

# Religion, The Rule of Law and Discrimination

## 2014 Gray's Inn Reading at Barnard's Inn

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1. One of the most difficult and contentious areas of our law today is the resolution of disputes generated by a conflict between, on the one hand, the religious beliefs of an individual and, on the other hand, actions which that individual is required to take, whether that requirement is by a public body, a private employer or another individual. The problem is particularly acute where the conflict is directly or indirectly between one individual's religious beliefs and another's non-religious human rights.<sup>2</sup>
2. It is a subject that affects many countries as they have become more liberal, multicultural and secular.<sup>3</sup> The issues in countries which are members of the Council of Europe and of the European Union, like England and Wales, are affected by European jurisprudence as well as national law. The development of the law in England is of particular interest because the Protestant Church is the established Church of England but the protection for secular and other non-Protestant minorities has progressed at a pace and in a

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<sup>2</sup> For two very recent commentaries, see Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others" (2014) 77(2) MLR 223-253, and Ronan McCrea, "Religion in the Workplace, *Eweida and Others v United Kingdom*" (2014) 77(2) MLR 277-307.

<sup>3</sup> see, e.g., Carl F. Stychin "Faith in the Future: Sexuality, Religion and the Public Sphere", (2009) 29 OJLS 729.

way that would have been beyond the comprehension of most members of society, including judges and politicians, before the Second World War.

3. This subject is large and complex and the law relevant to it is growing at a remarkably fast pace.<sup>4</sup> For the purpose of legal commentary, it falls naturally into two parts: (1) tracing the legal history and reasons for the developments I have mentioned, and (2) analysing the modern jurisprudence. In this address I propose to concentrate particularly on the first part although inevitably I shall refer, if briefly, to the contemporary developing jurisprudence. I think that it is important, for any sensible public debate on these sensitive and important issues, that we understand, from a legal perspective, where we have come from and why we have arrived here.
  
4. The Queen's Coronation Oath, in which she promised to maintain in the United Kingdom the Protestant religion and the rights and privileges of the Bishops and Clergy of the Church of England reflects the unique constitutional position of Christianity in Britain and, in particular, the Protestant Churches. The Queen is "Defender of the Faith", being the Christian faith. The Act of Settlement 1701 laid down that only Protestant descendants are eligible to succeed as monarch. A Roman Catholic is specifically excluded from succession to the throne.<sup>5</sup> The Sovereign must be in communion with the Church of England, and must swear to preserve the

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<sup>4</sup> See the recent masterly survey of Dingemans, Yeginsu, Cross and Masood, "*The Protections For Religious Rights Law and Practice*" (OUP 2013).

<sup>5</sup>Until the enactment of the Succession to the Crown Act 2013 a person could not succeed to the Crown or possess it if they married a Roman Catholic.

established Church of England and the established Church of Scotland. The Archbishop of Canterbury, the Archbishop of York, the Bishop of London, the Bishop of Durham, the Bishop of Winchester and the 21 longest-serving Bishops from other Dioceses in the Church of England are entitled to sit as Members of the House of Lords by virtue of their ecclesiastical offices. They are known as Lords Spiritual. No representatives from other religious organisations have a right to membership of the House of Lords.

5. The historic significance of Christianity in the application of our laws is a necessary starting point for any analysis of the relationship between religion, the rule of law and discrimination. In 1676 Hale CJ in convicting the defendant of blasphemy in *Taylor's Case* (1676) 1 Vent 293, 86 ER 189 said that—

“...to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved, and Christianity is a parcel of the laws of England: therefore to reproach the Christian religion is to speak in subversion of the law”

6. As Lord Radcliffe later said, to Hale CJ the bonds of civil society were preserved by religion, and the major institutions of society, including the government and the law, had it as their duty to support that form of it known as Christianity.<sup>6</sup>

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<sup>6</sup> Lord Radcliffe, *The Law & Its Compass* (1960), at 16.

7. That approach is exemplified by three historic societal and legal trends: the treatment of Jews, the law relating to blasphemy and the laws relating to homosexuality.
8. Following a prolonged period of persecution, the Jews were finally expelled from England by Edward I in 1290, the first European country to do so. One commentator has described medieval England as “innovative and precedent-establishing in its anti-Semitism”.<sup>7</sup> Jews started to return, with the tacit approval of Oliver Cromwell, in the middle of the 17<sup>th</sup> century, but foreign-born Jews faced severe legal obstacles to carrying on a livelihood here.
9. The so-called “Jew Bill” of 1753 was enacted to enable Jews to become naturalised without first converting. There was huge popular outcry, including the protest that naturalised Jews would threaten the livelihood of Christian merchants and shopkeepers and they would come to threaten Christian political authority, and that it was proper to reciprocate in some measure Jewish enmity towards Christianity. The Act was almost immediately repealed due to the popular opposition.<sup>8</sup>
10. That was the political setting for the approach of judges, who considered that it was their duty to ensure that the law gave no countenance to anything that involved a conflict with Christian beliefs. So, a gift for the advancement of

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<sup>7</sup> Anthony Julius, *Trials of the Diaspora* (2010), at 128.

<sup>8</sup> Note also that, although Jews (like Quakers) were exempt from the stipulations in The Clandestine Marriages Act 1753 (by section 18) as to the legal requirements for a valid marriage in England and Wales, that Act did not go so far as to declare their marriages valid.

the Jewish religion was held illegal by Lord Hardwicke LC in 1754 on the ground that it would advance that which was contrary to the Christian religion.<sup>9</sup> It was not until 1826 that the right of naturalisation was finally extended to Jews.<sup>10</sup> It was not until 1871, with the Promissory Oaths Act, that Jews were altogether free of legal disabilities on account of their faith and ethnicity.

11. Turning to blasphemy, the common law offence was entirely the result of judicial decisions over three centuries. It was only abolished in the Criminal Justice and Immigration Act 2008. Until the 19<sup>th</sup> century blasphemy was constituted by any attack on Christianity in general. It was then narrowed to scurrilous vilification.<sup>11</sup> The offence was restricted to attacks on Christianity; notably, for example, the court rejected the right of Mr Abdul Choudhury to bring a private prosecution against Salman Rushdie and the publishers of “The Satanic Verses” for (in the words of the summonses) “a blasphemous libel concerning Almighty God (Allah) the Supreme Deity common to all religions of the world...”<sup>12</sup>

12. Christian values were, of course, reflected in the law and the views of judges on sexual issues, such as homosexuality. Chapters 18 and 20 of Leviticus were the source of medieval Christianity’s rejection of homosexuality (and

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<sup>9</sup> *De Costa v De Paz* (1754) 2 Swans 532.

<sup>10</sup> *Ibid*, at 252.

<sup>11</sup> Blasphemy was an offence of strict liability, that is to say, the offence did not depend on the accused having an intent to blaspheme. It was sufficient for the prosecution to prove that what was said or written was intentional and blasphemous: *Whitehouse v Lennon*, *Whitehouse v Gay News Ltd* [1979] AC 617.

<sup>12</sup> *R v Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury* [1991] 1 QB 429.

continue to be so for many Christians, and, for that matter, orthodox Jews). The rejection found its way into the common law and statute. 1290 saw the first documented mention in English common law of a punishment for homosexuality. The Buggery Act 1533 brought sodomy within the scope of statute law for the first time and made it punishable by hanging. It was not until over three hundred years later that the Offences Against the Person Act 1861 abolished the death penalty for buggery. In 1887 Oscar Wilde was sentenced to two years in prison with hard labour under the Criminal Law Amendment Act 1885 which created the offence of committing “gross indecency” with another man. The offences of committing buggery with another person and of committing gross indecency with another man were carried forward into the Sexual Offences Act 1956.<sup>13</sup>

13. The classic common law view of Christianity as part of the law of England began to soften in the second half of the 19<sup>th</sup> century when scientific advances raised questions which could not be sensibly debated without a discussion of biblical texts and Christian doctrine free from the threat of prosecution. There also began to grow a genuine appreciation of the importance of freedom of speech. Accordingly, by the middle of the century, blasphemy had ceased to be regarded as affecting the security of the State or as challenging the very basis of the law. The law conferred considerably greater latitude for religious debate. In *R v Ramsay and Foot* (1883) 15 Cox CC 231, 238 Lord Coleridge CJ said:

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<sup>13</sup> Sections 12 and 13 of the Sexual Offences Act 1956.

“... the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy. I now lay it down as law that, if decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.”

14. It was not, however, until the seminal decision of the House of Lords in *Bowman v Secular Society* [1917] A.C. 406—upholding the validity of a testamentary bequest to the Secular Society notwithstanding that its main object involved a denial of Christianity—that it was authoritatively determined that the proposition “Christianity is part of the law of England” was held to be incorrect.
15. Accordingly, the broad picture until the end of World War II was of a society in which the law gave special recognition and protection to one religion, Christianity, but in a manner which increasingly recognised the importance of temperate free speech and philosophical scientific debate. There were no anti-discrimination laws in relation to other faiths, beliefs or conduct specifically designed to protect or enhance the rights of minorities.
16. That state of affairs has plainly changed beyond all recognition since the middle of the 20<sup>th</sup> century. The foundation stones for the remarkable transformation lay in the reaction to the atrocities of Nazism and fascism. That reaction was embodied in the Preamble to the 1945 Charter of the United Nations, the 1948 Universal Declaration of Human Rights<sup>14</sup>, and the 1950 European Convention on Human Rights (“the Convention”). They

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<sup>14</sup> This contained the statement: “*Recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*”.

enshrine an ethos of equality in dignity and rights, as distinct from simple majoritarianism, which has come to reflect one of the core values of liberal western democracy.

17. It is possible to identify three overriding factors which, in part building on those foundations, have diminished the centrality of Christianity in the application of our laws and resulted in the complex balancing of a range of rights, of which the manifestation of Christian beliefs is only one. First, there are “home-grown” discrimination laws relating to race. Secondly, there is the remarkable transformation brought about by European influence, in particular the Convention and membership of (what is now) the European Union. Thirdly, there is the huge shift in social and moral values away from the tenets of conservative or traditional Christianity, most notably in the support for same sex relationships, which has resulted in legislation despite opposition by observant Christians and those of other faiths.<sup>15</sup>

18. Let us start with race. The connection with religion may, at first sight, seem odd. What is clear, however, is that the legislation outlawing discrimination on the ground of race brought with it an element of anti-discrimination in relation to non-Christian faiths due to the overlap between ethnicity and

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<sup>15</sup> I shall not comment on the International Covenant on Civil and Political Rights 1966, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, or the European Union’s Charter of Fundamental Rights because they have not separately played a significant part in the historical development of the relevant jurisprudence in England and Wales.



religion, as in the case of Sikhs and Jews.<sup>16</sup> Moreover, the legislation not only reflected a more diverse community, and a greater embracing of difference, but it provided the model for later hate crime legislation in relation to, for example, religion and sexual orientation. This race aspect to the development of our anti-discrimination law is a uniquely British phenomenon due to Britain's colonial history and association with Commonwealth countries.<sup>17</sup>

19. The very first Race Relations Act, the 1965 Race Relations Act, was enacted to address discrimination against black people, and in particular, recent immigrants from the new commonwealth.<sup>18</sup> This made incitement to racial hatred a criminal offence. Subsequently, the Race Relations Acts 1968 outlawed racial discrimination by employers and trade unions in, amongst other things, the provision of goods, facilities, and services to members of the public. The Race Relations Act 1976 gave individuals the right of access to a court in their own name to seek redress for unlawful racial discrimination in various fields. The Crime and Disorder Act 1998 provided for the enhancement of sentences for criminal offences on the basis of racial

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<sup>16</sup> *Mandla v Dowell Lee* [1983] 2 AC 548 (concerning a Sikh); *R(E) v Governing Body of JFS* [2010] 2 AC 728 (concerning a Jewish faith school). As Albie Sachs has said, “Race and religion often go together” in ‘In praise of “fuzzy law”’ in *Islam and English Law* (ed Griffiths-Jones) (2013), at 228

<sup>17</sup> Professor David Feldman, for example, has pointed to the pluralism and multiculturalism that followed the immigration to Britain particularly from the Caribbean: “Why the English like turbans: multicultural politics in British history” in *Structures and Transformations in Modern British History* (eds Feldman and Lawrence) (2011), at 281-302.

<sup>18</sup> Karon Monaghan, “Equality Law”, at [5.53]. But, as noted above, by virtue of the definition of “racial grounds” and “racial group” in section 3(1) of the Race Relations Act 1976 as embracing colour, race, nationality or ethnic or national origins, the provisions of the Race Relations Acts extend far wider than black people: *Mandla v Dowell Lee* [1983] 2 AC 548.

motivation and for racially aggravated forms of the offences of assault, criminal damage and harassment.

20. I turn to the European influences on our law in the area of religious rights and their interface with other values. Before I do so, however, it is worth emphasising once again that, while European influences have been critical, our own, peculiarly British, social history and race legislation reflect a home-grown (non-European) context of multi-culturalism, including non-Christian ethnic traditions, in which tolerance and protection of difference is a pronounced feature. It is no accident that (as we shall see) the extension of hate crimes to embrace both religion and sexual orientation has been grafted on to the pre-existing race crime legislation.

21. I start with the Convention.<sup>19</sup> The United Kingdom was the first country to ratify it in November 1950. Particularly significant, for the purposes of this address, are Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 14 (prohibition of discrimination) and Article 2 of the First Protocol (right to education).

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<sup>19</sup> The Convention itself may be seen as reflecting a particular polity, namely a secular liberal democracy constituted by popular elections, rule of law, pluralism in the political sphere and respect for public freedoms and human rights: Mashood A Baderin in “An analysis of the relationship between shari’a and secular democracy and the compatibility of Islamic law with the European Convention on Human Rights” in *Islam and English Law* ed Robin Griffiths-Jones (2013 CUP), at p. 81.

22. The following initial points must be made about Article 9.<sup>20</sup> First, the jurisprudence of the European Court of Human Rights (“the ECtHR”) has highlighted the importance of the rights protected by Article 9 in a pluralist democratic society. In *Sahin v Turkey* (2005) 41 EHRR 8 the Grand Chamber said:

“104. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion ...”<sup>21</sup>

23. Secondly, as appears from that quotation and other cases, a belief may fall within the protection of Article 9 and Article 2 of the First Protocol even though it has nothing to do with religion, as commonly understood, provided that it satisfies some minimum requirements as to seriousness, cogency and recognition of human dignity.<sup>22</sup>

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<sup>20</sup> Article 9 – “Freedom of thought, conscience and religion. (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

<sup>21</sup> See also *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, at [15].

<sup>22</sup> *Ibid*, at [23]. See also *Lautsi v Italy* (2012) 54 EHRR 3; Dingemans et al, The Protections for Religious Beliefs para. 3.19., 3.23. The courts generally have refused to evaluate the core tenets of particular beliefs. There should be noted the recent decision of the Court of Appeal in *Mba v London Borough of Merton* [2014] 1 All ER 1235 where the majority held that Article 9 made it irrelevant for the purposes of the proportionality assessment whether a belief, in that case the refusal of a Christian to work on a Sunday, was or was not “a core component of the Christian faith” Per Elias LJ at [34] et seq

24. Thirdly, there is a critical distinction under Article 9 between the freedom to hold a belief and the freedom to express or “manifest” a belief. The former right is absolute. The latter right, the freedom to manifest belief, is qualified.<sup>23</sup>
25. Fourthly, the protection conferred on freedom of thought, conscience and religion under Article 9 must, of course, take its place alongside and must accommodate the other freedoms and protections conferred by the Convention. As the ECtHR said in *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34, at para 47:

“Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. ...”<sup>24</sup>

The ethos of mutual respect and tolerance applies equally where several religions co-exist in the same population.<sup>25</sup>

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with whom Vos LJ agreed (at [39]); Maurice Kay LJ reached the same conclusion but without resort to Article 9 ([18]-[19]). In *R (Hodkin) v Registrar of Births, Death and Marriages* [2013] UKSC 77, [2014] 2 WLR 23, at [57] Lord Toulson described religion for the purpose of the Place of Worship Registration Act 1855 in the following terms: “*I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.*”

<sup>23</sup> *Williamson*, [2005] 2 AC 246, at [16].

<sup>24</sup> See also *ibid*, at [17].

<sup>25</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397 at 418-419.

26. Fifthly, the ECtHR acknowledges the wide divergence between the national traditions and societal values of the different Member States in relation to Article 9 rights and the political sensitivities surrounding those rights. Accordingly, it gives Member States a wide margin of appreciation in relation to the balancing exercise under Article 9(2).<sup>26</sup>
27. Even allowing for that wide margin of appreciation one can see immediately from these principles that they represent a quite different social, political and legal environment to the Christian-centric one that existed in Britain before World War II.
28. Many of the early cases under Article 9 concerned prohibitions on the right to wear items of clothing regarded by the applicant as having religious significance.<sup>27</sup> There have been a number of cases on religious clothing in this jurisdiction. In *R(SB) v Governors of Denbigh High School* [2006] 1 AC 100 the claimant schoolgirl, who was Muslim, wished to wear a “jilbab”, a long coat-like garment which effectively concealed the shape of the female body and was considered to represent stricter adherence to the tenets of the Muslim faith than the shalwar kameez which was one of the uniform options

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<sup>26</sup> Dingemans et al, *The Protections for Religious Rights*, at paras. 3.92 ff.

<sup>27</sup> One of the first and most important was *Sahin v Turkey* (2005) 41 EHRR 8. In that case the applicant brought proceedings in Strasbourg as a result of being suspended from Istanbul University for wearing the Islamic headscarf in breach of the ruling of the Vice-Chancellor of the University that students who wore the Islamic headscarf would not be admitted to lectures. The ECtHR held that the interference with the applicant’s Convention rights was justified in principle, proportionate to the aim pursued and within the margin of appreciation allowed to Turkey bearing in mind in particular that the principle that the state should be secular was one of the fundamental principles of the Turkish state. It emphasised (at para. 109) the importance of the role of the national decision-making bodies in the difficult and sensitive area of the relationship between the State and religions. Interestingly, in that case, the Court singled out the United Kingdom for its tolerance, multiculturalism and efforts to eliminate racial discrimination.; at [61]. See also *Dogru v France* (2009) 49 EHRR 8.

permitted by her school. There were other schools in the area where the wearing the jilbab was permitted, and in one of which she eventually enrolled.

29. The House of Lords held that, since the wearing a jilbab was a sincere manifestation by the claimant of her religious belief, Article 9(1) was engaged; but that, since there was no evidence to indicate that she would have had any real difficulty attending another school where pupils were permitted to wear the jilbab, the refusal to allow her to attend school wearing a jilbab did not amount to an interference with her right to manifest her religious beliefs in practice or observance. Furthermore, the defendants' insistence on their policy on uniforms being adhered to was a limitation prescribed by law which was proportionate to its purpose and was objectively justified under Article 9 (2) even if it had interfered with the claimant's right to manifest her religion under Article 9 (1).<sup>2829</sup>

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<sup>28</sup> The following reasons were given (1) the school's rule about uniforms had been made for the legitimate purpose of protecting the rights and freedoms of others; (2) the defendants had gone to great lengths to devise a school uniform policy which respected Muslim beliefs in a way which was inclusive, unthreatening and uncompetitive; (3) the defendants had been entitled to conclude that the shalwar kameez was acceptable to mainstream Muslim opinion and that allowing the claimant to wear a jilbab had significant adverse repercussions for other pupils; and (4) Parliament had given the defendants the power to make their own decisions about uniforms.

<sup>29</sup> In *R(X) v The Head Teachers of Y School and The Governors of Y School* [2007] EWHC 298 (Admin) Silber J, applying the *Denbigh High School* case, held that the claimant's school had not infringed her Article 9 rights in prohibiting her from wearing the niqaab veil at school as she could have accepted an offer of a place at another school which achieved good academic results and which it was easy for her to get to and, most significantly, where she could wear a niqaab. There is also *R v Governing Body of Millais School ex p. Playfoot* [2007] EWHC 1698 (Admin) (decision of the defendant not to permit the claimant schoolgirl to wear a "purity" ring held not unlawful). Another interesting recent judgment on religious dress, not related to either school uniforms or employment, was that given on 16 September 2013 in *R v D(R)* (unreported) by HHJ Peter Murphy in relation to the wearing of the niqaab by the defendant during proceedings in the Crown Court. Balancing the defendant's Article 9 rights against "*the public interest in the Courts conducting criminal proceedings in accordance with the rule of law, open justice, and the adversarial process*" (at [36]), including the crucial importance of the ability of the jury to see the defendant for the purposes of evaluating her

30. In *Eweida v UK* (2013) 57 EHRR 8 the applicant, a practising Coptic Christian employed by British Airways, claimed that BA had directly and indirectly discriminated against her and was in breach of Article 9 of the Convention when it refused to permit her to wear a cross visible to customers.
31. The ECtHR held that there had been a violation of Article 9.<sup>30</sup> On the facts, Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith and was a manifestation of her religious belief which attracted the protection of Article 9.<sup>31</sup>
32. The Court said that, in order to count as a "manifestation" within the meaning of Article 9, there must exist a sufficiently close and direct nexus between the act and the underlying belief. A manifestation of religious belief within Article 9 is not limited, however, to an act of worship or devotion which forms part of the practice of a religion or belief or to an act in fulfilment of a duty required by the religion in question.<sup>32</sup>
33. The Court acknowledged that there is case law which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right

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evidence, Judge Murphy held that the defendant should be asked to remove her niqaab for identification and she must remove the niqaab throughout her evidence, but otherwise she would be free to wear the niqaab during the trial.

<sup>30</sup> Ms Eweida's claim was rejected by the Employment Tribunal as she had not established indirect discrimination. Her appeal to the Court of Appeal was dismissed. The Supreme Court refused her permission to appeal.

<sup>31</sup> (2013) 57 EHRR 8, at [89]. See also *Mba v Merton London Borough Council* [2014] 1 All ER 1235 at [34] (Kay LJ) and [41] (Vos LJ).

<sup>32</sup> Para. 82.

under Article 9(1).<sup>33</sup> The Court, however, distinguished employment cases where there is, of course, always an option for the employee to resign from the job and change employment. It determined that, where an individual complains of a restriction of freedom of religion in the workplace, rather than holding that the possibility of changing the job would negative any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction is proportionate.<sup>34</sup>

34. The Court held, accordingly, that there was an interference with Ms Eweida's right to manifest her religion and the only question was whether that was justified under Article 9(2). Since the interference with Ms Eweida's Article 9 rights was not directly attributable to the State, the Court's task was to examine whether in all the circumstances her right freely to manifest her religion was sufficiently secured within the domestic legal order and whether a fair balance was struck between her rights and those of others.<sup>35</sup>

35. The Court concluded that a fair balance had not been struck. It acknowledged that the aim of BA's uniform code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff. It held, however, that the domestic courts had accorded that aim too much weight. It had failed to give sufficient weight to the

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<sup>33</sup> It referred in that context to Lord Bingham's observations in the *Denbigh High School Governors* case.

<sup>34</sup> *Ibid*, at [83].

<sup>35</sup> *Ibid*, at [91].



consideration that the desire to manifest religious belief is a fundamental right both because a healthy democratic society needs to tolerate and sustain pluralism and diversity and because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. Furthermore, on the facts of the case, there was, no evidence of any real encroachment on the interests of others: Ms Eweida's cross was discreet, did not detract from her professional appearance and there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans or hijabs, had any negative impact on BA's brand or image.<sup>36</sup>

36. *Chaplin v UK* (2013) 57 EHRR 8 was decided by the ECtHR at the same time as *Eweida*. Ms Chaplin was a Christian, who, like Ms Eweida, wore a cross on a chain around her neck as a manifestation of her religious belief. She was employed by an NHS Trust as a nurse. The Trust had a uniform policy, based on guidance from the Department of Health, which prohibited the wearing of necklaces. The reason for the restriction on jewellery was to protect the health and safety of nurses and patients as it posed a risk of injury or infection. Ms Chaplin was asked to remove the cross and chain, but refused to do so, and was moved to a non-nursing position which subsequently ceased to exist.

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<sup>36</sup> Ibid, at [92]-[95].

37. The ECtHR held, consistently with its reasoning in *Eweida*, that there was an interference with Ms Chaplin's Article 9(1) rights<sup>37</sup> and the issue was whether the interference by the Trust, a public body, was necessary in a democratic society in pursuit of one of the aims set out in Article 9(2).<sup>38</sup> The Court considered that the interference was justified on the facts. It considered that the reason for asking Ms Chaplin to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Further, clinical safety was a field in which the domestic authorities must be allowed a wide margin of appreciation. It followed that the Court was unable to conclude that the measures of which Ms Chaplin complained were disproportionate.<sup>39</sup>
38. Reference to employment now takes us to our membership since 1972 of (what is now) the EU.<sup>40</sup> Membership of the EU has resulted in a further layer of rights and obligations bearing on the manifestation of religious beliefs and their reconciliation with other rights and obligations. This has produced legal complexity and cases of considerable difficulty and sensitivity. I am not here concerned with the EU's Charter of Fundamental Rights.<sup>41</sup> Rather, I am concerned with specific legislation of the EU bearing on the issues of religion and discrimination, and consequential legislation in the UK.

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<sup>37</sup> *Ibid*, at [97].

<sup>38</sup> *Ibid*, at [98].

<sup>39</sup> *Ibid*, at [99]-[101].

<sup>40</sup> European Communities Act 1972

<sup>41</sup> This was issued in 2000 and became legally binding on member states with the entry into force of the Treaty of Lisbon in December 2009. The Charter entrenches various rights, freedoms and principles, including those enshrined in the Convention.

39. The EC Framework Directive of 2000<sup>42</sup> required Member States to outlaw discrimination connected to religion and belief, disability, sexual orientation and age in employment and related fields. What is immediately striking is that the Framework Directive not only, for the first time in Europe, expressly outlawed discrimination in relation to sexual orientation, but it did so alongside express protection against discrimination connected with religion or belief, and without conferring any superiority of the one over the other. Yet, as history has shown, religion and sexual orientation are often in conflict.
40. The United Kingdom introduced two sets of regulations to give effect to the anti-discrimination provisions in the Framework Directive concerning religion or belief and sexual orientation in employment and related fields. These were the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003.
41. The subsequent history of this line of legislation can be briefly summarised. Part 2 of the Equality Act 2006 contained wide-ranging provisions, outside the employment field, making discrimination on the grounds of religion and belief unlawful: for example, in the provision of goods, facilities or services, the disposal of premises, the conduct of an education establishment and the performance of functions by a public authority, subject to certain specified exceptions. Pursuant to Part 3 of the 2006 Act, the Equality Act (Sexual Orientation) Regulations 2007 were made, outlawing sexual orientation

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<sup>42</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJL 303, 2 Dec 2000, 16).

discrimination across similar areas. The relevant anti-discrimination provisions are now to be found in the Equality Act 2010 (“EA 2010”).<sup>43</sup>

42. I have highlighted those provisions in relation to sexual orientation because the way the law has from time to time related to homosexual conduct and gay rights, or the absence of them, is an indication of the influence of religion, and Christianity in particular, within our society and polity. The change in that respect in the last 50 years has been on any footing dramatic.
  
43. The Wolfenden Report published in September 1957 recommended that “homosexual behaviour between consenting adults in private should no longer be a criminal offence”. The recommendation of the Report was highly controversial and was opposed by many. They included senior judges, who, in expressing publicly their views, reflected their social and religious conservatism. Lord Devlin, a Roman Catholic, attacked the philosophical basis of the Report in his book *The Enforcement of Morals*<sup>44</sup> in a famous exchange with Professor HLA Hart.<sup>45</sup> Ten years after the Wolfenden Report homosexual acts between consenting adults over 21 in private were legalised by the Sexual Offences Act 1967.

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<sup>43</sup> That is to say, the relevant anti-discrimination provisions formerly in the Race Relations Act 1976 and Part 2 of the Equality Act 2006, the 2003 Religion or Belief Regulations, the 2003 Sexual Orientation Regulations and the 2007 Sexual Orientation Regulations. EA 2010 includes race, religion or belief and sexual orientation as “protected characteristics” and prohibits discrimination in relation to them in Part 2 of the Act. A distinction is drawn between direct and indirect discrimination: the former cannot be justified but the latter can be.

<sup>44</sup> Patrick Devlin, *The Enforcement of Morals* (1965).

<sup>45</sup> See also the views expressed in *Shaw v DPP* [1962] AC 220 by Viscount Simonds (at p. 268) and Lord Tucker (at p. 285).

44. In the 1977 Gay News trial<sup>46</sup> there occurred what, in retrospect, was one of the seminal events in the history of the post-war tension between the promotion of religious and faith values and what are now generally accepted as core values of a pluralist liberal western democracy, namely press freedom and the right to express irreligious or even anti-religious views. The defendants were the publishers and the editor of Gay News, who were charged with blasphemous libel. Gay News had published a poem, which purported “to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after the moment of his death”.<sup>47</sup>
45. The defendants were duly convicted by a majority verdict of 10 to 2 and the judge imposed on the editor a sentence of 9 months’ imprisonment suspended for 18 months, a fine of £500 and on the publishers a fine of £1000. The convictions were upheld in the Court of Appeal, but the prison sentence was quashed as inappropriate. That was itself a small but nonetheless significant nod in the direction of pluralism, dissent and free speech.<sup>48</sup>
46. The moment which many will have seen as the most decisive modern victory of religious morality over those without faith or respect for religion proved to be the swansong of the criminal offence of blasphemy. The Commissioners

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<sup>46</sup> In a private prosecution brought by Mrs Mary Whitehouse

<sup>47</sup> Per Roskill LJ, [1979] QB 10, at 12.

<sup>48</sup> The case was further appealed to the House of Lords on the issue of whether the offence of publishing a blasphemous libel required an intention to blaspheme. The House of Lords, dismissing the appeal, held (with Lord Diplock and Lord Edmund-Davies dissenting) that it was sufficient for the prosecution to prove that publication had been intentional, and that the matter published was blasphemous. In other words, it was an offence of strict liability.

of the Law Commission of England and Wales began consideration of the abolition or reform of the offences of blasphemy and blasphemous libel in July 1977 upon conclusion of the trial. The Law Commission published its final report<sup>49</sup> in June 1985 which, highly unusually, put forward both a majority and a minority recommendation. The majority recommended the abolition of blasphemy and blasphemous libel without any replacement.<sup>50</sup>

47. There were no successful prosecutions for blasphemy or blasphemous libel after the *Gay News* case,<sup>51</sup> although it took a further 23 years following the publication of the Law Commission report for Parliament to abolish the offences of blasphemy or blasphemous libel in the Criminal Justice and Immigration Act 2008. The eventual repeal reflected an inexorable process of confining the importance of religion generally, and Christianity in particular, in its interface with other social and moral values.

48. As the 20<sup>th</sup> century reached its close, there was there was a marked extension of gay rights. In July 1997 the European Commission expressed the opinion that the fixing of the minimum age for lawful homosexual activities between men at 18, rather than 16 as for sexual relations between a man and a woman, violated Articles 8 and 14 of the Convention. After two

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<sup>49</sup> Law Com No. 145

<sup>50</sup> The two dissenting Commissioners agreed with the substance of the main criticism of the existing common law offence of blasphemy of the majority and with the recommendation of the majority that it should be abolished. They considered, however, that the preferable course would be to enact a new offence which, reflecting the views of Lord Scarman in the *Gay News* case, would penalise anyone who published grossly abusive or insulting material relating to any religion for the purpose of outraging religious feelings.

<sup>51</sup> The last blasphemy case was an unsuccessful attempt to prosecute the Director-General of the BBC, Mark Thompson for broadcasting “Jerry Springer – The Opera”: *R(Green) v City of Westminster Magistrates’ Court, Thoday and Thompson* [2007] EWHC 2784 (Admin).

attempts to introduce legislation to rectify the position, which were rejected by the House of Lords in its parliamentary capacity, the age of consent to lawful homosexual acts was lowered to 16 by use of the Parliament Act 1911.<sup>52</sup>

49. In 1999 the ECtHR held that investigation into the sexual lives of members of the armed services and their subsequent discharge on the grounds of their homosexuality was a breach of Article 8.<sup>53</sup> As a result in 2000 the Government lifted the ban on lesbians and gay men serving in the armed forces.<sup>54</sup>

50. Then from 2000 there came the European legislation, to which I have referred, outlawing discrimination in relation to sexual orientation as well as race and religion.

51. As the history I have outlined clearly indicates, it would be quite wrong to regard the protection of gay and lesbian rights as a purely European dimension imposed on an unwilling Christian-centric UK. The European dimension is important but it must be remembered that the Wolfenden Report and the relevant provisions of the Sexual Offences Act 1967 had nothing to do with European legislation or jurisprudence. They were

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<sup>52</sup> Sexual Offences (Amendment) Act 2000, which was brought into force on 8 January 2001. The proceedings in the ECtHR were then struck out by consent: *Sutherland v UK*, (Application no. 25186/94) (27.3.2001).

<sup>53</sup> *Lustig-Prean and Beckett v UK*, (2000) 29 ECHR 548

<sup>54</sup> Another notable Strasbourg decision was in *Goodwin v UK*, (2002) ECHR 588, in which the ECtHR upheld the complaint of the applicant, who was a post-operative male to female transsexual, that the failure of English law to recognise and give effect to her gender reassignment was a violation of Article 8 and Article 12. This led to the enactment of the Gender Recognition Act 2004.

consequences of changes in political and social values in the pluralist and tolerant democracy that is now an overriding characteristic of Britain today and which produced Britain's original home grown anti-discrimination race laws. Similarly, the recognition of the freedom to express views inconsistent with Christian teaching, by the abolition of the offence of blasphemy, was independent of European influence.

52. This can also be seen in extensions of the stirring up or incitement offences, the so called "hate crimes", and of the enhanced sentencing regime, which were originally restricted to race. Since 2001 they have been extended to religious hatred and hatred on the ground of sexual orientation.<sup>55</sup> There was no obligation under EU legislation or the Convention to extend the criminal law in these ways. Equally, the enactment of the Civil Partnership Act 2004 and, more recently, the Marriage (Same Sex Couples) Act 2013 were expressions of domestic political will and not a requirement of membership of the EU or the Council of Europe.

53. I have highlighted this point because one of the most difficult and sensitive issues currently faced by the courts is the extent to which it is legally permissible for public institutions and our law to favour one protected right over another. This has arisen most markedly in the friction between the right

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<sup>55</sup> Aggravated offences of assault, criminal damage and harassment were extended to religious hatred by the Anti-terrorism and Security Act 2001. The stirring up or incitement offences were extended to religious hatred by the Racial and Religious Hatred Act 2006 and to sexual orientation by the Criminal Justice and Immigration Act 2008. The enhanced sentencing regime was extended to hostility to religious groups by the Anti-terrorism, Crime, and Security Act 2001 and to hostility on the ground of sexual orientation by the Criminal Justice Act 2003.



of sincere Christians to manifest their religious belief, notably belief in the sinfulness of homosexual practices, and the right of gay men and lesbians not to be discriminated against. Both can claim to rely on Articles 8, 9 and 14 of the Convention and on the anti-discrimination provisions now to be found in the EA 2010.

54. Important recent cases provide guidance on how the courts should approach these difficult conflicts between the manifestation of Christian (or, indeed, other religious) beliefs and the protection and promotion of secular values and other conduct protected by the Convention and anti-discrimination legislation.
55. In *Ladele v UK* (2013) 57 EHRR 8, the claimant, a Registrar of Births, Marriages and Deaths, employed by the London Borough of Islington before the introduction of civil partnerships for same sex couples, refused to officiate at civil partnerships on the ground that, as an orthodox Christian, she believed that marriage is the union of one man and one woman for life. Her employer initiated disciplinary proceedings because, by refusing to conduct civil partnership ceremonies, she had failed to comply with the local authority's code of conduct and equality and diversity policy. Ms Ladele applied to the ECtHR<sup>56</sup> on the ground that the local authority's decision not to make an exception for her and others in her situation amounted to discrimination in

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<sup>56</sup> The Employment Tribunal upheld Ms Ladele's complaint of direct and indirect discrimination. The Employment Appeal Tribunal reversed that decision. The Court of Appeal rejected her appeal. The Supreme Court refused her permission to appeal.

breach of Article 14. The Court held that there had been no violation of Article 14 taken in conjunction with Article 9.

56. The Court noted that it had previously held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification and that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship. It also noted, however, that since practice in that regard is still evolving across Europe, the contracting states enjoy a wide margin of appreciation as to the ways in which that is achieved within the domestic legal order.<sup>57</sup>

57. The Court acknowledged that the consequences for Ms Ladele were serious in that she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and ultimately lost her job. The Court also noted that the requirement to participate in the creation of civil partnerships was introduced subsequent to her entry into her contract of employment. The Court said that, on the other hand, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. It concluded that the local authority, which initiated the disciplinary proceedings, and the domestic courts, which rejected Ms Ladele's

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<sup>57</sup> (2013) 57 EHRR 8, at [105].

discrimination claim, had not exceeded the margin of appreciation available to them.<sup>58</sup>

58. In *McFarlane v UK* (2013) 57 EHRR 8, Mr McFarlane, a Christian, was employed as a counsellor. He was not willing to work with same-sex couples in cases where issues of psycho-sexual therapy were involved, and he was dismissed for that reason. The employers had an equal opportunities policy which required them to ensure “that no person ... receives less favourable treatment on the basis of characteristics, such as ... sexual orientation”. On entering into his contract of employment, the claimant signed up to the employers’ equal opportunities policy.

59. The ECtHR noted that Mr McFarlane was employed by a private company. In determining whether the United Kingdom had complied with its positive obligation to secure Mr McFarlane’s rights under Article 9, and whether a fair balance was struck between the competing interests at stake, the court noted that the loss of Mr McFarlane’s job was a severe sanction for him. It also noted that he was aware at the time of his enrolment that his employer operated an equal opportunities policy and that the filtering of clients on the ground of sexual orientation would not be possible.<sup>59</sup>

60. The Court said, however, that the most important factor was that the employer’s action was intended to secure the implementation of its policy of

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<sup>58</sup> Ibid, at [106].

<sup>59</sup> Ibid, at [109].

providing a service without discrimination. The Court did not consider that the margin of appreciation was exceeded,<sup>60</sup> and so concluded that there had been no violation of Article 9, taken alone or in conjunction with Article 14.<sup>61</sup>

61. In *Preddy v Bull*<sup>62</sup> the defendants ran a private hotel. In *Black v Wilkinson*<sup>63</sup> the defendant let out rooms in her family home on a bed and breakfast basis. In both cases the defendants were Christians who, because of their religious beliefs, operated a policy to restrict occupancy of their double-bedded rooms to married couples. In both cases they turned away the claimants, who were homosexual couples. The claimants in *Preddy* were in a civil partnership. The claimants in *Black* were partners, but not civil partners. The claimants in both cases brought proceedings alleging discrimination contrary to the Equality Act (Sexual Orientation) Regulations 2007 (“the Sexual Orientation Regulations”). Those Regulations contained specific exceptions, including an exemption for religious organisations in Regulation 14.

62. The Court of Appeal in both *Preddy* and *Black* concluded that there had been direct discrimination on grounds of sexual orientation because the claimants, being of the same sex, could not marry.<sup>64</sup> Mr and Mrs Bull and Mrs Wilkinson were granted permission to appeal to the Supreme Court, but Mrs Wilkinson decided not to pursue the appeal.

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid, at [110].

<sup>62</sup> [2012] 1 WLR 2514; on appeal [2013] 1 WLR 2741.

<sup>63</sup> [2013] 1 WLR 2490.

<sup>64</sup> The judges in *Black* indicated that they would have preferred to hold that there had been indirect discrimination rather than direct discrimination, but considered that they were bound in that respect by the earlier decision in *Preddy v Bull*.

63. While the judges in the Supreme Court disagreed over whether the defendants had directly (as opposed to indirectly) discriminated against the claimants on the grounds of sexual orientation (with the majority led by Lady Hale finding that there had been direct discrimination<sup>65</sup>), all of the judges agreed that the policy of letting double-bedded rooms only to married couples was unjustified discrimination on the basis of sexual orientation within Regulation 3(3) of the Sexual Orientation Regulations. The Supreme Court also unanimously rejected the argument that the Regulations needed to be read so as to give effect to the defendants' Article 9 right of freedom to manifest their religious beliefs. The limitation on the Bulls' Article 9 rights was deemed a proportionate means of pursuing the legitimate aim of protecting the claimants' rights not to be unlawfully discriminated against on the basis of their sexual orientation.

64. I turn finally and briefly to the one part of this address which I have not specifically addressed - the Rule of Law. The Rule of Law is one of the fundamental principles of our uncodified democratic constitution.<sup>66</sup> There are different views about its precise meaning and ambit.<sup>67</sup> I refer to it here as

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<sup>65</sup> For further exploration of the distinction between direct and indirect discrimination, see Lady Hale, 'Religion and Sexual Orientation: The clash of equality rights', 7 March 2014, The Comparative and Administrative Law Conference, Yale Law School

<sup>66</sup> "The Rule of Law and Its Underlying Values" by Jeffrey Jowell in *The Changing Constitution* (7<sup>th</sup> ed, 2011) (eds Jowell and Oliver), at 12.

<sup>67</sup> Lord Bingham in *The Rule of Law* (2010) put forward eight principles underlying the concept of the Rule of Law. He summarised its core as being that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts. Some legal philosophers, on the other hand, have seen the Rule of Law as meaning that the law itself has certain inherent qualities, such as clarity, prospectivity, stability, openness and access to an impartial judiciary (see Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195, and *The Authority of Law* (1979). Lon Fuller's requirements

reflecting certain inherent values in the law: those of certainty, consistency, accountability, efficiency, due process and access to justice. It is relevant here because we can see how a body of law is steadily being built up which provides the means for resolving disputes in this very sensitive and difficult area where an individual's faith or belief system conflicts with a course of conduct imposed on him or her by a public body or someone else.

65. As I said at the outset, any attempt at an overall appraisal of the law is beyond the scope of this address. What is clear, however, is the extraordinary distance that the law has travelled in the course of barely half a century. It has moved from a Christian-centric body of law with no anti-discrimination legislation to one of neutrality towards all religions or beliefs and a complex framework of civil and criminal anti-discrimination legislation. It is an area where the State enjoys a wide margin of appreciation in balancing competing values. This does not necessarily mean, however, as some commentators have suggested, the unqualified triumph of secularism over religion. Rather, it means that the law has enlarged the space within which citizens are free to adhere to their own faith or belief system or to act in the absence of either.<sup>68</sup> Interference with that right is only legally valid if

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were generality, public promulgation, stability, consistency, fidelity to purpose and prohibition of the impossible (see Fuller, *The Morality of Law* (1964)).

<sup>68</sup> Comp, Nigel Simmonds, *Law As a Moral Idea*, (20007 OUP). This is not so different from Lord Rowan Williams' idea of the Rule of Law as "*the establishing of a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity as such, independent of membership in any specific human community or tradition*": Rowan Williams, "Civil and religious law in England: a religious perspective" in *Islam and English Law*, (ed Griffiths-Jones) (2013), at 30.

in all the circumstances it is proportionate and pursuant to a legitimate object.

66. That assessment is ultimately an objective one to be made by the judges. It is the very antithesis of the Rule of Law that it should be dependant on the faith or belief systems of individual judges. That is why Laws LJ in *McFarlane* rejected the suggestion of Lord Carey that these cases should only be heard by panels of judges who have “a proven sensitivity and understanding of religious issues”.<sup>69</sup> Judges are today selected in transparent and open selection processes and against objective criteria to assess their suitability for a judicial role. Lord Carey’s comment can be seen, however, as an endorsement of the principle of judicial diversity from a religious perspective. That is part of a broader and important discussion about judicial diversity but one for another day.

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<sup>69</sup> [2010] EWCA Civ 880 at [23]-[24]