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# **The right to freedom of religion or belief and its intersection with other rights**

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**A research paper for ILGA-Europe**

## Summary

International human rights law provides a framework for the practical resolution of situations where freedom of religion or belief appears to conflict with other rights or there are competing claims for the protection of freedom of religion or belief. Several inter-related principles can be derived from the case law. These include the principles of:

- **non-discrimination**, meaning that there is no 'right to discriminate'; in respect of claims for religiously-motivated refusals to provide goods or services to same-sex couples, courts have consistently held either that the requirement to provide goods and services to the public in a non-discriminatory way is not an interference with religious freedom, or that such interference is justified by the goal of combating discrimination;
- **neutrality and impartiality** of the state as between religions and as between religious and non-religious forms of belief;
- **respect for others to believe** and the duty of the state to create a level playing field between different groups of different religions or beliefs or no religion or belief, which may be summarised as respecting the believer rather than the belief;
- **pluralism and tolerance**, which includes that there is no right not to be offended;
- institutional and personal **autonomy**;
- **proportionality** in determining whether an interference with the right to manifest one's religion is justified: the restriction must have a legitimate aim and the means used to achieve that aim must be proportionate and necessary. This means that a fair balance needs to be struck between the rights of the individual and the rights of others. The proportionality analysis – the balancing act - is highly contextual and fact-specific and precludes making abstract determinations about competing rights or the outcome of any specific case;
- **no hierarchy of rights**, meaning that in each instance, an attempt is made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed; and,
- **legality**, i.e. that restrictions on rights must be clear, publicly accessible, non-retrospective, and that people must be able to understand the circumstances in which restrictions might be imposed and foresee the consequences of their actions with a degree of certainty.

The human rights-based principles above should be used not only within courts and tribunals but also in the wider public sphere. Additionally, this paper suggests a number of ground rules for negotiating differences outside the courts, including:

- **good faith and reciprocity**;
- **mutual respect** for the right of all to express views, whatever they might be;
- willingness to engage in **mediation, negotiation and conciliation** to resolve differences and an **avoidance of litigation** wherever possible;
- an awareness of the need to avoid **essentialising religions or beliefs or misattributing certain views or values to entire groups or communities**, whether these are communities identified by their religion or belief, their sexual orientation or any other characteristic; and
- a commitment to invoking legal cases in public debate in a way which is **accurate and socially-contextualised**, since erroneous reporting of high-profile cases may make tensions between religion or belief and other interests appear more prevalent or intractable than they actually are.

## **INTRODUCTION**

This paper was commissioned by ILGA-Europe, to examine how the right to freedom of religion or belief intersects with other human rights, including the rights to freedom of expression, freedom of assembly, and to be protected from discrimination and hate speech. The paper examines in particular the tension between religious freedom and the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people, which is a matter of controversy in both legal and political discourse in Europe and elsewhere. In particular, some Christian organisations and commentators have portrayed anti-discrimination law as conflicting directly with the right to freedom of religion or belief. Such arguments are increasingly couched in terms of the asserted ‘right’ of religious individuals conscientiously to opt out of providing goods or services to same-sex couples or to express views that might be considered by others to be homophobic or transphobic. This discourse has gone so far as to characterise the scope and application of equality law as a form of religious persecution. The aim of this paper is to assist ILGA-Europe and other interested parties to respond to such arguments in a manner which is consistent with the standards and principles enshrined in both human rights and equality law, as articulated in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and relevant United Nations treaties and declarations, and authoritative interpretations of these instruments by the relevant courts and treaty bodies.

Sections 1 and 2 explain, respectively, the right to freedom of religion or belief and the right to be free from discrimination. Section 3 explores the intersection of rights; the nature of intersectional and intra-group discrimination and areas of the law and public debate that are unsettled, including arguments for the extension of conscientious objection to new and diverse situations.

Drawing on principles derived from human rights law, Section 4 proposes some principles and ‘ground rules’ by which such tensions might be articulated and resolved in the public sphere.

### **1. THE RIGHT TO FREEDOM OF RELIGION OR BELIEF**

#### **a. The state of play in human rights instruments**

The right to freedom of religion or belief is a fundamental human right recognised in all the major human rights treaties. Article 18 of the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948, Article 18(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR), and Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) all guarantee freedom of thought, conscience and religion. All three state that this includes freedom to change one’s religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one’s religion or belief, in worship, teaching, practice and observance.

There is also the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (the ‘Declaration on Religion or Belief’). Its Article 1 is very similar to the above guarantees of freedom of religion or belief; in addition, it states that ‘this right shall include freedom to have a religion or whatever belief of his choice’ and determines, in Article 1(2),

that ‘no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice’.

Within the EU, the Charter of Fundamental Rights of the European Union (EUCFR), which has become binding through the Treaty of Lisbon, also contains the right to freedom of thought, conscience and religion in Article 10, which echoes Article 9(1) ECHR. The EU Guidelines on the promotion and protection of freedom of religion or belief reflect all the above mentioned international standards.<sup>1</sup>

## **b. Definition of religion and belief**

None of the international instruments guaranteeing the freedom of religion and belief provides a definition of these terms. The Human Rights Committee (HRC), in a General Comment on Article 18 ICCPR, has stated that this article protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief; that the terms ‘religion’ and ‘belief’ are to be broadly construed; and, that Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.<sup>2</sup>

The European Court of Human Rights (ECtHR) has also given a wide interpretation to the meaning of religious beliefs. All traditional religions and beliefs are covered, but also non-religious beliefs such as pacifism, veganism and atheism.<sup>3</sup> Further, religious or philosophical convictions or beliefs are protected if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.<sup>4</sup>

## **c. Limitations and restrictions on the right to freedom of religion or belief**

Under international human rights law, freedom of religion or belief has two components. The first is the right to freedom of thought, conscience and religion, which means the right to hold or to change one’s religion or belief and which cannot be restricted under any circumstances. The second is the right to manifest one’s religion or belief, which, according to Articles 9(2) ECHR and 18(3) ICCPR, can be restricted but only if the restriction is prescribed by law and is necessary – Article 9(2) adds here ‘in a democratic society’ – for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others. The ECtHR has held that ‘necessary in a democratic society’ means that the interference must fulfil a pressing social need and must be proportionate to the legitimate aim pursued. This means that there must be a reasonable relationship between the aim of the restriction and the means used to achieve that aim (see section 4 for discussion of the principle of proportionality).<sup>5</sup>

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<sup>1</sup> Council of the European Union, EU Guidelines on the promotion and protection of freedom of religion or belief (adopted 24 June 2013).

<sup>2</sup> HRC, General Comment 22, The right to freedom of thought, conscience and religion (Art. 18), para. 2.

<sup>3</sup> Pacifism: *Arrowsmith v UK*, No. 7050/75, 12 October 1978; veganism: *W v UK*, No. 18187/91, 10 February 1993; Atheism: *Angeleni v Sweden*, No. 10491/83, 3 December 1986.

<sup>4</sup> *Campbell and Cosans v UK*, Nos. 7511/76 and 7743/76, 25 February 1982, para. 36.

<sup>5</sup> *Handyside v UK* No. 5493/72, 7 December 1976, para 49.

Member states of the ECHR enjoy a margin of appreciation in deciding how to give effect to the Convention rights and freedoms, subject to the ultimate supervisory jurisdiction of the ECtHR. The Court has established that states enjoy 'a broad margin of appreciation in determining how to give effect to its responsibilities as the neutral and impartial organiser of religious life whilst ensuring the fullest possible enjoyment of the freedom of religion or belief that is consistent with respect for the rights and freedoms of others'.<sup>6</sup>

Article 18 UDHR does not mention any limitations to the right, but Article 29(2) UDHR allows for limitations in the exercise of the rights and freedoms which are determined by law and are 'solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. In relation to limitations, the Declaration on Religion or Belief states the same as Article 18(3) ICCPR.

According to Article 52(1) EUCFR, any limitation on the exercise of the rights and freedoms in the Charter must be provided for by law and, subject to the principle of proportionality, may be made only if it is necessary and genuinely meets objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Article 54 EUCFR determines that the rights in the Charter which correspond to rights in the ECHR have the same meaning and scope as they have under the ECHR.

## **2. THE RIGHT TO BE FREE FROM DISCRIMINATION**

### **a. The state of play in human rights instruments**

The right to be free from discrimination is a fundamental human right recognised in all the major international treaties on human rights. The UDHR starts, in Article 1, with: 'All human beings are born free and equal in dignity and rights'. Article 2 entitles everyone to enjoy the rights and freedoms in the Declaration 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 7 declares that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law ...'.

Other UN instruments also contain equality or non-discrimination clauses; for example, Article 2 ICCPR and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are similar to Article 2 UDHR. The ICCPR also contains a prohibition of discrimination in Article 26, which declares that the law should prohibit discrimination and guarantee equal and effective protection against discrimination.

The ECHR contains a non-discrimination clause in Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

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<sup>6</sup> M. Evans (2009) *Manual on the wearing of religious symbols in public areas* (Strasbourg: Council of Europe/Martinus Nijhoff) 83-84.

However, despite the extensive list of prohibited grounds, Articles 2 UDHR, ICCPR and ICESCR and 14 ECHR do not provide a freestanding right to non-discrimination. They only secure the enjoyment of the rights and freedoms in the instrument without distinction or discrimination. Therefore, discrimination can only be challenged in relation to other rights and a victim of discrimination cannot claim a breach of the anti-discrimination article alone. There are two exceptions to this: Article 26 ICCPR which provides a freestanding right that can be invoked without having to be linked to another protected right; and Protocol 12 ECHR, which prohibits discrimination in 'the enjoyment of any right set forth by law'. However, although the Protocol came into force in 2005, only 18 out of the 47 Council of Europe states have signed and ratified it.

## **b. Discrimination on the grounds of religion and belief, sexual orientation and gender identity**

All the instruments mention 'religion' as one of the prohibited grounds. But do they also prohibit discrimination on the grounds of sexual orientation and gender identity? The HRC has held that 'sex' in Articles 2(2) and 26 ICCPR includes sexual orientation,<sup>7</sup> while the Committee on Economic, Social and Cultural Rights (CESCR), which oversees the ICESCR, has also indicated that sexual orientation discrimination is covered by Articles 2(2) and 3 (on equal rights between men and women).<sup>8</sup> Gender identity has also been mentioned by both the Committees.<sup>9</sup> Thus, discrimination on the grounds of religion, sexual orientation and gender identity is expressly prohibited by the UN instruments.

The ECtHR has decided that discrimination on grounds of sexual orientation is covered by Article 14.<sup>10</sup> It is important to note here that the ECtHR has also held that same-sex relationships fall under the scope of Article 8 of the Convention, which protects the right to respect for family and private life, home and correspondence.<sup>11</sup> Therefore, in cases of sexual orientation discrimination, Article 14 can be invoked together with Article 8. The Court has made similar decisions in relation to gender identity or being transgender.<sup>12</sup>

The ECtHR has also confirmed that discrimination under Article 14 can be justified. It held that the equal treatment principle in Article 14 is only violated if the distinction has no objective and reasonable justification. To be justified, a difference in treatment must not only pursue a legitimate aim, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>13</sup>

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<sup>7</sup> *Toonen v Australia* (488/1992) CCPR/C/50/D/488/1992, 1-3 IHRR 97 (1994), para. 8.7.

<sup>8</sup> See CESCR, General Comment No. 14 (right to the highest attainable standard of health), 2000, para. 12; General Comment No. 15 (right to water), 2002, para. 18; General Comment No. 18 (right to work), 2005, para. 12; and, General Comment No. 20 (Non-discrimination in economic, social and cultural rights), 2009, para. 32.

<sup>9</sup> See, e.g. Concluding observations of the HRC on Ireland (CCPR/C/IRL/CO/4), para. 7, and on the United Kingdom (CCPR/C/GBR/CO/6), at para. 5; and, CESCR, General Comment No. 20 (n 8), para. 32.

<sup>10</sup> See, for example, *Salgueiro da Silva Mouta v Portugal*, No. 33290/96, 21 December 1999.

<sup>11</sup> See, for example, *Dudgeon v UK*, No. 7525/76, 22 October 1981; *Smith and Grady v UK*, Nos. 33985/96 and 33986/96 27 September 1999.

<sup>12</sup> Article 8: *B v France*, No. 13343/87, 25 March 1992; Article 14: *PV v Spain*, No. 35159/09, 30 November 2010.

<sup>13</sup> *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968, under THE LAW, B para. 10.

As with justification under Article 9, the ECtHR has also held that states enjoy ‘a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment’.<sup>14</sup> This means that states have some discretion in deciding on justification and this is because the national authorities are considered to be better placed to do so. But it is the ECtHR which gives the final ruling. However, the width of the discretion given to the state is not always the same and depends on whether a discrimination ground is considered by the ECtHR to be ‘suspect’ or not. The ECtHR will scrutinise a difference in treatment on suspect grounds more carefully and require very weighty reasons before it finds that discrimination on these grounds is justified. The ECtHR has held that sexual orientation is a suspect ground and thus that very weighty reasons are required before different treatment on this ground will be held to be justified.<sup>15</sup> It is not clear from the case law whether the Court considers religion to be a suspect ground, since not all the relevant case law refers expressly to the ‘very weighty reasons’ test.<sup>16</sup>

Within the EU, Articles 20 and 21 EUCFR contain a right to equality and non-discrimination. The EU has also adopted a Directive prohibiting discrimination on the ground of, among other grounds, religion or belief and sexual orientation.<sup>17</sup> However, this Directive is only applicable in the area of employment and occupation, including vocational training.<sup>18</sup> Gender identity does not appear as a discrimination ground in any of the EU provisions against discrimination. However, the Court of Justice of the EU (CJEU) has held that discrimination on the ground of gender identity falls under the prohibition of sex discrimination.<sup>19</sup> The CJEU has, to date, not made any decisions on religious discrimination or in any cases where the protection against religious discrimination clashes with the protection against sexual orientation discrimination.

Directive 2000/78/EC and other EU anti-discrimination measures distinguish between direct and indirect discrimination. Direct discrimination takes place where a person treats another person less favourably than he/she treats or would treat others because of a protected ground. Indirect discrimination involves the application of a provision, criterion or practice which is applied to everyone in the same way but which puts persons of a particular characteristic at a particular disadvantage and which is not a proportionate means of achieving a legitimate aim. Under EU law, direct discrimination can, in general, not be justified, except in certain circumstances prescribed by the Directives – genuine occupational requirements<sup>20</sup> and positive action. However, as the definition

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<sup>14</sup> *Willis v UK*, No. 36042/97, 11 June 2002, para. 39.

<sup>15</sup> See: *Smith and Grady v UK* (n 11) para 94; *SL v Austria*, No. 45330/99, 9 January 2003, para 29; *Karner v Austria*, No. 40016/98, 24 July 2003, para 37; *EB v France*, No. 43546/02, 22 January 2008, para 91.

<sup>16</sup> See on this: E. Howard (2012) *Law and the wearing of religious symbols: European bans on the wearing of religious symbols in education* (London and New York: Routledge) 115-116 and the authors and cases referred to there.

<sup>17</sup> Directive 2000/78/EC Establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. This Directive also prohibits disability and age discrimination.

<sup>18</sup> There is a draft directive to extend this protection (COM (2008) 426) to other areas such as access to goods and services, education and social protection, but this has not been adopted to date.

<sup>19</sup> See: *P v S and Cornwall County Council* C-13/94 [1996] IRLR 347; *K.B. v National Health Service Pensions Agency* C-111/01 [2004] ECR I-541 and, *Sarah Margaret Richards v Secretary of State for Work and Pensions* C-423/04 [2006] ECR I-3585. This has now been confirmed in Recital 3, of the Preamble of Directive 2006/54/EC.

<sup>20</sup> Article 4(2) Directive 2000/78/EC permits Member States to make exemptions for churches and organisations with an ethos based on religion or belief. This exemption permits difference of treatment based

shows, indirect discrimination can be objectively justified if it is a proportionate means to achieve a legitimate aim.

The ECtHR has held that both direct and indirect discrimination are covered by Article 14.<sup>21</sup> It has also held that Protocol 12 should be interpreted in the same way as Article 14.<sup>22</sup> But, under Article 14, the test for justification is applicable to both direct and indirect discrimination. The ICCPR and ICESCR also appear to include direct and indirect discrimination<sup>23</sup> and allow for justification of both forms of discrimination: the discrimination is not unlawful if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate.<sup>24</sup>

### **3. THE INTERSECTION OF RIGHTS - POTENTIAL AREAS OF CONTROVERSY**

As mentioned, the right to manifest one's religion or belief can be restricted if this is necessary for the protection of public safety, public order, health or morals or the rights of others. The latter includes the right of others not to be discriminated against, including the right not to be subjected to hate speech, for example on the grounds of sexual orientation or gender identity. Thus the right to manifest one's religion and to be free from religious discrimination can also come into apparent conflict with the rights to freedom of expression and freedom of assembly. At the same time, these rights can intersect in a complementary and mutually reinforcing way; for example, an individual who manifests their religion or belief may be protected *both* by freedom of religion *and* freedom of expression *and/or* freedom of assembly.

#### **a. Freedom from discrimination on grounds of religion or belief and other characteristics**

In *Eweida and Others v UK*,<sup>25</sup> a clash between, on the one hand, freedom of religion or belief and the right to be free from discrimination on grounds of religion or belief and, on the other hand, the right to be free from discrimination on grounds of sexual orientation was at issue. Two of the applicants, a registrar of birth, deaths and marriages (Ladele) and a relationship counsellor (McFarlane), refused to perform those parts of their duties which involved providing a service to same-sex couples, due to their Christian belief that homosexuality is against God's law (see also section 3 d below). The ECtHR considered that, in relation to both applicants, their employer's policy pursued a legitimate aim - to provide its services without discrimination. The Court considered that the right not to be discriminated against on the ground of sexual orientation is also protected under the Convention and that a difference in treatment on this ground requires particularly serious reasons by way of justification. The Court then examined whether the means used to achieve the legitimate aim were appropriate, or, in other words, whether a fair balance had been struck between the competing interests at stake. The ECtHR also held that the national authorities are allowed a wide margin of

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on a person's religion or belief where, by reason of the nature of the activities or of the context in which they are carried out, a person's religion or belief constitute a 'genuine, legitimate and justified occupational requirement'. Not all states have adopted the exception clause within their national legislation. Draft directive (COM (2008) 426) (n 18) contains no exemption clauses.

<sup>21</sup> *Thlimmenos v Greece*, No. 34369/97, 6 April 2000, para. 44.

<sup>22</sup> *Sejdic and Finci v Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06, 22 December 2009, para. 55.

<sup>23</sup> E. Howard (2010) *The EU race directive developing the protection against racial discrimination within the EU* (London and New York, Routledge), 42-43.

<sup>24</sup> See HRC, General Comment 18 on Non-discrimination, para. 13 and CESCR, General Comment No. 20 (n 8) (art. 2, para. 2), para. 13.

<sup>25</sup> *Eweida and Others v UK*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

appreciation when it comes to striking a balance between competing Convention rights. In both cases, they did not exceed this margin and thus there was no violation of Article 9 or Article 14 in conjunction with Article 9.<sup>26</sup>

In 2008, the Special Rapporteur on Freedom of Religion or Belief, who is appointed by the HRC, commented that, in relation to the UK, 'some recent statutory equality provisions are reported to lead to a clash of religious convictions with other strands, for example sexual orientation'. She continued that, on the one hand, some Christian people felt discriminated against by sexual orientation regulations but, on the other hand, members of the LGBT community argued that the existing statutory exemptions already favour religion.<sup>27</sup> The Special Rapporteur concluded that, when it comes to balancing rights, there exists no hierarchy of discrimination grounds and that, ultimately, balancing different competing rights can only be decided on a case-by-case basis taking into account the particular circumstances and implications of the case.<sup>28</sup>

## **b. Freedom of expression**

In respect of religion or belief, the right to freedom of expression can be engaged in two ways; when someone is expressing their religion or belief or when someone is expressing views about the religion or belief of others which might be deemed offensive. However, there is no right not to be offended in either international or European human rights law. The ECtHR has stated that the right to freedom of expression applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.<sup>29</sup>

Freedom of expression is, like freedom to manifest one's religion or belief, not an absolute right. Article 10(2) ECHR states that freedom of expression carries with it duties and responsibilities and allows 'formalities, conditions, restrictions or penalties' when these are prescribed by law, necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Thus, here the legitimate aims are even wider than for the Article 9 right; however, both Articles mention the protection of the rights of others. Article 19 ICCPR similarly permits restriction of freedom of expression to protect the rights or reputations of others, national security, public order or public health or morals.

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<sup>26</sup> The Special Rapporteur on Freedom of Religion and Belief refers, in his interim report in 2014, to *Eweida* and the problems that can occur for religious employees, and suggests that considering reasonable accommodation in such cases could be a solution. This is discussed in section 3e below. See: General Assembly of the United Nations, 69<sup>th</sup> Session, A/69/261, Interim Report Special of the Rapporteur on Freedom of Religion and Belief, para. 27, <http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>

<sup>27</sup> Report of the Special Rapporteur on Freedom of Religion or Belief, United Kingdom, A/HRC/7/10/Add.3, 7 February 2008, para. 47.

<sup>28</sup> *Ibid*, para. 72.

<sup>29</sup> *Handyside v UK* (n 5), para. 49; see also HRC, General Comment No. 34, Article 19: Freedoms of opinion and expression, para. 11, which states that the right to freedom of expression 'embraces even expression that may be regarded as deeply offensive'.

Restrictions on hate speech are a permissible limitation of the right to freedom of expression. There is no uniform definition of hate speech in either international or domestic law. The term is commonly used to refer to expression that is 'abusive, insulting, intimidating or harassing and/or which incites to violence, hatred or discrimination against groups identified by a specific set of characteristics',<sup>30</sup> for example, race, religion, disability, sexual orientation or gender identity. Article 20(2) ICCPR obliges states to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The ECHR contains no such positive duty on states. However, the ECtHR has stated that 'as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance...'.<sup>31</sup> The ECtHR has employed two alternative approaches to determining whether restrictions on freedom of expression are justified. The first is to apply Article 17 ECHR, which precludes applicants from relying on the protection of Article 10 to defend forms of expression 'aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention'.<sup>32</sup> This is the most severe restriction, since it permits no balancing exercise between the rights of the applicant and the rights of others. Article 17 has been invoked in cases concerning racist or xenophobic expression,<sup>33</sup> and instances of Holocaust-denial that amount to incitement to hatred of the Jewish community.<sup>34</sup>

The second approach is to invoke the permissible restrictions provided for in Article 10(2) ECHR. In order to determine if a form of expression can be considered as constituting hate speech, the ECtHR will examine the particular circumstances of the case, including the aim pursued by the applicant, the content of the expression, and the context in which it was disseminated, including the status and role in society both of the applicant(s) and the person(s) targeted by the remarks at issue and the potential impact of the remarks.<sup>35</sup> This approach was employed in the case of *Vejdeland and Others v Sweden*, in which the ECtHR for the first time applied the principles relating to hate speech in the context of sexual orientation.<sup>36</sup> The Parliamentary Assembly of the Council of Europe has also urged states to 'condemn hate speech and discriminatory statements and effectively protect LGBT people from such statements while respecting the right to freedom of expression', in accordance with the ECHR and the case law of the ECtHR.<sup>37</sup> Hate speech could also be considered a form of discrimination and would then fall under the prohibition of discrimination under the respective human rights instruments.

Expressions of religion are covered by the right to freedom of expression, but again, this freedom can be restricted. Teaching is mentioned by the ECHR, the UDHR and the ICCPR as one of the manifestations of religion or belief; many religions count teaching of the faith as one of the principal duties of believers. This does not mean, however, that a religious individual can express their

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<sup>30</sup> Article 19 (2013) *Responding to Hate Speech against LGBTI people* (London: Article 19), 8.

<sup>31</sup> *Erbakan v Turkey*, No. 59405/00, 6 July 2006, para. 56.

<sup>32</sup> See also the almost identical provision in Article 5(1) ICCPR.

<sup>33</sup> See, for example: *Soulas and Others v France*, No. 15948/03, 10 June 2008, *Norwood v UK*, No. 23131/03, 6 November 2004; *Glimmerveen and Hagenback v Netherlands*, Nos. 8348/78 and 8406/78, 11 October 1979.

<sup>34</sup> See, for example, *Garaudy v France*, No. 65831/01, 24 June 2003.

<sup>35</sup> A. Weber (2009) *Manual on Hate Speech* (Strasbourg, Council of Europe).

<sup>36</sup> *Vejdeland and Others v Sweden*, No. 1813/07, 09 February 2012.

<sup>37</sup> Resolution 1728 (2010), Discrimination on the basis of sexual orientation and gender identity, para. 16.10.

religion or belief in any or all circumstances; for example, healthcare providers may be constrained both by the law and professional guidelines from expressing religious or moral beliefs in ways that may distress patients or exploit their vulnerability.<sup>38</sup>

The ECtHR makes a distinction between bearing witness to a religion and improper proselytism. The latter, according to the Court, may take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.<sup>39</sup> Thus, the right of people to teach others about their religion or belief and to try and convert them to that religion or belief, must be balanced with the right of other people to be free from interference with their freedom of religion or belief and with their right to be free from religion or belief.<sup>40</sup>

Some Christian organisations have argued in favour of an untrammelled (or at least less restricted) right to freedom of religious expression). For example, the European Centre for Law and Justice has argued within the Council of Europe for a 'general provision reaffirming the fundamental right to freedom of religious opinion' and argues that the concept of hate speech should '*never* end in a limitation of free speech' (emphasis added).<sup>41</sup> However, it is clear from the preceding analysis that this position is significantly out of line with both the European and international human rights frameworks, whose carefully drawn limitations provide a framework to ensure that competing rights are appropriately balanced in each particular case in order that neither is inappropriately sacrificed.

### **c. Freedom of assembly**

The right to freedom of assembly is guaranteed by Articles 20 UDHR, 21 ICCPR and 11 ECHR. Again, under these instruments, this right can be restricted. Article 11(2) ECHR, for example, permits restrictions for very similar aims as are mentioned in Article 10(2). In recent years in some countries, peaceful assemblies, rallies and parades of LGBTI people have been prohibited or confined to venues out of public sight.<sup>42</sup> Where these events are not prohibited and do take place, there is often inadequate protection of participants by law enforcement agencies. This not only infringes the right

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<sup>38</sup> See A. Donald (with the assistance of K Bennett and P Leach) (2012) *Religion or belief, equality and human rights in England and Wales* (Manchester: Equality and Human Rights Commission) 154-57.

<sup>39</sup> *Kokkinakis v Greece*, No. 14307/88, 25 May 1993, para. 48. For an example of improper proselytising see: *Larissis and Others v Greece*, Nos 23372/94, 26377/94 and 26378/94, 24 February 1998.

<sup>40</sup> The Special Rapporteur on Freedom of Religion and Belief expressed a similar opinion: See General Assembly of the United Nations, 60<sup>th</sup> Session, A/60/399, Interim Report of the Special Rapporteur on Freedom of religion and Belief, para. 67, [http://www2.ohchr.org/english/issues/religion/docs/A\\_60\\_399.pdf](http://www2.ohchr.org/english/issues/religion/docs/A_60_399.pdf)

<sup>41</sup> European Centre for Law and Justice (G. Puppink and K. Wenberg) 'Comments on the Draft Resolution and Report on Discrimination on the basis of sexual orientation and gender identity – Committee on Legal affairs and Human Rights, Doc. 12087, 8 December 2009', 11 (available at [http://eclj.org/pdf/ECLJ\\_MEMOPACECOEGROSSRESOLUTIONLGBT2010\\_EN\\_20091216.pdf](http://eclj.org/pdf/ECLJ_MEMOPACECOEGROSSRESOLUTIONLGBT2010_EN_20091216.pdf)); see also Observatory on Intolerance and Discrimination against Christians in Europe (2013) *Report 2012* (Vienna, Observatory on Intolerance and Discrimination against Christians in Europe), 17

<sup>42</sup> Bans on the holding of marches in favour of LGBTI rights have been held by the ECtHR to violate Article 11, Article 13 (the right to an effective remedy) and Article 14 (prohibition of discrimination) taken in conjunction with Article 11. See, for example, *Bączkowski and Others v Poland*, No. 1543/06, 3 May 2007; *Alekseyev v Russia*, Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010; and *Genderdoc-M v Moldova*, No. 9106/06, 12 June 2012.

of LGBTI people to freedom of expression and assembly, but it also makes them vulnerable to discrimination, abuse and violence.

For their part, Christian organisations have asserted their right to freedom of assembly in respect of protests and vigils in the vicinity of abortion clinics, arguing that these should only be restricted for ‘compelling reasons of outweighing [sic] gravity’.<sup>43</sup> Again, in such situations, the human rights framework provides that states may restrict the activities of protesters either for or against abortion, in a proportionate manner in order to prevent crime or disorder or to protect the rights of others.

#### **d. Conscientious objection**

In *Eweida and Others v UK* (see section 3a above),<sup>44</sup> two partly dissenting judges raised, in relation to Ladele, the issue of conscientious objection. They saw the case as one of ‘freedom of conscience – that is, that no one should be forced to act against one’s conscience or be penalised for refusing to act against one’s conscience’.<sup>45</sup> They viewed this as falling under Article 9(1), where justification does not play a role because of the absolute nature of the right to hold or change one’s religion or belief. However, as explained below, this interpretation is contradicted by other ECtHR case law, while the HRC appears to support it only in respect of conscientious objection to military service.

The ECtHR has dealt with cases of conscientious objection only in relation to military service, where it has held that such objection can attract the protection of Article 9,<sup>46</sup> and in relation to abortion, where it has made clear that services should not be made difficult or impossible to obtain because of conscientious objections by individuals.<sup>47</sup> In *Eweida*, the ECtHR did not refer to either Ladele or McFarlane as conscientious objectors, but focused its reasoning on the proportionality of the restriction of their right to freedom of religion or belief (as the domestic courts had also done). It has never been accepted by the ECtHR or any other international human rights institution that an objection to providing goods or services to same-sex couples can be seen as comparable to conscientious objection to either military service or abortion. Moreover, even if the situations were deemed to be comparable, the ECtHR has, in a number of cases in relation to conscientious objection to military service, assessed whether the interference with the applicant’s rights was justified under Article 9(2) and balanced the general interests of society as a whole with those of the conscientious objector.<sup>48</sup> It is thus well-established in ECtHR case law that conscientious objection falls under Article 9(2) and conscientious objectors cannot expect that their objections will always be accepted.

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<sup>43</sup> Observatory on Intolerance and Discrimination against Christians in Europe, *Report 2012* (n 41), 21.

<sup>44</sup> Above n 25.

<sup>45</sup> *Eweida and Others v UK*, Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano, para. 2. They stated (at para. 3) that ‘once that a *genuine* and *serious* case of conscientious objection is established, the State is obliged to respect the individual’s freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her)’ (emphasis in original).

<sup>46</sup> *Bayatyan v Armenia*, No. 23459/03, 7 July 2011, para. 110.

<sup>47</sup> See, for example, *Tysiqc v Poland*, No. 5410/03, 20 March 2007, para. 116 and *R.R. v Poland*, No. 27617/04, 26 May 2011.

<sup>48</sup> *Bayatyan v Armenia* (n 46); *Ercep v Turkey*, No. 43965/04, 22 November 2011; *Savda v Turkey*, No. 42730/05, 12 June 2012.

The HRC has stated in relation to conscientious objection to military service that ‘the Covenant [ICCPR] does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the *obligation to use lethal force* may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief’ (emphasis added).<sup>49</sup> The HRC has never mentioned or considered conscientious objection to any service other than military service.<sup>50</sup> In relation to conscientious objection to military service, it has held that this falls under the freedom of thought, conscience and religion and not under the manifestation of religion and thus it cannot be restricted under Article 18(3). So here the HRC has come to a different conclusion from the ECtHR.<sup>51</sup> But, as noted, this has only ever been applied by the HRC to conscientious objection to military service and it has not been mentioned in relation to employees objecting to performing parts of their duties which involve providing goods or services to same-sex couples. The use of the words ‘obligation to use lethal force’ suggests that the latter would not be accepted as a form of conscientious objection for the purpose of Article 18 ICCPR.

For its part, the Parliamentary Assembly of the Council of Europe has called on states to ‘ensure the right to well-defined conscientious objection in relation to morally-sensitive matters such as military service or other services related to health care and education ... provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed’.<sup>52</sup> The Assembly has thus construed conscientious objection as applying to a potentially wider range of services than those considered by the ECtHR or HRC, but still subject to the proviso that there is no ‘right to discriminate’.

While ECtHR and HRC judgments and decisions have restricted their application of the term conscientious objection to performing military service and abortion, some organisations and commentators have continued to argue for an extension of such protection to individuals exercising their conscience in other situations, and in some instances claims have been made in national jurisdictions. Claims have included requests for conscientious objection in areas of reproductive health other than abortion,<sup>53</sup> such as pharmacists who wish to opt out of dispensing hormonal

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<sup>49</sup> HRC, General Comment 22 (n 2), para. 11.

<sup>50</sup> See, for example, General Comment 22 (n 2), para. 11 and the following documents:

[http://www.ohchr.org/Documents/Publications/ConscientiousObjection\\_en.pdf](http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf) and

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.22\\_AUV.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.22_AUV.pdf).

<sup>51</sup> *Atasoy et al v Turkey* CCPR/C/104/D/1853-1854/2008. However, a minority of four members was of the opinion that prohibiting the right to conscientious objection amounted to a violation of the right to *manifest* one’s religion or belief, a distinction discussed at length in the decision.

<sup>52</sup> Parliamentary Assembly of the Council of Europe, Resolution 1928 (2013), ‘Safeguarding human rights in relation to religion or belief, and protecting religious communities from violence’, para. 9.10. Para 9.11 calls on member states to ‘accommodate religious beliefs in the public sphere by guaranteeing freedom of thought in relation to health care, education and the civil service provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed’.

<sup>53</sup> European Centre for Law and Justice (G. Puppink and K. Wenberg), ‘Memorandum on the PACE Report, Doc 12347, 20 July 2010, “Women’s access to lawful medical care: the problem of unregulated use of conscientious objection”, September 2010’, which argues that conscientious objection in the context of healthcare applies to both individuals and institutions; to both direct and indirect participation, even when referral to another service provider is impossible; includes complete immunity from liability; and cannot be balanced with the rights of patients to access lawful medical care.

contraceptives;<sup>54</sup> and midwives who wish to opt out of any involvement with patients in connection with the termination of pregnancy (e.g. in the course of delegating to or supervising other staff).<sup>55</sup> Claims have also been made in national jurisdictions for exemptions for religious individuals from anti-discrimination measures that interfere with manifestation of their beliefs; these include not only registrars or marriage commissioners<sup>56</sup> but also, for example, providers of commercial services such as wedding-related services,<sup>57</sup> printing services,<sup>58</sup> fertility services<sup>59</sup> and bed and breakfast or hotel accommodation.<sup>60</sup>

Almost invariably, such claims have failed. Courts have held either that the requirement to provide goods and services to the public in a non-discriminatory way was not an interference with religious freedom, or that the interference was justified by the goal of combating discrimination.<sup>61</sup> Despite this, legal claims and arguments based on religious conscience continue to proliferate. These are often expressed in non-negotiable terms, implying (as the dissenting judges did in *Ladele*) that actions motivated by conscience (and especially religious conscience) deserve a *special* form of legal protection. For example, the Observatory on Intolerance and Discrimination against Christians in Europe ventures that:

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<sup>54</sup> In 2007, Pope Benedict invited pharmacists to 'address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia'. See 'Address of His Holiness Benedict XVI to members of the International Congress of Catholic Pharmacists', Consistory Hall, 29 October 2007. See also *Pichon and Sajous v France*, No. 49853/99, 2 October 2001.

<sup>55</sup> *Greater Glasgow Health Board v. Doogan and Wood* [2014] UKSC 68.

<sup>56</sup> See, for example, Supreme Court of Spain *Interpuesto por Pablo de law Rubio Comos* Application No 69/2007 (11 May 2009); and, in the Netherlands, Law of 4 July 2014 (<https://zoek.officielebekendmakingen.nl/stb-2014-260.html>) which determines that local authorities cannot appoint any new registrars with conscientious objection to performing same-sex marriages, but also permits local authorities to dismiss registrars who refuse to perform such marriages, without obliging them to do so. See also, from Canada, *Nichols v Saskatchewan Human Rights Commission*, 2009 SKQB 299 (29 July 2009). Subsequently, the Saskatchewan Court of Appeal ruled unconstitutional draft legislation that would have permitted marriage commissioners to refuse to perform marriages when doing so would be contrary to their religious beliefs and that would have provided that such a refusal was not discriminatory under provincial law (*In the Matter of Marriage Commissioners Appointed Under The Marriage Act*, 1995 2011 SKCA 3 (11 January 2011)).

<sup>57</sup> See, for example, *Harriet Bernstein and Luisa Paster v Ocean Grove Camp Meeting Association*, No. PN34XB-03008 (29 December 2008).

<sup>58</sup> Ontario Board of Inquiry, *Brillinger and the Canadian Lesbian and Gay Archives v Brockie and Imaging Excellence Inc* (24 February 2000). On appeal, the Divisional Court upheld the Board's conclusions. It noted that the further an activity is from the core elements of freedom of religion, the more likely the activity is to impact on others and the less deserving it is of protection. Commercial printing services were found to be at the periphery of the protection of freedom of religion. However, the court left open the possibility of a different result in a different context; for example, where the content of the materials being printed might more directly conflict with the core elements of an individual's 'religious beliefs or creed'. See *Ontario Human Rights Commission v Brockie* [2002] O.J. No 2375 (Ont. Sup Ct.).

<sup>59</sup> See, for example, *North West Women's Care Medical Group v Benitez*, 189 P.3d 959, 968 (2008).

<sup>60</sup> *Bull v Hall and Preddy* [2013] UKSC 73 (couple in a civil partnership); *Black and Morgan v Wilkinson* [2013] EWCA Civ 820 (couple not in a civil partnership).

<sup>61</sup> For a useful overview, see Third Party Intervention in *Ladele and McFarlane v UK* by the International Commission of Jurists, Professor Robert Wintemute, Fédération Internationale des Droits de l'Homme and ILGA-Europe, September 2011; [http://www.ilga-europe.org/home/how\\_we\\_work/litigation/ecthr\\_litigation/interventions/submission\\_in\\_ladele\\_and\\_mcfarlane\\_v\\_uk](http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions/submission_in_ladele_and_mcfarlane_v_uk).

Limiting or denying an individual the right to freedom of conscience violates personal autonomy which is a main requirement of human dignity. 'Conscientious objection' is not a 'privilege' the legal order confers on religious believers but it is a moral obligation for everyone to act according to his conscience.<sup>62</sup>

It is frequently asserted that *Ladele* and other cases demonstrate that public authorities, employers and courts have allowed LGBTI rights inappropriately to 'trump' the rights of religious believers.<sup>63</sup> These views suggest that the principles established in the case law need to be more broadly disseminated and debated.<sup>64</sup>

Wintemute provides a useful analysis based upon the principle of harm. He argues that, even if accommodation of a religiously-motivated individual's refusal to serve others for a reason prohibited by anti-discrimination law entails minimal cost or disruption (e.g. because someone else could provide the service), it should be rejected because of the harm, direct or indirect, that it would cause.<sup>65</sup> Direct harm would provide the strongest case against accommodation and would arise in the event that a religiously-motivated individual refuses to serve a customer to their face.<sup>66</sup> Accommodation which causes indirect harm is also wrong as a matter of human rights principle because it is distinguished from direct harm only by 'invisibility and secrecy'.<sup>67</sup> The mere knowledge that the law permits religious individuals to discriminate against same-sex individuals is itself 'an affront to the dignity and worth' of LGBTI individuals and would perpetuate 'social and political prejudice and negative stereo-typing'.<sup>68</sup>

Wintemute considers – and rejects - the argument that accommodating individuals in *Ladele*'s position would constitute only a 'modest extension' of the right to conscientious objection already recognised with respect to military service and abortion by applying it in the context of 'morally controversial' acts such as solemnising same-sex marriages or partnerships.<sup>69</sup> For example, he argues, military service and abortion have more significant conscientious implications, involving the 'possible or certain termination of an actual or potential human life'. Wintemute considers, finally, the suggestion that the harm done to *Ladele*, who lost her job, outweighs the possible or vicarious harm to her colleagues or potential clients.<sup>70</sup> Again, he rejects this argument (and the concomitant

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<sup>62</sup> Observatory on Intolerance and Discrimination against Christians in Europe, *Report 2013* (Vienna, Observatory on Intolerance and Discrimination against Christians in Europe, 2013), 34.

<sup>63</sup> *Eweida and Others v UK*, Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano (n 45), para. 5. The dissenting judges suggested that *Islington*, in an act of 'blinkered political correctness', had 'clearly favoured "gay rights" over fundamental human rights'.

<sup>64</sup> For an overview of this debate in England and Wales see Donald *Religion or belief, equality and human rights in England and Wales* (n 38) 83-94.

<sup>65</sup> R. Wintemute (2014) 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others', *Modern Law Review* 77(2): 223, 240. For a similar analysis, see M. Malik, 'Religious Freedom in the 21<sup>st</sup> Century', *Westminster Faith Debates*, 18 April 2012; [http://faithdebates.org.uk/wp-content/uploads/2013/09/1352122648\\_MALIK-Westminster-Faith-Debates-RELIGIOUS-FREEDOM-IN-THE-21ST-CENTURY-Maleiha-Malik2.pdf](http://faithdebates.org.uk/wp-content/uploads/2013/09/1352122648_MALIK-Westminster-Faith-Debates-RELIGIOUS-FREEDOM-IN-THE-21ST-CENTURY-Maleiha-Malik2.pdf).

<sup>66</sup> Wintemute (n 65) 240.

<sup>67</sup> *Ibid* 242.

<sup>68</sup> This was the view of two of the five judges in the Saskatchewan Court of Appeal (n 56), para. 107.

<sup>69</sup> Wintemute (n 65) 246-248.

<sup>70</sup> *Ibid*, 249-251.

suggestion that LGBTI rights had inappropriately overridden the right to freedom of religion in *Ladele*):

It was not a case of sexual orientation trumping religion, but rather the greater harm of potential direct dissemination [based on sexual orientation] trumping the lesser harm of potential indirect discrimination [arising from failure to accommodate a manifestation of a religious belief that was harmful to others].<sup>71</sup>

Underlying this conclusion is the nature of equality and non-discrimination law as a “package deal” consisting of reciprocal rights and duties’, under which ‘protection against discrimination for members of historically disadvantaged groups also means restrictions on their own ability to discriminate against others’.<sup>72</sup> A further principle established in case law concerning both public servants and providers of commercial services is that following one’s conscience by seeking to opt out of anti-discrimination law cannot be expected to be cost-free; while human rights law protects the right to work,<sup>73</sup> no-one has a right to do a particular job or to make a living by providing particular goods or services and individuals may need to restrict their career options or choose between obeying their conscience and accepting certain penalties, up to and including dismissal.<sup>74</sup> In addition, Malik argues that the distinction between speech and conduct is crucial in situations where religious freedom and the equality rights of others conflict: ‘Those with strong beliefs about women, gays and lesbians can hold or express that view. But they cannot act on their belief in ways that constitute discriminatory harassment (via speech) or discriminatory acts (via conduct)’.<sup>75</sup>

The preceding analysis establishes several principles applicable to claims for conscientious objection beyond the current exemptions from performing military service or abortion. In summary, there is no ‘right to discriminate’. The right to freedom of conscience is not absolute. Non-accommodation of religiously-motivated refusals to serve others on grounds of sexual orientation (or, indeed, any other protected characteristic) is a legitimate interference with the right to manifest religion or belief. It is necessary in a democratic society for the protection of the rights of others, including the right to be free from discrimination. It is justified on the basis of the direct and/or indirect harm caused to others, even if there is no cost, disruption or inconvenience to others. These principles apply not only to public office holders but also to private providers of goods and services. Despite these principles, claims based on religious conscience expressed in morally absolute terms persist. This suggests that attention must shift towards the way in which such apparently irreconcilable views can be negotiated and managed in the public sphere, which we discuss in section 4.

#### **e. Reasonable accommodation**

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<sup>71</sup> *Ibid*, 249.

<sup>72</sup> *Ibid*.

<sup>73</sup> Article 6 of the ICESCR.

<sup>74</sup> Wintemute, (n 65) 250-252. See also D. Pollock (2011) ‘Is Conscientious objection an absolute right?’ in British Humanist Association, *Right to object? Conscientious objection and religious conviction* (London: British Humanist Association) 43; and *Bull v Hall and Preddy* [2013] UKSC 73, para. 56.

<sup>75</sup> Malik (n 78) 2. Note, however, that others reject the ‘belief/manifestation’ or ‘private/public’ distinction as meaningless to individuals who feel compelled to act by virtue of a comprehensive religiously-based worldview; see, e.g. C Stychin (2009) ‘Faith in the Future: Sexuality, religion and the public sphere’ *Oxford Journal of Legal Studies* 29(4): 729, 732.

A duty of reasonable accommodation of (prospective) employees' religious observance or practice is imposed on employers in both the United States and Canada as long as this can be done without undue hardship to the employer's business. In Canada, the duty has also been imposed on service providers. The duty means that employers/service providers must make, at least, an attempt to accommodate a religious practice when asked to do so and, if they turn down the request, they must show undue hardship. If no accommodation is made and no undue hardship can be shown, then there is a breach of anti-discrimination law. Although no such duty has been explicitly laid down in the human rights provisions on freedom of religion or freedom from religious discrimination, it might be seen as part of the justification test, as a restriction on the human right must be proportionate and necessary. If other, less restrictive or less discriminatory, ways of achieving the legitimate aim are available, then a measure cannot be said to be proportionate and would thus fail the justification test.<sup>76</sup> Some authors argue that an explicit duty of reasonable accommodation would place a greater onus on the employer to accommodate employees' observance or practice of religion or belief.<sup>77</sup> However, the impact of such a duty would depend upon the threshold established for justifying any failure to accommodate; the same effect might be achieved if human rights bodies and courts were to consider reasonable accommodation explicitly as part of the proportionality test.

The Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, has recommended that the equality laws in the Council's Member States should require that all organisations 'make reasonable accommodation for the practical implications of diversity across all grounds covered by the legislation unless this causes a disproportionate burden on them, as has Equinet.'<sup>78</sup>

The Special Rapporteur on Freedom of Religion or Belief has also suggested that the provision of reasonable accommodation as it is laid down in Article 5 of the Convention on the Rights of People with Disabilities 'should be understood as part of the legal responsibility of States, including as regards the guarantee of freedom of religion or belief'.<sup>79</sup> But he has also stated that:

[A]gainst a widespread misunderstanding, the purpose of reasonable accommodation is not to "privilege" religious or belief-related minorities, at the expense of the principle of equality. One should bear in mind that in the context of human rights, equality must always be conceived of as a diversity-friendly equality, which is the opposite of "sameness" or uniformity. From the perspective of a diversity-friendly, complex and substantive equality,

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<sup>76</sup> See on this: E. Howard, E. (2013) 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU law' *European Law Review* 38: 3, 360-375 and the authors referred to there.

<sup>77</sup> L. Vickers (2008) *Religious Freedom, Religious Discrimination at the Workplace* (Oxford and Portland, Oregon: Hart Publishing) 220.

<sup>78</sup> Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, under 6.1 point 2, [https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66\\_5638](https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638); Equinet (2008) *Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination* Equinet, Brussels, p. 8, [http://www.equineteurope.org/IMG/pdf/EN\\_-\\_Beyond\\_the\\_Labour\\_Market\\_-\\_Opinion\\_2008.pdf](http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf)

<sup>79</sup> General Assembly of the United Nations, 69<sup>th</sup> Session, A/69/261, Interim Report of the Special Rapporteur on Freedom of Religion or Belief, para. 62, <http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>

measures of reasonable accommodation should be appreciated as instruments of translating the principle of equality into different social contexts.<sup>80</sup>

#### **f. Intersectional discrimination and intra-group discrimination**

An individual can be discriminated against because of more than one ground, for example because of both their race and their gender. When these grounds intersect and cannot be separated from each other, the term 'intersectional discrimination' is used. For example, gay and lesbian older or disabled people can face specific forms of discrimination based on their sexual orientation and their age or disability, as older and disabled people are often seen as asexual.

Awareness is also required of the rights of 'minorities within minorities', or intra-group discrimination: for example, individuals may be discriminated against within their own religious community because of their sexual orientation or gender identity. Some countries and some interpretations of religion or belief do not tolerate deviation from heterosexual social norms and thus discriminate against LGBTI individuals. Individuals may face discrimination both within and outside their group or community. This can also lead to intersectional discrimination as individuals can be discriminated against because of (say) their sexual orientation or gender identity and because of their membership of the religious or migrant/ethnic group.

Legal and policy arguments about equality and human rights reflect ideological and theological discussions that are taking place within religious organisations and communities. The assertion of religion as a discrete category fails to acknowledge the high degree of differentiation *within* many religious organisations and communities in respect of tradition, generation, ethnicity, gender, sexual orientation, geographical location and other variables. This internal differentiation has implications for the identification of authentic voices that represent different groups or communities, or denominations, traditions or social structures within them. The uncritical use of 'religion' (or, for example, 'Christianity' or 'Islam') as a category in conflict with equality or human rights is unsustainable in the face of the evident differentiation within communities defined by religion. It is therefore important not to essentialise religions or beliefs or to misattribute certain views or values to religious communities as a whole. Moreover, constructions which place the supposedly 'secular' values of equality and human rights in opposition to 'religion' are likely to be harmful in their disregard for the rights of minorities within minorities, such as LGBTI believers. At stake in this debate are not only the right of such individuals to be free from discrimination on grounds of sexual orientation or gender identity, but also their own right to freedom of religion or belief.

### **4. RESOLVING SITUATIONS OF COMPETING RIGHTS: PRINCIPLES AND APPROACHES**

#### **a. Principles established in human rights law**

International human rights law on freedom of religion or belief provides a framework for the practical resolution of situations where rights appear to conflict. This section summarises principles that are derived from the case law of the ECtHR.<sup>81</sup>

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<sup>80</sup> Ibid, para. 72.

<sup>81</sup> For a useful overview, see Evans (n 6).

### **Non-discrimination**

As explained in section 2, the principle of non-discrimination is derived from a number of separate, though interlocking, provisions of international human rights law. In respect of freedom of religion or belief, any restriction should not be discriminatory in the sense that it bears more directly or more harshly on the followers of one religion or belief than another.<sup>82</sup>

### **Neutrality and impartiality**

The state is required to act in a neutral fashion as between religions and as between religious and non-religious forms of belief. This means that any protection or restriction should be generic and not focused on a particular religion or belief.<sup>83</sup>

### **Respect for the right of others to believe**

This principle is a key factor when assessing the necessity of any interference with the manifestation of a religion or belief; it establishes the duty of the state to create a 'level playing field' between different groups, including both those with religious or non-religious beliefs and those with no religion or belief, with one side being free to present their point of view, and the other to reject it.<sup>84</sup> The principle of respect is thus sensitive to imbalances of power and seeks to ensure that those who 'enjoy "superiority" over others, educationally, socially, politically or in any other fashion, are not unduly advantaged in an exchange of ideas'.<sup>85</sup> The principle may be summarised as respecting the believer rather than the belief:

[B]elievers and non-believers are entitled to the respect of those who hold to other forms of belief – even though, of course, there may be profound disagreement regarding the content of those views since respect for the believer does not necessarily entail respect for what is believed.<sup>86</sup>

This principle has come into play in cases concerning the restriction of proselytising activities which run the risk of subjecting individuals to pressure which they might be powerless to resist.<sup>87</sup>

As noted in section 3b, there is no right not to be offended. Rather, the ECtHR has held that:

Those who choose to exercise the freedom to manifest their religion ... cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.<sup>88</sup>

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<sup>82</sup> Evans (n 6) 35-40.

<sup>83</sup> For example, in *Manoussakis and Others v Greece* No. 18748/1991, 26 September 1996, concerning the right of Jehovah's Witnesses to set up a temple without authorisation, the ECtHR (para. 47) stated that: 'The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.

<sup>84</sup> Evans (n 6) 28.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid, 30.

<sup>87</sup> *Larissis and others v Greece* (n 39).

<sup>88</sup> *Otto-Preminger-Institut v Austria*, No. 13470/87, 20 September 1994, para. 47.

### **Fostering pluralism and tolerance**

Pluralism and tolerance are fostered by the application of the principles of state neutrality/ impartiality and respect. However, the principle of fostering pluralism and tolerance is also viewed as a goal in its own right because it is a means of preserving democracy. It requires religious adherents to accept 'a fairly high degree of challenge' to their belief systems in the pursuit of this goal.<sup>89</sup> Believers must 'accept the legitimacy of there being a divergence of views on matters of fundamental significance to them within the broader society of which they form a part', and the same principle applies to non-believers who are faced with the manifestation of forms of religion or belief which they might find unwelcome or unpalatable.<sup>90</sup> In such situations, the role of the state is 'not to remove the cause of tension by eliminating pluralism, but through its actions seek to ensure toleration'.<sup>91</sup>

### **Institutional and personal autonomy**

Freedom of religion or belief under Article 9 ECHR (and analogous provisions in other human rights instruments) protects not only individuals but also communities and organisations.<sup>92</sup> The right to freedom of religion (along with the right to freedom of association) thus protects religious organisations and communities from state intrusion into their associative life and governance or into doctrinal or other internal disputes, to the extent that this is compatible with the rights and freedoms of others.<sup>93</sup> Personal autonomy is also protected under Article 8 ECHR, the right to respect for private and family life, home and correspondence.

### **Proportionality**

As noted in section 1c, the concept of justification plays an important part in both human rights and in anti-discrimination measures and claims under either or both are often unsuccessful because the interference or restriction is considered to be justified. To be justified, a restriction or limitation must have a legitimate aim and the means used to achieve this aim must be proportionate and necessary. This justification test applies to Articles 9 ECHR and 18 UDHR and ICCPR, to the right not to be discriminated against under human rights law, EU law and, in many countries, under domestic anti-discrimination law. Thus, proportionality plays an important role both in human rights and anti-discrimination law. Proportionality means that all interests at stake must be considered and balanced against each other: a fair balance needs to be struck between the rights of the individual and the interests of the state, employer, service provider or the rights of others. This balancing of interests can involve a consideration of the question whether the restriction or limitation of the right could be achieved with less restrictive or discriminatory means and this comes close to a duty of reasonable accommodation (see section 3e). As discussed in section 3d, Wintemute places emphasis

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<sup>89</sup> The Court recognised the tension caused by pluralism in *Serif v Greece* No. 38178/97, 14 December 1999, involving the prosecution of a man claiming to be the Mufti of a Muslim community and the potential for unrest arising out of rival claims to this role. The Court stated (para. 53) that: 'The role of authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.

<sup>90</sup> Evans (n 6) 50.

<sup>91</sup> Ibid.

<sup>92</sup> *Metropolitan Church of Bessarabia and Others v Moldova*, No. 45701/99, 13 December 2001, para. 118 ('the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords').

<sup>93</sup> Evans (n 6) 30-35.

on the presence or absence of direct or indirect harm to others (as well as cost, disruption or inconvenience to the accommodating party) in case-by-case assessments of proportionality.

Human rights law eschews the notion of a hierarchy of rights. In situations of competing rights, the proportionality analysis is not a 'zero sum' game, in which a gain for one side in a conflict necessarily entails a corresponding loss for the other; rather, it is one in which compromise may be required. Discussing the intersection of the right to freedom of religion or belief and the right to freedom of expression, Evans argues that:

... it is both artificial and unhelpful to juxtapose them in an oppositional fashion or seek to determine a hierarchy of significance between them. Rather, it is necessary to identify the important contribution of both rights to the functioning of a tolerant, plural and democratic society and seek to ensure there is a maximising of both rights in situations of tension, rather than a relativising of the one in the interests of the other.<sup>94</sup>

The key is to assess the legitimacy of any restriction to the right(s) engaged in the particular circumstances of the case. The proportionality analysis is thus highly contextual and fact-specific and does not lend itself to making abstract determinations or dictating the factual outcome of cases.

The proportionality or balancing test should be used not only inside but also outside the courts: in employment, service provision and within equality bodies and tribunals. Such an approach assists decision-makers in ensuring that they consider whether a particular intervention has a legitimate aim and whether the means employed are an effective and proportionate method of achieving it, taking into account the interests of all parties.

### **Legality**

Restrictions on the right to manifest one's religion or belief must not be arbitrary or irrational. They must be clear, publicly accessible, non-retrospective, and people must be able to understand the circumstances in which they might be imposed and foresee the consequences of their actions with a degree of accuracy.

### **b. Approaches towards dispute resolution**

This paper has discussed the actual or potential tension between equality rights and religious freedom and between different religions or beliefs. Such clashes involve worldviews that may at least appear to be mutually incomprehensible. Ensuing debates have on occasions been conducted in highly intemperate language; for example, groups in the UK advancing competing claims for protection under anti-discrimination law have traded accusations of 'totalitarianism' and 'bigotry'.<sup>95</sup>

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<sup>94</sup> M. Evans (2009) 'The Freedom of Religion or Belief and the Freedom of Expression', *Religion & Human Rights* 4(2-3): 197, 233.

<sup>95</sup> See 'Human rights "agenda" is new totalitarianism, bishop warns judges', *The Telegraph*, 1 September 2012, <http://www.telegraph.co.uk/news/religion/9511836/Human-rights-agenda-is-new-totalitarianism-bishop-warnsjudges.html>; and 'Stonewall unapologetic over Scottish cardinal's "bigot of the year" award', *The Guardian*, 2 November 2012, <http://www.guardian.co.uk/world/2012/nov/02/stonewall-unrepentant-cardinal-bigot-award>.

Section 4a outlined principles derived from human rights case law which provide a sound framework for resolving conflicts in particular cases. These principles are applicable not only within courts and tribunals but also in the wider public sphere. In addition to these human rights-based principles, a number of attempts have been made to devise ground rules or 'ethical rules of engagement' for the negotiation of differences in the public sphere.<sup>96</sup> Stychin suggests that acceptance of these conditions is a minimum requirement for groups or individuals who seek to negotiate a particular outcome in a context where competing interests are at stake.<sup>97</sup> One such set of conditions was proposed by the 2008 Bouchard-Taylor Commission in Quebec, which addressed what it called a crisis of perception with regard to the accommodation of minority religious and cultural practices. It suggested as a set of ethical reference points for any negotiation process:

... openness to the Other, reciprocity, mutual respect, the ability to listen, good faith, the ability to reach compromises, and a willingness to rely on discussion to resolve stalemates. The institution of a culture of compromise largely centres on all of these factors that foster the coordination of action and the peaceful, concerted resolution of disputes.<sup>98</sup>

Another initiative exploring the 'Interface between Sexual Orientation, Gender Identity and Expression and Religion and Belief' recommended an approach based on 'willingness to listen to all views', 'honesty and openness in all communications', 'respect for all persons and identities', 'confidentiality of everything disclosed in discussion' and a 'non-judgemental' approach based on respect for the right of all to express views, whatever they might be.<sup>99</sup>

Nedelsky draws on Hannah Arendt's idea of the 'enlarged mentality' to propose ways of negotiating differences. The enlarged mentality relies on an 'imaginative capacity to put ourselves in the position of another', even—or especially—when the other's views are incomprehensible to oneself.<sup>100</sup> The imperative, Nedelsky proposes, is to ask oneself how one would judge matters from the 'mental standpoint' of another; that is, their 'ideologies, assumed frames of reference, and core values', which include their religion and 'spiritual commitments' or, conversely, their lack of, or hostility to, religion.<sup>101</sup> Nedelsky observes that those who claim conscientious objection on religious grounds do so from a perspective that embodies 'a sense of loss and anger' at the marginalisation of their worldview in the face of profound and rapid social transformation.<sup>102</sup> She argues that the enlarged mentality requires 'taking loss seriously', although she acknowledges that, in conflict over issues such as same-sex marriage, 'it is not clear ... what exactly one should do with such understanding' -

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<sup>96</sup> Stychin (n 75) 754.

<sup>97</sup> Ibid.

<sup>98</sup> G. Bouchard and C. Taylor (2008) *Building the Future: A Time for Reconciliation – Abridged Report* (Government of Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences) 55.

<sup>99</sup> Exploring freedoms together, the interface between sexual orientation, gender identity and expression and religion and belief, Joint Seminar between ENORB (European Network on Religion and Belief) and ILGA-Europe; <http://enorb.eu/wp-content/uploads/2012/05/Exploring-Freedoms-Together-ENORB-ILGA.pdf>.

<sup>100</sup> J. Nedelsky (2006) 'Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives' in R. W. Bauman and T. Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press) 98.

<sup>101</sup> Ibid, 99.

<sup>102</sup> Ibid, 106-107.

an uncertainty which is reflected in the conflicted debate about conscientious objection examined in section 3d.<sup>103</sup>

Stychin argues for a human rights-based approach based on ‘democratic dialogue and compromise’, in which, ‘pragmatic solutions will be preferred to ideological stalemates’.<sup>104</sup> For Stychin, nuanced analysis of the context in each case is preferable to abstract determinations on how to balance competing rights or the pursuit of victory in a ‘zero-sum game’ between irreconcilable world views.<sup>105</sup>

This approach implies a move away from litigation as a means of resolving disputes and towards mediation, conciliation, arbitration and other non-litigation routes. This approach recognises the limitations of law in addressing complex questions of multiculturalism and social identity. The adversarial dynamics of litigation tend to magnify underlying tensions and encourage an undue insistence on the assertion of competing identities or characteristics, especially when viewed through an equality ‘lens’ in isolation.

As noted in section 3f, another ‘ground rule’ is the need to avoid essentialising religions or beliefs or misattributing certain views or values to entire groups or communities, whether these are communities identified by their religion or belief, their sexual orientation or any other characteristic.

A further striking aspect of public discourse about religion or belief is the extent to which it has been framed by certain legal judgments, in the sense that judgments are adduced as evidence of wider patterns of experience or behaviour. Sandberg characterises this tendency as indicative of the ‘juridification of religion’.<sup>106</sup> He suggests that juridification has three dimensions: the expansion of law to regulate an increasing number of activities within the ‘religious market place’; a growing tendency for conflicts to be solved by, or with reference to, law; and a process of ‘legal framing’ by which people increasingly think of themselves and others as legal subjects. However, legal cases are not necessarily representative of common experience or a reliable indicator of the place of religion or belief (or specific religions or beliefs) in society. Indeed, the opposite is likely to be true. There are invariably contingent reasons why certain cases come to court and others do not. Meritorious claims may not reach court because individuals or organisations do not wish to litigate or lack the means to do so. Unmeritorious claims may reach court because of the sheer persistence of the applicant or the backing of campaign groups. Thus, legal judgments need to be contextualised with other types of evidence in order to determine what (if any) social significance they have. There is a risk that public responses to certain high-profile legal cases may make tensions between religion or belief and other interests appear more prevalent or intractable than they actually are, especially where cases are partially reported or misreported.

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<sup>103</sup> Ibid, 105, 107.

<sup>104</sup> Stychin (n 75) 754.

<sup>105</sup> Ibid, 752.

<sup>106</sup> R. Sandberg (2011) *Law and Religion* (Cambridge: Cambridge University Press) 193-195.