Current Approaches of the European Courts to Religious Rights and Freedoms

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Two Legal Frameworks for Religion in Europe

There are two legal frameworks governing religion and law in Europe.

The First Legal Framework

The first legal framework is article 9 of the European Convention on Human Rights (ECHR). This consists of: article 9 (1), the right to freedom of thought, conscience and religion (the *forum internum*), which is an absolute right under the ECHR and refers to the right to have inner thoughts and beliefs; and article 9 (2), the qualified right to manifest religion (*forum externum*).

Demonstrating that your right to manifest religion or belief has been restricted involves first showing that the activity in question is, indeed, a manifestation of religion or belief, and second that any restriction does not come within the restrictions provided in article 9(2).

Showing that your activity is a manifestation can be difficult: it means that you must show that it is more than something just motivated by your religion in your particular case. This has led to lots of disputes, including the one before ECHR relating to the Christian cross worn by the BA check-in staff member. Eweida argued that she believed it was necessary to wear the cross, but few Christians agree. Ruling on such questions can lead courts into territory which is probably very inappropriate for them; they end up having to decide what the religion requires, and perhaps unsurprisingly we end up with inconsistent decisions.

In this particular case the European Court of Human Rights (henceforth ECtHR, or Court) ruled that a practice did not need to be an absolute requirement of the religion to be a manifestation, as long as the practice was closely related to the religion. This means that wearing a cross is protected (subject to the rights of others, even if it is not a strict 'requirement' of the Christian religion).

Even if you can show that it is a manifestation which is interfered with, the right is a qualified one. If there are other interests served by the restriction (for example privacy, freedom of expression, or the rights of others) then one considers whether it is necessary and proportionate to restrict the right.

It is at this stage that the 'margin of appreciation' comes in: and the ECtHR will take a

reasonably flexible approach to setting standards when it comes to protecting religious rights. This enables it to take into account regional differences, historical contexts and so on in determining the bounds of what is reasonable. It means that the Court can seem fairly 'hands off' in terms of setting standards, as it relies on the margin of appreciation to allow a fairly wide range of responses to what is 'lawful'. For example the headscarf ban in Turkey is allowed under the ECHR, as headscarves carry a strong message in Turkey, while displaying the crucifix in Italian classrooms is allowed, because the crucifix is said to be just a 'passive symbol'. These cases seem to be completely inconsistent, but can be explained by the 'margin of appreciation'.

So the mechanism of the ECtHR has to try to achieve a balance between competing interests when dealing with religion, and it does so by taking an essentially pluralist approach, and by using the doctrine of the margin of appreciation. The danger of this flexibility can be that inconsistencies slip in and we get differential treatment of different groups.

The Second Legal Framework

The second legal framework is the EU Equality Directive 2000/78 (ED) which protects religious interests via its prohibition against discrimination in employment on grounds of religion and belief.

Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief. Direct discrimination cannot be justified. However, there is a defence to a direct discrimination claim where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes a genuine occupational requirement for the job in question, and it is proportionate to impose that requirement (ED art. 4).

Indirect discrimination occurs where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary (ED art. 2(2)(b)). Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. For example, bans on headscarves, or requests to be exempt from workplace tasks (such as performing civil partnerships) would all be dealt with as examples of indirect discrimination. These rules may be lawful, but only if justified.

Interaction of the Two Frameworks

In terms of the formal interaction of these different legal frameworks, in some senses there is little. We have two separate courts. And of course EU law applies only to the EU whereas ECHR applies more widely to bigger range of countries. But there will in future be more formal interaction, as the EU is acceding to the ECHR, and so in future the EU law will need to be interpreted to comply with the ECHR.

This leads to some very interesting questions, as the legal systems themselves have to deal with issues of legal pluralism and how to manage conflicting standards of protection as between different legal approaches (as well as the issues of pluralism

and managing conflicting standards of protection for religious freedom in different member states).

What Issues are Raised by the Interaction of these Two Legal Systems?

The ECHR system is based on protecting freedom of religion and belief. The EU system is based on upholding equality on the grounds of religion and belief. In what ways are these the same thing? And in what way are they different?

In some ways the right to freedom of religion and the right not to be discriminated against on grounds of religion in employment and occupation are intimately related: both are founded on the concepts of dignity, autonomy and equality (for more detail see Vickers, 2008). Full enjoyment of autonomy, equality and dignity cannot exist where individuals can be discriminated against because of their religion.

One consequence of recognising links between human rights protection for religion and the non-discrimination norms is the recognition from human rights law that religion and belief has a group dimension. This should, presumably, be extended to our equality law on religion and belief. But the two types of religious interest can also at times be in tension with each other.

First, many religions do not recognise fundamental rights and freedoms of others, such as rights not to be discriminated against on grounds of birth, status, gender, religion (other than their own), sexual orientation or other grounds. It is therefore arguable that a society that values equality and dignity should not protect or accommodate those who do not share those fundamental values.

Second, clashes can arise between various human rights where religious interests are concerned. For example, once religious harassment is prohibited at work, there is a possible clash between individual freedom of speech and non-harassment rights (members of staff are not free to speak to colleagues where that speech would cause offence or create a hostile environment) and between non-harassment and religious claims to proselytise. *[For more detail on the debate on freedom of speech and harassment see Volokh, 1992; Browne, 1991. For the discussion in the context of religion see Dworkin and Peirce, 1995; Vickers, 2006.]*

In sum, then, the relationship between freedom of religion and belief, and equality on grounds of religion and belief is complex: in some ways they strengthen and complement each other; in other ways they undermine each other or at least exist in tension with each other. Perhaps in response to these inherent tensions and conflicts, both the ECHR and the ED recognise in their different formulations that religious interests do not need to be enjoyed in an absolute sense, but are qualified in nature. And similarly, both systems recognise that there needs to be a level of flexibility and adaptability in the interpretation of the law, hence the 'margin of appreciation'. And EU law uses similar system of a 'margin of discretion' when looking a fundamental rights cases.

However, despite this acceptance of flexibility in EU law, we cannot just say that both systems are 'flexible' and so assume there will be no difference in treatment. This is

because we can also see clear signals in EU equality law that equality is a fundamental principle of EU law, and that there should be no hierarchy as between the different grounds. *[The European Court of Justice has suggested that there should be uniform application of the various equality provisions across the EU: see ECR, 2006, para 40, a case involving the definition of disability.]* So for example, in the context of the application of equality law on grounds of gender, it seems inconceivable that the court would allow a member state to argue that local custom and practice should be allowed to explain and justify sex or race discrimination in employment. Indeed, it is precisely because these are seen to be fundamental rights that they are not seen as areas of 'reasonable disagreement' where a variety of states practice would be respected within a margin of discretion. Thus, viewing the matter through the lens of EU equality law may give rise to tensions between religious equality and religious freedom which are not readily resolved by resort to concepts such as a margin of appreciation or a margin of discretion.

This problem can be reduced if it is accepted that the protected ground of religion is different from other protected grounds such as race and sex. However, this would require an acceptance of a hierarchy as between equality rights, an outcome that is likely to be contested (see Bell and Waddington, 2001, 2003; Schiek, 2002. It also creates lots of difficulties in terms of deciding why religion is so different. Courts have suggested that religion is 'chosen', and so is different from other equality grounds, but there are lots of people who would contest this.

Some Case Studies

Having set out the legal context, and the different rights, I thought it would be useful to consider a few recent cases which show the approach of the ECtHR to some difficult religion cases.

Obst, Schüth, Fernández Martínez and Siebenhaar

These cases under the ECtHR were about whether religious employers which require staff to comply with religious rules infringe the religious freedom rights of their staff. They arose in the context of claims under article 8 (privacy and family life) rather than article 9 (religion and belief), but the facts of the cases are immersed in a religious context, and so I am considering them here.

In both *Obst* and *Schüth*, churches wished to dismiss staff for failing to comply with religious teaching. In both cases staff had been involved in extra-marital relationships, in *Schüth* a Catholic church organist and in *Obst* the Director of European Public Relations for the Mormon Church. The ECtHR came down on different sides in the cases, with the claim of the Catholic organist upheld and the claim of the Morman PR Director rejected, but the reasoning related to a procedural question about the extent to which privacy rights had been considered by the decision-makers in each case.

The same approach was taken in *Fernández Martínez v Spain* where a decision was taken not to renew the contract of employment of a priest who was married and had five children. He had been given dispensation to marry by the Vatican, and was employed in a school to teach Catholic religion and morals. The decision not to renew his contract followed the publication of an article in which his membership of the

'Movement for Optional Celibacy' was disclosed. In his original appeal against dismissal it was found that he had been discriminated against on grounds of his civil status and his membership of the organisation, but this finding was then overturned on further appeal. At the ECtHR he argued, as had *Obst* and *Schüth*, that the dismissal interfered with article 8 rights to privacy and family life. Again, the ECtHR relied on procedural questions to find that the Spanish courts had reached a fair balance between interests of privacy, freedom of religion and freedom of association, and that therefore there had been no violation of article 8.

A similar outcome can be seen in an article 9 case, *Siebenhaar v Germany*, where a member of the Universal Church/Brotherhood of Humanity was dismissed from her post as a teacher in a church kindergarten. The Chamber of the ECtHR found there to be no violation of article 9 as the German Labour Court had undertaken an appropriate balancing exercise of the relevant interests in reaching their decision that the dismissal was fair.

What is clear from all three cases is that the ECtHR gave significant weight to the fact that national courts had undertaken a careful balance of the competing interests at stake in the cases. The Court thus seems to be tacitly accepting that clear standards are difficult to identify in these cases, and that appropriate protection may be best achieved by ensuring that national courts undertake proper balancing exercises, taking account of the correct factors in doing so. Only where it can be shown that the balancing exercise was defective will the ECtHR intervene. Thus in *Schüth* the court upheld the applicant's claim because the balancing exercise undertaken by the national court was defective on the basis that it had failed to include the privacy rights of the applicant and his family in the balancing scales. Where the correct factors have been identified and put into the scales (as in *Obst, Fernández Martínez and Siebenhaar*), the ECtHR seems unlikely to intervene. In terms of the general approach, the cases referred to the need to give national courts a degree of discretion in deciding these cases, given that there is no common practice across member states, and since the issues involved religion and tradition. The cases are good examples of the way in which the margin of appreciation operates in assessing whether article 9 (or article 8) has been breached.

One interesting question here is whether the outcome would have been any different if approached under the EU Equality Directive 2000/78. In both *Obst* and *Fernández Martínez* the ECtHR cited the ED, noting that it allows for exceptions where the employer has a religious ethos and religion is a genuine occupational requirement of the job. This suggests that the outcome could have been the same even if brought under the ED: under article 4(2) an employer such as a church, which clearly has a religious ethos, would be allowed to discriminate on the basis of religion in order to uphold its religious ethos.

However, the genuine occupational requirement exception in EU law is subject to a requirement of proportionality, and it is interesting to speculate whether a court would find dismissal to be proportionate in any of the cases, but perhaps most particularly in the third ECHR case, *Siebenhaar*. Here, the employee worked as a teacher in a church kindergarten. Under the EU the question on the facts of *Siebenhaar* would be: having regard to the nature of the job or the context of the work, was the requirement not to be a member of the Universal Church a genuine and determining occupational

requirement, did it have a legitimate objective and was it proportionate to require it? (ED art. 4) On the one hand, it is arguable that the fact that she was an active member of the Universal Church, and teaching very young children, who might potentially be more readily influenced, might still mean that the interests of the employer in maintaining their religious ethos would prevail and the restriction could be held to be proportionate. On the other hand her behaviour took place outside the workplace and was not connected to her performance at work, and there was no evidence before the Court that she had in fact sought to influence the children in her care, and so it is arguable that it was not proportionate to dismiss her.

Of course, we can only speculate about what the outcome might have been if these cases had been argued under the different legal provisions. But what is interesting to see is that the ECtHR uses both a margin of appreciation approach and a 'fair procedure' approach to determine religious issues.

Eweida, Ladele and McFarlane

Finally I would like to consider two recent UK legal cases before ECtHR which were decided in January 2013.

In *Eweida v British Airways*, a Christian member of the check-in staff was not allowed to wear her cross visibly at work. She claimed this was indirect discrimination. She was unsuccessful. The Employment Appeal Tribunal held that in order to meet the definition of indirect discrimination, she had to show that others with the same belief would be similarly disadvantaged - and she had not identified any others who believed the same thing. This finding was upheld by the Court of Appeal (CA). The decision of the CA confirms that indirect discrimination is designed to prevent group disadvantage, and that here there was no group disadvantage. Ms Eweida was the only person identified who thought it necessary as part of her faith to wear a cross visibly over her uniform. So the fact that she was the only one with the belief did not stop it being a belief but it did stop it being protected. The implication of this case at the domestic level was that individual beliefs are not protected under the indirect discrimination provisions. When the case was heard by the ECtHR under article 9, however, it was decided that article 9 did apply, and so it would seem that under the ECHR the right to freedom of religion applies to individual belief.

The second case to consider is *Ladele v Islington*. Ladele worked for Islington Council as a Registrar of Births, Deaths and Marriages. She refused to participate in registering civil partnerships between same-sex couples because she was an evangelical Christian who did not belief in gay marriage. Two colleagues complained that this was contrary to the council's 'dignity for all' policy. Ladele was disciplined for failing to comply with the Council's dignity at work policy. She claimed religious discrimination. She was successful at the first hearing, but the case was overruled on appeal. The CA held that there was no direct discrimination on grounds of religion or belief because the employers had applied the same rule to all registrars. Any indirect discrimination was justified and proportionate, as it was needed to uphold the employer's business aim of providing a service to all (including gay and lesbian couples) without discrimination. Although some councils dealt with this issue by allowing the registrars to object, and just gave them all heterosexual couples, Islington

was entitled to require her to comply with their policy of equal treatment on grounds of sexual orientation. Interestingly, in the CA there was some acceptance that Ladele had been treated badly, in particular that her letter asking to be excused duties which was written in a measured tone had been treated as gross misconduct. However the CA said that although that was not fair, it did not amount to discrimination (i.e they had not treated it as gross misconduct because it was based on religion). A similar outcome was reached in the case *McFarlane v Relate (2009)*, where a counsellor refused to give counselling to same sex couples. Relate required staff to offer services to all regardless of sexual orientation, and did not need to accommodate the religious member of staff. These cases were not successful in the ECtHR.

Although article 9 applied, its protection did not extend to the manifestation of religion where it conflicted with the rights of others; in the gay marriage cases these include the right of gay and lesbian people to equality, and the rights of the employer to determine its own equality policy. The qualified nature of the protection of the manifestation of religion in article 9 means that where there are clashes between religious freedom and other equality rights, the equality rights may well prevail.

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