

## Conscientious Objection to Same-Sex Unions as a Reasonable Accommodation

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### 1. *Introduction*

With their thought-provoking contributions, Ryan Hill and Michel Miaille have made me think again about the many questions, which to my mind, were left unanswered by the ECtHR's reasoning in *Eweida and Others v the UK*.<sup>1</sup>

I have been challenged, on the one hand, by the emphasis Miaille puts on the difference between the public and private spheres for civil servants (such as Ms Ladele) when certain accommodations based on religious grounds need to be made. In particular, in the light of the French law on same-sex marriages, he argues that civil servants cannot allow their duties to be compromised in order to comply with their comprehensive views: the 'public' person always goes before the 'private' one. In such a view, French civil servants should, not only put aside their personal convictions when on duty, but also should act affirmatively against them. On the other hand, Hill points out that whether in 'theory' the conscientious objections to same-sex unions on religious grounds should be recognised in general, just 'how much' this is so, remains unclear according to the ECtHR's reasoning in *Ladele* as well as the joint partly dissenting opinion of Judges Vucinic and De Gaetano.

Prompted by this discussion, my aim is to tackle this topic from a slightly different perspective, looking in a paradigmatic way at the UK debate on this matter, fostered both by the recent judgment delivered

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<sup>1</sup> *Eweida and Others v United Kingdom*, App no 48420/10, 59842/10, 51671/10, 36516/10 (ECtHR [GC], 15 January 2013).



by the ECtHR in *Ladele* and parliament's discussions on the much debated Marriage (Same Sex Couples) Act 2013. I will argue that, first, the right to freedom of religion enshrined by Article 9 ECHR goes a step farther than the French debate about what concerns the private sphere and what can encroach on the public arena; second, the analysis of each concrete circumstance can lead the judge to assess primarily a fair balance of competitive rights through reasonable accommodations and, only later, to opt for severe limitations of fundamental rights.

## 2. *Freedom of religion goes beyond freedom of choice*

From the very beginning of the drafting of the European Convention on Human Rights, religious freedom was seen, without any doubt, as a fundamental right for every democratic society. It is not just one right among others; it is the mother of all rights. When a state recognises religious liberty, it consequently allows people the right to worship an authority higher than the state. In fact, every totalitarian regime narrows the right to freedom of religion precisely because it has the power to undermine the primacy of the state over citizens' morality. This is why the greatest guarantee of limited government is the right to freedom of religion.

Obviously, the right to freedom of religion, conscience, and belief includes the freedom to change religions or beliefs, and this right is reinforced by duties in constitutional and criminal law. The importance of the protection of the freedom of choice, as Krishnaswami notes, lies in the fact that the 'freedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible'.<sup>2</sup>

Hence, a consequence of considering freedom of conscience as freedom of choice is to make the core principle of the former more vague and much narrower. Freedom of conscience has its foundation not only in the subjective attitude of the person; rather, it deals with his intimate nature. The individual has the ability to look for truth by fol-

<sup>2</sup> A Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices' UN doc E/CN.4/Sub.2/200/Rev.1 16.

lowing a path, which can be a particular religion or a philosophical conviction, and in this regard, he has the capacity to choose what is good for him and can reject what does not correspond to his conception of good. For this reason, religious freedom, as a requirement of personal dignity, is the cornerstone of the structure of human rights. As the House of Lords asserts in one of its judgments, ‘religion and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society, individuals respect each other’s beliefs. This enables them to live in harmony. ... This freedom is not confined to freedom to hold a religious belief. It includes the right to express and practice one’s beliefs. Without this, freedom of religion would be emasculated’.<sup>3</sup>

This last issue was clearly considered during the passage of the Marriage (Same Sex Couples) Bill 2013 where concerns arose in relation to a number of employment scenarios. In particular, there was some difficulty for registrars who were bound by their duty to perform same-sex unions regardless of their religious belief. In fact, the Bill’s protections for religious ministers do not consider civil registrars (in line with the ECtHR’s reasoning in *Ladele*). In his oral submission at the invitation of the Public Bill Committee on February 12, 2013, Julian Rivers argued that despite the fact that the position reflected the European Court of Human Rights decision in *Ladele*, it does not necessarily imply that a fair balance had been struck between the perspective of human rights and employment equality law. Hence, a ‘reasonable accommodation’ approach could be appropriate in that context.<sup>4</sup>

In line with this reasoning, Baroness Cumberlege proposed Amendment 3, which allowed registrars who are ‘conscientious objectors’ to opt out from conducting same-sex marriages. However, that Amendment was rejected by a large majority. One of the main legal reasons, debated in the House of Lords, against the right to conscientious objection for registrars pertained to the fact that registrars are civil servants, and in this case, they should embody the state and should there-

<sup>3</sup> *R. v Secretary of State for Education and Employment and Others ex parte Williamson and Others* (2005) UKHL 15, paras 15–16.

<sup>4</sup> Human Rights Joint Committee—Second Report. Legislative Scrutiny: Marriage (Same Sex Couples) Bill, para 82. Available at <[www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/24/2402.htm](http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/24/2402.htm)>.

fore marry people regardless of their sex.<sup>5</sup> Hence, the law should not only come first, but also should *a priori* overcome individual core beliefs. This reasoning reflects the French *Conseil Constitutionnel*'s decision,<sup>6</sup> which stated that registrars and majors who oppose same-sex unions on religious grounds have no constitutional right to be exempted from carrying out homosexual marriages. The decision, in fact, emphasises the same point: registrars perform their duties on behalf of the state,<sup>7</sup> and the law on marriage seeks to guarantee the neutrality of public services within civil registration.<sup>8</sup>

Of course, registrars as civil servants should not only act in conformity of the law, but also as its guarantor. Does this necessary mean that their intimate nature as human beings with core beliefs should come not only second, but third? At this point, every registrar will face a dilemma: either to act against their conscience or to do what it takes to retain their post. However, one of the purposes of the UK Employment Equality (Religion or Belief) Regulations 2003<sup>9</sup> and the French

<sup>5</sup> For a better understanding of the discussion, I have reported part of Lord Pannick's intervention: 'I cannot accept that a public official is entitled to protection against the requirement to perform his or her basic obligations in relation to the official duties which they are contracted to perform. (...) Of course, as has been pointed out, the law does allow, in various contexts, for conscientious objections, including doctors and abortion and teachers and religious education. (...) The difference, as I see it, is that the registrar is performing the function of the state, and the function of the state in this respect is to marry people. The law, not the registrar, determines who is eligible to marry. It is unfortunate if registrars take the view that they cannot continue to perform this role, but no one is asking them to approve of or bless same-sex marriage; all that they will be required to do is to perform the official function that they have contracted to undertake.' House of Lords, Marriage (Same Sex Couples) Bill, Report (1st Day). Available at <[www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130708-0001.htm#13070819000024](http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130708-0001.htm#13070819000024)>.

<sup>6</sup> Decision 2013-353 QPC (18 October 2013).

<sup>7</sup> *ibid* para 8.

<sup>8</sup> *ibid* para 10.

<sup>9</sup> 'Harassment on grounds of religion or belief:

5. (1) For the purposes of these regulations, a person ('A') subjects another person ('B') to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of —

(a) violating B's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Constitution's preamble of 1946<sup>10</sup> is to protect employees, first by condemning any conduct that has the aim of violating their own dignity and any environment that may severely jeopardise their well-being through prejudice on religious grounds.

3. *Conscientious exemption to same-sex unions as a reasonable accommodation*

Generally, the neutrality of the state on this sensitive matter means that governments should step back from the endorsement of any particular religion, and even the idea of religion in general, in order to support the individual's freedom to choose a particular belief or to reject a belief. However, governments are not abstract entities, rather their systems were constituted by citizens bound together by the valuable ideal of leading a nation towards a common good. The perspectives of new liberalism have a significant impact on this issue. On the one hand, there is Rawls' doctrine of public reason,<sup>11</sup> which requires officials to offer justifications to their actions that are grounded on the political values of the community and not on comprehensive religious or moral doctrines. However, as the late Rawls conceded, this request can be excessively onerous, and if this were the case, then religious and moral doctrines could be introduced to the political arena, but only through the lens of a 'political language'. However, the fact that judges cannot deal with controversial moral opinions in their judgments may be an impossible demand since the law itself is not an aseptic instruction manual. At the same time, asking citizens to refrain from manifesting their core beliefs in a public sphere through practices and acts not

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect'.

<sup>10</sup> Preamble to the Constitution of 27 October 1946:

'5. Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs'.

<sup>11</sup> For a detailed explanation of these theories, see also J Rawls, *Political Liberalism* (Columbia UP 2005) and *A Theory of Justice* (The Belknap Press of Harvard University 1971).



against their creed can mean imposing a precise view. This is not the 'neutral' stance it pretends to be.

On the other side of the debate is Sandel's view. He does not think that questions about morality and religion can, or should, be set aside as Rawls suggests. Rather, he maintains that at each opportunity, morality and religion must be part of the public debate. The norms of a society are not determined solely by abstract principles of justice. They are also decided by the context. It is clear that Sandel is not defending a discriminatory system where governments espouse religious and philosophical views, as in a theocratic regime. But neither does he require governments to hide before the myth of neutrality as indifference to core beliefs, nor does he believe that the presence of religion in the public arena undermines the state's duty of impartiality before different religious and philosophical beliefs.

Moreover, there are norms that, quite simply, cannot be neutral when they directly interfere with citizens' moral convictions, in this case, the refusal to allow the registrar to conduct same-sex marriages. This does not mean that those norms are necessarily illegitimate but 'inasmuch as they indirectly favour the majority, measures of accommodation must sometimes be taken to re-establish equity within the terms of social cooperation'.<sup>12</sup>

On this last point, I would suggest three main aspects to be highlighted. First, the legitimacy of requests for accommodation on religious grounds is not unanimously accepted. In the case of Ms. Ladele, for instance, this is because, specifically, the aim pursued by the London Borough of Islington was not only to guarantee an effective service where same-sex couples could get married without facing any sort of inconvenience, but also to ensure that employees did not discriminate against others on grounds of sex.<sup>13</sup> Of course, those two goals are not only legitimate but also essential for any public authority. However, the ECtHR did not take into account that in that case, the applicant's exemption to the conduction of same-sex unions would not undermine these principles: (1) Other employees could carry out that duty in her place, and (2) Any arrangements would occur in the background. Rea-

<sup>12</sup> C Taylor and J Maclure, *Secularism and Freedom of Conscience* (Harvard UP 2010) 68.

<sup>13</sup> *Eweida and Others* (n 1) para 105.

sonable accommodations come from a balancing test between competing rights *in action*.

Secondly, within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status, but rather all core beliefs that allow individuals to make up their moral identity. The pertinent distinction is therefore not between religious and secular core beliefs, but rather between core commitments and personal preferences that are not intimately connected to our understanding of ourselves as moral agents.<sup>14</sup> In *Ladele*, the Court admits that the applicant's new duty to carry out a civil partnership between homosexual couples 'ha[s] a particularly detrimental impact on her because of her religious beliefs'.<sup>15</sup>

Taken together, these last two findings suggest that there is a risk of favouring excessive accommodations, especially since anything can be thought to have a potentially disadvantageous impact on a person's moral life, whereas the jurisprudence on Article 9 of the ECHR clearly states that not every act motivated by religious or philosophical beliefs goes under that provision.

The last point emphasises how important it is for courts and governments to bear in mind the definition of 'core belief' and its implications when dealing with cases on freedom of religion. The pluralism of values and conceptions of the good life make it impossible to make a list of beliefs. The criterion adopted by the Court to distinguish between belief and a simple preference was clearly expressed in the early stages of the work of the ECtHR. In fact, in *Campbell and Cosans*,<sup>16</sup> the Strasbourg Court affirmed that the convention protects only religions and philosophies, which are worthy of respect in a democratic society and are not incompatible with human dignity; moreover, the beliefs in question must attain a certain level of cogency, seriousness, cohesion, and importance. In short, conviction of conscience is intimately connected to the individual's moral integrity, and it means that the individual must establish what is central and what is marginal to his moral identity. However, the national authorities must evaluate not only the genuine-

<sup>14</sup> See also C Taylor and J Maclure (n 12) 89.

<sup>15</sup> *Eweida and Others* (n 1) para 104.

<sup>16</sup> *Campbell and Cosans v the United Kingdom*, App no 7511/76, 7743/76 (ECtHR, 25 February 1982).



ness of the belief, but also the consequences of the request for accommodation on the rights of others and on the institution's capability to pursue its aims. Serious restrictions on freedom of religion are sometimes legitimate, as long as they are not aimed to impose a particular conception of the good life. That said, 'it is probably unreasonable to expect a normative theory to provide *a priori* an adequate response to all the imaginable empirical cases that might arise,' and 'we cannot rule out *a priori* the possibility that insincere individuals or those with eccentric beliefs or expensive tastes will not surmount the two justificatory hurdles and obtain measure of accommodation'.<sup>17</sup>

That reasonable accommodations are required in connection with the right to religious freedom means that this right has the status of a 'special right'. In fact, any position maintaining that, in certain circumstances, it is a moral obligation to seek measures of accommodation must inevitably demonstrate that religious beliefs belong to a distinct type of belief that calls for greater legal protection. In line with this argumentation, it is worth noting the situation in the UK related to doctors' conscientious objection to abortion. According to the UK Abortion Act 1967, doctors can refuse to terminate a pregnancy except in emergency circumstances where the woman's life is threatened. Moreover, in regards to the initial steps in arranging an abortion, the Standard General Medical Services Contract states that the conscientious objection to abortion applies also to general practitioners (GPs), who have in that case only a duty to refer the patient to the hospital, specifically it states: 'where the Contractor has a conscientious objection to the termination of pregnancy, prompt referral [should be made] to another provider of primary medical services, who does not have such conscientious objections'.<sup>18</sup>

Can this situation be compared with that of a registrar who cannot carry out same-sex marriages because it is against his core belief? In the first case, doctors (employed by the National Health System, NHS) who are conscientious objectors should promptly seek the advice of colleagues who can perform that duty in their place (guaranteeing no de-

<sup>17</sup> C Taylor and J MacLure (n 12) 103.

<sup>18</sup> See 'NHS England Standard General Medical Service Contract' para 9.7.1., available at <[www.england.nhs.uk/wp-content/uploads/2014/05/gms-contract-04-14.pdf](http://www.england.nhs.uk/wp-content/uploads/2014/05/gms-contract-04-14.pdf)>.



lays and the same outcome). Now, the question that comes to mind is whether the case of the registrar who refuses to conduct a same-sex marriage on the grounds of religion is really so far from a doctor who refuses to make a referral for abortion on the same basis. Of course, the premise is that, in both cases, the homosexual couple and the patient will receive the same service without any difficulty.

