

## Religious discrimination and the 'hierarchy of rights': non-existent, appropriate or problematic?

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### Abstract

*In theory, there is no hierarchy of rights in the Equality Act 2010: equal weight is given to each protected characteristic. At least two, very different, critiques though have been made of this argument as it relates to religion or belief. One argument is that religious discrimination has unfairly been given a lower priority than other characteristics, particularly sexual orientation. The second is that religion is inherently different, partly because religions tend to set extensive, and possibly discriminatory, rules for behaviour. In order to keep religion or belief claims within a reasonable limit, religious discrimination claims must therefore be confined. However, the perceived danger of confining these claims is that, because of the insistence that there is no hierarchy of rights, this will lead to reduced protection across all the rights since concepts which apply across the Equality Act will be reinterpreted in order to avoid unwanted results. As will be demonstrated though, both of these arguments are misconceived.*

### Keywords

Religion or belief discrimination; discrimination law; Equality Act 2010; clash of rights; hierarchy of rights

### Word Count

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## **Introduction**

The Equality Act 2010 was designed to unify and simplify discrimination law, gathering together the various pieces of legislation dealing with each ground of discrimination, and creating one overall scheme. Whilst there are some differences in the provisions relating to the various protected characteristics, the Act in theory does not have a hierarchy of rights. Leaving aside the more extensive provisions relating to disability due to its specific nature, each right is given the same degree of protection, although the provisions relating to each are not identical. However, this theoretical equivalency between each ground has, it has been argued, been challenged by the inclusion of religion or belief as a protected characteristic.

Two very different critiques of this formal non-hierarchy have been made. The first is that a hierarchy does in fact exist since religious discrimination has unfairly been given a lower priority than other characteristics, particularly sexual orientation, as can be seen from cases where there is a clash of rights (see eg Carey and Carey, 2012). The second argument has a very different starting point: religion or belief is inherently different from other protected characteristics, perhaps because it is a choice rather than an inherent characteristic of an individual, and certainly because religions or beliefs place extensive obligations for behaviour on their adherents (see eg, McColgan 2009, 2014; Pitt, 2010). In particular, these obligations may require believers to discriminate against others. Thus its inclusion may inhibit rather than progress efforts to eradicate discrimination, particularly, although not exclusively, sexual orientation discrimination. As a result, religious claims must be confined. In order to do so, established concepts such as the distinction between direct and indirect discrimination, will be reinterpreted in order to avoid unwanted results. However, this will, so the argument goes, create problems because of the insistence that there is no hierarchy of rights. Decisions made in the context of religious claims will have an effect more broadly because such concepts apply across all the protected characteristics. Including religion and belief, it is argued, will therefore have a detrimental effect on anti-discrimination rights as a whole. This article will, however, challenge both of these critiques and argue that these fears are unfounded.

### **Is religion treated less favourably than other rights?**

Many of the claims that religion is treated less favourably than other rights refer to the specific context of the conflict between religious and sexual orientation discrimination. (Ahdar and Leigh, 2013; Hambler, 2012; Rivers, 2007). There have been several cases where employees or service providers have argued they should be exempted from having to perform certain duties because of their religious beliefs. They have almost uniformly though been unsuccessful. Most of these cases predate the Equality Act, but the provisions they interpret, which were contained in the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Equality Act (Sexual Orientation) Regulations 2007, are almost identical to those in the Act and the results would not be different under the newer legislation.

The first significant case to consider this clash of rights was *Ladele v Islington LBC* ([2010] 1 WLR 955) where a registrar refused to perform civil partnerships because of her religious beliefs that marriage should only be between a man and a woman. She ultimately failed in her claim that her employer's refusal to accommodate her<sup>1</sup> amounted to direct and indirect discrimination on the grounds of religion. Although her claim of direct discrimination was successful at first instance, this conclusion was erroneous and was rejected by the Employment Appeal Tribunal (EAT). Direct discrimination requires less favourable treatment because of a protected characteristic.<sup>2</sup> Any person who refused to perform civil partnerships would have been subject to disciplinary action, regardless of whether this was for a religious reason or not. Her claim of indirect discrimination, which was again successful at first instance but failed at the EAT and Court of Appeal, was rejected. While it was agreed that the council had applied a provision, criterion or practice which put people of Ladele's religion or belief at a disadvantage compared to others, Islington could demonstrate that it was a proportionate means of achieving a legitimate aim to require her to provide its services in a non-discriminatory way in line with its equality policies.<sup>3</sup> Similarly, in *McFarlane v Relate* ([2010] EWCA Civ 880) a relationship counsellor refused to provide psycho-sexual counselling to same-sex couples and his employer refused to permit him to do this. He too was unsuccessful in his indirect religious claim because it was proportionate for Relate to require non-discrimination in line with its ethos and Code of Ethics.

Religious defences made to claims of sexual orientation discrimination within the context of the provision of services have also failed. In *Bull v Hall* ([2013] 1 WLR 3741) and *Black v Wilkinson* ([2013] 1 WLR 2490) it was held that the owners of bed and breakfast accommodation had directly discriminated against gay couples by, in *Bull* refusing them double-bedded accommodation, and in *Black* refusing to allow the couple to share a room at all, because the owners would only allow married couples to do so.<sup>4</sup> In both cases it was held that there was no defence to the claim of direct discrimination either within the Equality Act or on the basis of Art 9 ECHR. In a different context, litigation brought by a Catholic adoption charity, Catholic Care,<sup>5</sup> claiming that it should be permitted to refuse to accept gay couples as potential adopters in its adoption service was also unsuccessful. While it argued that it would have to close as a result since it would no longer be able to provide the service in accordance with its Catholic beliefs, this was not considered to be sufficient justification to allow it to discriminate.

Some religious claims made within the entirely religious sphere have also failed. In *Reaney v Hereford Diocesan Board of Finance*, (ET 1602844/2006) Reaney applied for the post of Diocesan Youth Officer, but was rejected because of his sexual orientation. The Diocese argued that the post fell within the 'organised religion' exception in the Equality Act 2010.<sup>6</sup> This allows an employer to discriminate if the employment is for the purposes of an organised religion and the discriminatory requirement is applied either to comply with the doctrines of the religion (the 'compliance principle'), or to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers (the 'non-conflict' principle). However, while the Tribunal agreed that the post was one of the small number of non-clergy positions which was for the purposes of an organised religion, it held that the Diocese's actions did not fall within either the compliance or the non- conflict

principle since Reaney had said that he would remain celibate and therefore complied with the religion's teachings. The discrimination was thus illegal and Reaney won his claim.

While such religious claims have been unsuccessful, only in a very limited sense however, do these cases show that religion is placed under sexual orientation in any strict hierarchical sense. There are numerous explanations for these cases which do not rest on the automatic trumping of one right above another. Since these are complex matters on which it is possible to have a range of opinions, I will not discuss the particular merits or the appropriate balance of rights in each of these decisions but rather consider what, taken as a whole, they demonstrate. Of course merely because there is no hierarchy of rights does not mean that the decisions are unproblematic or even necessarily that the results reached were correct.

In considering possible explanations for these cases, it is firstly necessary to bear in mind the forms of discrimination in issue and particularly the distinction between direct and indirect discrimination. While cases such as *Ladele* and *McFarlane* undoubtedly state that it is not indirect discrimination to prohibit direct discrimination, this can be explained on the basis that preventing direct discrimination (here on the ground of sexual orientation) is given a greater priority than indirect discrimination (here on the ground of religion or belief). This conclusion is understandable given the insistence in English law that direct discrimination cannot be justified unless a specific exemption applies but indirect discrimination can be. These cases therefore demonstrate a hierarchy of different types of discrimination, but do not necessarily demonstrate a hierarchy between different protected characteristics.

Secondly, the courts may have decided these cases against the religious actors not because the courts undervalue religion, but because of the courts' feelings of institutional incompetence and deference towards the detailed statutory scheme in the Equality Act 2010 and in preceding legislation, particularly given the highly controversial and sensitive context in which these cases arise. Again this does not mean these decisions are necessarily justifiable, but it goes some way to explaining them. Particularly with regard to *Catholic Care*, there had been considerable public and legislative debate as to whether religious adoption agencies should have an exemption. It was decided that there should only be a temporary exemption, lasting until the end of 2008.<sup>7</sup> Similarly, there had been considerable Parliamentary debate about the rights of bed and breakfast owners, (Cobb, 2009) but a specific exemption was not included in the legislation.

Furthermore, while the courts have denied a right to discriminate within the secular context, the Equality Act gives numerous rights to religious organisations to discriminate on the basis of sexual orientation and other grounds, although the courts have rejected claims seeking to extend these exemptions, as *Catholic Care* demonstrates. These exemptions are in addition to those available to all employers and organisations. In employment, in addition to the usual exemption where being of for example a particular sexual orientation is a genuine occupational requirement, there is an exemption allowing sex, sexual orientation, marital status and transgender discrimination where the employment is for the purposes of an organised religion, as described above. There is also an exemption allowing religious discrimination in employment where the organisation has a religious ethos, although it is

unclear whether this adds anything to the standard genuine occupational requirement exemption.<sup>8</sup> In addition, organisations relating to religion or belief may also impose restrictions on the provision of services<sup>9</sup> if this is applied in order to comply with the compliance or non-conflict principle as detailed above, as long as the service is not provided on behalf of a public authority or under the terms of a contract between the organisations and the public authority.

A religious organisation can therefore implement its discriminatory beliefs in some contexts and is not required to accept the state's conception of equality. If all that is needed for there to be a hierarchy of rights is that one right 'wins' against another in a particular context, given the existence of these exemptions, then it could as easily be argued that religion trumps sexual orientation discrimination (see Johnson and Vanderbeck 2014). In the same way though as cases such as *Ladele* do not necessarily show the trumping of sexual orientation above religion, these exemptions do not necessarily demonstrate the converse hierarchy of rights. It is necessary to see the Equality Act scheme as a whole: in some cases religious concerns will be predominant, in others sexual orientation. The exemptions are valid responses to the need to protect the autonomy and religious freedom rights of religious organisations, although of course there will be considerable disagreement on their appropriate scope.

Within the context of religious discriminatory expression within the workplace, rather than claims to discriminate by employees it is also very difficult to see a hierarchy of rights (Pearson 2014). Rather these claims are highly context specific, although this may be because these decisions have primarily been made at Employment Tribunal level and therefore there is little general guidance available. Some cases have held that discriminatory expression can be prohibited. In *Apelogun-Gabriels v Lambeth* ((2006) ET/2301976/05) an employee was dismissed because he distributed a document to his colleagues which stated that, 'sexual activity between members of the same sex is universally condemned' and 'male homosexuality is forbidden by law and punished by death', following a prayer meeting at his place of work which took place with his employer's consent. Similarly in *Haye v Lewisham* ((2010) ET 2301852/2009) an employee was dismissed when she sent an email from her work account to the Lesbian and Gay Christian Movement (LGCM). In it she stated that being gay is a sin, that LGCM was 'deceiving' people into believing that it was acceptable to be gay and a Christian and urged them 'to repent and turn from your sinful ways before [it's] too late... Hell is not a nice place'. In both cases it was held that the claimants had not been subjected to direct or indirect discrimination and had not been unfairly dismissed. It has also been held that dismissal for repeated attempts at proselytisation towards a more junior member of staff, which did not involve any discriminatory speech, did not amount to unfair dismissal.<sup>10</sup>

However, in other cases it has been held that discriminatory religious expression is not a sufficient reason for disciplinary action. In *Smith v Trafford Housing Trust* ([2012] EWHC 3221 (Ch). it was held that it amounted to wrongful dismissal where a housing manager was demoted to a non-managerial position with a 40% reduction in pay because of comments he made on Facebook about civil partnerships in religious premises. He posted a news article

entitled, 'Gay church 'marriages' set to get the go-ahead' and commented 'an equality too far'. After a colleague replied 'does this mean you don't approve?' he replied:

No not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose it's [sic] rules on places of faith and conscience.<sup>11</sup>

Similarly in the recent case of *Mbuyi v Newpark Childcare*, ((2015) ET 3300656/2014) a nursery assistant was alleged to have said to a colleague 'Oh my God, are you a lesbian?' (something which at the time no complaint was made about) and a number of months later, during the course of a conversation about the church the claimant attended, stated that homosexuality was a sin. The tribunal held that dismissal for these reasons amounted to direct or alternatively indirect religious discrimination because it relied on stereotypical assumptions about Evangelical Christianity and because she was asked hostile questions about her beliefs, rather than her actions, which did not relate to the specific allegations at issue, at a disciplinary meeting.

These varying decisions show that it is not possible to say that there is a hierarchy of rights in this context. Whether the expression is permissible will depend on the offensiveness of the speech and the context in which it is made: whether it takes place within work time, whether it is in the context of a conversation about religious matters or whether it is the result of active, unwanted proselytisation.

However, while in the majority of cases there are alternative explanations which do not depend on there being a hierarchy of rights within the Equality Act, one case does strongly suggest that religion was there undervalued in comparison to other rights. In the well publicised case of *Eweida v British Airways* ([2010] ICR 890) a member of BA's check in staff wished to wear a cross visibly while at work, which contravened BA's uniform policy. Her claim of indirect discrimination failed because it did not put Christians as a whole or an 'identifiable section of the workforce'<sup>12</sup> at a disadvantage.<sup>13</sup> It was held that the claimant had not shown herself to be a member of a group that had been disadvantaged by the company's no jewellery policy in being forbidden to wear a cross visibly as she was the only one in a workforce of 30,000 that had complained about the policy. This was an extremely narrow and unsatisfactory analysis of indirect discrimination (see also Hatzis, 2011). It is not necessary for the group that a claimant asserts she is part of to exist at the place of work. To require this would hardly break down structural barriers at work, since it would mean indirect discrimination claims could not be brought where a policy was harsh enough to discourage members of a particular group from applying for employment. (Pitt 2011). Thus in *Edwards v London Underground* ([1998] EWCA Civ 877) a woman could claim indirect sex discrimination where she could not work a shift pattern because of her child care responsibilities. It did not matter that she was the only woman who had complained about the policy, bearing in mind that very few women worked for London Underground at the time (only 21 out of a workforce of 2044) and that in the population at large women were

more likely to be disadvantaged by such a policy because they were more likely to have child care responsibilities. It was therefore always possible for a pool of comparators to be hypothetical and it is surprising that this was not recognised in *Eweida*.

While this was a highly restrictive interpretation of indirect discrimination, this was a relatively isolated case<sup>14</sup> and later developments have ameliorated this problem. In *Eweida v UK* [2013] ECHR 37 the ECtHR held that Eweida's treatment amounted to a contravention of Art 9. Partly as a result, the Court of Appeal gave a less restrictive interpretation of indirect discrimination in the later case of *Mba v Merton LBC* [2013] EWCA Civ 1562. Mba refused to work on a Sunday because of her Christian beliefs. After some confusion in the lower courts about the relevance of this not being (as they saw it) a core belief of Christianity, the Court of Appeal disavowed this reasoning. It held that it was not necessary that all Christians or even a majority refused to work on a Sunday as it was clear that some Christians, including the claimant, refused to do so. It is however remarkable that these difficulties for the claimants arose in cases which hardly involve entirely idiosyncratic beliefs. That some, although by no means all or even a majority of Christians, wish to wear a cross as a way of manifesting their faith or refuse to work on Sundays is fairly well known. Nevertheless it is not possible to extrapolate from them a conclusion that religion is treated less favourably in general.

#### **Is a hierarchy of rights appropriate?**

While these cases do not therefore demonstrate a hierarchy of rights, a very different argument has been made, particularly by Aileen McColgan, (2009, 2014; also Lester and Uccellari 2008) that religion is fundamentally different from the other protected characteristics. As a result, it is argued, artificially treating it the same will affect the whole scheme of the Equality Act. However, even if it is justifiable to say that religion is different from the other protected characteristics, an assumption which will be addressed further below, these fears have proved to be unfounded.

A principal part of this argument is that in order to avoid unwanted results, religious discrimination will be defined as indirect rather than direct so it can be justified, following the normal position that direct discrimination is illegal unless a specific exemption, which are narrowly interpreted, applies. It is argued that including religion would affect the traditional distinction between these concepts and lessen the protection given by discrimination law overall. However, this redefinition does not appear to have occurred.

In *R(E) v JFS* ([2010] 2 AC 728) a challenge was made to a Jewish faith school's admission policy on the basis that it unlawfully racially discriminated. JFS gave priority to children who were regarded as Jewish by the Office of the Chief Rabbi. This applied a matrilineal test: a person was regarded as Jewish if his mother was Jewish or had converted to Judaism through Orthodox auspices. E was therefore not considered to be Jewish, although his father was Jewish and his mother had converted to Judaism (but not through Orthodox auspices) and the family followed Jewish religious practices. The majority of the Supreme Court held that the policy was direct race discrimination. It is clear that Jews are an ethnic group,<sup>15</sup> and

so a test based on descent from a Jewish mother must be direct race discrimination. It is a foundational principle of English discrimination law that a subjective intention to discriminate is not necessary.<sup>16</sup> Indeed, it is no defence that a person may have acted from the best of motives. It was therefore irrelevant that the test applied was for sincere religious reasons and could not be described as 'racist' in any usual sense. The majority therefore resisted calls to alter established jurisprudence and to 'allow the result to dictate the reasoning'.<sup>17</sup> To decide this case the other way (as did the court at first instance, and four of the nine members of the Supreme Court) would have weakened discrimination law. As Lord Phillips suggested, permitting discrimination in these circumstances would have to be a matter for Parliament and a legislative exemption. In addition to not disrupting the distinction between direct and indirect discrimination, it is also noticeable that neither this case nor any other has led to any clear demand to introduce a general justification defence to direct discrimination claims; an alternative concern raised about the inclusion of religion as a protected characteristic (Pitt, 2011).

Whilst *JFS* gave the correct reading of the Equality Act, this analysis is not without its problems. Requiring *JFS* to change its policy may well be considered appropriate by many given that it concerned admissions criteria to a state funded school. However, this decision evidently applies outside this specific context. As described above there are exemptions for employment which is for the purposes of an organised religion but these do not apply to race discrimination. Applying a test of Jewishness which depended on matrilineal descent would therefore be impermissible race discrimination even for centrally religious roles. However, to not permit a religion to define religious membership for its own internal purposes would be to interfere with the very core of religious autonomy. Nevertheless, the court's decision was still correct. Rather than changing the scheme of discrimination law by defining this as indirect rather than direct discrimination, the proper reaction to such a problem would be to have a specific exemption dealing with this situation, although the scope and wording of such an exemption would be inevitably difficult and controversial. Probably because this issue has not arisen in practice, there have not been any moves to do so.

*JFS* therefore does not demonstrate a weakening of the distinction between direct and indirect discrimination. McColgan (2009 and 2014) also has pointed to *Azmi v Kirklees MBC* ([2007] ICR 1154) as an example. *Azmi* was a teaching assistant, who worked with children who did not speak English as their first language. She was Muslim and wished to be able to wear a full face veil while working unless this was with only female teachers, but the school forbade her from doing so. It was held this was indirect rather than direct discrimination and could be justified. The tribunal accepted that it was not possible for her to only work with female teachers as all the children were taught by some male teachers and that she was not as effective in communicating with and teaching the children if they could not see her face. It was not direct discrimination because she would have been treated in the same way had she wished to cover her face for a reason unrelated to her religious beliefs.

McColgan argues that the conclusion that this is not direct discrimination is inconsistent with the treatment of pregnancy discrimination as direct sex discrimination. As the ECJ put it



in *Dekker v Stichting*, (C-177/88, [1990] ECR I-34941) ‘Only women can be refused employment on the ground of pregnancy and such a refusal therefore constitutes direct discrimination on the ground of sex.’<sup>18</sup> McColgan’s argument is that in reality only Muslim women are likely to want to cover their face while working and so this is analogous to pregnancy discrimination being sex discrimination. The inclusion of pregnancy as direct sex discrimination was an important advance for women’s advancement in the workplace. It prevented employers from arguing that it was not sex discrimination if they would have dismissed an employee who would have been similarly absent for ill health or from allowing them to justify their treatment of pregnant women based on economic considerations.

Nevertheless pregnancy and veiling for religious reasons are not comparable situations. While it may be difficult to think of an example of why someone may wish to cover their face apart from because of their Muslim beliefs, there is not the intrinsic link between being female and being pregnant, even though of course not all women are pregnant, or even can become pregnant. Treating this as direct discrimination would also create inconsistencies in another sense. If an employer had a rule that hair must be uncovered at work, this would place Muslim women who wished to wear a hijab at a disadvantage compared to others and thus be indirect discrimination. However, it is quite possible to think of other groups who may wish to wear head-coverings, for non-religious as well as religious reasons. This cannot therefore be direct discrimination. But to treat covering the face as direct discrimination but wearing a headscarf as indirect discrimination would be extremely odd, particularly bearing in mind that there is likely to be far more justification for allowing the first but not the second. Contrary then to McColgan’s argument, *Azmi* does not therefore show any narrowing of the direct discrimination concept but is an orthodox application of it. Practically also, treating pregnancy as part of sex discrimination is firmly established, and pregnancy is now also a protected characteristic in its own right in the Equality Act. Even if *Azmi* were inconsistent with the treatment of pregnancy discrimination, the treatment of pregnancy discrimination is highly unlikely to be altered.

Another context where it could be argued that the inclusion of religion or belief may or will alter established concepts, is in the broadening of the concept of indirect discrimination and its lost relationship with group disadvantage at the expense of its coherence. As described above, the phrase ‘put or would put persons with whom [the claimant] shares the characteristic at a disadvantage’<sup>19</sup> was initially interpreted restrictively in the religious context in *Eweida v British Airways* but this reasoning was disapproved of in *Eweida v UK* by the ECJ and later disavowed by the English courts in *Mba*. This means, given the subjective and variable nature of religious belief, and even more so of non-religious beliefs, that it is theoretically possible for the group who has been disadvantaged to be a group of one. While this does lessen the link between indirect discrimination and group disadvantage, it is not clear that this amounts to, if anything, more than a slight shift in emphasis. The group the claimant argued had been disadvantaged and that she was a member of could always be hypothetical within the workforce. Even applying an entirely orthodox analysis, it should not have mattered that Eweida was the only one out of the workforce to make a complaint about the policy.

## Is religion different from other protected characteristics?

While the risks put forward by McColgan and others resulting from the inclusion of religion have not therefore materialised, there is a more foundational problem with the argument. The critique rests to some extent on a view that religion is different from other protected characteristics. A couple of reasons have been put forward for this. Firstly, as Sedley LJ stated in *Eweida v British Airways*, 'one cannot help observing that all of these [characteristics] apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice'.<sup>20</sup> This though this is an unsatisfactory answer. It fails to take an internal view of religion (McCrudden, 2011) as few believers would define their religion in this way. Moreover, to describe it in this way implies that religion is a relatively unimportant consumer choice. It fails to describe why religion may be so important to individuals (Vickers, 2010). While there may be some who do perceive their religion in this way, and the 'marketplace of religion' may be increasing, (Hunt, 2005) this understanding of the nature of religious belief cannot be taken to be representative (Bacquet, 2015; Edge, 2000).

A further argument is that religion is different because it (tends to) place extensive requirements for behaviour onto believers. In particular, these obligations may require believers to discriminate against others and therefore create conflict between rights (Lester and Uccellari, 2008). Unlike other protected characteristics like race, religion or belief is not merely a status, in that a person *is* a Christian or a Muslim, but a reason for acting in a particular way. Nevertheless, the differences between religion and other protected characteristics can be overstated in this respect. In a direct discrimination claim religion is merely a status, in the same way as any other protected characteristic: a person is discriminated against not because of any particular action they have taken or its effect on the workplace, but merely because they *are*, for example a Christian. It is in indirect discrimination claims that it could be argued there is the most difference, since by being about requests to accommodate behaviour engaged in for religious reasons, religious claims may require the modification of workplace rules. This does not demonstrate though that religion is necessarily different from other protected characteristics. Indirect discrimination claims are inherently about challenging seemingly neutral rules. There is little structural difference between a sex discrimination claim arguing that a particular shift pattern is indirectly discriminatory because women are more likely to have childcare responsibilities and therefore less able to comply with it and a religious discrimination claim arguing that a requirement to work on Friday lunchtime is indirect discrimination against Muslims. While accommodating religion in this way may well impose burdens on employers and others, again this is not unique to religion. Much of the point of discrimination law is to challenge established practices that may lead to exclusion or disadvantage. The burden on employers is in any case likely to be higher with pregnancy and disability but it is accepted that it is right to prohibit discrimination on these grounds.

The fact that religious beliefs may conflict with other protected characteristics, including the religious beliefs of others, sexual orientation and potentially race and disability (Elias and Coppel, 2001) is however a relevant difference. This issue will though mainly arise in the

context of indirect discrimination claims where religious employees are seeking to be accommodated in their religious beliefs. Concerns about the rights of others can therefore be taken into account at the justification stage in indirect discrimination claims, in addition to considering the employer's interests in terms of practicality, the interests of other employees and so on. While claims may therefore be more complex, this does not make the claim wholly different from other indirect discrimination claims.

Furthermore, excluding religion from the Equality Act would lead to gaps in coverage. As McColgan herself makes clear, there are clear links between religion and ethnicity. There has been a rise in Islamophobia and anti-Muslim sentiment, (Ogan et al, 2013) but for the purposes of discrimination law it has been held that Muslims per se do not constitute an ethnic group, given the highly varied backgrounds of adherents.<sup>21</sup> To fail to protect Muslims from stereotypical and discriminatory attitudes within the sphere covered by discrimination law would evidently fail to address structural disadvantage within society.

Pitt (2010) has argued that protection should be left to Article 9 ECHR, coupled with a broader understanding of cultural or ethnic discrimination, because claims are primarily about religious freedom rather than discrimination. It is not so easy though to distinguish between the two. Freedom tends to be restricted unequally. Indeed what the majority may not even perceive as a restriction of freedom because they have no wish to do the prohibited act, may be perceived very differently by a minority group. There are also practical problems. Confining protection to Art 9 would create problems for claimants particularly in the employment context since they would not be able to bring claims alleging a breach of Art 9 to an Employment Tribunal, which is at least in theory, a faster, cheaper and more informal method of ensuring redress than the court system. It is also unclear what the benefits would be of such a policy. To withdraw detailed legislation on some points, for example when religious organisations can discriminate in employment would cause confusion and be detrimental to the protection of both religion and other rights. In other contexts which are not so clearly delineated in the legislation, such as the extent to which a person's religious beliefs should be accommodated at work, the courts would still have to make difficult decisions about the boundaries of the right, particularly where rights conflict. In fact the test itself would be very similar. Under both Art 9 and indirect discrimination claims, there is a proportionality test which involves the consideration of the rights of others. It is therefore unclear what the benefit would be. To exclude religion from the Equality Act would be a retrograde step for equality law.

## **Conclusion**

This article began by highlighting two critiques of the treatment of religion: firstly that religion had been undervalued, and secondly that it was inappropriate to include religion because of its differences to other protected characteristics. Neither of these arguments have though been made out. In relation to the first, while there may have been a less sympathetic approach to religious claims made under equality legislation in a few cases, a far more nuanced interpretation is necessary. Religion or belief has not been systemically undervalued. As to the second, the dangers highlighted by this argument have not

materialised. There have not been major reinterpretations of established concepts in the Equality Act. While this article therefore sounds a positive note, this is not wholly unqualified. This is a controversial, fast-moving and complex area of law. The inclusion of religion in the Equality Act will continue to pose challenges and cases will continue to arise. There is on-going work to be done in articulating the appropriate boundary of the right.

## Notes

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<sup>1</sup> Although they did give her the option of transferring jobs or of only requiring her to administer the simple signing of the register rather than performing full ceremonies.

<sup>2</sup> Equality Act 2010 s.13. The test at the time referred to 'on the ground of' rather than 'because of' but this change in terminology was not meant to have any substantive effect.

<sup>3</sup> Equality Act 2010 s.19.

<sup>4</sup> Both cases arose before the Marriage (Same Sex Couples) Act 2013, although Hall and Preddy were in a civil partnership.

<sup>5</sup> *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395 (TCC). Although see the different decision made by the Scottish Charity Appeals Panel in *St Margaret's Children and Family Care Society App 2/13* (31 Jan 2013).

<sup>6</sup> Equality Act Schedule 9 para 2.

<sup>7</sup> The Equality Act (Sexual Orientation) Regulations 2007 otherwise came into force on 30<sup>th</sup> April 2007.

<sup>8</sup> The employer must still demonstrate that 'having regard to [the religious] ethos and to the nature or context of the work' being of a particular religion or belief is an occupational requirement and a proportionate means of achieving a legitimate aim'. Equality Act 2010 Schedule 9 para 3.

<sup>9</sup> Specifically it may restrict: 'membership of the organisation, participation in activities undertaken by the organisation or on its behalf or under its auspices; the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices; or the use or disposal of premises owned or controlled by the organisation.' Equality Act 2010 Schedule 23 para 2.

<sup>10</sup> *Wastenev v East London NHS Foundation Trust* 3200658/2014.

<sup>11</sup> [2012] EWHC 3221 (Ch) at para 4.

<sup>12</sup> [2010] ICR 890, 896.

<sup>13</sup> Direct discrimination may also have been relevant because other religious symbols such as the Sikh turban were permitted.

<sup>14</sup> That is in so far as religious *discrimination* cases under the Equality Act go. There were greater problems with cases brought under Art 9 ECHR, as for example in *R(Begum) v Denbigh High School* [2007] 1 AC 100 where it was held that there was no interference with the claimant's rights when she was prohibited from wearing a jilbab to school as there were other schools she could attend. See Pearson (2013).

<sup>15</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427.

<sup>16</sup> See eg *James v Eastleigh BC* [1990] 2 AC 751.

<sup>17</sup> *JFS* [2010] 2 AC 728 at para 70 (Baroness Hale).

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<sup>18</sup> Quoted in McColgan (2014): 157.

<sup>19</sup> Equality Act 2010 s.19.

<sup>20</sup> See also Schiek (2002).

<sup>21</sup> *Nzayi v Rymans* EAT [1988] 6/88.

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