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RELIGIOWEST

Reasonable Accommodation: Faith and Judgment

Mark Hill QC

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ReligioWest is a four year research project funded by the European Research Council and based at the European University Institute, Florence, Italy. It aims at studying how different western states in Europe and North America are redefining their relationship to religions, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements and with Islam.

Abstract

This paper considers the approach of domestic courts and the European Court of Human Rights to the adjudication of religious liberty claims, contrasting them with the output of the United States Supreme Court. It questions the definition of religion and judicial illiteracy in faith based claims. It seeks to make take a fresh approach to such cases by recasting them as claims for freedom of conscience. It commends a nuanced application of the principle of reasonable accommodation.

Keywords

Religious liberty – freedom of conscience – *Eweida* – Equality Act

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 how far it should go in making special provisions or exceptions for particular beliefs, how far it should require the providers of employments, goods and services to accommodate them, and how far it should allow for a 'conscience clause' [...] I am not sure that our law has yet found a reasonable accommodation of all these different strands.

Lady Hale, Deputy President, UK Supreme Court, 13 June 2014¹

Introductory

It is occasionally suggested that in Catholic canon law, everything that is not prohibited is mandatory, and there is a grain of truth in this light-hearted remark. This paper explores the centre ground which lies between the forbidden and the obligatory, where individuals live out their lives according to their wishes and preferences, including those founded on doctrinal beliefs. It gives particular attention to how – if at all – this territory should be managed by government in general and the judiciary in particular.

The treatment of religious minorities, for example, has changed over time: from persecution to tolerance and latterly to accommodation.² In the twentieth century, religious freedom came to develop a distinct identity under the protections afforded by the Race Relations Act 1976,³ by the granting of exemptions from generally applicable rules,⁴ through the recognition of conscientious objection⁵ and, eventually, in the conferral of some limited directly enforceable rights.⁶ However, this never amounted to wholesale religious liberty;⁷ it was more a negative freedom than a positive right.⁸ In the absence of a legal prohibition, citizens were permitted to do as they wished, although the common law was able to define long-stop boundaries when the circumstances so demanded.

The legislature and judiciary generally favoured light touch accommodation as opposed to prescriptive regulation.⁹ But two recent developments in United Kingdom religion law have now led to greater prominence being given to freedom of religion as a realisable and enforceable personal and collective liberty: the Human Rights Act 1998 which gave further effect to the rights and freedoms guaranteed under the ECHR; and the Equality Act 2010 which reiterated earlier statutory prohibitions concerning discrimination on grounds of religion or belief in employment and the provision of goods

¹ B Hale, 'Freedom of Religion and Belief', the Annual Human Rights Lecture given to the Law Society of Ireland on 13 June 2014. <http://supremecourt.uk/docs/speech-140613.pdf>.

² For a more detailed discussion of this historic trajectory, see M Hill, R Sandberg and N Doe (eds) *Religion and Law in the United Kingdom* (Wolters Kluwer, Second edition, 2014) at pp 26-27.

³ *Mandla v Dowell Lee* [1983] 2 AC 548; *Seide v. Gillette Industries Limited* [1980] IRLR 427; *J H Walker Limited v Hussain and Others* [1996] ICR 291.

⁴ See the Employment Act 1989, s. 11, Motorcycle Crash Helmets Religious Exemption Act 1976 (now the Road Traffic Act 1988 s 16); Welfare of Animals (Slaughter or Killing) Regulations 1995 (SI 1995/731) Reg 2.

⁵ For example, conscientious objections to military service (Military Service Act 1916, s. 2), oath taking (Promissory Oaths Act 1868; Oaths Act 1978), and abortion (Abortion Act 1967, s. 4).

⁶ See, eg, the law on education and adoption: Education Act 1996, and the Children Act 1989.

⁷ M. Hill & R. Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World', [2007] PL 488–506, 489.

⁸ See generally, M. Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 2 Emory Int'l L. Rev. 19, 1129 at 1131–1132 (2005).

⁹ See S Poulter, *Asian Traditions and English Law* 1 (Trentham Books 1990).

and services.¹⁰ It may be that an unintended consequence of these detailed and legalistic provisions is judicial impotence to apply common sense and come to reasonable and workable solutions. Certainly, judicial decisions have now become highly technical and polarised: there is less room for compromise and the oppositional binary nature of litigation produces a dynamic of winner takes all.

The concept of accommodation should be afforded as broad an interpretation as possible. As a British Supreme Court Justice poignantly observed,

In matters of human rights, the courts should not show liberal tolerance only to tolerant liberals.¹¹

There is no right not to be offended. Thanks to the modern day wonders of the World Wide Web, every individual can now elect to be offended at a time and place of his or own choosing, including the privacy of their own home, and as often as they like. Tolerating beliefs and practices with which one is in agreement hardly amounts to an accommodation. It is in embracing those things that are alien – and even threatening – that the concept of accommodation has a real role to play as both a judicial tool and a means for social harmony.

Actors in the justice system and their purposes

It is helpful to begin with some general observations as to the ‘players’ in the case law of the European Court of Human Rights in Strasbourg, with which this paper is primarily concerned. However, these prefatory remarks are equally applicable to the domestic courts of European nations and those of the USA that are encompassed by numerous comparative studies.

The sole purpose of an advocate is to pursue his client’s case to a successful outcome. The client may be an individual, a commercial enterprise or a governmental body. The principle is the same; but success is an elusive concept whose nature and form is governed by pragmatic considerations. Often success is achieved by compromise and a mediated settlement beyond the public gaze. Sometimes an adverse judgment can be categorised as a success if the law is clarified in a positive manner or if the resultant publicity is considered beneficial to an underlying cause. Success is not necessarily the obliteration of the opposing party.

The primary purpose of the judiciary is to decide the particular case brought by particular parties, achieving justice in the unique fact-specific circumstances as found by the court upon contradictory evidence. Defining, clarifying and developing the law are, at best, merely incidental consequences of the primary function of the judiciary. For scholars and academics, their *raison d’être* is the critical discussion of a constellation of individual judicial decisions, the distillation of fact-specific determinations into general rules and the exercise of leisurely conjecture on theoretical issues arising out of real cases.

Secondly, and perhaps more controversially, the judicial function is to declare and apply the law. It is not to create social policy.¹² The routine and low-level functionality of courts and tribunals should be borne well in mind, even when those courts are of a trans-national character, such as the European Court of Human Rights, charged with the interpretation of treaty undertakings by state governments in

¹⁰ For a thorough overview of policy, practice and experience over the past decade, see P Weller, K Purdam, N Ghanea and S Chervallil-Contractor, *Religion or Belief, Discrimination and Equality: Britain in Global Contexts* (Bloomsbury, London, 2013).

¹¹ *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 AC 246, per Lord Walker at para 60.

¹² By way of example, in the United Kingdom Supreme Court decision in *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, four Justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) concluded that the question whether the current law on assisting suicide was compatible with Article 8 of the ECHR involved a consideration of issues which Parliament is inherently better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament’s assessment.

accordance with the language of what, in the jurisprudence of Strasbourg, is styled ‘a living instrument’.

Thirdly, and less controversially, the European Court of Human Rights does not deal with absolutes. The established practice of the Court recognises a national ‘margin of appreciation’ although there is an observable intellectual dishonesty in its inconsistent application.¹³ In addition to this variable margin, the very structure and content of the Convention itself is couched in language which requires the balancing of competing interests.

Religious literacy and judicial assumptions

The ECtHR does not make sharp distinctions amongst the differing instantiations of the general freedom of ‘thought, conscience and religion’ under Article 9 of the ECHR: secular, non-theistic belief systems are afforded the same status as religions. There may be objectively legitimate reasons for this, and the ECtHR’s approach is consistent with the language of Article 9. However, the consequence of eliding ‘religion’ and ‘belief’ into a single amorphous entity is that there ceases to be any requirement, or indeed legitimacy, for a nuanced discussion of the nature of religion and, in consequence, the jurisprudence of Strasbourg is the poorer. But, as a recent decision of the United Kingdom Supreme Court makes plain, judicial definitions of religion struggle to transcend the obvious and anodyne. For the purposes of Places of Worship Registration Act 1855, Lord Toulson JSC recently offered the following description:

I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.¹⁴

The ‘groups of adherents’ recognised by Lord Toulson represent the associational nature of religion which necessitates the need for juridic personality and separateness. Autonomy for faith communities is achieved actively, through the express grant and preservation of rights of self-governance and passively, through non-interference on the part of the State by its legislature or judiciary.¹⁵ The differing manner in which this is achieved constitutionally and socially in various states of the Council of Europe is a factor within the ‘margin of appreciation’ (discussed above) by which the ECtHR affords deference to national governments as to the delicate issue of church/state relations. However, the recognition of a spiritual sphere, howsoever defined, has implications for civic society, because it

¹³ Compare *Lilian Ladele with Nadia Eweida*: it is inexplicable how the ECtHR permitted a local authority to render a staff-member unemployed by unilaterally changing her job description but micromanaged the decision of a private company on its staff uniform code. See *Eweida and Others v. United Kingdom* (2013) 57 EHRR 8, discussed in M Hill, ‘Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg’s Judgment in *Eweida and others v United Kingdom* (2013) 15 *Ecclesiastical Law Journal* 191.

¹⁴ *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, per Lord Toulson at para 57.

¹⁵ For a recent – and somewhat controversial – decision from the European Court of Human Rights on the autonomy of religious organizations see *Fernández Martínez v Spain* (Application 56030/07), 12 June 2014, in which the Grand Chamber was split 9 votes to 8.

engages overlapping loyalties for its citizens whose multiple identities embrace family, race, religion, nationality, local community, sexuality and more besides.¹⁶

Freedom of conscience

While not infrequently rooted in religion, the concept of conscientious objection from military service has come to be regarded as essentially secular in its nature and, at best, as a sub-set of pacifism. Its gradual recognition within the ECtHR's case law has not been through an increased respect for religion but a discernible pan-national consensus that military service should not be obligatory and an alternative non-combatant version should be acceptable. It is an interesting straw in the wind for future litigation that two dissenting judges in their minority opinion in *Eweida v United Kingdom* sought to re-craft Lillian Ladele's claim as one of freedom of conscience rather than freedom of religion.¹⁷

The construction of Article 9 (and hence its application by the ECtHR) is complex and technical.¹⁸ First, it creates an absolute, unfettered and unqualified right to freedom of religion and then it establishes a series of limitations and qualifications to the *manifestation* of such religious beliefs. In the case of Lillian Ladele, as I have argued elsewhere, these qualifications have been interpreted by both domestic courts and in Strasbourg so as to emasculate the right, thereby rendering the freedom nugatory.¹⁹ In effect the court is saying that a competing ideology in civic society (an equality directive which is expressly favours homosexuality) outweighs the freedom of religion of a particular individual. It reduces faith to nothing more than a private, internal matter, not appreciating that faith permeates the whole of one's being. It treats religion like a hobby, as Professor Julian Rivers has suggested, to be exercised in a private club out of the gaze of the wider world.²⁰ In any event, as Rivers states:

... the courts have never rushed to expand the categories of conscience ... and it is understandable that judges should be very cautious in wielding a power to dispense with general laws in individual cases.²¹

Miss Ladele was effectively told by the ECtHR her deeply felt and sincere religion was less important than the sexual orientation of a hypothetical same-sex couple. On a balance of harm analysis, the scales come down firmly in favour of accommodating Miss Ladele's conscience.²² No gay couple was harmed: there was undisputed evidence that Islington Borough Council has sufficient staff to register every civil partnership without requiring Miss Ladele to participate and compromise her beliefs. The harm to Miss Ladele was vast. She was rendered unemployed, without compensation for loss of office,

¹⁶ See A Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (Cambridge, 2001) 13-15), and note the media storm generated by the misreporting of a public lecture by Dr Rowan Williams when he was Archbishop of Canterbury in February 2008 under the title, 'Civil and Religious Law in England'. The storm, and its more constructive aftermath, now form the basis of reflective volume of essays: R Griffith-Jones (ed), *Islam in English Law: Rights, Responsibilities and the Place of Sharia*, (Cambridge, 2013).

¹⁷ Judges Vučinič and Gaetano referred to the 'backstabbing of [Ms Ladele's] colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights)'. The majority failed to engage with this important distinction, although (to be fair to the judges of the ECtHR) that was not how the case was argued on the applicant's behalf.

¹⁸ For a thorough overview of policy, practice and experience over the past decade, see P Weller, K Purdam, N Ghanea and S Chervallil-Contractor, *Religion or Belief, Discrimination and Equality: Britain in Global Contexts* (Bloomsbury, London, 2013).

¹⁹ Hill, 'Religious Symbolism and Conscientious Objection in the Workplace' (2013).

²⁰ J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371.

²¹ *Ibid*, p 389.

²² Harm is rarely discussed in the caselaw. Where was the harm to the pupil in *Lautsi* who might occasionally glance at wooden crucifix on the wall of a classroom or to a French citizen catching a glimpse of a Muslim woman wearing a veil in the *SAS* scenario?

at a time of life when retraining and reemployment were unlikely. The financial loss to her and her family was considerable. Accommodation was not rejected because it was impractical but because it did not fit with an emergent ideological narrative. In a subsequent case, however, involving a Deputy Registrar who refused to register same-sex marriage, Central Bedfordshire Council reinstated her following an internal appeal on the basis that her Christian beliefs could be accommodated.²³

This seeming promotion of gay rights over religious freedom is a particularly surprising end-result because religion and sexual orientation are both ‘protected characteristics’ under EU equality directives, now embedded in English law under the Equality Act 2010. A statutory body, the Equality and Human Rights Commission is responsible for ensuring that individuals are protected in both their religious and their sexual identity, yet it has a track record of promoting the latter at the expense of the former.²⁴ Strasbourg seems to have created an Orwellian world of competing protected characteristics and rights where ‘some are more equal than others’.²⁵

Mediation

The case load of the ECtHR has increased exponentially in recent decades but it is miniscule when one considers the daily encounters between religionists and public and private bodies in the workplace, in education, in the welfare and health systems and in other forms of daily life. We must be careful not to let a tiny number of high profile (and by their very nature contentious cases) distort the lived reality. The reasonable accommodation of the individual conscientious objector takes place at a practical grass roots level on a daily basis time and time again. Good sense and reason prevail. Providing an environment for a respectful conversation which allows the believer to explain why his faith dictates his conduct is generally all that is needed to achieve a sensible compromise.²⁶

The ECtHR is not entirely to blame. Often the fault lies with the litigants and their representatives. Any court – the ECtHR is no exception – decides a case on the evidence: evidence of fact (often disputed, although the national courts are the fact-finding bodies) and expert opinion. Religion is a matter of expert opinion. Too often applicants (who can be crusaders or lobbyists, or genuine individuals whose causes are hijacked by campaigners) merely reason by assertion. They tell the court what they must or must not do; but they fail to adduce dispassionate independent evidence of theology or ecclesiology which explains the situation. Thanks to the intervention of a number of parties, the evidence of the centrality of the cross for Christian believers was before the ECtHR in *Eweida*, in a manner which had been overlooked in the domestic courts.²⁷

²³ The case did not proceed to a hearing before a tribunal or court, and there are conflicting reports of the outcome in the media: compare

<http://www.christiantoday.com/article/christian.registrar.who.refused.same.sex.weddings.wins.discrimination.case/40156.htm> with <http://www.christianconcern.com/our-concerns/religious-freedom/victory-for-christian-registrar-dismissed-for-refusing-to-conduct-sam> (both accessed 4 April 2015).

²⁴ In addition to the circumstances of Nadia Eweida and Lillian Ladele (discussed above), see *Bull v Hall* [2013] UKSC 73, which concerned a Christian couple who wished to restrict the use of double room at their bed and breakfast business to married couples.

²⁵ Following the judgment of the ECtHR in *Eweida*, the Equality and Human Rights Commission produced a more nuanced (though still far from perfect) document in the form of *Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments* (2013). See <http://www.equalityhumanrights.com/publication/religion-or-belief-workplace-guide-employers-following-recent-european-court-human-rights-judgments> (accessed 4 April 2015).

²⁶ A charity known as BIMA (Belief in Mediation and Arbitration) was set up to encourage the use of alternative dispute resolution without recourse to the courts in disputes which have a religious flavour: www.bimagroup.org/ (accessed 4 April 2015).

²⁷ In a further interesting development, in *Mba v Merton LBC* [2013] EWCA Civ 1652, the Employment Appeal Tribunal criticised the first instance Employment Tribunal for giving weight to the view that the belief in not working on a Sunday

Insights and parallels from the USA

As the informed gathering at the European University Institute²⁸ made plain, issues of conscientious objection, howsoever articulated, are not confined to the United Kingdom or Europe. The *Hobby Lobby* case in the United States Supreme Court concerned two firms run by devout Christians who objected to implementing parts of the ‘Obamacare’ mandate which would require them to offer contraceptive services to their employees.²⁹

There is undoubtedly a distinction between the church/state relations in the USA and those in Europe. The United States’ law concerning accommodation is very different since it is founded upon a rather different understanding of the relationship between the state and civic society. In short, it fosters a strict separation of church and state (the establishment clause)³⁰ which has no general equivalent in Europe; indeed in many countries active cooperation between church and state is the norm, facilitated by primary legislation.³¹ Nonetheless the ‘free exercise’ of religion is guaranteed by Article 9 of the ECHR.³² Secondly, section one of the Fourteenth Amendment prohibits discrimination, including on the basis of religion, by securing ‘the equal protection of the laws’ for every person, with clear echoes of *Magna Carta*.³³ This is more akin to the EU Equality Directives.

Many European countries either retain established or national churches such as in England, Denmark and Greece or accord certain historic privileges to the Catholic church as in Spain, Italy, Malta and parts of Germany.³⁴ Article 17 of the Treaty on the Functioning of the European Union states that the EU ‘respects ... the status under national law of churches and religious associations or communities in the member states’.³⁵ There is no question of Brussels imposing a uniform church-state regime. But despite these conceptual and ideological differences, European and American practice seems to have been converging. On both sides of the Atlantic, courts are leaning towards respect for the ‘autonomy’ of religious organisations, namely their right to set their own rules in respect of internal structure.³⁶

America has less well developed processes giving security of employment, but its Civil Rights Act of 1964 was intended to outlaw all discrimination on the basis of religion as well as race and national origin. In EU law, there is strong protection for workers against arbitrary dismissal, together with a Directive outlawing all forms of discrimination (including on the grounds of religion) in employment.³⁷

(Contd.) _____

was ‘not a core component of the Christian faith’. It is not necessary, it held, to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage.

²⁸ *Judging Faiths: Religious Freedom at the Bar in US and European Courts*, sponsored by the ReligioWest Programme at the European University Institute in Florence on 23-24 October 2014.

²⁹ *Burwell v Hobby Lobby*, 573 U.S. ____ (2014).

³⁰ For an engaging collection of essays on the myths and realities of the establishment clause, see T Jeremy Gunn and John Witte Jr (eds), *No Establishment of Religion: America’s Original Contribution to Religious Liberty* (Oxford University Press, 2012).

³¹ See M Hill, ‘The Established Church in England: Religious Liberty in a State of Entanglement’, Annual Church/State Lecture, delivered at De Paul University, Chicago, on Thursday 19 March 2015.

³² Set out in full and discussed above.

³³ See R Griffith Jones and M Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, 2015).

³⁴ See G Robbers, *State and Church in the European Union* (Second edition, Nomos Baden Baden, 2005).

³⁵ For an insightful evaluation of the resultant religious tapestry, see A Pimor, ‘A collection of states or a state of mind? The religious and spiritual dimension of European citizenship’ in N Doe and R Sandberg, *Law and Religion: New Horizons* (Peeters, 2010), pp 191-217. See also, R McCrea, *Religion and the Public Order of the European Union* (Oxford, 2010).

³⁶ Note the recent decision of the UK Supreme Court in *Shergill v Khaira* [2014] UKSC 33, where the President, Lord Neuberger, stated, ‘courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites’ (para 45).

³⁷ See M Hill (ed), *Religion and Discrimination Law in the European Union* (Trier, 2012).

Judges in both America and Europe have to pick their way through the claims of parties—be they private employers, employees, or agents of the State—who aspire to behave differently from other people, or avoid being treated worse than other people, because of their religious belief. People of fervent religious faith on both sides of the Atlantic may seek the right to opt out of activities that most other people are expected or obliged to undertake. In many European countries, exceptions on grounds of conscience have been regarded as a political necessity whenever legislation on key moral issues has been liberalised. In Ireland, where conservative Catholic sentiment remains strong, the legal sale of contraceptives faced huge obstacles when it was introduced in 1979, and a religious opt out from involvement in their sale or distribution was written into law. Britain's pharmacists were allowed to opt out of selling the morning-after pill. Italy's abortion law permits doctors to decline, and reputedly half the country's gynaecologists refuse to carry out the procedure. In Belgium, health-care workers can decline to participate in euthanasia (which is legal) or abortion. Britain's abortion law, dating from 1967, allows doctors and nurses to opt out, and its provisions were recently revisited by the United Kingdom at the behest of two Scottish midwives claiming the right to avoid even indirect involvement with terminations.³⁸

Whilst the Strasbourg court may be perceived as leaning towards a defence of secularism, it has upheld the right of France and Turkey to restrict headscarves and other forms of religiously-motivated dress. However its decision in *Eweida*, discussed above, marked a turning away from the 'impossibility test', as rigorously applied in *Jewish Liturgical Association v France*,³⁹ whereby the option of obtaining from Belgium *glatt* (kosher meat) negated any breach on the part of the French government in not making such facilities available in France.⁴⁰ Shachar criticises this 'right to exit' principle as unfair as it 'imposes the burden of solving conflict on the individual' thereby 'relieving the state of any responsibility for the situation'.⁴¹

The European Union's Employment Directive says that 'churches or other public and private organisations the ethos of which is based on religion and belief' do have a right to discriminate in their hiring policy. In other words, a church can insist that people who perform its rites or teach its dogmas do actually adhere to the relevant beliefs, and if it believes the priesthood should be confined to one gender, it can act on that belief. When this Directive was embodied into British law, there was litigation over how wide an exception religious bodies should be allowed, and only a narrow right to discriminate was granted.⁴²

The unusual aspect of *Hobby Lobby*, from a European perspective at least, is the fact that corporations, rather than individual believers or health workers, have been afforded a conscience-based opt out. Europeans are accustomed to free medical care or compulsory insurance and thus the factual matrix of the case is beyond their experience. The concept of commercial corporations being given a conscientious opt out in the European context of a heavily protected labour market is somewhat speculative.

³⁸ *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

³⁹ (2000) 9 BHRC 27.

⁴⁰ This had been criticised by the UK House of Lords (Supreme Court) in *Begum*, although it effectively applied the test by relying on the fact that the school girl, Shabina Begum, could readily find an alternative school to attend which had a less restrictive dress code whereby she would have been allowed to wear the *jilbab*. The fact that she had chosen the school (knowing of the policy) then changed her mind on a matter of dress was seemingly decisive. Lady Hale was uneasy with this: adolescents generally do not choose their schools: they are chosen for them by their parents. The alternative analysis of voluntary submission has not gained currency. By contracting out, Article 9 is not engaged; whereas the more nuanced view is to accept that the provision is engaged and then to resolve the matter in the delicate balance of justification: eg *Bashir* (Muslim fasting in prison), *Samede* (Occupy Movement at St Paul's Cathedral).

⁴¹ A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, 2001) 41.

⁴² *R (Amicus) v Secretary of State for Trade and Industry* [2007] ICR 1176. See also the discussion in *Reaney v Hereford Diocesan Board of Finance* [2007] ET 1602844/2006.

There may be concepts from the USA which could be adapted and adopted in the European theatre. The Religious Land Use and Institutionalized Persons Act (RLUIPA) is a United States federal law which was enacted in 2000 and prohibits the imposition of burdens on the ability of prisoners to worship as they please and gives churches and other religious institutions a way to avoid burdensome zoning law restrictions on property use. It also defines the term 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'. Adopting a similar definitional approach in Europe would finally lay to rest the motivation/manifestation issue which has served as a distracting sideshow in Strasbourg and the domestic courts for the past few decades.

RLUIPA sought to reverse the perceived problems of the Religious Freedom Restoration Act (RFRA) of 1993, which was itself a corrective passed following decisions of the US Supreme Court,⁴³ which upheld legislation that incidentally prohibited religiously mandatory activities by particular groups as long as the ban was 'generally applicable' to all citizens. Under RFRA, government legislation would be unconstitutional if it substantially burdened a person's exercise of religion even if that burden results from a rule of general applicability. An exception was created provided both of two conditions were met: first, the burden must be necessary for the 'furtherance of a compelling government interest', and secondly the rule must be the 'least restrictive' way in which to secure the government interest. These concepts are best understood in practice. In *Holt v Hobbs*, the US Supreme Court recently ruled that a prisoner had the right to wear a half-inch beard in accordance with his Muslim faith. The State of Arkansas had failed to show that it had a compelling interest in banning beards: there was evidence that more than 43 state, federal, and local prison systems allow beards, and Arkansas had long done so for medical reasons.⁴⁴

The real lesson to be learned from the American experience is that there needs to be a balancing test which readily recognizes sincerely held beliefs and is astute to occasions when those beliefs are interfered with (or 'burdened' to adopt US terminology). As a general principle, it is good for society to structure its laws in a way that allows people to live their lives in accordance with their religious beliefs. However when this broad liberality of religious manifestation causes harm to another (actual or threatened) or violates some compelling governmental interest, then it becomes right to curtail its exercise. That curtailment should be the least invasive means possible. The task for the judiciary will be to decide those difficult cases which will always exist in the penumbral world where competing rights and ideologies are carefully balanced.

Conclusions

As with many of the best symposia, the conversation at the European University Institute in October 2014 was energetic and varied: starting points are many and varied, and finishing positions more so. Experienced scholars and practitioners read case law differently and have divergent views on its likely application in future cases. One thing is certain, namely that there will be no shortage of litigation in years to come. My conclusions are best cast as aspirations for the years which lie ahead.

First, I hope that far fewer cases will be litigated. Just as governmental departments entitled 'social cohesion' are symptoms of the underlying malaise rather than remedial tools, so also litigation reflects a failure to achieve a lasting compromise on a grass roots level. Time and energy needs to be invested in providing a means of constructive dialogue and an effective mechanism of alternative dispute resolution.

⁴³ Notably *Employment Division v Smith*, 494 U.S. 872 (1990), which concerned the tradition use of the proscribed drug peyote by native Americans.

⁴⁴ *Holt v Hobbs*, 574 U.S. ____ (2015).

Secondly, creating progressively more sophisticated and technical legislative provision is unlikely to assist. I am tolerably confident that a review of the effect of litigation under the Human Rights Act and the Equality Act will demonstrate more failure than success from cases which have been brought asserting individual and collective religious rights. Our courts are too blunt an instrument to achieve the careful balance which is necessary and our judges are constrained and confined by recondite legislation enacted by the religiously illiterate.

And thirdly, we need a new language of accommodation to deal with the Christian bakers who decline to make cakes for gay weddings, and the Muslim publishers who refuse to print images of the Prophet. It may be, perhaps, that we can borrow from across the Atlantic. The Deputy President of the United Kingdom Supreme Court correctly observed that our law has yet found a reasonable accommodation of all the different strands which make up this most delicate of all social conflicts. The quotation from Lady Hale's lecture with which I started my reflection concludes, 'the story has just begun'.⁴⁵ I hope that my observations, shared and shaped by the ReligioWest project, might serve to form part of an opening chapter of that story which is waiting to be told.

⁴⁵ B Hale, 'Freedom of Religion and Belief', the Annual Human Rights Lecture given to the Law Society of Ireland on 13 June 2014. <http://supremecourt.uk/docs/speech-140613.pdf>

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