

Are we a Christian country? Religious freedom and the law

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When the Prime Minister repeated his view that we are a Christian country in April this year,¹ it instantly provoked a reaction from leading secularists, scholars and celebrities, regretting “the negative consequences for politics and society that this engenders”.² The politics are not for me, but the confusing attitude to religion in this country (by which for this purpose I mean England) which this exchange reveals also has consequences for the law, and that is my concern.

We have an established church. This means that our head of state, Her Majesty the Queen, is also head of the Church of England and 26 of its bishops have seats in the House of Lords. Anglican prayers are said at the beginning of each day in both the House of Lords and the House of Commons. The judiciary of England and Wales begin each legal year with a spectacular service in Westminster Abbey and many similar services are held around the country during the month of October. The Church of England has its own legislative powers and also has special privileges and duties in relation to marriages and to burials. Until recently it enjoyed the special protection of the law of blasphemy.

¹ *Church Times*, 16 April 2014, repeating a view expressed in December 2011, on the 400th anniversary of the King James Bible.

² *Daily Telegraph*, 20 April 2014.

But England is one of the least religious countries in Western Europe. According to the British Social Attitudes Survey, affiliation to the Church of England fell from 40% in 1983 to 20% in 2010 and 16% in 2013.³ Self-identification as any sort of Christian fell from around 72% in the 2001 census to under 60% in 2011, while having no religion rose from 15% (14.6) to 25% (24.7). Insofar as religious adherence is holding up here, it is because of the growth of religions other than Christianity, most notably Islam, which rose from 3% in the 2001 census to 5% in 2011. Only 24% in the most recent British Social Attitudes Survey thought that being a Christian was an important component of being British.⁴

You might still think that adherents of the established Church would feel that they are well protected by the law in this country. But that is not how they feel. An academic study of perceptions of religious discrimination in 2011 reported that “over the past decade there has, in general, been a reduction in the reported experience of unfair treatment on the basis of religion or belief”.⁵ However, new forms of unfair treatment were being reported, particularly by Christians. “Some Christians also articulated a sense of the marginalisation of Christianity compared to its historic position in society and spoke of what they felt was a comparatively fairer treatment of other religion or belief groups . . .” On the other hand, non-religious groups felt that Christianity and religion in general was still privileged in ways which could result in unfair treatment for them.⁶

³ British Social Attitudes No 28, 2011, and No 31, 2014.

⁴ No 31, 2014, Table 4.1.

⁵ Weller and others, *Religion or Belief, Discrimination and Equality*, Bloomsbury, 2013, p 208.

⁶ *Ibid*, p 210.

The truth is that the law also has a confusing attitude to religion. And that is because of the nature of religious belief. Some of us will be going on to Evensong in the Cathedral after this lecture. We shall probably say the creed. This is a summary of what Christians believe about their God, his promises to us and his sacrifices for us. It tells us two things about religious belief: first, that what we believe is different from what people of other religions believe, but we all think that our particular beliefs are true; and second, therefore, that religious truth is different from scientific truth.

My fellow Justice of the Supreme Court, Lord Toulson, has described religion as:

“a spiritual or non-secular belief system, which claims to explain mankind’s place in the universe and relationship with the infinite and teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with that 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.”⁷

The same point was made by another colleague, Lord Justice Laws when he said that:

“In the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, . . . but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society”.⁸

⁷ R (*Hodkin*) v Registrar of Births, Deaths and Marriages [2013] UKSC 77, [2014] 1 AC 610, para 57.

⁸ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872, para 21.

Religion tends to make two different sorts of claim upon the law, one which I believe to be legitimate and one which I believe to be illegitimate, but neither is without its problems, for believers and non-believers alike.

The legitimate claim is to freedom of thought, conscience and religion – the freedom to believe what one wishes, the freedom to express those beliefs, the freedom to manifest them, in worship, teaching, practice and observance, and the right not to be treated less favourably than others simply because of those beliefs. These claims are indeed recognised in our law. Article 9.1 of the European Convention on Human Rights, which is made part of United Kingdom law by the Human Right Act 1998, provides that:

“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.”

Freedom of thought is unqualified: anyone can believe what they like. But article 9.2 provides that the freedom to manifest one’s beliefs can be subject to limitations, though only to those which are “prescribed by law and 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”.

Article 14 of the European Convention also provides that the enjoyment of the rights

protected by the Convention, such as the right to liberty or the right to freedom of expression, must be secured without unjustified discrimination on a wide variety of grounds, including religion or belief.

The European Convention is mainly about protecting us from the State. It is unlawful for a public authority to act in a way which is incompatible with our convention rights. Laws which Parliament has enacted must so far as possible be interpreted so as to be compatible with those convention rights. If this is not possible, the courts cannot strike them down, but the High Court (and above) can make a declaration that a particular provision in an Act of Parliament is incompatible; then it is up to Parliament whether to put it right.

But the Equality Act 2010 goes further, because it also protects us from discrimination – less favourable treatment – by the suppliers of employment, training, goods and services on a variety of grounds, including religion or belief. Those suppliers may be in either the public or the private sector. The inspiration for this protection came from European Union law, but that only operates in the fields of employment and vocational training. It was our Parliament that decided to take the protection further, into the supply of goods and services, including such things as bakery and hotel rooms.

But legitimate though it is, this protection raises many questions. First, it is given to all religions and beliefs, including the lack of them. As the European Court of Human

Rights has often said (most recently in its defence of the French ban on wearing face coverings in public):

“Freedom of thought, conscience and religion is one of the foundations of a democratic society . . . 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”.⁹

This pluralism is a challenge for all of us, because, by definition, if we believe in the creed we do not believe in the central tenets of other faiths and other faiths may not afford us the same toleration. We may have to respect all faiths equally even if not all faiths are equally respectable.

Secondly, as the role of the State is to be a “neutral and impartial organiser of the exercise of various religions, faiths and beliefs”, its “duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the way those belief are expressed”.¹⁰ This, of course, includes the courts. So, for example, we had a case about whether the statutory ban on corporal punishment in all schools, state and independent, was compatible with the freedom of certain Christian sects to manifest their belief that to spare the rod is to spoil the child.¹¹ It would have

⁹ *S.A.S. v France*, App no 43835/11, Grand Chamber Judgment of 1 July 2014, para 124.

¹⁰ *Ibid*, para 127.

¹¹ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

been very tempting to interrogate that belief and to demonstrate that the parents and teachers were mistaken in thinking that the Bible required them to beat their children.¹² But we could only examine whether that belief was genuinely held.

In the same way, we had a case about a Muslim school girl who complained that her school uniform rules interfered with her right to manifest her belief that, on reaching puberty, she should cover herself from neck to toe in a long black garment called a jilbab.¹³ One of our number, who happens to have Muslim children, did express the view that she was mistaken in thinking that the Prophet's instruction to dress modestly required this of her. The rest of us did not think it right to question the theology. We could only investigate whether this was genuinely her belief, rather than one foisted upon her by her male relatives.

Other countries have experienced the same problem. The First Amendment to the United States Constitution requires, first, that "Congress shall make no law respecting an establishment of religion" – in other words that it cannot prefer one religion over another – that was what the framers were fleeing from in Europe; and second, that "Congress shall make no law . . . prohibiting the free exercise of" religion. So they too have refused to get involved in interpreting religious doctrine.

Thirdly, while the State cannot place limitations on what beliefs you may hold, it can

¹² As in fact the first instance Judge had done.

¹³ *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

place limitations on the manifestation of your beliefs, provided that the limitation is a proportionate means of achieving one of the listed legitimate aims (protecting public order, health or morals, or the rights and freedoms of others). The State is not obliged to tolerate your religion if it does harm to others.

A good example of this dates back long before the era of human rights, but would, I believe, be decided the same way today. In *R v Senior* [1899] 1 QB 283, a father was convicted of the manslaughter of his baby by the illegal act of neglecting the child, contrary to the Prevention of Cruelty to Children Act 1894. He had refused to provide the child with medical aid or medicine, although he knew that the child was seriously ill, because he belonged to a sect called the “Peculiar People” which believed that to do so showed insufficient faith in God and the power of prayer. Nowadays, of course, we can interfere in the family in order to protect the life and health of the child, either by taking the child away altogether, or more probably, by authorising the treatment to which the parents object. There is, for example, a standard procedure for authorising, as a last resort, the giving of blood products to the child of Jehovah’s Witnesses.¹⁴ Many of you will know that Ian McEwan’s latest book, *The Children Act*, centres round the more difficult dilemma of whether to authorise life-saving treatment for a 17 year old child who himself fervently believes that his religion forbids it. The question is whether the child’s right to life trumps his right to manifest his religious belief.

A similar balancing act comes up in private law discrimination cases. An employer or

¹⁴ *Re R (A Minor) (Blood Transfusion)* [1993] 2 FLR 757.

supplier cannot discriminate against you directly because of your religion (“no Jews here”). However, he can impose rules or practices which indirectly discriminate against particular believers who will find it hard to comply with them (“you must work on Friday afternoons in winter”). But he can only do this if it is a proportionate means of achieving a legitimate aim, rather than a disguised way of discriminating against a particular religion. This is where the concept of reasonable accommodation comes in. But when is it reasonable to expect an employer to accommodate an employee’s religious practices?

There has been an idea that the more central a practice is to a particular religion, the more reasonable it is to expect an employer to accommodate it. Christians have faced problems with this idea, because our religion is so comparatively undemanding. The Church of England, for example, has no dietary laws, no dress code for men or women, and very little that is positively required of us by way of religious observance (I seem to recall being taught in my confirmation classes that we must take communion at least three times a year, including Easter Day, but it was a long time ago so I may have got that wrong). So Christians have found it harder to challenge their employers’ requirements than have members of some other faiths.

There was, for example, the case of Ms Eweida, a British Airways check-in desk worker, who was prohibited from wearing a discreet cross at work, whereas Muslim workers were allowed to wear the hijab; and the case of Ms Chaplin, an NHS nurse, who was also prohibited from wearing a cross at work, whereas a particular type of hijab was allowed. Both of them lost their discrimination cases before employment tribunals in this country.

The tribunals held that this was not even indirect discrimination, for the highly technical reason that Christians as a group were not put at a particular disadvantage by not being able to wear a cross, because the group did not regard wearing a cross as an obligation. It was a matter of personal choice to manifest their religion in this way. Even if it were discrimination, the requirements were justified, either by the corporate uniform policy or on health and safety grounds.

Ms Eweida and Ms Chaplin then took their cases to the European Court of Human Rights in Strasbourg under article 9 of the Convention. They claimed that wearing the cross was a manifestation of their Christian belief and there was no good reason for preventing them from doing so. The Strasbourg court was much more sympathetic than the employment tribunals had been. It held that wearing the cross was indeed a manifestation of their religion, even though it was not a mandatory requirement for them to do so. It also held that this was an interference with their right to manifest their religion. It was no answer to say that they could get a different job where the uniform requirements were not so strict. (Some previous cases had held that this was a good enough answer, so this was an important break-through.) The ease of changing jobs was just an element in the deciding whether the interference was justified. The Strasbourg court held that British Airways had not been justified in prohibiting the cross (and indeed they had abandoned the rule soon afterwards). On the other hand, that the hospital had been justified in doing so for health and safety reasons (the hijabs which were permitted were the tightly fitting sports variety which did not pose the sort of health risk posed by dangling jewellery.)

More recently, our courts have been grappling with the case of a Sabbatarian Christian care worker who did not wish to be rostered to work on a Sunday. The Court of Appeal held that the tribunals had been wrong to reject her claim on the basis that Sabbatarianism is not a “core component” of the Christian faith: it was a matter for her what her religion required. But they rejected it on the basis that it was simply not practicable for her employer to let her off Sunday working altogether – it was enough to time her shifts so that she could get to church.¹⁵

Whether you agree with these decisions or not, you can see that what is going on is a careful balancing act between the different interests involved and that both in discrimination and in human rights law there is developing a principle of reasonable accommodation between them. That does not mean that the decision is always an easy one. I had a lively debate recently with one of the Strasbourg judges who was in the majority in the case of *Francesco Sessa v Italy*.¹⁶ A Jewish advocate complained about the Italian court’s refusal to adjourn his case to a date which did not coincide with the Jewish holidays of Yom Kippur and Sukkot. This, he said, was an interference with his right to manifest his religion. His complaint was dismissed by a majority of 4 to 3. My friend in the majority thought that the lawyer was just playing games to get the case adjourned yet again and could easily have sent along another lawyer in his place. A powerful minority pointed out that, for a measure to be proportionate, the authority must choose the means which is least restrictive of rights and freedoms. Seeking a reasonable accommodation

¹⁵ *Mba v London Borough of Merton* [2013] EWCA Civ 1562, [2014] 1 WLR 1501; the Supreme Court refused permission to appeal.

¹⁶ App no 28790/08, judgment of 3 April 2012.

may, in some circumstances, constitute a less restrictive means of achieving the aim pursued. Mr Sessa had given the Italian court ample notice of the problem and reorganising the lists to accommodate him would have caused minimal disruption to the administration of justice - “a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society” (para 13). My friend agreed that the majority could have articulated this principle more clearly, even if they had come to a different conclusion on the facts.

A rather different problem arises where there is a clash between two different equality rights. So, for example, there was Ms Ladele, the registrar of births, deaths and marriages who would not take any part in registering civil partnerships and Mr McFarlane, the Relate counsellor who would not provide psycho-sexual counselling to same sex couples. Their deeply held conviction that same sex relationships were wrong conflicted with their employers’ obligations to offer their services without discriminating on the ground of sexual orientation, which is another characteristic protected by the Equality Act. Again, both of them lost their discrimination cases in this country. Both of them also lost their cases before the European Court of Human Rights.¹⁷ But Ms Ladele might not have lost her job if she had been prepared to accept the compromise offered by her employer, which would have let her off having to conduct civil partnership ceremonies, while requiring her to take part in the administrative arrangements. Mr McFarlane accepted that it was not practicable for his employer to screen clients in advance. So they were cases where a reasonable accommodation had either been offered or was just not possible.

¹⁷ *Eweida v United Kingdom*, above.

But there was a strongly worded dissent from two of the Strasbourg judges in *Ladele*. They argued that this was not so much a case of freedom of religious belief as one of freedom of conscience, protected under Article 9.1 and not mentioned in Article 9.2. “Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and avoid evil”. As such it was different from and superior to religious doctrine: John Henry Newman (Cardinal Newman) had said that “conscience may come into collision with the word of a Pope and is to be followed in spite of that word”. Once a genuine and serious case of conscientious objection was established, the State was obliged to respect it both positively and negatively. It was not a case of discriminating against the service users – none of them had complained. The local authority should have treated her differently from those who did not have such a conscientious objection and could have done so without prejudice to the service offered. Instead of practising the tolerance and “dignity for all” it preached, the local authority had “pursued the doctrinaire line, the road of obsessive political correctness”. The dissenters had earlier said that it was “a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured ‘gay rights’ over fundamental human rights)” which had eventually led to her dismissal.

Those were both cases where the employer was providing the service and was obliged to do so without discriminating against same sex couples. The problem is more acute when it is the believer who is providing the service and asks the court to excuse him from the obligation to provide that service without discrimination. This was the situation in *Bull v*

Hall,¹⁸ where Christian hotel keepers would only let their double-bedded rooms to “heterosexual married couples” (although they would let their single and twin-bedded rooms to anyone). This was certainly indirect discrimination against same sex couples, because at that time they could not get married. A majority of the Supreme Court held that it was direct discrimination against them, because the hotel would only recognise hetero-sexual marriages and not civil partnerships or marriages between same sex couples. The hotel-keepers claimed that their rule was justified by their religious beliefs, which were undoubtedly sincerely held, and that to hold otherwise would be an interference with their right to manifest those beliefs. We all held that they were not justified in discriminating against same sex couples in the service they offered to the public and that the State was justified in prohibiting them from doing so.

It was also argued in *Bull v Hall* that the hotel keepers had done all that could reasonably be expected of them – that there should be give and take on both sides. They had advertised their policy. They had explained it politely when the couple arrived. They had refunded their deposit. And (albeit rather later) had offered to pay the increased cost of the alternative accommodation the couple had had to find. But we rejected that argument, holding that they were not justified in refusing to provide their services on a non-discriminatory basis. But ought the law to provide for reasonable accommodation or a “conscience clause” for the providers of goods and services?

This is, I think, an example of the sort of claim made by believers which is *not* legitimate.

¹⁸ *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741.

It boils down to a claim that their religious belief should dictate what the law is.

Parliament has said “thou shalt not discriminate”. It has not made any exception for conscientious objection in the provision of goods and services (although it has made a limited exception for employment by religious organisations). Sometimes it does make an exception – turban-wearing Sikhs were long ago absolved from the requirement to wear crash helmets, but they are not harming other people if they put themselves at risk in this way. Denying some people a service which you are prepared to offer others is deeply harmful to them. It is reminiscent of the days when women were not allowed to order their own drinks at the bar in certain establishments and landlords were allowed to say “no blacks here”. It is a denial of their equal dignity as human beings. So it is not surprising that Parliament, having given the matter careful consideration, decided not to make an exception for this case.

In the Court of Appeal, Lady Justice Rafferty rightly pointed out that it would be unfortunate if the oppression of one group – homosexuals – were to be replaced by the oppression of another – religious believers. My response was that this was not oppression of Christian believers. Both homosexuals and Christians are subject to the same laws requiring them not to discriminate in the running of their businesses. So if homosexual hotel keepers had refused a room to an opposite sex or a Christian couple, they too would have been acting unlawfully (para 54).

This provoked an interesting reaction from the Attorney General of Northern Ireland. He commented that it showed that I do not understand religious belief. The objection

which believers have to same sex relationships is morally and biblically based, whereas any objection which homosexuals might have to religious believers would be pure prejudice (I do not know what he would have said about other supposedly biblically based objections, for example to women or other races, or indeed to other religions). The former Archbishop of Canterbury, Lord Carey of Clifton, said much the same when he intervened in the *McFarlane* case in the Court of Appeal. This, he said, “illuminates a lack of sensitivity to religious belief” and “is further evidence of a disparaging attitude to the Christian faith and its values”.

It is true, as Lord Justice Laws said in response to Lord Carey, that the law may protect a particular moral position which is espoused by Christianity, such as the prohibition of violence and dishonesty; but it does so, not because of its religious imprimatur, but because of its objective merits. He went on to say that legal protection or preference should not be given to a particular moral view the *sole* ground that it is held by the adherents of a particular faith. This is to impose compulsory law “not to advance the general good on objective grounds, but to give effect to the force of subjective opinion”.¹⁹

It was all so much easier in the olden days. When you have a state religion, it is perfectly rational to give it legal preference and protection – in Parliament, in the conduct of marriages and burials, in requiring certain properties to contribute to the repair of chancels, in the law of blasphemy, to name but a few. But the law now protects all

¹⁹ *McFarlane v Relate Avon Ltd*, above.

religions equally, without discriminating between them and without attempting to determine which are forces for good and which are not. Not only that, it also protects other belief systems, such as humanism and pacifism, and it has dropped any requirement that these be “similar” to religion. It also protects the lack of a religion or belief. In other words, while it protects freedom of thought, it does not give any special protection to religion as such – although it may be rather easier to claim that belief in a religion, especially one of the mainstream world religions, falls within its protection than it is for other less conventional kinds of belief. But those who argue that secularism has gone too far would usually like there to be special consideration given to religious belief as such, claiming that religious beliefs are in some way different in kind from other kinds of belief.

One of the first projects to hit my desk when I joined the Law Commission for England and Wales in 1984 was the proposed abolition of the common law offence of blasphemy. Everyone (including the Church of England) agreed that an offence which protected only Christianity (and originally only the established church) against critical or offensive speech could not be justified. Hence the Commission’s working paper, published in 1981, had recommended simply that the offence be abolished.²⁰ Then the composition of the Commission changed. Some of those who had responded to the working paper (including the Church of England) argued for replacing it with a general offence of offending religious feelings, although without defining what constituted a religion for this purpose. The underlying premise of this proposal, as of the arguments of Lord Carey and the Attorney General for Northern Ireland, was that religious feelings are different from

²⁰ PWP No 79, *Offences against Religion and Public Worship* (1981).

other kinds of feelings and deserve the special protection of the law. That view found favour with the new Commissioners. But their report had to wait for the Parliamentary draftsmen to find time to draft the proposed new offence, which they were reluctant to do. Then the composition of the Commission changed again. Hale and two others joined and all three strenuously objected to such a broadly defined new offence as an unjustified interference with freedom of speech. So the report which was published in 1985 had three Commissioners recommending abolition without replacement – a majority dissent – and two recommending the replacement offence.²¹ Not surprisingly, nothing at all was done. But when promoting the reform of the law one should never give up hope entirely. The offence of blasphemy was eventually abolished without replacement by the Criminal Justice and Immigration Act 2008. The National Secular Society held a “bye bye blasphemy party”.

So the moral of all this is that if the law is going to protect freedom of religion and belief it has to accept that all religions and beliefs and none are equal. It cannot realistically inquire into the validity or importance of those beliefs, or any particular manifestation of them, as long as they are genuinely held. It then has to work out the answers to a set of problems of which we have certainly not seen the end: how far it should require the providers of employment, goods and services to accommodate particular beliefs; how far it should go in making special provision or exceptions for them; how far it should allow for a “conscience clause”, either to employees, as suggested by the dissenting minority in *Ladele*, or to the providers, as argued by the hotel keepers in *Bull v Hall*.

²¹ Law Com No 145, *Offences against Religion and Public Worship* (1985).

I do believe that there is a difference between the last two. It is one thing to expect employers (and others) to make reasonable adjustments to cater for their employees' religious beliefs. It is another thing to expect the law to make exceptions to generally applicable rules in order to cater for particular religious beliefs. Believers who want it to do this must surely show that it will not cause harm to others, whether members of the religion or outsiders.

This does not mean that we cannot take pride in what Bishop Michael Nazir-Ali has called the "inextricable link between the Judaeo-Christian tradition of the Bible and the institutions, the values and the virtues of British society". Our law's respect for human dignity, for liberty and for equality may indeed be traced to that religious tradition. To this extent, at the very least, we are a Christian country.