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UBI CARITAS ET AMOR, DEUS IBI EST

1. INTRODUCTION

1.1 There has undoubtedly been a certain tension in the Catholic Church's use of, and institutional response, to the law and language of equality and human rights both as used in the United Kingdom (and, by extension, in contemporary Europe from where much of this law emanates). The International Theological Commission (under the Presidency of the then Cardinal Ratzinger) observed in 1999 that:

> "Just as the history of humanity is full of violence, genocide, *violations of human rights* and the rights of peoples, exploitation of the weak and glorification of the powerful, so too *the history of the various religions is marked by intolerance, superstition, complicity with unjust powers, and the denial of the dignity and freedom of conscience*. Christians have been *no exception* and are aware that all are sinners before God." [1]

1.2 Under Pope John Paul II and continuing with Pope Benedict XVI, there was a seeming readiness on the part of the Vatican to use the language of fundamental rights where this is understood as *defending* the Church ("the freedom of religious communities to act in accordance with their beliefs" and "the Church's right to live freely in society according to her beliefs") and in allowing the Church to defend *itself* ("grapple firmly with the challenges presented by the increasing tide of secularism in your country") [2] and "your right to participate in national debate .... maintaining longstanding British traditions of freedom of expression and honest exchange of opinion").

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[1] International Theological Commission (President, Cardinal Ratzinger) *Memory and Reconciliation: the Church and the faults of the past* December 1999, paragraph 6.3(4)

[2] See for example Pope Benedict XVI 5 February 2010 address to the Bishops of Scotland on the occasion of their *ad limina* visit to the Vatican which, among other things, exhorted the Scottish Catholic bishops to :

> "grapple firmly with the challenges presented by the increasing tide of secularism in your country .... [and] continually call the faithful to complete fidelity to the Church's Magisterium, while at the same time upholding and defending the Church's right to live freely in society according to her beliefs"

http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/february/documents/hf_ben-xvi_spe_20100205_bishops-scotland_en.html

1.3 On the other hand, the application of general equality law norms to the Church was deprecated as "violating the natural law upon which the equality of all human beings is grounded" and the very idea of freedom of expression within the Church is rejected ("the expression of a variety of opinions ... is .... dissent ... and not ... a mature contribution to a balanced and wide-ranging debate"). [3] On this model, the language of human rights would seem then to be a good thing only when used by, but not against, the Church.

1.4 The perception remains within some Church circles that equality law and human rights law are being used to undermine traditional religious beliefs and practices and that it would perhaps be better for all if we did away with equality law and abolished human rights law and returned to an older dispensation in which "traditional" values and structures flourished.

1.5 In this paper I want to explore and tease out some of these tensions with particular reference to the work of religiously affiliated, specifically Catholic charities.

2. THE PROHIBITION AGAINST DISCRIMINATION ON "PROTECTED GROUNDS"

2.1 Equality law in the UK began with the enactment of the Race Relations Act 1965, 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. One could say that equality law arises from the State *not doing enough* to protect those subject to its law.

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[3] See for example Pope Benedict XVI 1 February 2010 in an address to the Bishops of England and Wales on the occasion of their *ad limina* visit to the Vatican which included the following remarks:

> "Your country is well known for its firm commitment to equality of opportunity for all members of society. Yet as you have rightly pointed out, the effect of some of the legislation designed to achieve this goal has been to impose unjust limitations on the freedom of religious communities to act in accordance with their beliefs. In some respects it actually violates the natural law upon which the equality of all human beings is grounded and by which it is guaranteed. .... Continue to insist upon your right to participate in national debate through respectful dialogue with other elements in society. In doing so, you are not only maintaining longstanding British traditions of freedom of expression and honest exchange of opinion, but you are actually giving voice to the convictions of many people who lack the means to express them....[T]he Catholic community in your country needs to speak with a united voice. ..... In a social milieu that encourages the expression of a variety of opinions on every question that arises, it is important to recognize dissent for what it is, and not to mistake it for a mature contribution to a balanced and wide-ranging debate."

http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/february/documents/hf_ben-xvi_spe_20100201_bishops-england-wales_en.html

2.2 The 1965 Act sought to penalise incitement to racial hatred and to prohibit discrimination on racial grounds in terms of access to places of public resort (for example hotels and restaurant, theatres and dance halls, sports grounds and swimming pools) or to public transport and to prevent the enforcement or imposition on racial grounds of restrictions on the transfer of tenancies. [4]

2.3 The now relevant statutes is the Equality Act 2010 is largely a consolidating measure which brings into the four corners of one statute these various grounds or characteristics which may now form the basis for a claim of unlawful discrimination. Section 4 of the Equality Act now provides that

> "The following characteristics are protected characteristics—
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> - age;
> - disability;
> - gender reassignment;
> - marriage and civil partnership;
> - pregnancy and maternity;
> - race;
> - religion or belief;
> - sex;
> - sexual orientation."

[4] It is profoundly disheartening that 50 years on from that Act we have a finding by the court - in *R(JCWI) v. Home Office* [2019] EWHC 452 (Admin) – that the Government's promotion and Parliament's endorsement of the creation of a "hostile environment" to make it impossible for those deemed to be "irregular migrants" in the UK to live and work here (and so, it is hoped, "encourage" them to leave to leave the UK) has resulted in practice in increased discrimination on racial grounds, notably in the private rented sector. Under the relevant sections of the Immigration Act 2014, a scheme was set up imposing obligations on landlords to take measures to ensure that they do not provide private accommodation to "disqualified persons". The aim of the Scheme is that persons who are in the UK illegally should not be able to obtain residential tenancies from landlords. A landlord is forbidden to rent a property to a disqualified person, namely a person other than a British, EEA or Swiss national who needs but does not have leave to enter or remain in the UK. The landlord must (to ensure he avoids a civil penalty) either request, obtain, check and copy the relevant identity documents before renting the property, or instruct an agent responsible for doing those things. Landlords who authorise disqualified persons from abroad to rent or occupy accommodation, knowing or having reasonable cause to believe that they are disqualified, are liable to be fined and/or imprisoned unless they can demonstrate that they undertook the prescribed checks and, where necessary, informed the Home Office of the disqualified person's occupation of the premises. Where a landlord is made aware that an occupier does not have the right to rent, the landlord is required to take reasonable steps to letting which may include steps to repossess the property. Rather than run the risk of breaching these obligations – effectively involving them in the private enforcement of immigration law – and incurring these penalties, landlords are simply inclined not to rent properties to "foreigners", a category into which all EEA nationals (other than the Irish) will fall back into once Brexit happens. In the Ireland Act 1949 which, in Section 1(1) "recognized and declared that the part of Ireland heretofore known as Eire ceased, as from 18 April 1949, to be part of His Majesty's dominions" but declared in Section 2(1) that "notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is *not* a foreign country for the purposes of any law in force in any part of the United Kingdom".

2.4 In principle, sex discrimination law requires that men and women be treated equally regardless of their sex. And race discrimination law aims at a form of "colour blindness". Age discrimination law seeks to protect the old and young alike. And sexual orientation discrimination law wishes the equality of treatment between gay and straight.

2.5 The Equality Act's prohibition on discriminatory treatment against those identifying as "trans" gives legal protection only to those who would so identify themselves. [5] The Equality Act does give equal protection to a woman making the transition to being a man, as to a man making the transition to being a woman; and it requires equivalent protection for those who have started out on the process of changing their gender with those who have completed the process, at least to their own satisfaction.

2.6 And disability discrimination law does not pretend that the disabled and the non-disabled have the same abilities, but instead aims to protect the disabled against detrimental treatment as regards something arising in consequence of an individual's disability, [6] as well as against treatment which is to a disabled person's detriment

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[5] In *R(C) v. Secretary of State for Work and Pensions* [2017] UKSC 72, Baroness Hale observed at § 1:

> "'We lead women's lives: we have no choice'. Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debateable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self.
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> Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man.
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> Gender dysphoria is something completely different - the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that *a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history*. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

[6] Section 15 of the Equality Act 2010 provides as follows:

> **15 Discrimination arising from disability**
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> (1) A person (A) discriminates against a disabled person (B) if—

precisely because it fails to take account of – and make reasonable adjustments in respect of – that individual's particular disability or disabilities.[7]

2.7 The prohibition in the Equality Act 2010 on married/civilly partnered status discrimination protects only those who are married or civilly partnered [8] (and requires that the two states be treated equivalently[9]). Yet while the married and civilly partnered are protected against discrimination *because* they are married or civilly partnered [10] to (rather than simply in a close relationship with [11]) a particular individual, [12] the single -

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(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

[7] Section 21 of the Equality Act 2010 provides as follows:

> "**21 Failure to comply with reasonable adjustments duty**
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> (1) A failure to comply with the first, second or third requirement [in Section 20 EA] is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person ..."

[8] Section 8 of the Equality Act 2010 specifies "marriage or civil partnership" as one of the protected characteristics under the Act.

[9] See *Preddy v. Bull* [2013] UKSC 73 [2013] 1 WLR 3741 per Baroness Hale at § 36:

> "Parliament has created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. They are also worthy of the same respect and esteem. The rights and obligations entailed in both marriage and civil partnership exist both to recognise and to encourage stable, committed, long term relationships. It is very much in the public interest that intimate relationships be conducted in this way. Now that, at long last, *same sex couples can enter into a mutual commitment which is the equivalent of marriage*, the suppliers of goods, facilities and services should treat them in the same way."

[10] The categories of sex and marital status discrimination can be interconnected. In *Chief Constable of the Bedfordshire Constabulary v Graham* [2002] IRLR 239 (EAT), a challenge to a police force's policy restricting officers who were married to or in a (opposite sex) relationship with another officer from working together, was found not to be marital status discrimination but was, instead, discriminatory on grounds of sex, in that a higher proportion of women police officers were found to be in relationships with their male colleagues than the proportion of male constables in relationships with their female fellow officers.

[11] See *Hawkins v Atex Group Ltd* [2012] ICR 13157, EAT holding that the characteristic protected was the fact of being married. The appropriate comparator would be someone in a relationship akin to marriage, but who was not actually married.

[12] See *Dunn v Institute of Cemetery and Crematorium Management* [2012] ICR 941, EAT holding that a person who was married, or in a civil partnership, was protected against discrimination on the ground of that relationship and on the ground of their relationship to the other partner.

or those cohabiting without benefit of the law, whether gay or straight - are *not* expressly protected under the Equality Act 2010 against discrimination because unwed. [13]

2.8 The Marriage (Same Sex Couples) Act 2013 legislated for the extension of marriage to same sex couples in England and Wales. It did so whilst allowing churches and other religious organisations to opt-out of same sex marriages at least in the sense that may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement) to conduct, be present at, carry out, consent to or otherwise participate in a same sex marriage and are not guilty of a breach of equality law in so opting out: section 2 of the 2013 Act and Section 25A EA 2010. [14] Otherwise, Section 11 of the 2013 provides that "(1) in the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples" and that "(2) The law of England and Wales (including all England and Wales legislation

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[13] Though see *In re P (A Child) (Adoption: Unmarried Couples)* [2009] 1 AC 173 where the House of Lords declared that it was contrary to fundamental rights for the Family Division of the High Court of Justice in Northern Ireland to reject the appellants as prospective joint adoptive parents on the ground only that they were cohabiting but not married to one another.

[14] Further provisions carving out the possibility of lawful discrimination on grounds of same sex marriage are to be found in paragraph 2 of Schedule 9 to the Equality Act 2010 which provides that:

> "**2 Religious requirements relating to sex, marriage etc., sexual orientation**
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> (1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—
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> (a) the employment is *for the purposes of an organised religion*,
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> (b) the application of the requirement engages the compliance or non-conflict principle,
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> and
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> (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).
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> ...
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> (4) This sub-paragraph applies to— .... (ca) *a requirement not to be married to a person of the same sex*;
>
> (5) The application of a requirement engages the compliance principle if the requirement is applied *so as to comply with the doctrines of the religion*.
>
> (6) The application of a requirement engages the non-conflict principle if, *because of the nature or context of the employment*, the requirement is applied so as to *avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers*.

This provision has been used by the Church of England which currently allows its priests to enter into (same sex) civil partnership but holds that a priest entering into a same sex marriage commits a canonical offence and may be disciplined under the Church's canon law: see *Pemberton v. Inwood* [2018] EWCA Civ 564.

whenever passed or made) has effect in accordance with subsection (1)." The 2013 Act provides in paragraph 1 to Schedule 4 as follows:

> **"Existing instruments**
> (1) Section 11 does not alter the *effect* of any private legal instrument made before that section comes into force.
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> (2) In this paragraph "private legal instrument" includes— ...
> (d) an instrument (including a private Act) which—
> (i) establishes a body, or
>
> (ii) regulates the purposes and administration of a body,
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> (whether the body is incorporated or not and whether it is charitable or not)..."

2.9 Now that the State has legislated (at least for England, Wales and separately in Scotland) to allow for the possibility of marriage between two individuals regardless of their sex or gender, then the full panoply of non-discrimination law would apply to prevent any discrimination among the married on the basis that their spouse was of the same sex or of the opposite sex. Any difference in treatment between the same sex married and the opposite sex married could be caught both by a prohibition against discrimination on grounds of sex [15] and on grounds of sexual orientation. [16]

2.10 The Equality Act 2010 prohibits both direct and indirect discrimination on any of the protected grounds both in the workplace and in the provision of goods and services to the public.

2.11 Section 13 EA 2010 defines direct discrimination as follows

> **"13 Direct discrimination**
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> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

2.12 Lord Phillips observed in *JFS*:

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[15] Compare *MacDonald v. Ministry of Defence* [2003] ICR 937, HL

[16] See *Onu v Akwiwu* [2016] UKSC 31 [2016] 1 WLR 2653 per Baroness Hale at § 29:

> "In *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741... Christian hotel keepers would deny a double bedded room to all unmarried couples, whether of opposite sexes or the same sex. That would undoubtedly have been indirect discrimination, as same sex couples were not then able to marry and thus fulfil the criterion, whereas opposite sex couples could do so if they chose. But the majority held that *it was direct discrimination, because the hotel keepers expressly discriminated between heterosexual and non-heterosexual married couples. The couple in question were in a civil partnership, which for all legal purposes is the same as marriage.*"

"[T]here may well be a defect in our law of discrimination. In contrast to the law in many countries, where English law forbids direct discrimination it provides no defence of justification."[17]

2.13 But it is of particular note that nothing in the Equality Act 2010 states *in terms* and expressly that direct discrimination can never be justified. The non-justifiability of direct discrimination is, and is only, a court developed doctrine, originally found in the equal treatment/equal pay jurisprudence of the CJEU and which then was imported in UK equality law jurisprudence, at least in those area falling within the ambit of EU law. But the present situation of the provision of adoption services is not in implementation of or within the ambit of EU law. [18] Accordingly, in the interpretation and application of the EA 2010, domestic courts are *not* bound by decisions of the Court of Justice of the European Union. In particular they are *not* required to adopt the "never justifiable" direct discrimination and "potentially justifiable" indirect discrimination dichotomy developed in the CJEU equality law case-law.

2.14 Section 19 EA 2010 defines indirect discrimination as follows:

19 Indirect discrimination

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate

[17] *R(E) v Governing Body of JFS* [2010] 2 AC 728 per Lord Phillips at § 9.

[18] The Employment Equality Directive 2000/78/EC outlaws discrimination in or connected with the *workplace* which is based on an individual's religion or belief, disability, age or sexual orientation. In July 2008, the European Commission issued a proposal for a draft Directive seeking to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market, notably in access to the commercial/professional supply of goods and services, and the public provision of housing, education, social security and health care. This proposed Directive has not been taken forward by the EU legislature.

2.15 Any body which is "concerned with the provision of a service to the public" in principle:

(a) "must not discriminate against a person requiring the service by not providing the person with the service": Section 29(1) EA 2010, or
(b) in providing the service, it must not discriminate against a person as to the terms on which it provides the service to that person: Section 29(2)(a) EA 2010.

2.16 This obligation not to discriminate in the provision of goods and services does not apply *in any circumstances* in relation to "the protected characteristic of ... marriage or civil partnership": Section 28(1)(b) EA 2010.

3. RELIGION AS THE BASIS FOR DISCRIMINATION

3.1 The equality law based objection to allowing 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.

3.2 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 dis-analogies 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).

3.3 Currently 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.

3.4 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; [19] or his seeking exemption in his job as relationship/marriage guidance counsellor from working with same sex couples[20]; or in his refusing to rent a double-bedded room to a gay couple in the hotel which he owns [21] and runs; or in his wearing a religious symbol to work; [22] or in his seeking to foster [23] or to adopt [24] children within a home context which strongly emphasises a religiously based moral code of what it considers to be right behaviour? It appears not.

3.5 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.

3.6 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.

3.7 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

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

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

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

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

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

[24] 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)

discriminate on grounds of a religiously informed conscience, and those who so act simply from some unthinking incoherent prejudice or bigotry.

3.8 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.

3.9 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. This is where human rights law might have a distinct role to play.

3.10 Human rights law – which 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 - 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). So one could say that whereas equality law arises from the experience of the State *not doing enough* to protect the people for which it has responsibility, human rights law arises from the perception that the State may *do too much*, and oppresses those in its care and at its mercy.

3.11 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. However in *Dojan v Germany* the Fifth Section of the European Court of Human Rights, in a non-admissibility decision dismissed as "manifestly ill-founded" a complaint brought by a group of married couples, all members of the Christian Evangelical Baptist Church, that the refusal to exempt their children from mandatory sex education lessons (and in one

case a participatory theatre workshop performed by children on the issue of child sex abuse) constituted a disproportionate restriction on the parents' right to ensure that their children were educated in conformity with the parents' religious convictions. The parents argued that that the sex education lessons were harmful to their children's moral development, in that the parents felt that the lessons promoted a view of sexuality which ran counter to biblically based doctrines of the importance of chastity and undermined the idea of an absolute prohibition of all and any sexual activity outside (opposite sex) marriage. A number of the parents were fined for keeping them off school to avoid these lessons and some indeed served prison sentences for non-payment of the fines imposed upon them for failing to ensure their children's school attendance (home schooling not being lawful in Germany). In dismissing this application the Strasbourg Court observed as follows

> "[T]he aim of sexual education is to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. *Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity*.
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> This objective is also reflected in the decisions of the German courts in the case at hand, which have found in their carefully reasoned decisions that sex education for the concerned age group was necessary with a view to enabling children to deal critically with influences from society instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society—in particular, *with a view to integrating minorities and avoiding the formation of religiously or ideologically motivated "parallel societies*". The Court finds that these objectives are consonant with the principles of pluralism and objectivity embodied in art.2 of Protocol No.1." [25]

4. SUBSIDIARITY, FREEDOM OF RELIGION AND FREEDOM OF ASSOCIATION

4.1 As the law currently stands, there appears to be little space for the possibility for a carve-out from the general requirements of respect for equality law for *individuals*, no matter how religiously motivated they may be. The Strasbourg Court has held that discrimination on grounds of sex cannot be justified, even if based on conscientious and religiously based convictions. [26] And in *Alekseyev v. Russia* the Court denied that

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[25] *Dojan v Germany (Admissibility)* (2011) 53 EHRR SE24http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=192&crumb-action=replace&docguid=IC931CCA010B311E1B24D949420840183 (13 September 2011)

[26] On the rejection of religiously based discrimination on grounds of sex see the non-admissibility decision in *Reformed Protestant Party (Staatkundig Gereformeerde Partij) v. Netherlands* (2012) 55 EHRR SE 17:

> 76. The issue in the present case is the applicant party's position, restated in the present proceedings before the Court, that women should not be allowed to stand for elected office in general representative bodies of the State on its own lists of candidates. It makes little difference whether or not the denial of a fundamental political right based solely on gender is

Contracting States (any longer) had any wide margin of appreciation on the issue of civil rights for gay men and lesbians, or that religiously based concerns could properly be prayed in aid as a justification to limit these rights. [27]

4.2 But if and insofar as individuals formally join together in associations formed for proclaiming or teaching or manifesting or practising religion, then there is some greater scope for manoeuvre. [28]

4.3 Thus in *Preddy v. Bull* [2013] UKSC 73 [2013] 1 WLR 3741 Baroness Hale notes as follows on this point (at §§ 35, 38):

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stated explicitly in the applicant party's bye-laws or in any other of the applicant party's internal documents, given that it is publicly espoused and followed in practice.

77. The [Netherlands] Supreme Court, in paragraphs 4.5.1 to 4.5.5 of its judgment, concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together that the SGP's position is unacceptable *regardless of the deeply-held religious conviction on which it is based*. ... For its part, and having regard to the Preamble to the Convention and the case-law .... the Court takes the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14."

[27] *Alekseyev v. Russia* [2010] ECHR 4916/07, 25924/08 and 14599/09 (First Section, 21 October 2010) at §§ 78-9:

"The Court observes that the mayor of Moscow on many occasions expressed his determination to prevent gay parades and similar events from taking place, apparently because he considered them inappropriate..... The [Russian] Government in their observations also pointed out that such events should be banned as a matter of principle, because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults. The Court observes, however, that these reasons do not constitute grounds under domestic law for banning or otherwise restricting a public event."

[28] See for the position under the South African Constitution *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 Sachs J. in the South African Constitutional Court at §§ 136-137:

"A State that recognises difference does not mean a State without morality or a State without a point of view. It does not banish concepts of right and wrong nor envisage a world without good or evil. It is impartial in its dealings with peoples and groups, yet is not neutral in its value-system. The Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded upon a deep political morality. *What is central to the character and functioning of the State, however, is the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*

The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. *The first is that gays and lesbians cannot be forced to conform to heterosexual norms: they can break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reason of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet while the Constitution protects the right of people to continue with such beliefs, it does not permit the State to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society*."

"Mr and Mrs Bull seek to justify their policy [to rent double-bedded rooms only to married couples] by reference to a deeply held belief that sexual intercourse outside marriage is sinful. ....Parliament did not insert a conscientious objection clause for the protection of *individuals* who held such beliefs. Instead, it provided .... a carefully tailored exemption for *religious organisations* and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation."

4.4 Baroness Hale is here alluding to paragraph 2(3)(c) of Schedule 23 EA 2010 which provides in summary that:

(1) a *mainly* non-commercial organisation, or a person acting on its behalf of under its auspices

(2) the purpose of which organisation is

(a) to "practise a religion or belief" or

(b) to "enable persons of a religion or belief ... to engage in *any* activity *within the framework of that religion or belief*"

(3) does *not* contravene Part 3, 4 or 7 so far as relating to religion or belief or sexual orientation, only by restricting—:

(a) membership of the organisation;

(b) participation in activities undertaken by the organisation or on its behalf or under its auspices;

(c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices;

(4) in particular such an organisation is permitted *to impose a restriction relating to religion or belief* if that is imposed—

(a) because of the purpose of the organisation, *or*

(b) to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.

(5) and separately such an organisation is permitted to impose a restriction relating to sexual orientation if this is imposed—

(a) because it is necessary to comply with the doctrine of the organisation, *or*

(b) to avoid conflict with strongly held convictions of a significant number of the religion's followers

(6) except that organisations relating to religion or belief, which are concerned with the provision of a service to the public or a section of the public (for payment or not) must not directly or indirectly discriminate because of sexual orientation against a person requiring the service if what is done—

(a) on behalf of a public authority, *and*

(b) under the terms of a contract between the organisation and the public authority

4.5 Given that the Equality Act 2010 does *not* cover acts of worship or devotion, it is clear that Paragraph 2 of Schedule 23 EA 2010 is intended to cover acts by an organisation with religious purposes which extend beyond the purely devotional or worship related.

4.6 Separately Section 193 EA provides a charity specific derogation from the Equality Act. This is intended to allow charities - which in pursuance of their charitable instruments may provide benefits only to persons having a protected characteristic - to continue to engage in those activities, provided that they can satisfy the requirements of a legitimate aim and proportionality. A charity is not permitted under this derogations to practice workplace related discrimination in relation to employees and applicants, contract workers and the provision of employment services: Section 193(9).

4.7 But a charity does not necessarily breach the duty not to discriminate only by restricting the provision of benefits to persons who share a protected characteristic: Section 193(1) EA 2010. And charity does not necessarily breach the duty not to discriminate by restricting the access to a benefit, facility or service to those members who state their membership or acceptance of a religion or belief: Section 193(5) EA 2010 and *R. (on the application of Z and others) v. Hackney London Borough Council and Agudas Israel Housing Association* [2019] EWHC 139 (Admin). Further Section 193(8) EA provides that a charity regulators - in the case of a charity registered in England and Wales, the Charity Commission; while for Scottish registered charities the Office of the Scottish Charities Regulator (OSCR) - does not contravene the EA 2010

> "only by exercising a function in relation to a charity in a manner which the regulator thinks is expedient in the interests of the charity, having regard to the charitable instrument".

This provision gives a discretion to the Charity Commission and/or OSCR as the relevant "charity regulators" *not* to enforce the non-discrimination provisions of the EA 2010 against a charity where the result of such enforcement would be wholly disproportionate

(for example in requiring the charity to close down completely and cease its work which the regulator may otherwise accepts results in significant public benefit.

4.8 These derogations from the Equality Act's prohibitions must also, by virtue of Section of the Human Rights Act 1998 be read and applied in a manner which is compatible with, at least in the case of religiously based charities, both Article 9 ECHR (guaranteeing Freedom of thought, conscience and religion) and Article 11 ECHR (guaranteeing freedom of association).

Article 9 ECHR

4.9 Article 9 ECHR sets out five distinct rights as follows:

"**Article 9 - Freedom of thought, conscience and religion**

1. Everyone has the right to:
[i] freedom of thought,
[ii] [freedom of] conscience and
[iii] [freedom of] religion

this right includes
[iv] freedom to change his religion or belief
and
[v] freedom, either alone or in community with others and in public or private, to *manifest* his religion or belief, in
[a] worship,
[b] teaching,
[c] *practice and*
[d] observance.

4.10 Article 9(2) ECHR allows for limitations to be placed *only* on the last of these right, that of *manifestation* of religion or beliefs by providing as follows:

"2. Freedom to manifest one's religion or beliefs shall be subject only to such limitation 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."

4.11 Earlier case law and admissibility decisions of the European *Commission* on Human Rights were to the effect that the freedom of religion and conscience guaranteed under Article 9 of the European Convention on Human Rights were rights that were guaranteed to individuals and could not be claimed by legal persons/corporate bodies (whether for profit [29] or not for profit [30]). The Commission subsequently departed from that approach holding instead that:

[29] *Company X . v. Switzerland* [1979] ECommHR 7865/77 (27 February 1979):

"In respect of the Church [of Scientology], the Commission has previously applied the rule according to which a corporation being a legal and not a natural person is incapable of having or exercising the rights mentioned in Article 9 of the Convention (see *Church of Scientology v. United Kingdom* Application No. 3798/68, Collection of Decisions 29, p . 70) .

....

The Commission, however, would take this opportunity to revise its view as expressed in Application No. 3798/68. It is now of the opinion that the above distinction between the Church and its members under Article 9(1) is essentially artificial.

...

Accordingly, the Church of Scientology, as a non-governmental organisation, can properly be considered to be an applicant within the meaning of Article 25 11) of the Convention." [31]

4.12 It is now clear that a church body, or an association incorporated by a church body or its members to have religious and/or philosophical objects is, no matter its legal form, recognised as being capable of possessing and exercising the rights contained in Article 9 ECHR. [32]

"[T]he Commission is of the opinion that a limited liability company given the fact that *it concerns a profit-making corporate body*, can neither enjoy nor rely on the rights referred to in Article 9, paragraph 1, of the Convention. It follows that in this respect, the application is incompatible with the provisions of the Convention and must be rejected under Article27, paragraph 2 of the Convention.

[30] See for example *Verein "Kontakt-Information-Therapie" (KIT) and Siegfried Hagen v. Austria* [1988] ECommHR 11921/86 (12 October 1988):

"The first applicant is a private association (Verein) engaged in the operation of rehabilitation centres for young drug abusers. It was established in Innsbruck in 1974. ...

Notwithstanding its status as a *private non-profitmaking organisation*, the first applicant was granted State recognition by a decree of the Federal Minister for Health and Environmental Protection (*Bundesminister für Gesundheit und Umweltschutz*), Fed. Law Gazette No. 435/1981. ...

As a private association, the first applicant is a "non-governmental organisation" within the meaning of this provision notwithstanding the recognition by a ministerial decree that it fulfils functions of public interest. However, the association does not claim to be a victim of a violation of its own Convention rights. Moreover, *the rights primarily invoked, i.e. the right to freedom of conscience under Article 9 (Art. 9) of the Convention and the right not to be subjected to degrading treatment or punishment (Article 3) (Art. 3), are by their very nature not susceptible of being exercised by a legal person such as a private association.*

Insofar as Article 9 (Art. 9) is concerned, the Commission considers that *a distinction must be made in this respect between the freedom of conscience and the freedom of religion, which <u>can</u> also be exercised by a church as such* (cf. No. 7805/77, *X and Church of Scientology v. Sweden*, Dec. 5.5.79, D.R. 16 p. 68). The Commission concludes that the first applicant would be debarred from bringing an application invoking Articles 3 or 9 (Art. 3, 9) of the Convention in its own name.

[31] *X. and Church of Scientology v. Sweden* [1979] ECommHR 7805/77 (5 May 1979) on the admissibility of the application

[32] *A.R.M. Chappell and the Secular Order of Druids v. United Kingdom* [1987] ECommHR 12587/86 (14 July 1987).

Article 11 freedom of association and the principle of subsidiarity

4.13 Article 11 ECHR is in the following terms:

1. "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

4.14 The Strasbourg Court has emphasised the importance of the freedom of association protected under Article 11 ECHR in its case law concerning associations for religious purposes, noting that

> "associations formed for ... proclaiming or teaching religion, are also *important to the proper functioning of democracy*". [33]

4.15 The Strasbourg Court has also repeatedly stressed that:

> "78. .. *[T]he ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association,* without which that right would be deprived of any meaning....
>
> 79 The state's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, *as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom*." [34]

4.16 Paradoxically this emphasis in the European Court of Human Rights on the importance of freedom of association derives from the social teaching of the Catholic Church - which began to be developed in a number of Papal encyclicals produced by various pontiffs at the close of the nineteenth century and in the first third of the twentieth century - sought new answers to the social injustices which were seen to be the consequences of excesses of contemporary unbridled robber-baron capitalism on the one hand a communist/socialist ideology of class warfare against capital , and on the other. [35]

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

[34] *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12 at §§ 78-9

[35] See for example Pope Leo XIII *Rerum Novarum: on the condition of workers* (1891) at paragraphs 39. 45:

This new Catholic social teaching spoke, instead, a mutuality of duties of justice and a commonality of purpose between workers and capital. [36] And as was observed in *O'Keefe v. Ireland* (2014) 59 EHRR 15 (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.* [37]

4.17 The motto of the *totalitarian* State, as articulated by Mussolini (in a speech in La Scala Milan in 1925) was: *tutto nello Stato, niente al di fuori dello Stato, nulla contra lo Stato – everything within the State, nothing outside the State, naught against the State.* In the 20th century Catholic social teaching sought to curb the idea of the totalitarian State which the new ideology of Fascism proclaimed, by emphasizing the idea of society as being made up of a commonwealth of associations in which individuals participated

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> "[T]he labour of the working class – the exercise of their skill and the employment of their strength, in the cultivation of the land and in the workshops of trade – is especially responsible and quite indispensable. Indeed their co-operation is in this respect so important that it may truly be said that is only by the labour of working men that States grow rich. Justice therefore demands that the interests of the working class should be carefully watched over by the administration, so that they who contribute so largely to the advantage of the community may themselves share in the benefits which they crate – that being housed, clothed and bodily fit, they may find their lives less hard and more endurable.
> ...
> There underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accepts harder conditions because an employer or contractor will afford him no better, he is made a victim of force and injustice."

[36] See Pope Pius XI *Quadragesimo Anno* (1931) paragraphs 57-8:

> "57 ... [T]he riches that economic-social developments constantly increase ought to be so distributed among individual persons and classes that the common advantage of all ... will be safeguarded; in other words, that the common good of all society will be kept inviolate. By this law of social justice, one class is forbidden to exclude the other from sharing in the benefits. Hence the class of the wealthy violates this law no less, when, as if free from care on account of its wealth, it thinks it the right order of things for it to get everything and the worker nothing, than does the non-owning working class when, angered deeply at outraged justice and too ready to assert wrongly the one right it is conscious of, it demands for itself everything as if produced by its own hands, and attacks and seeks to abolish, therefore, all property and returns or incomes, of whatever kind they are or whatever the function they perform in human society, that have not been obtained by labour, and for no other reason save that they are of such a nature. ...
>
> 58. To each, therefore, must be given his own share of goods, and the distribution of created goods, which, as every discerning person knows, is labouring today under the gravest evils due to the huge disparity between the few exceedingly rich and the unnumbered propertyless, must be effectively called back to and brought into conformity with the norms of the common good, that is, social justice."

[37] *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)

and to which their loyalties could be given and, accordingly, in which there might be a multiplicity of identities. With the concept of subsidiarity, the Church proclaimed that the State should not presume to arrogate all power to itself, but should respect the nature of society as a commonwealth by permitting power to cascade down to the lowest level at which it could most effectively be exercised. [38] In denying the legitimacy of the absolutist State, this social teaching of the Catholic Church also emphasized the possibility of a loyalty and belonging which transcended national boundaries, most notably in religion - rather than, as with the communist ideal that "workers of the world unite", in terms of class.

4.18 In *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 when striking down Scottish legislation which had been passed without any dissenting votes by the democratically elected and accountable Scottish Parliament and which required the universal appointment of State guardians to children in Scotland the Court noted (at § 73) that:

> "The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."

4.19 To similar effect *In re B (Children)* [2008] UKHL 35 [2009] 1 AC 11 Baroness Hale noted at § 20:

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[38] See Pope Pius XI *Quadragesimo Anno* (1931)

> "79. .... Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.
>
> 80. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function', the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.
>
> 81. First and foremost, the State and every good citizen ought to look to and strive toward this end: that the conflict between the hostile classes be abolished and harmonious cooperation of the Industries and Professions be encouraged and promoted.
>
> 82. The social policy of the State, therefore, must devote itself to the re-establishment of the Industries and Professions."

> "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. …. 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.'

4.20 In this analysis the first community may be said to be families, or households. In a sense the protection against discrimination on grounds of being married or civilly partnered and/or on grounds of pregnancy and maternity may be said to be a partial recognition by the State of the respect to be accorded to families as community. But there are a whole host of other ways in which people form and participate in communities or associations, whether these be trade unions, charities, churches, or indeed limited liability companies.

4.21 The post-Nuremberg/anti-totalitarian State is one which is obliged, at the level of fundamental constitutional principle, to recognise and respect freedom of association as perhaps the fundamental right of individuals to be free to form communities and join associations and have the freedom and privacy to enjoy family life. This 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.

5. CATHOLIC CHARITIES AND SUBSIDIARITY

5.1 Neither Scots law nor English law recognise the Catholic Church as a legal entity in its own right, but treat it instead as an unincorporated association with no legal personality.[39] Accordingly Catholic dioceses usually establish charitable trust to enable

[39] Compare *Catholic Church of Canea/Chania v. Greece* (1999) 27 EHRR 521 per the Court decision at §§ 40-1:

> "As to the possibility-which the Government maintained still existed-of the applicant church's acquiring such a personality or constituting itself as a union of persons in order to be able to bring or defend legal proceedings in the future, in accordance with Article 62 of the Code of Civil Procedure, the Court shares the reservations expressed by counsel for the applicant church. Quite apart from the difficulties of adapting a church to that kind of structure and the procedural problems which might arise in the event of litigation, such late compliance with the relevant rules of domestic law might be interpreted as an admission that countless acts of the applicant church in the past were not valid. Furthermore, the Court of Cassation's judgment would make it problematical to transfer the applicant church's property to a new legal entity which would take the place of the church, hitherto the owner of its property.
>
> 41. In holding that the applicant church had no capacity to take legal proceedings, the Court of Cassation did not only penalise the failure to comply with a simple formality necessary for the protection of public order, as the Government maintained. It also imposed a real restriction

them to own and manage property and otherwise conduct their financial and pastoral affairs in a manner which will be recognised in domestic law. [40]

5.2 Among the tasks enjoined of the Church and its members are corporal works of mercy, acts of charity. The Catholic Church understands charity as being a fundamental aspect of the very life of the Church. Charity is not something which the Church *does*; some kind of an extra or an add-on. Instead it is something that the Church *is*; it defines the Church's very nature. And it is what Christians are commanded to do by Sacred Scripture. Psalm 82:3 says "Defend the weak and the fatherless; uphold the cause of the poor and the oppressed"; Isaiah 1:17 says "Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow"; and the Letter of James 1: 27 states that "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress".

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on the applicant church preventing it on this particular occasion and for the future from having any dispute relating to its property rights determined by the courts.

[40] See too *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] QB 722 *per* Ward LJ at § 8:

> "The Code of Canon Law promulgated in 1917 was the Code in force at the material times. As for the structure of the Roman Catholic Church, bishops are appointed by the Pope who, as Bishop of Rome, shares orders as bishop. Bishops are ultimately responsible to the Pope though they have full independent authority over their own dioceses. They are not delegates of the Pope. The diocese comprises the people within a defined territory who have been entrusted to the care of a bishop as pastor. Since the law of England and Wales does not recognise the Catholic Church as a legal entity in its own right, but sees it as an unincorporated association with no legal personality, the diocese usually establishes a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law. The defendant Trust is such a charity. Each parish is in canon law a separate legal entity so that, for example, any property belongs to the parish rather than the diocese. In canon law the position of parish priest is an ecclesiastical office which is of its nature perpetual and to which successive individuals are appointed. The effect is that subject to the oversight of the bishop, and any diocesan laws and regulations, the responsibility for running a parish rests on the parish priest. He is not a delegate of the bishop and does not receive instructions from him on how to run the parish. The bishop exercises oversight through periodic visitation of the parish which should be at least once every five years. It is possible for the bishop to transfer a priest from the parish against his will should the circumstances so require but only by carrying out the process set out in the Code of Canon Law. Thus the bishop may lawfully remove any parish priest from his parish whenever his ministry suffers injury, even without grave fault on his part, or is rendered ineffective by reason of any of the causes recognised in law or for any other similar reason. The procedure for the removal of a parish priest must be followed. That process in effect allows the parish priest to have recourse to the Congregation for the Clergy in Rome if dissatisfied with the decision the bishop. The day to day responsibilities of the parish priest are to reside in the parochial house, celebrate the divine services, minister to the sick and those close to death and "watch with diligence lest anything contrary to faith or morals is passed on in his parish, especially in public and private schools". As for the relationship between the bishop and the priest, while the priest owes his bishop reverence and obedience, he exercises his ministry as a co-operator and collaborator rather than someone who is subject to the control of his superior as would be the case in the employment field.

5.3 All this is summed up in the Encyclical of Pope Benedict XVI entitled *Deus Caritas Est* or, in English, *God is Love* and signed by the Pope on Christmas Day 2005. In this the Pope summarized, from a theological perspective, the very nature of the Church within that document in saying:

> "The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the Word of God (*kerygma-martyria*), celebrating the Sacraments (*leitourgia*) and exercising the Ministry of Charity (*diakonia*). These duties presuppose each other and are inseparable" (Pope Benedict XVI, Encyclical Letter, God is Love, § 25).

5.4 Catholic laity have the right under Church law (Canon 1030 of the Code of Canon Law) to form charitable agencies under the auspices of the Catholic Church. Charitable organisations that are formally linked to the action of the Catholic Church and separately use money contributed by members of the Church that is collected through the Church are subject to the Canon law of the Catholic Church. Such Catholic charities are required as a matter of Catholic canon law to follow Catholic principles in their activity and they may not accept commitments which could in any way affect the observance of those principles. Formally it is the responsibility of the diocesan Bishop to ensure that in the activities and management of these agencies the norms of the Church's laws are respected. It is the duty of the diocesan Bishop and the respective parish priests to see that in this area the faithful are not led into error or misunderstanding; hence they are to prevent publicity being given through parish or diocesan structures to initiatives which, while presenting themselves as charitable, propose choices or methods at odds with the Church's teaching. (Benedict XVI Apostolic Letter *On the service of charity* (2010).

5.5 On this analysis no true distinction can be drawn as a matter of law between the work of Catholic charities and the work of the Catholic Church. And the Strasbourg Court reiterated in *Eweida v. UK*:

> "[T]he state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs, or the ways in which those beliefs are expressed."

and Lord Dyson recognised in *Black v. Wilkinson* that:

> "51 It is clear that article 9(1) is engaged in situations far wider than religious activities alone
> ...
> 53 *I consider that, if the act in question is sufficiently intimately linked to the applicant's religion or belief to amount to a manifestation of it, then the court should be slow to make a judgment of the importance or significance of that manifestation. Quite apart from the insensitivity of making judgments of this kind, I do not consider that the court is equipped to make them. By what yardstick would*

the court make the assessment? … How people choose to manifest their religious beliefs is a matter for their consciences." [41]

5.6 This would mean that Catholic charities should be able to pray in aid the protections afforded by Article 9 ECHR (freedom of religion) and Article 11 ECHR (freedom of associations) in their dealings with public authorities in the UK. In particular those public bodies tasked with regulatory or oversight functions in relation to the activities of charities – for example, the Charity Commissioners, OFSTED or the Equality and Human Rights Commission – are themselves required under Section 3 to interpret and apply any applicable legislation in a Convention compatible manner [42] and separately

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[41] *Black v Wilkinson* [2013] EWCA Civ 820; [2013] 1 WLR 2490 per Lord Dyson MR at paragraphs 51-3

[42] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at §§ 106-7:

> "106 Inevitably, when section 3 of the Human Rights Act 1998 comes to be considered by a court, the focus is on the approach which section 3(1) requires the court to adopt when reading a statutory provision that, on a conventional interpretation, would be incompatible with a Convention right. Nevertheless, the section is not aimed exclusively, or indeed mainly, at the courts. In contrast to section 4—which applies in terms only to "a court" of the level of the High Court or above—and in contrast also to section 6—which applies only to public authorities—section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that *the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government, but the section is not confined to them. The broad sweep of section 3(1) is indeed crucial to the working of the 1998 Act*. It is the means by which Parliament intends that people should be afforded the benefit of their Convention rights—"so far as it is possible", without the need for any further intervention by Parliament. ...[S]ection 3(1) *requires public authorities of all kinds to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to them in a way which is compatible with the Convention rights of the people concerned*. In practice, even before the 1998 Act came into force, many public authorities had reviewed the legislation affecting them so as to be in a position to comply with this obligation from the date of commencement. This was a wise precaution. *Once the 1998 Act came into force, whenever, by virtue of section 3(1), a provision could be read in a way which was compatible with Convention rights, that was the meaning which Parliament intended that it should bear. For all purposes, that meaning, and no other, is the "true" meaning of the provision in our law*.
>
> 107 The second point to notice is that, so far as possible, legislation must be "read and given effect" compatibly with Convention rights. The use of the two expressions, "read" and "given effect", is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, *section 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct*. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular Convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the local authority will be in breach of article 14 in relation to the other article concerned and, in terms of section 3(1), will have failed to give effect to the legislation in a way

under Section 6 of the Human Rights Act 1998 to exercise their functions in a manner which is compatible with the Convention rights of the charities: see *R (Adath Yisroel Burial Society) v Inner North London Coroner* [2018] EWHC 969 (Admin) [2018] 3 WLR 1354.

5.7 For example, a requirement by a State regulator to require a private charitable organisation to change its internal constitution as a condition of recognition as a corporate body or otherwise to allow it duly to with the State, may constitute an interference with its Convention rights under both Article 9 ECHR and Article 11 ECHR. In its decision in *Moscow Branch of the Salvation Army v. Russia* the European Court of Human Rights observed

> "74. The Court considers that in the present circumstances, in which the religious organisation w*as obliged to amend its articles of association and where registration of such amendments was refused by the state authorities, with the result that it lost its legal entity status, there has been an interference with the organisation's right to freedom of association.*" [43]

5.8 And such breach of Convention rights may be said to affect both the (religious) association itself and those who are its constituent members. Thus, in *Jehovah's Witnesses of Moscow v. Russia* where the Court also reiterated:

> "101 The Court refers to its constant case law to the effect that a refusal by the domestic authorities to grant legal-entity status to an association of individuals, *religious or otherwise,* amounts to an interference with the exercise of the right to freedom of association.
>
> *The authorities' refusal to register a group or their decision to dissolve it have been found by the Court to affect directly both the group itself <u>and also its presidents, founders or individual members</u>.*
>
> Where the organisation of a religious community was at issue, a refusal to recognise it as a legal entity has also been found to constitute an interference with the right to freedom of religion under art.9 of the Convention, *as exercised by both the community itself and its individual members.*"[44]

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which is compatible with Convention rights. So, *even though the heading of section 3 is "Interpretation of legislation", the content of the section actually goes beyond interpretation to cover the way that legislation is given effect*."

[43] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 at § 74

[44] *Jehovah's Witnesses of Moscow v. Russia* (2011) 53 EHRR 4 at §§ 99-101

5.9 In *Islam-Ittihad Association and Others v. Azerbaijan* [2014] ECtHR 5548/05 (First Section, 13 November 2014) at paragraphs 39-40 the European Court of Human Rights underlined that:

> "39. The right to form an association is an inherent part of the right set forth in Article 11 of the Convention. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aims and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.
>
> 40. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy."

5.10 And in *Dogan v Turkey* (2017) 64 EHRR 5 the Strasbourg Court confirmed (at paragraphs 109-110):

> "Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.
>
> Pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.
>
> Respect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment.
>
> 110 As indicated above, the right of a religious community to an autonomous existence is at the very heart of the guarantees in art.9 of the Convention and, were the organisational life of the community not protected by art.9, all other aspects of the individual's freedom of religion would become weakened."

5.11 In *Ramazanova v. Azerbaijan* (2008) 47 EHRR 16 the Strasbourg Court found that the State's delays in allowing a charity to be legally registered meant that the charity had been unable to receive grants or financial donations or to engage in the charitable activities which were the main purpose of its existence. The significant delays in state registration, resulting in the association's prolonged inability to acquire legal entity status, had amounted to an interference by the authorities with the applicants' exercise of their right to freedom of association under Article 11 ECHR, and also with its freedom as protected under Article 9 ECHR to manifest without arbitrary State and unjustified

interference its religious beliefs in its charitable actions: *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 at §§ 71-5.

5.12 Religious organisations - including religiously based charities - are entitled to rely upon the principles of fairness and good administration to resist an oppressive and hence unlawful use of State power contrary to the contravention of the principle of pluralism most recently set out by the European Court of Human Rights in *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v. the former Yugoslav Republic of Macedonia* [2017] ECHR 532/07 (First Section, 16 November 2017) at §§ 93-96 where it reiterated that:

> "93. .... Since religious communities traditionally exist in the form of organised structures, the right of believers to freedom of religion, which includes the right to practise one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, *without arbitrary State intervention*.
>
> 94. In the context of Article 11 of the Convention, the way in which national legislation enshrines freedom of association and *its practical application by the authorities* reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions
> ...
> 95. ..[*T]he State has a duty to remain neutral and impartial in exercising its regulatory power* and in its relations with the various religions, denominations and groups within them. What is at stake here is the preservation of pluralism and the proper functioning of democracy .... *[W]here a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may work together and pursue common objectives collectively*.
>
> 96. The State's power to protect its institutions and citizens from associations that might jeopardise them must be used *sparingly, as the exceptions to the rule of freedom of association are to be construed strictly, and only convincing and compelling reasons can justify restrictions on that freedom*
> ...
> 97. ... This does not mean that it [the Court] has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued', and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'."

5.13 Thus, for example, in *St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator* [45] the provisions of paragraph 2 of Schedule 23 EA were

[45] *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)

held to apply to a Scottish registered charity which was "established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church among whose aims and objectives were:

- "to provide a Catholic, comprehensive, independent adoption service to birth parents, babies and children and adoptive parents .... especially those who wish to do so within the framework of their faith";

- "to offer an adoption service which has a concern for the spiritual care of the service users, rooted in the Catholic tradition" and

- "to prepare and assess prospective adoptive parents and to make decisions on their suitability as prospective adopters, with an emphasis on providing Catholics and others adoption and family support services within the framework of the Catholic faith".

5.14 The Scottish Charities Appeal Panel held that a religiously based adoption society could *not* lawfully be required by the Office of the Scottish Charities Regulator (OSCR) 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. This decision was avowedly taken in order to comply with the principles which the Strasbourg Court has found to be embodied within Articles 9 and 11 ECHR among them the following:

- that "associations formed for ... proclaiming or teaching religion, are also important to the proper functioning of democracy" [46]

- 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" [47]

- that "in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any

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

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

assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed" [48]

- that "states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs" [49] and

- that "the need to maintain true religious pluralism.... is vital to the survival of a democratic society." [50]

5.15 Turning back to the idea of the principle of subsidiarity as being the fundamental constitutional principle for the post-Nuremberg State, we may perhaps see the beginnings of a way of reconciling the idea of the general enforcement of equality law with leaving a human rights required space for *associations* which promote or preserve other visions of human flourishing than those now embodied in our current equality law.

6. MINISTERIAL EXCEPTIONS AND THE PROHIBITION AGAINST WORKPLACE DISCRIMINATION

6.1 In the United States of America, the courts developed what has become known as "the "ministerial exception" from anti-discrimination law. [51] 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. [52] In what might be seen as adding legal insult to spiritual injury,

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

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

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

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

[52] 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

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. [53]

6.2 Currently the Equality Act 2010 *concedes* to religious bodies some exemption from the full rigours of equality law in relation to work-related discrimination. 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. Paragraphs 1 and 3 provide, so far as relevant as follows:

"1 General

(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—

(a) it is an occupational requirement,
(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2) The provisions are—

.....

(e) section 49(3)(a) or (c) or (6)(b) or (c);

....

3 Other requirements relating to religion or belief

A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

(a) it is an occupational requirement,
(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

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taught a daily half-hour religion class and daily led her class in prayer was disallowed as inadmissible/non-justiciable before the civil courts.

[53] 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.

6.3 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").

6.4 The "occupational requirement" provisions of Schedule 9 EA 2010 were made in implementation of EU law accordance with the exceptions in relation to occupational requirements provided for by Article 4 of Directive 2000/78. [54] In Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43 (Grand Chamber, 22 January 2019) the European Court of Justice confirmed (at § 58) that:

> **"**freedom of religion is one of the fundamental rights and freedoms recognised by EU law and that the term 'religion' must be understood, in that regard, as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public."

6.5 Nonetheless the same CJEU has ruled in two cases recently considered whether Charities established under German law which were associated with respectively the Reformed and the Catholic Churches were able to rely upon these religious based derogations in relation to employment related decisions that the Article 4 of Directive 2000/78 religious derogations from the prohibition against workplace discrimination have to be construed narrowly by the courts and applied only in accordance with their strict terms[55] as being very much understood an exception, rather than as the expression

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[54] Article 4 of Directive 2000/78.

> "1. Notwithstanding article 2(1) and (2), member states may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
>
> "2. Member states may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

[55] See *Percy v Board of National Mission of the Church of Scotland*, 2006 SC (HL) 1, [2006] 2 AC 28 where the House of Lords held by a majority (Lord Hoffmann dissenting) that an associate Minister in

of a fundamental right of respect for the autonomy of religious bodies or as any general acceptance that religious motivated individuals can assert any kind of right to respect for their conscientious held beliefs.

6.6 In Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257 (Grand Chamber, 17 April 2018) a charity associated with the Reformed church advertised a job which involved preparing a report on Germany's compliance with the United Nations Convention on the Elimination of All Forms of Racial Discrimination. One of the requirements for the position was relevant church membership. Vera Egenberger's application was unsuccessful, in spite of her qualifications and previous experience, and she claimed not to have been selected due to her lack of confessional faith. She argued that the hiring decision was discriminatory and in breach of EU law, in accord with which German law had to be interpreted and complied. The CJEU observed at § 63:

> "[T]he lawfulness from the point of view of that provision of a difference of treatment on grounds of religion or belief depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may follow either from the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church or organisation to the outside world."

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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.

By contrast in *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29 [2014] 2 AC 163 the UK Supreme Court 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 at § 10:

> "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 § 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."

6.7 In Case C-68/17 *IR v. JQ* the employer was a company established under German law. Its purpose was to carry out the work of Caritas (an international confederation of Catholic charitable organisations) as an expression of the life and nature of the Roman Catholic Church through, among other things, the operation of hospitals. JQ, who was of the Roman Catholic faith, trained as a doctor and worked at one of IR's hospitals as head of internal medicine. He was divorced from his first wife, whom he had married in accordance with the Roman Catholic rite, but married his new partner in a civil ceremony without his first marriage having been annulled. IR dismissed him from his employment. JQ brought proceedings, claiming that his remarriage was not a valid ground for dismissal. He also argued that the dismissal breached the principle of equal treatment because a member of the Protestant faith in his position would not have had to suffer the same consequences on remarriage. According to IR, the terms of JQ's employment contract were such that he had breached his obligations under that contract by entering into a marriage that was invalid under canon law. The CJEU held that a church or other organisation the ethos of which was based on religion or belief and which managed a hospital in the form of a private limited company could not decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differed according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review before the national courts The Court further held that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees was consistent with that Directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they were carried out, the religion or belief constituted an occupational requirement that was genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and was consistent with the principle of proportionality, which was a matter to be determined by the national courts. The CJEU found

> "57 In the present case, the requirement at issue in the main proceedings concerns the respect to be given to a particular aspect of the ethos of the Catholic Church, namely the sacred and indissoluble nature of religious marriage.
>
> 58 Adherence to that notion of marriage does not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed. Therefore, it does not appear to be a genuine requirement of that occupational activity within the meaning of the first subparagraph of art.4(2) of Directive 2000/78, which is, nevertheless, a matter for the referring court to verify."

6.8 There are clearly then limits to the degree to which the European Courts (whether the European Court of Human Rights or the European Court of Justice) will afford respect to religious beliefs, even if held in community.

7. THE FREEDOM OF NON-EXPRESSION

7.1 In *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 the UK Supreme Court was faced with 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).

7.2 The directors of Ashers Baking Company Limited, Colin and Karen McArthur, are both committed Christians. Their contention was that it was 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 argued that legislation did 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). [56] Furthermore it was noted that there was as yet no Europe-wide consensus

[56] 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

on same sex marriage. [57] Neither is there as absolute Convention right not to be offended [58] nor is it "possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own".[59]

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disproportionate interference with Mr Brockie's freedom of religion in being forced to act in a manner contrary to his religious beliefs.

[57] 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 CoE 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."

[58] *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"."

[59] *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"

Contrast however *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 [2014] PTSR 758 *per* Lord Dyson MR at §88 opining 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. That was a lawful aim consonant with the objects of section 149 of the Equality Act 2010 and the policy adopted by TfL. The court noted that "Some people are gay" was a correct statement of fact. 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

7.3 It is not entirely clear that Ashers Bakery could properly be described and understood as being a "faith based" company or corporation, much along the lines described by one author as follows:

> "Recognising the power and ubiquity of the corporate form, certain individuals have combined to build and sustain corporations that adhere to their most deeply held convictions of all: their religious values.
>
> Motivating these individuals has not been a desire to proselytize per se, but rather a desire to serve their own needs—and the needs of other people of faith. This should not be surprising, as many people of faith, from a variety of religious backgrounds, feel alienated from if not downright excluded from a marketplace and corporate world driven primarily by the pursuit of profit.
> ....
> Predictably, they have created niche enterprises where individuals of shared religious convictions can pool resources, coming together as directors, and employees, investors and customers. These corporations are commonly committed not simply to honourable business practices broadly speaking, but rather to the principles of certain, particular religious traditions.
> ...
> [T]hey do not consider themselves beholden to profits alone. Their shareholders bargain around the rules that arguably require them to strictly maximize shareholder profits. They embrace certain principles and values as ends in themselves, willing to sacrifice potential financial gain, and to accept decreased profitability, in pursuit of them." [60]

7.4 In any event, 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,[61] though on one Papal analysis, they should be able to do so. As Pope John Paul II noted:

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advertisement with the slogan "Not gay! Ex-gay, post-gay and proud. Get over it!" was a riposte to the "gay acceptance" message of Stonewall and was seen as countering that message and encouraging "gay rejection" by implying, offensively and controversially, that homosexuality can be cured. TfL therefore were found to have acted lawfully in refusing to carry the advertisement.

[60] Ronald J Colombo *The First Amendment and the Business Corporation* (Oxford University Press 2014) at pp xv and 95.

[61] See the (5 to 4) majority decision in the US Supreme Court *Burwell v Hobby Lobby Stores Inc.* 134 S Ct 2751 (2014); 573 US (2014)

> The principal dissent . . . [Justice Ginsburg et al] stat[es] that '[f]or-profit corporations are different from religious non-profits in that they use labour to make a profit, rather than to perpetuate the religious values shared by a community of believers.' ...The first half of this statement is a tautology; for-profit corporations do indeed differ from non-profits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek 'to perpetuate the religious values shared,' in these cases, by their owners. Conestoga's Vision and Values Statement declares that the company is dedicated to operating 'in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business.' . . . Similarly, Hobby Lobby's statement of purpose proclaims that the

"In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business."[62]

7.5 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. [63] The fact that Asher Ltd was a business which charged for its services does not mean that its activities are not covered by the protections of human rights. This states, so far as relevant that

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

7.6 In protecting the right to *hold* an opinion the ECHR also protects what might be termed "negative freedom of expression", [64] 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. [65] This might also be termed *the freedom of non-expression*. 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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company 'is committed to . . . . [h]onouring the Lord in all we do by operating . . . in a manner consistent with Biblical principles."

[62] Pope John Paul II *Centesimus Annus* (Encyclical Letter, 1 May 1991) section 35 (emphasis in original) (available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.pdf :

[63] 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.

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

[65] 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.)"

> 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 <u>not</u> to express one's opinion*."[66]

7.7 By analysing the situation in *Lee v. Ashers Bakery* not as a discrimination against the messenger, but as disagreement with the message, the UK Supreme Court was able to hold that the defendants were being asked 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. And, as the Strasbourg Court has explained:

> "Bearing witness in words and deeds is bound up with the existence of religious convictions."[67]

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3 March 2019

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

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