therefore be far more profound than its relatively simple facts might initially have led us to believe.

Not making windows into men's souls

The result of the Belfast County Court decision in *Lee v. Ashers Bakery* as well as other "religion v. equality" cases is that a white, male, middle-aged, married, heterosexual Christian can pray in aid anti-discrimination law if he is subject to detrimental treatment which is directly or indirectly referable to the fact that he is

male, or middle-aged, or white or heterosexual or married or Christian. But there then arises the paradox. Is it not unlawful discrimination against, for example a committed Muslim or Christian, to prevent him from acting upon his religiously based beliefs by say: his asking to be relieved of his duties as a civil registrar to solemnise same sex civil partnerships; [45] or his seeking exemption in his job as relationship/marriage guidance counsellor from working with same sex couples[46]; or in his refusing to rent a double-bedded room to a gay couple in the hotel which he owns [47] and runs; or in his wearing a religious symbol to work; [48] or in his seeking to foster [49] or to adopt [50] children within a home context which strongly emphasises a religiously based moral code of what it considers to be right behaviour? It appears not.

The courts have analysed such cases from an equality and fundamental rights perspective by asking whether a person *without* religiously based views would have been permitted to act in any of these ways. If both a religious and a non-religious person would not have been permitted to do these things, then there is no discrimination on grounds of religion or belief. For the religious, however, this feels like a false comparison and an empty exercise on the part of the courts.

The point about religiously based beliefs is that, for their adherents, they are understood and experienced as being *justified* within their own terms. These beliefs are embedded within an overarching (religious) system. Their beliefs form an inextricable part of that religious world view. Their religious beliefs are intimately tied into the moral values to which they would adhere, by word *and* deed. Failing to act on those beliefs is not an option for the religious, because a failure so to act expresses for them a *denial* of their beliefs. Thus, for the religious, their attitudes and judgments on right conduct are the very opposite of "prejudice" which anti-discrimination law was supposed to be aimed at. And, they would say, there can be no proper comparison between those who would discriminate on grounds of a religiously informed conscience, and those who so act simply from some unthinking incoherent prejudice or bigotry. The pretended comparison between the religious and the irreligious wrongly treats unlike cases alike. From the point of view of the religious, the law should, instead, respect those who act on the basis of religiously informed conscience and make some form of reasonable accommodation to allow

them space, even within the workplace and the public marketplace, not to be required to act in a manner contrary to their conscientious religious based beliefs. The claim is that the law should not treat the religious and the irreligious as equivalent; rather, the law should respect the beliefs and consciences of the religious and allow for the possibility of their being able to act in accordance with those beliefs without fear of falling foul of the requirements of equality law or fundamental rights as interpreted by the secular civil courts.

Interestingly, one reply of the English courts to date has been an implicitly Erastian one, relying upon Elizabeth Tudor's attributed remark to the effect that she had "no desire to make windows into men's souls", and that the courts therefore will not require into (religious) motivations, but will simply examine (discriminatory) actions. Thus in *R (on the application of Johns) v Derby City Council* the Divisional Court stated:

> "It is quite impossible to maintain that a local authority is not entitled to consider a prospective foster carers' views on sexuality, least of all when, as here, it is apparent that the views held, and expressed, by the claimants might well affect their behaviour as foster carers. *This is not a prying intervention into mere belief. Neither the local authority nor the court is seeking to open windows into people's souls*. The local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them. In our judgment the local authority was entitled to have regard to these matters."[51]

The riposte of the religious to that is two-fold. First the criminal law does already look at motivation; no-one can be convicted of a criminal offence unless it can be established not only that the wrongful act was done (*actus reus*) but that it was done with the requisite criminal intent (*mens rea*). Secondly Elizabeth Tudor's remarks were made in the context of her law's enforcement of conformity of religious practice, in requiring Catholics and Dissenters to attend Anglican service against their conscience. Her remark is not one based on any principled neutrality, but on cynicism backed by power: "I cannot govern how you think, but I can govern what you do".

Applying that Elizabethan parallel to the present-day, the application of the norms of equality and fundamental rights law, even in the face of religiously based conscientious objection, is interpreted by the new religious Dissenters as the State's

imposition of a required outward conformity to a new form of religious settlement: no longer Anglicanism, but a secularism which would banish, as sectarian, religiously motivated action from the public square, and would confine religious belief wholly to the "internal forum" of the individual. In the absence of provision for "reasonable accommodation" for different institutional voices, other traditions, alternative theologies (which may deviate from fundamental rights orthodoxy) the Human Rights Act 1998 - and the Equality Act 2010 - have become, on this analysis, new Acts of Uniformity. [52]

The beginnings of an alternative approach on these issues may be found in the decision of the UKSC in *HJ (Iran) v. Secretary of State for the Home Department* which concerned a refugee from Iran seeking asylum in the United Kingdom from State-sponsored (and religiously inspired) persecution in his country of origin on the basis of his sexual orientation. The UKSC, in which the leading judgment was delivered by Lord Rodger of Earlsferry, rejected as utterly unreasonable and inhumane the claim of the Secretary of State that the applicant could reasonably accommodate himself to his persecutors and, in effect, choose no longer to be a victim of persecution if, on being returned to Iran, he were to live "discreetly". [53]

From a theological-constitutional perspective, what the UK Government may be said to have been arguing for in *HJ (Iran)* was precisely an application, within our contemporary politics, of Elizabeth Tudor's Nicodemite religious settlement [54] – for asylum seekers simply to keep quiet (about their sexuality or religious beliefs) and outwardly to conform in order to avoid persecution on being returned to their home country. And Lord Rodger of Earlsferry's principled rejection of this solution may also have had its intellectual source in his Scottish Calvinist theological background, notably in Calvin's condemnation of equivocation for survival in the face of religious persecution of Protestant individuals by Catholic powers [55] (while Jesuits in Jacobean England were hanged for allegedly counselling Catholics how, in good conscience, to lie to the governing authorities, even under oath. [56])

Lord Rodger's analysis in *HJ (Iran)* has since been expressly taken up and followed in the context of the exercise of religious liberty both in the jurisprudence of the Court of Justice of the European Union and in the Scottish courts. Thus *Y and Z v. Germany* [57] concerned a claim for asylum based on fear of persecution for

religious beliefs; the Opinion (of 19 April 2012) of Advocate General Bot noted (at [100], [103], [104], [105]):

> "It seems to me contrary to the respect due to human dignity enshrined in Article 1 of the Charter. By requiring the asylum-seeker to conceal, amend or forego the public demonstration of his faith, we are asking him to change what is a fundamental element of his identity, that is to say, in a certain sense to deny himself. However, no one has the right to require that.....[W]e cannot reasonably expect an asylum-seeker to forego manifesting his faith or to conceal any other constituent element of his identity to avoid persecution ... Persecution does not cease to be persecution because the individual may, upon his return to his country of origin, show restraint and discretion in the exercise of his rights and freedoms by hiding his sexuality or his political opinions, concealing his membership of a community or renouncing the practice of his religion. ... In fact, regardless of the efforts that the person concerned may make in his way of life in public, he will remain a heretic, a dissident or a homosexual in his country of origin. And we know that in some countries, all activities, even the most insignificant, can be a pretext for all sorts of abuses."

And the Scottish judge, Lord Stewart, observed to similar effect in *AHC (Pakistan) v Secretary of State for the Home Department*:

> "[I]f a proper respect for human rights entails that individuals should be entitled to live out their sexuality openly, they should be as much entitled to live out their religious faith; and that no one should be expected to veil his or her faith from a motive of self-protection" [58]

Conclusion: the principle of subsidiarity

Perhaps one way of beginning to find a way through these complex questions is for the courts to (re-)discover a new constitutional principle to help them begin to establish a more coherent approach to the relationship between religious institutions and the general law, and more particularly religious belief and equality law. It is suggested that the principle of subsidiarity might begin to do some of the necessary work in this regard.

The principle of subsidiarity is central to the argument in the forthcoming UKSC hearing in *Christian Institute v. Lord Advocate*[59] which is a judicial review which challenges the validity of legislation of the Scottish Parliament which mandates the appointment of a State guardian (the "named person service") to every child in Scotland to oversee and ensure their "well-being". The argument against the

legislation is to the effect that it is not the business of the State to so insinuate itself into every family in Scotland and that the provisions concerning the named person's collation, retention and sharing of personal information on children is incompatible with EU law standards for data protection

The principle of subsidiarity is founded upon the idea that the governing principle behind the formulation and the adoption of the European Convention of Human Rights (and other post-Nuremberg international human rights law instruments) is the *rejection* of the totalitarian State, the defining motto of which is:

> "Everything within the State. Nothing outside the State. Nothing against the State."

Baroness Hale noted *In re B (Children)*:

> "In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design.
>
> Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality.
>
> Hence the family is given special protection in all the modern human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 8), the International Covenant on Civil and Political Rights (article 23) and throughout the United Nations Convention on the Rights of the Child."
>
> As McReynolds J famously said in *Pierce v Society of Sisters* (1925) 268 US 510, 535:
>
> > 'The child is not the mere creature of the state.' [60]

And as was observed in *O'Keefe v. Ireland* (in a joint and partly dissenting Opinion):

> "According to the Preamble to the Convention, fundamental freedoms are best maintained in an effective political democracy. The notion of a democratic society encompasses the idea of subsidiarity. *A democratic society may flourish only in a state that respects the principle of subsidiarity and allows the different social actors to self-regulate their activities.* [61]

The post-Nuremberg/anti-totalitarian State is one which is obliged, at the level of fundamental constitutional principle, to recognise and respect diversity in the

multiplicity of associations and institutions which together make up community, foremost among them perhaps the recognition of the family as a basic society in its own right, but equally also recognition of churches and other religious bodies as constitutive of society as a whole.

This duty of recognition is the principle of subsidiarity which may be understood *in the positive sense* as entailing constitutional obligations on the post-Nuremberg State to offer economic, institutional or legal support to those basic social associations which form the essential cells of society. The principle of subsidiarity also entails a corresponding series *of negative* implications that requires the State to *refrain* from using its coercive powers in a manner which subverts or undermines those smaller essential associations that go to make up society. [62]

It is suggested that this notion of subsidiarity might usefully be applied in the area of church-state relations meaning that the State adopts a certain self-denying ordinance not to impose its own value and value judgments within the context of individual ministers' relations with their Church. Thus for example in *Fernandez Martinez v. Spain* [63] where the dismissal of an individual, a laicised Catholic priest, from his position as a teacher of religion and morals in a State school following the withdrawal of the necessary episcopal approval as a result of the teachers public association with a movement seeking to promote married priests within the Latin-rite was held not to breach the individual's Convention rights.

There may also be positive actions embodied in the principle of subsidiarity such as to require the State to allow religiously based organization – for example – adoption agencies – the space to be able to continue to provide services for the common good. An example of this may be seen in the decision of the Scottish Charities Appeal Panel *in St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator* [64] where it was held that a religiously based adoption society could not lawfully be required to amend its published guidance to ensure no discrimination on grounds of religion and belief or sexual orientation in respect of prospective adoptive parents on the grounds that any such amendment would result in the withdrawal of Church support for the agency and its consequent closure. The Strasbourg Court has emphasised that among the principles which are embodied within Article 9 ECHR [65] are the following:

- that "associations formed for … proclaiming or teaching religion, are also *important to the proper functioning of democracy*" [66]

- that "in exercising its regulatory power in this sphere and *in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial*" [67]

- that "in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with *any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed*" [68]

- that "states have responsibility for ensuring, neutrally and impartially, the *exercise* of various religions, faiths and beliefs" [69] and

- that "the need to maintain *true religious pluralism…. is vital to the survival of a democratic society*." [70]

On that happy note, I leave you.

AIDAN O'NEILL QC **11 February 2016**

Matrix
Griffin Building
Gray's Inn
London WC1R 5LN

Advocates Library
Parliament House
Parliament Square
Edinburgh EH1 1RF

[1] This is a revised paper based, in part, on my Chapter 46 "The Courts, the Church and the Constitution" of Burrows, Johnston & Zimmermann (eds.) *Judge and Jurist: essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP 2013)

[2] The Act of Settlement 1701 originally provided that

> 'that all Papists and persons marrying Papists, shall be excluded from and forever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof'.

With effect from 26 March 2015 the prohibition against any member of the Royal family succeeding to, or holding, the Crown for 'marrying a person of the Roman Catholic faith' was repealed with the bringing into force of s 2 of the Succession to the Crown Act 2013, but the prohibition against Papists inheriting the throne remains.

[3] Linda Colley, *Britons: Forging the Nation, 1707-1837* (2nd edn, 2005).

[4] *R v Dibdin* [1910] P 57 per Darling J at 78

[5] For a critical view of this re-establishment of the Court of Session see George Buchanan *Rerum Scoticarum historia* (1582) (translated as Buchanan, *The History of Scotland*, 2 vols, tr. J. Aikman (1827), vol 2, p 306:

> "The College of Justice was established in Edinburgh [in 1532]. At first, much utility was expected from the equal distribution of justice by these judges, but the events which followed did not answer the expectation which had been formed; for in Scotland, as there are almost no laws except Acts of Parliament and these, in general, not fixed but temporary, and as the judges, as much as they can, hinder the passing of statutes, all the property of the subject is entrusted to the will of fifteen men who evidently possess a perpetual tyranny, because their will alone is law. In gratitude to the Pope, a severe inquisition was instituted against the opinions of Luther and the Pope in return, to testify to the king his sense of his merit, granted him a tenth of the ecclesiastical revenues for the next three years."

[6] In 494 CE Pope Gelasius I (the bishop of Rome from 492 to 496 CE) sent the letter (now known from its opening words *Duo sunt*) to the Eastern Roman (Byzantine) emperor Anastasius on the subject of their respective distinct spheres of authority, in which he stated - as translated by Brian Tierney in *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (1982) at pages 13-14 - :

> "Two there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priests is more weighty, in so far as they will answer for the kings of men themselves at the divine judgment... [I]n the order of religion... you ought to submit yourselves [to priests] rather than rule... [T]he bishops themselves... obey your law so far as the sphere of public order is concerned."

And see Pope Benedict XVI in his Encyclical *Deus Caritas Est*, 25 December 2005 which states (at paragraph 28(a)) :

> "Fundamental to Christianity is the distinction between what belongs to Caesar and what belongs to God (cf. *Mt* 22:21), in other words, the distinction between Church and State, or, as the Second Vatican Council puts it [in the Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, 36] the autonomy of the temporal sphere. The State may not impose religion, yet it must guarantee religious freedom and harmony between the followers of different religions. For her part, the Church, as the social expression of Christian faith, has a proper independence and is structured on the basis of her faith as a community which the State must recognize. The two spheres are distinct, yet always interrelated."

[7] The exchange is captured, in its original Scots, Andrew Melville's nephew James in *The Autobiography and Diary of James Melvill, with a Continuation of the Diary* (R Pitcairn ed, 1842)

[8] *King v Dibdin* [1910] P 57, per Fletcher-Moulton LJ at 129-30. The decision of the Court of Appeal was upheld by the House of Lords in a decision reported as *Thompson v Dibdin* [1912] AC 533. See, for remarks to similar effect, Sir John Laws LJ "A judicial perspective on the sacred in society" (2004) 34 *Ecclesiastical Law Journal* 317 at 324-5:

> "[T]he established Church, its acts and its forms of worship, are subject to the law of the land as it is administered in the Queen's courts, which of course include the ecclesiastical courts. This is the Church's virtue: it means that the Christian faith is mediated or offered to the people on a universal and compulsory basis which transcends the doctrinal, liturgical or other predilections of individual priests or prelates. Their voices are put in their proper place, which is under the law. … The priest has no other legitimate space for conscientious objection. If he is driven by such an objection, then his place is in a sect, or a congregational church where no general law prescribes the duties of the ministers."

[9] *Khaira v. Shergill* [2012] EWCA Civ 983 *per* Mummery LJ at § 24

[10] See *Hashwani v Jivraj* (London Court of International Arbitration and others intervening) [2011] UKSC 40 [2011] 1 WLR 1872 holding that the selection, engagement or appointment of Arbitrators was not covered by the Employment Equality (Religion or Belief) Regulations 2003

[11] See *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56 [2008] 1 WLR 1852 holding that a Mormon Temple was not entitled to non-domestic rates reduction as place of "public religious worship" since it as not a place that was open to the general public. This decision was upheld by the European Court of Human Rights in *Church of Jesus Christ of Latter-Day Saints v UK* (2014) 59 EHRR 18

[12] *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [2014] AC 610 holding that a chapel of the Church of Scientology could properly be registered under section 2 of the Places of Worship Registration

Act 1855 as "a place of meeting for religious worship" and hence a lawful marriage venue.

[13] *Khaira v. Shergill* [2014] UKSC 33 [2015] AC 359

[14] See *Reg. v. Chief Rabbi, Ex p. Wachmann* [1992] 1 WLR 1036, QBD and *R. v Imam of Bury Park Mosque, Luton Ex p. Ali (Sulaiman)*, EWCA unreported 12 May 1993 (digested in *Times*, 20 May 1993)

[15] *Percy v Board of National Mission of the Church of Scotland*, 2006 SC (HL) 1, [2006] 2 AC 28.

[16] The first Auchterarder case is reported as *Earl of Kinnoull and Rev R Young v Presbytery of Auchterader* (1838) 16 S 661, (1841) 3D 778, (1843) 5D 1010 where the House of Lords held the civil courts could enforce the right of a local landowner to nominate a new minister to a vacant charge. The second Auchterarder case is Reported as *Ferguson v Earl of Kinnoull* (1842) 1 Bell 662; 9 Cl & F 251 which held that the refusal by the Presbytery to allow a minister duly nominated by his patron to take up his charge gave rise to a liability of the Church authorities in damages before the civil courts. These and related cases resulted in "the Disruption" whereby, in 1843, more than a third of the Ministers and members left the Church of Scotland and established themselves as the Free Church of Scotland in protest against what they considered to be the civil courts' unconscionable and unconstitutional interference in the Church's affairs.

[17] *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29 [2014] 2 AC 163 per Lord Sumption at § 10

[18] *R (on the application of E) v JFS Governing Body* [2010] 2 AC 728, UKSC

[19] Ibid. at [227].

[20] Ibid.

[21] Ibid, at [228].

[22] Ibid, at [233].

[23] See *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] PTSR 1073, Ch.

[24] See *Bull v Hall* [2013] UKSC 73 [2013] 1 WLR 3741.

[25] "Notes – the Ministerial exception to Title VII: the case for a deferential primary duties test" 121 *Harvard Law Review* 1776-97 (2008) at 1776

[26] See the decision of the US Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission and others* 565 US ___ (2012) holding that the "Establishment" and "Free Exercise" Clauses of the

First Amendment to the US Constitution bar suits brought in the civil courts by ministers of religion against their churches, alleging mistreatment in, or termination of, their employment in violation of general employment discrimination laws. This meant, on the facts of this case, that a disability discrimination/dismissal claim made by general primary school teacher employed in a school affiliated to Lutheran Church-Missouri Synod who also taught a daily half-hour religion class and daily led her class in prayer was disallowed as inadmissible/non-justiciable before the civil courts.

[27] See *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455, 461 (D.C. Cir. 1996) the US Court of Appeals found that a Catholic nun whose primary duties were to teach canon law at Catholic University and who was "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life, defines the rights and duties of its faithful and the responsibilities of their pastors, and guides its administration" was a ministerial employee.

[28] Compare with *Ontario Human Rights Commission v Brockie* (2002) 22 DLR (4th) 174 in which a commercial printing company, Imaging Excellence Inc., was required by order of Ontario Superior Court of Justice to afford its general printing services in a non-discriminatory manner to a gay rights group (as regards the production of letterheads and business cards and the like), but was expressly not placed under any obligation to print leaflets which actively promoted "an homosexual lifestyle" and/or which was dismissive of the Christian beliefs of Mr Brockie, the president and directing mind of the company. The Ontario Superior Court of Justice held that, otherwise, there would be a disproportionate interference with Mr Brockie's freedom of religion in being forced to act in a manner contrary to his religious beliefs.

[29] *Kokkinakis v Greece* (1993) 17 EHRR 397

[30] Contrast with the situation in the United States where in *Burwell v. Hobby Lobby* 573 US _ (2014 the US Supreme Court affirmed that for profit corporations could claim the protections afforded to respect for religious belief under the US Constitution.

[31] See *Markt Intern* v *Germany* (1989) 12 EHRR 161. In an EU law context see *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* [1997] ECR I-3689. See too Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025; and Case C-421/07 *Frede Damgaard* [2009] ECR I-2629.

[32] See *Gillberg v. Sweden* [2012] ECHR *41723/06* (Grand Chamber, 3 April 2012) at § 86

[33] See *Strohal v. Austria* (no. 20871/92, Commission decision of 7 April 1994) at § 2:

> "[T]he Commission recalls that the right to freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, i.e. to remain silent (see *K. v. Austria* (16002/90, Commission Report of 13 October 1992, § 45.)"

[34] See for example *Gustafsson v. Sweden* (1996) 22 E.H.R.R. 409 and

[35] *AB Kurt Kellerman v. Sweden* (2003) 37 EHRR CD 161. The case also contains the following passages:

> "[T]he union asserted that Art.11 of the Convention did not afford any protection to a limited liability company
> ...
> The applicant company contends that Art.11 is applicable in the present case. It argues that the union threatened the applicant company with industrial action unless the applicant either joined an employers' association or signed the IG agreement. The applicant found that that collective agreement was poorly adapted to the special nature of the business conducted by the company, in contrast to the employment contracts already applied. Having in no way participated in the drafting of the terms and conditions of the agreement, the applicant was placed in a situation where its only possibility of—indirectly—influencing those terms and conditions was to join an employers' association. The applicant asserts that it was principally opposed to membership of such an association, as it did not wish to transfer the right of determination over central aspects of its business to an association whose aims did not correspond with those of the applicant and waive the right to negotiate itself with its employees regarding the terms and conditions governing their employment.
>
> The Court considers that it is not decisive whether the applicant expressed a clear aversion to participate in the Swedish collective-bargaining system as such; it accepts that the applicant wished to retain the possibility of negotiating the terms of employment directly with its employees and that it, to this end, was opposed to joining an employers' association or signing the collective agreement proposed by the union. Facing industrial action, the applicant was placed under considerable pressure to meet the union's demand that it accept one of these alternatives. In these circumstances, the Court finds that, to a degree, the applicant's enjoyment of its freedom of association was affected and that, thus, Art.11 is applicable in the present case (see *Gustafsson v Sweden*, §.[44])."

[36] UN Human Rights Committee *General comment No. 34 on Article 19: Freedoms of opinion and expression* (12 September 2011) at §§ 9-10

[37] *RT (Zimbabwe) v Home Secretary* [2013] 1 AC 152 [2012] UKSC 38 *per* Lord Dyson at §§ 42-5

[38] See *Hämäläinen v Finland* [2014] ECHR 37359/09 (Grand Chamber, 16 July 2014) at §§ 31, 71, 74, 96:

> "31. From the information available to the Court, it would appear that ten member States of the Council of Europe permit same-sex marriage (Belgium, Denmark, France, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (England and Wales only)).
> ...

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf v. Austria* (2011) 53 EHRR 20 § 101).

...

74. ...[I]t cannot be said that there exists any European consensus on allowing same-sex marriages.

...

96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v. United Kingdom* (1987) 9 EHRR 56 § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf v. Austria*, cited above, § 63)."

See to like effect *Oliari and others v. Italy* [2015] ECHR 18766/11 & 36030/11 (Fourth Section, 21 July 2015) at § 192:

"[D]espite the gradual evolution of States on the matter (today there are eleven Council of Europe States that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage."

[39] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 § 49

"49. As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."

[40] *Appel-Irrgang v Germany* [2009] ECHR 45216/07 (8 October 2009 – non-admissibility decision). See to similar effect *Doojan v. Germany* (2011) 53 EHRR SE24 at §68:

"The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions"

[41] *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 [2014] PTSR 758 *per* Lord Dyson MR at §88

[42] Section 149 of the Equality Act 2010 provides, so far as relevant, as follows:

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

....

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are— age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

[43] See *R. (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) [2013] PTSR 378 per Beatson J at §§20, 42, 47, 48, 55:

"20. .. Convention rights, including article 10, are given direct effect in domestic law by the Human Rights Act 1998. Section 6 of that Act provides that it is unlawful for a public authority to act in a way which is incompatible with, *inter alia*, article 10 (save in limited circumstances concerning primary legislation). Section 3 provides that legislation and subordinate legislation, so far as it is possible to do so, must be read and given effect in a way which is compatible with the Convention rights.

...

42. ... [I]n *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 297 and *R v Shayler* [2003] 1 AC 247, § 21, Lord Steyn and Lord Bingham respectively described freedom of expression as having 'the status of a constitutional right with attendant high normative force', and 'a fundamental right' which 'has been recognised at common law for very many years'. One of the consequences of giving this constitutional status to freedom of expression is that clear words are required to restrict it, and thus in that sense there is a narrower approach to the interpretation of legislation and instruments made under legislation restricting it.

...

47. ... Hoffmann LJ... recognised, in *R v Central Independent Television plc* [1994] Fam 192 at 203, that freedom of expression is subject 'to clearly defined exceptions laid down by common law or statute', but did not appear to favour a process of balancing. He stated that, outside those exceptions and any exception enacted in accordance with Parliament's obligations under the Convention, 'there is no question of balancing freedom of speech against other interests. It is a trump card which always wins': p 203.

....
48 More recently, in *R (Gaunt) v Office of Communications (Liberty intervening)* [2011] 1 WLR 2355, § 23 Lord Neuberger MR, considering restrictions on broadcasting 'offensive and harmful material' in the Broadcasting Code made pursuant to the Communications Act 2003, stated that 'like virtually all human rights, freedom of expression carries with it responsibilities which themselves reflect the power of words, whether spoken or written'. Although he also emphasised that 'any attempt to curtail freedom of expression must be approached with circumspection', his recognition of the responsibilities that are carried by freedom of expression reflects an element of balancing. There, of course, has to be balancing when the exercise of the right to free expression in article 10 right by one person will violate other Convention rights, notably the right to respect for private and family life protected by article 8.
...
55. .. [I]t is clear, as a general proposition, that freedom of expression includes the right to say things which 'right thinking people' consider dangerous or irresponsible or which shock or disturb: see *R v Central Independent Television plc* [1994] Fam 192, 203 (Hoffmann LJ); *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (Sedley LJ); *Jerusalem v Austria* 37 EHRR 567, § 32; *Kwiecien v Poland* (2007) 48 EHRR 150, § 43; *Filipovic v Serbia* (2007) 49 EHRR 1183, § 53. ... The statements of Hoffmann LJ in the *Central Independent Television* case [1994] Fam 192, 203 that 'a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom' and that freedom of expression means 'the right to publish things which government and judges, however well motivated, think should not be published' and of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249, § 20 that '[f]reedom only to speak inoffensively is not worth having', are clearly relevant and have been relied on by courts"

[44] The Human Rights Act 1998 provides in this regard:

"**3:- Interpretation of legislation**.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility....

[45] *Ladele v Islington London Borough Council* [2010] WLR 955, CA

[46] *McFarlane v Relate Avon Limited* [2010] EWCA 880 [2010] IRLR 872, CA

[47] *Bull v Hall* [2013] UKSC 73 [2013] 1 WLR 3741

[48] *Eweida v British Airways plc* [2010] ICR 890, CA and *Eweida and others v. United Kingdom* (2013) 57 EHRR 81 ECtHR

[49] *McClintock v Department of Constitutional Affairs* [2008] IRLR 28, EAT

[50] See *Catholic Care (Leeds Diocese) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 (17 March 2010) and, after sundry further procedure, [2012] UKUT 395 (TCC), [2012] EqLR 1119, Upper Tribunal (2 November 2012)

[51] See *R (on the application of Johns) v Derby City Council* [2011] EWHC 375 (Admin), [2011] HRLR per Munby LJ and Beatson J at [97].

[52] The Act of Uniformity 1662 purged the Church of England of those who dissented from the Erastian settlement and in so doing gave birth to the religious Nonconformist tradition in England.

[53] *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, per Lord Rodger of Earlsferry at [76]-[80].

[54] See Diarmaid MacCulloch *Silence: a Christian history* (2013) at 163, 174-5, 176-7:

> "[G]roups which represented the 'Other' … have repeatedly made themselves invisible in order to survive: they have become what John Calvin in the 16th century contemptuously called 'Nicodemites', in allusion to Jesus' timorous disciple who according to John's Gospel (John 3: 1-2) would only visit his Lord at night ….Elizabeth [Tudor's] religious settlement of 1559 [was] something unprecedented in Europe. It was planned and executed by former Nicodemites, Protestants who had nevertheless conformed outwardly to the Roman Church from the moment Mary [Tudor] had secured her throne. Foremost among this group was the Queen [Elizabeth Tudor] herself …. [M]any leaders of the established Church [of England] not least its Nicodemite Queen [Elizabeth Tudor], were happy to tolerate merely formal adherence from equivocators."

[55] See John Calvin pamphlet of 1544, *Excuse à messieurs les Nicodémites sur la complaincte qu'ils font de sa trop rigeur* in which the Frenchman Calvin condemns, from the security of his exile in Swiss Geneva, those of his compatriots of reformed Protestant sympathy who remained in France and who outwardly conformed to and attended Catholic worship

[56] See James Shapiro *1606: William Shakespeare and the Year of Lear* (London 2015) Chapter 9 "Equivocation" at pages 181-3:

> "Sir Edward Coke [the Attorney General] learned from the *Treatise of Equivocation* [by Henry Garnet SJ] that Jesuits distinguished between four ways of equivocating. The first and simplest was by deliberately choosing

ambiguous words. … The second way was by omitting a crucial piece of information. … The third way depended on the interplay of word and gesture … As infuriating to the authorities as these three techniques might be, it was only the fourth that was truly beyond the pale, the kind involving what English writers this year began to call 'mental reservation', when your words and thoughts were at odds, though the person with whom you were speaking could have no idea that this was the case. … A few years later, when the full implications of mental reservation had sunk in, a court succinctly described how this tempting doctrine, once widespread, would lead to chaos:

> 'The commonwealth cannot possibly stand if this wicked doctrine be not beaten down and suppressed, for if it once take root in the hearts of people, in a short time there will be no faith, no troth, no trust … and all civil societies shall break down and be dissolved'….

…

Coke publicised this dangerous doctrine at the state trial held on 27 January 1606, brandishing the newly discovered manuscript before the eight surviving Gunpowder plotters. It is unclear whether any of them had even seen it or even knew of its existence, but that mattered little. For Coke, and for those who packed the room to observe the trial, including James VI and I, it was Exhibit A, the means whereby the traitors were able to conceal their plans, with the blessing of their Jesuit handlers. Coke spoke of

> 'their perfidious and perjurious equivocating abetted, allowed and justified by the Jesuits, not only simply to conceal or deny an open truth, but religiously to aver, to protest upon salvation, to swear that which they themselves knew to be most false.'

He explained how 'mental reservation' was at the heart of this Jesuitical doctrine,

> 'reserving a secret and private sense inwardly to themselves, that they may safely and lawfully elude any questions whatsoever'.

A lawyer who believed that words spoken under oath were the bedrock of an orderly society, Coke was at pains to convey how deeply destructive equivocation was, an 'art of cozening' that could tear apart social fabric, no less than barrels of gunpowder could destroy bodies and buildings."

[57] Joined Cases C-71/11 and C-99/11 *Y and Z v. Germany* 5 September ECLI:EU:C:2012:518 [2013] 1 CMLR 5, CJEU (Grand Chamber)

[58] *AHC (Pakistan) v Secretary of State for the Home Department* [2012] CSOH 147 (11 September 2012) *per* Lord Stewart at [46]

[59] *Christian Institute and others v. Lord Advocate* [2015] UKSC nyr, [2015] CSIH 64, [2015] CSOH 7

[60] *In re B (Children)*[2008] UKHL 35 [2009] 1 AC 11 per Baroness Hale at § 20

[61] *O'Keefe v. Ireland* (2014) 59 EHRR 15 (Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at O-11-7)

[62] See generally Maria Cahill "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2016) *International Journal of Constitutional Law* (forthcoming).

[63] *Martinez v. Spain* (2015) 60 EHRR 3 (Grand Chamber, 12 June 2014)

[64] *St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator* SCAP App 02/13 (Scottish Charity Appeal Panel, 31 January 2014)

[65] Article 9 ECHR states:

> 1. 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*.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[66] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at § 61

[67] *Barankevich v. Russia* (2008) 47 EHRR 8 (26 July 2007) at § 30

[68] *Zengin v. Turkey* (2008) 46 EHRR 44 (9 October 2007) at § 54

[69] *Lautsi v. Italy* (2012) 54 EHRR 3 **(**18 March 2011) at § 60

[70] *Bayatyan v. Armenia* (2012) 54 EHRR 15 (7 July 2011) at § 122