Religion and human rights
Deconstructing and navigating tensions

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Introduction
Religion and human rights have oftentimes been portrayed as enemies. Increasingly, however, a number of scholars have challenged this way of thinking and moved towards more conciliatory approaches (see, e.g., Sunder 2003; Witte and Green 2012). The relationship between religion and human rights does not have to be inherently contradictory. Yet freedom of religion, a human right itself, may sometimes raise tensions and apparent conflicts with other human rights. What makes these kinds of tensions and conflicts particularly thorny is that there are human rights involved on both sides of the competing claims.

These tensions and apparent conflicts raise various fundamental questions. Why do they emerge in the first place? Is there anything inherent in freedom of religion that makes it more likely to “clash” with other human rights? Or are these “clashes” simply part of how human rights have been conceived of and evolved over the years? Are there any approaches that may contribute to diluting and softening these tensions and conflicts? And, if dispelling conflicts is simply not possible, can human rights then co-exist even though neither of them does it to its fullest extent? In focusing on the relationship between religious rights and other human rights, this chapter explores answers to these questions.

The chapter starts by deconstructing the tensions and conflicts between religious rights and other human rights in an attempt to understand why they tend to occur in the first place. Using controversies brought before the European Court of Human Rights as examples, the chapter continues by exploring ways of dissipating and navigating these apparent tensions and conflicts. Our intention is not simply to offer a descriptive and critical account of these types of

1 See, e.g., Moller Okin 1999 (conveying the idea that religion and women’s rights are incompatible).
2 See also Evans and Hood 2012: 82 (referring more concretely to conflicts between religious employers and employees).
3 For the purposes of this chapter, we use the term “religious rights” to refer to the range of rights usually covered by human rights provisions guaranteeing freedom of religion – in its individual and associational forms – and non-discrimination on the ground of religion.
controversies but, most importantly, a forward-looking perspective from which they can be addressed in more constructive ways. The point of departure is that neither religion nor human rights law should be viewed as monolithic, reified and fixed entities. We will show that our understandings of both religion and human rights have a significant impact on the ways in which we frame, manage, and resolve apparent tensions and conflicts.

Deconstructing tensions

**Human rights versus human rights**

Tensions and conflicts between human rights are inevitable. In part, this is due to the very nature of human rights. Save a few exceptions, human rights are not absolute. The structure of several human rights provisions makes clear that they can be limited in accordance with the law in order to advance legitimate aims necessary in a democratic society, including the protection of the rights of others. Take the formulations of the freedom of expression, freedom of association and the right to respect for private and family life in the European Convention on Human Rights (“ECHR”). The three of them contemplate the protection of the rights of others as a legitimate ground of limitation. Similar formulations can be found in other human rights instruments. Classic examples include tensions between freedom of expression and the right to private life (e.g., defamatory speech) as well as freedom of expression and non-discrimination (e.g., racist hate speech).

Moreover, conflicts between human rights seem to be increasingly frequent. One reason for this is the continuing expansion of the list of human rights via new instruments and interpretation. Another reason is the growing recognition of “the horizontal effect of fundamental rights” (Brems 2008: 2). Initially viewed as individual guarantees against the state, the validity of human rights is increasingly recognized with respect to non-state actors such as individuals, groups and organizations (ibid.). This means that states must protect individuals against violations of their human rights by others, including private actors (ibid.).

In brief, that human rights are potentially in tension or conflict with one another is not uncommon. Freedom of religion – a human rights itself – is no exception in this regard. In fact, and using again the example of the ECHR, the right to manifest one’s religion may be “subject only to such limitations as are prescribed by law and are necessary in a democratic society for . . .

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4 The classic example is the prohibition of torture and inhumane or degrading treatment.
5 Article 10(2) provides: “The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . .”.
6 Article 11(2) states: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society . . . for the protection of the rights and freedoms of others.”
7 Article 8(2) provides: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of the rights and freedoms of others.”
9 For example, rights have become increasingly refined through case law, oftentimes giving rise to new sets of sub-rights. See Brems 2008: 2.
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the protection of the rights and freedoms of others." So it is fundamental to understand that human rights tensions and conflicts are not exclusively inherent to freedom of religion. The tensions and conflicts arising out of the exercise of religious rights should be put in this broader perspective. That is, they should be placed within the broader and overall scheme of human rights tensions and conflicts.

Religious rights versus other human rights

Besides the reasons discussed above, the question now is whether there are any specific features surrounding the exercise of religious rights – from the perspective of both the religious person/group and human rights law – that may account for why religious rights are potentially at odds with other human rights.

From the perspective of religious people or groups, human rights law may be viewed as simply one source of normative commitments. For them, the law may be relevant “but hardly the last or most important word” (Minow 2007: 825). Martha Minow nicely captures this reality: “For [religious people], the secular is one of many spaces, and potentially one that is threatening to commitments and practices held dear. And for them, government enforcement of norms contradicting their beliefs is coercive and threatening” (2007: 826). Religious groups and individuals may thus be said to be standing at the intersection of two main sources of norms and meanings – notably religious and human rights sources. These “twin authorities” – of religion and human rights law – may sometimes confront religious people and groups with conflicting values and obligations. Human rights claim to be the ultimate authority for judging human behavior; in that respect, religion is a direct competitor. To a large extent, human rights and religious norms can coexist or even strengthen each other, yet when they contradict each other, only one of them can have the final word. Faced with this kind of scenario, it should not be surprising that many religious people will follow religious authority, as this is the source they ultimately deem the most compelling.

Think of Jehovah’s Witnesses parents opposing blood transfusion even when that transfusion might be the only way of keeping their child alive. By insisting on following religious authority these Jehovah’s Witnesses parents may enter into conflict with another human right – i.e., their child’s right to life. Think also of a Reformed Protestant political party that, based on the word of God as revealed in the Bible, seeks to prohibit women in the party from standing for election. Again, the commitment grounded in religious authority puts members of this political party at odds with the prohibition of gender discrimination grounded in human rights law. Another example is the Catholic Church’s adherence to the sanctity of marriage, which may put the Church in conflict with the right to respect for private and family life of employees who engage in non-marital relationships.

From the perspective of human rights law, one fundamental feature that might be more specifically contributing to the emergence and growth of tensions between religious rights and

10 Article 9(2) ECHR. (emphasis added).
11 Martha Minow makes this point, albeit referring to US federal constitutional law (Minow 2007: 825).
12 This feature, however, is not exclusive to religion. Other examples of people standing at similar normative intersections include those individuals and groups subject to customary sources of authority like members of indigenous groups and cultural minorities.
13 M. McConnell in Religious Freedom Project 2011: 18: “The twin authorities of religion and the state present believers with a kind of conscientious conflict that is not seen elsewhere.”
14 See ECtHR, Staatkundig Gereformeerde Partij v. the Netherlands, July 10, 2012.
other human rights is the rise and refinement of non-discrimination and equality. This is reflected, for example, in the expansion of grounds of non-discrimination so as to include new ones such as sexual orientation. Moreover, it is reflected in the increasing levels of protection of more groups against discrimination. In parallel with sex/sexual orientation equality becoming self-evident and in line with mainstream opinion, secularism is on the rise, and religious freedom has been losing support from the majority opinion. The place that gender and sex equality has gained in human rights law has spurred various areas of contention between religious rights and non-discrimination. One of them is that of sexual and reproductive rights, as evidenced in healthcare professionals’ opposition to abortion or pharmacists’ refusal to provide birth control options on religious grounds. Another example is that of same-sex marriage and civil partnerships. The recognition of same-sex marriage rights in some countries has increased tensions and conflicts with religious people who view marriage as the union between a man and a woman.

Navigating tensions

Religion and human rights law as living entities

Though religion scholars have struggled with their discipline’s understandings and definitions of religion, there seems to be one “safely generalizable statement” (Berger 2012: 27) within religious studies: “Religions are constantly in flux, redefining their practices and beliefs in dialogue with their local, historical, and social milieus” (Berger 2012: 27). Legal scholars appear to be taking this crucial insight more and more seriously. In the context of human rights law, for instance, Madhavi Sander has challenged what she regards as human rights law’s outdated view of religion (Sander 2012: 283). On this view, religion and religious traditions are homogenous and static rather than heterogeneous and dynamic (Sander 2012: 283). The obvious assumption flowing from this view is that there is no room for change and adaptation on the side of religion, and as a result, no room for accommodation of human rights. Moreover, unable to see internal contestation and variation, essentialist accounts of this sort oftentimes lead to portrayals of

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16 See, e.g., McCrudden in Religious Freedom Project 2012: 21: “The last element in the equality agenda that occurred has been the increasing expansion of the grounds of protection, beginning with gender or race, and then growing to include religion, sexual orientation, age, disability, and so on. So the protection from discrimination on grounds of sexual orientation is part of a trend of decision-making which has particular attributes.”
17 One indication of this is domestic and supranational human rights courts’ application of stricter scrutiny tests to differentiations based on gender and sexual orientation. The European Court of Human Rights, for example, applies its very-weighty-reasons test to such differentiations. See, e.g., ECtHR, Eweida and Others v. the United Kingdom, January 15, 2013 § 105 (recalling that “differences in treatment based on sexual orientation require particularly serious reasons by way of justification”) and ECtHR (GC), Konstantin Markin v. Russia, March 22, 2012 § 127 (reiterating that “the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention”).
18 For an illuminating analysis of the various understandings of religion within religious studies, see, e.g., Woodhead 2011.
19 There is ample scholarship rejecting this assumption and showing a more nuanced view instead, according to which religions may leave room for human rights even though there might still be areas of divergence. See, e.g., McCrudden 2012 and An-Na’im 1990.
religion (or certain religions) as law’s “other”: as inherently oppressive, hierarchical, irrational and patriarchal (Sander 2012: 283).

Just like religion, human rights norms are not static or fixed. On the contrary, the human rights regime is fluid and continuously open to contestation and adaptation. This fluidity and adaptability is evidenced, for example, in its constant expansion both at the levels of standard-setting and judicial interpretation. What is more, critical accounts of human rights show how the noble ideal of universality has not always been all that inclusive in practice (see generally Brems 2001). The initial dominant understanding of the “human” of human rights law has sometimes functioned to exclude a range of “others” from its purview (see, e.g., Grear 2012). Yet human rights law has not remained indifferent to charges of exclusion. The proliferation of specialized human rights instruments attending to the constructed disadvantage of some groups comes to mind as an example (Grear 2012). Of course, this is not to say that full inclusion has been entirely achieved in human rights law. The point, rather, is simply to show that human rights law allows “for continually changing, negotiated understandings of that which it is most essential to protect in order to defend and to enhance our common humanity” (Van Ness 1999: 17).

The advantage of de-essentializing both sides – religion and human rights law – is that clashes are no longer assumed inevitable. Moreover, when tensions and conflicts do arise, they are no longer assumed insurmountable: they may not necessarily be viewed in sharply dichotomous win/lose terms. In over-emphasizing homogeneity and ignoring internal debates on areas of tensions, either in the religious or the human rights contexts, one risks overlooking flexibility on both sides and encouraging “positional hardening” instead. If, on the contrary, one recognizes that many religious rules and practices are subject to internal contestation and that human rights laws are “living instruments,” one way out of many apparent conflicts may be re-interpretation. Religious norms may be interpreted in ways that do not conflict with, say, women’s rights and, at the same time, human rights norms may be interpreted in ways that are more open to religious diversity (Brems 2010: 137).

20 Moreover, just like religious scholars understand religion in different ways, human rights scholars have different understandings of human rights. See Dembour 2010.
21 See also Witte and Green 2012: 18: “[T]he human rights regime is not static. It is fluid, elastic and open to challenge and change.”
23 One noteworthy illustration is the “living instrument” notion developed by human rights courts. The notion refers to the need to interpret human rights instruments in light of present-day conditions. See, e.g., ECtHR (GC), Bayatyan v. Armenia, July 7, 2011 §§ 102–109 and ICtHR, Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, August 31, 2001 §§ 146–148.
24 See McCrudden in Religious Freedom Project 2012: 22: “We should not, however, overemphasize the homogeneity of the two ‘sides’. In neither the human rights nor the religious contexts there is a settled orthodoxy on many areas of the most significant tensions.”
25 We borrow the term “positional hardening” from Benjamin Berger, who uses it to warn against legal approaches that induce the religious fundamentalism that arises from “rigid or absolutist fidelity to a particular interpretation of a tradition” (2012: 25).
Using examples of the European Court of Human Rights’ case law, we will now illustrate how human rights law may navigate apparent tensions and conflicts in particular controversies. We will start by showing how some of these tensions and conflicts may dissipate or at least appear less overwhelming in human rights adjudication if we keep in mind the approaches outlined above. Next, we will argue for searching compromises when conflicts are inevitable.

**Dissipating conflicts**

Essentialist accounts of religion are sometimes at work in human rights law, informing the framing of apparent tensions as inherent and insuperable conflicts. One of the most notable examples is the portrayal of religious practices associated with certain religious traditions – or of the religious traditions themselves – as intrinsically at odds with gender equality. This kind of portrayal rests precisely on flawed assumptions that there is wide intra-group consensus that coercing women into certain practices is justified. The problem with this way of thinking is that it takes the part for the whole. As Maleiha Malik notes, this assumption “is based on a definition of the cultural or religious group which takes the viewpoint of some of the most extreme members as being representative of the group as a whole” (2008: 7). As a result, it remains oblivious to dialectics of religious or cultural contestation (see Parekh 1999: 73).

Examples of essentialist assumptions about religion and its inherent incompatibility with gender equality in human rights law can be found in the human rights debates concerning Muslim women. Consider the reasoning of the European Court of Human Rights in several cases. The Court has, for instance, said that Sharia’s rules on the legal status of women “clearly diverge from Convention values.” It has also held that “the wearing of an Islamic headscarf” seems difficult to reconcile with gender equality and non-discrimination because it appears to be imposed by the Koran. Note that the Court’s statements in both cases arise from a monolithic characterization of an entire religion: Islam. Had the Court viewed Islamic rules and practices as dynamic and heterogeneous, the apparent intractable character of the conflict between religion and gender equality would have most likely eased, if not dissipated. For example, once aware of the variety of reasons why many Muslim women wear the headscarf, the assumption that the symbol is religiously (or otherwise) imposed and that (all) Muslim women are thus oppressed loses ground. So does the gender equality justification to ban the practice. Indeed, once this internal plurality is acknowledged, the proportionality of blanket headscarf bans to protect Muslim women from oppression can no longer be sustained. Viewed in this light, such blanket measures turn out a disproportionate response to the risk that some Muslim women may be intimidated or pressured to wear it and risk oppressing those women who wear it autonomously (Malik 2008: 22).

The essentialist understandings of religion sometimes underlying framings of religious “practices” as contrary to gender equality run the additional risk of feeding into racial stereotypes. This is because of what Sherene Razack calls “culturalization,” which happens when gendered treatment is exclusively attributed to culture understood “as frozen in time and separate from
systems of domination” (Razack 2004: 131, footnote 3). Making “religion” or “culture” responsible for gendered behavior does not only leave the material, institutional and political sources of gender subordination unexplored (Razack 2004: 132). Most relevantly for the purposes of this chapter, culturalization contributes to “othering” those religions and cultures blamed for such behavior. Gender inequality is thus located in “other” religions or cultures rather than in one’s own. Othering, in turn, serves as a mechanism to re-inscribe Orientalist divides of “us” (as fully respectful of gender equality) and “them” (as violators of gender equality). In racializing the debate, this kind of discourse clouds and exaggerates tensions and conflicts between religious rights and women’s rights (Malik 2008: 6–7). It is therefore fundamental to keep an eye on whether the racialization of conflicts may be playing a role in deeming them widespread and intractable (Malik 2008: 6–7).

In brief, approaching religion as “living” may allow dissipation of apparent conflicts. What at first appears like real conflicts may turn out to be imaginary once one acknowledges that the practice in question: (i) may be animated by a variety of motives; (ii) may be embraced in a diversity of ways; (iii) may be subject to internal challenge and different interpretations; and (iv) may not be the exclusive “fault” of “religion” but of material, political and institutional sources as well. This approach does not deny that conflicts sometimes exist in reality but at least it eschews over-magnifying or exacerbating conflicts and allows for more proportionate and effective responses.

Approaching human rights law as a living entity may similarly contribute to defusing what at first sight looks like conflicts between freedom of religion (or religious non-discrimination) and other human rights. For instance, human rights law has relatively recently seen the appearance of sophisticated concepts such as indirect discrimination and reasonable accommodation. Moreover, increasingly, the argument has been made for using the notion of reasonable accommodation to prevent or correct indirect religious discrimination in the context of human rights law (see, e.g., Henrard 2012). Simply put, reasonable accommodation means making “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden.” Applying reasonable accommodation may sometimes defuse apparent conflicts by allowing both rights to co-exist and remain entirely intact.

Consider the example of what is usually viewed as a conflict between freedom of religion (or religious non-discrimination) and a woman’s right to respect for her private life in abortion cases. A doctor might refuse performing an abortion based on her religiously held convictions but, in so doing, cause a serious breach of the woman’s right to respect for private life. In this kind of scenario, both rights may sometimes be able to survive entirely if the state reasonably...
accommodates the doctor. The state may do this in several ways. What is crucial, however, is that the state does not accommodate the doctor in a way that might cause undue hardship to women seeking abortion. This might be the case, for instance, if the woman has to travel disproportionately long distances to have access to abortion. Thus, the state should make sure that, in organizing its opt-out system for healthcare professionals, it does not prevent women from effectively accessing abortion services. As the European Court of Human Rights has stated in abortion cases: “States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”\(^{35}\) In the cases of \textit{R.R. v. Poland} and \textit{P. and S. v. Poland}, the Court found that the state violated the Article 8 ECHR rights of women wanting to have an abortion.\(^{36}\) The state could have however defused the conflict by providing an optimal solution to both parties involved in the dispute (see Smet 2012: 121–3).

\textit{Tackling conflicts}

When conflicts are inevitable, advocating an approach that establishes \textit{a priori} primacy of one human right over another should be avoided, as this runs counter to the principle of indivisibility of human rights (Brems 2010: 136–7). According to this principle, all human rights are \textit{a priori} equally worthy of protection (ibid.). Thus, priority to one human right over another should be determined in light of a specific problematic and on the basis of legal reasoning centered around the proportionality of the limitation on each right (Brems 2010: 137). A compromise should first be explored between the rights in conflict. In that case, both human rights may be restricted to a certain extent in order to achieve the fullest possible protection for the two of them; neither of them trumps the other, as the two are “optimized” and partly successful.\(^{37}\)

\textit{Clashes with liberty}

Cases involving conflicts between religious rights of churches and the rights of their employees/members have gained more and more prominence in the ECHR context in the past few years. Examples include a series of cases against Germany: \textit{Obst}, \textit{Schüth} and \textit{Siebenhaar}.\(^{38}\) In \textit{Obst}, the Church of Jesus Christ of the Latter-Day Saints or Mormon Church terminated the employment of its Director of Public Relations for Europe, following his admission that he was having an extra-marital affair. Given the seriousness of his offense, his employment was terminated without notice. \textit{Schüth}, in turn, concerned an organist and choirmaster of a Catholic parish, who left his wife and started living with his new partner, with whom he expected a child. Once this situation became known, the Catholic Church dismissed him. By having an extra-marital relationship with another woman, he was accused not only of committing adultery but also bigamy in light of the sanctity of marriage professed by the Catholic Church. Last, \textit{Siebenhaar} concerned a


\(^{36}\) Ibid.

\(^{37}\) This is the German notion of “praktische Konkordanz.” See also McCrudden in Religious Freedom Project 2012: 23.

teacher hired by a kindergarten run by a Protestant parish. When the fact that she was an active member of the Universal Church came to light, the teacher was dismissed, given the incompatibility between the principles of this Church and those of the Protestant Church. The German domestic courts dismissed the employees’ claims in the three cases. The applicants went to Strasbourg claiming that the German state had failed to protect the right to respect for family and private life (Article 8 ECHR), in the case of Obst and Schüth, and freedom of religion (Article 9 ECHR), in the case of Siebenhaar.39

In Schüth, the Court found a violation of the applicant’s human rights, primarily because the German courts did not engage in a real balancing exercise between the ECHR rights of the Church under Article 9 and Article 11 (freedom of association) and those of the applicant under Article 8.40 The Court found, for example, that the German courts overlooked a series of factors on the side of the applicant, including his de facto family life and his limited opportunities of finding another job.41 In Obst and Siebenhaar, on the contrary, the Court considered that the German courts did engage in a proper balancing exercise and, as a result, found no violations of the applicants’ human rights.42 Regardless of the difference in outcomes, there is a fundamental commonality underlying the Court’s approach in Obst, Schüth and Siebenhaar: the Court requires that domestic courts balance both parties’ rights, taking into account the specific nature of the post as one more factor in the weighing process (see Evans and Hood 2012: 104). This approach is encapsulated in the following principle in Schüth:

Whilst it is true that, under the Convention, an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty cannot be subjected, on the basis of the employer’s right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality.43

This approach, which emphasizes the need for ad hoc balancing, stands in contrast with the more categorical approach adopted by the US Supreme Court, which insulates churches from lawsuits by certain categories of employees, eschewing all possibility of balancing.44 Jack Balkin explains the US Supreme Court’s approach: “Once an employee is characterized as a minister, then the religious body has an absolute right to fire them for any reason” (Balkin 2012). Obst, Schüth and Siebenhaar, on the other hand, deal with conflicts between collective religious rights and individual human rights in a way that gives both sides their due, allowing them to co-exist.

39 In the three cases, the respective Churches intervened as third parties. See ECtHR, Obst v. Germany, September 23, 2010 §§ 37–38; Schüth v. Germany, September 23, 2010 § 52 and Siebenhaar v. Germany, February 3, 2011 §§ 34–35.
40 ECtHR, Schüth v. Germany, September 23, 2010 § 74.
41 Ibid. §§ 67 and 73.
43 ECtHR, Schüth v. Germany, September 23, 2010 § 69.
44 Balkin 2012. For a comparison of the approaches adopted by the Strasbourg Court and US courts, see Evans and Hood 2012.
Thus, in exercising religious autonomy, Churches are entitled to require their employees to adhere and behave in accordance with their religious precepts. Yet if Churches dismiss their employees for failing to live up to such precepts, they cannot do it without having due regard to the employees’ rights. As Evans and Hood nicely sum up:

It is not enough that the Catholic Church believes that adultery is a serious sin and that employing an organist who is known to be living in an extra-marital relationship to play in religious services would undermine the Church’s moral teaching. The Church must also consider the right to privacy, family life and employment prospects of the employee.

(Evans and Hood 2012: 102)

We agree with Evans and Hood that this kind of “middle ground” approach may be more apt to “navigate the complexities of a world in which both religious and equality rights [and other human rights] are taken seriously and given their due” (2012: 107). It remains to be seen if the Court will be capable of keeping its ad hoc balancing approach instead of more categorically leaning towards religious freedom where dismissals concern clergy – as opposed to lay – positions.

**Clashes with equality**

Let’s now turn to another type of case, one that involves the right to individual religious freedom and non-discrimination on the basis of religion, on one side, and the right to non-discrimination on sexual orientation grounds, on the other. The case was brought to the European Court of Human Rights by Ms Ladele, a registrar of births, deaths and marriages at a local public authority in London. Ms Ladele is a Christian who holds the orthodox view that same-sex partnerships are contrary to God’s will and who therefore believes that it would be wrong to participate in the creation of an institution equivalent to marriage between same-sex couples. Because of her refusal to be designated as a registrar of civil partnerships, disciplinary proceedings were brought against her, resulting in the loss of her job. The applicant framed her complaint in Strasbourg as one of religious discrimination (Articles 14 and 9 ECHR).

The Court accepted that the local authority’s requirement that all registrars be designated as civil partnership registrars had a detrimental impact on the applicant because of her religious beliefs. Moreover, it accepted that the requirement pursued a legitimate aim (non-discrimination...

45 The Court has read the religious autonomy of religious organizations into Articles 9 and 11 ECHR. See ECtHR, Schüth v. Germany, September 23, 2010 § 58.
46 ECtHR, Siebenhaar v. Germany, February 3, 2011 § 46 (“La Cour note que la nature particulière des exigences professionnelles imposées à la requérante résulte du fait qu’elles ont été établies par un employeur dont l’éthique est fondée sur la religion ou les convictions.”).
47 The Court might be moving towards a US-style ministerial exception, as evidenced in ECtHR, Fernández Martínez v. Spain, May 15, 2012. The Grand Chamber, before which the case is currently pending, might however revise the approach. Fernández Martínez concerned a “secularized priest” in the Catholic Church. It may well be that the nature of the applicant’s position led the Chamber to accept the Spanish courts’ categorical balancing, instead of insisting on a more ad hoc balancing. See Smet 2012.
48 ECtHR, Eweida and Others v. the United Kingdom, January 15, 2013. The case concerns three other religious applicants, one of them (Mr McFarlane) also in conflict with non-discrimination norms. However, we will confine ourselves to the case of Ms Ladele for reasons of space.
49 Ibid. § 104.
on the ground of sexual orientation), recalling its own case law: differences of treatment on the basis of sexual orientation require very weighty reasons by way of justification. When turning to the proportionality of the requirement, the Court acknowledged the serious consequences it had had on the applicant (job loss) and the fact that the requirement had been introduced a few years after she signed her contract. At the same time, the Court noted that the local authority’s policy aimed to protect the rights of others, which are also protected by the ECHR. The conclusion was that the United Kingdom did not exceed its margin appreciation; a wide margin is in principle given to states when striking a balance between competing ECHR rights. The Court thus found no violation of Ms Ladele’s right.

In relying on the wide room states have for discretion, the Court simply guarded a bottom line of minimal human rights protection: a human rights violation would have been found only if the solution at the domestic level was unreasonable (see generally Brems 2009). “When an international human rights court’s ‘no violation’ judgment is based on the accommodation of contextual diversity, such as through the use of the margin of appreciation, this is not supposed to function as a guideline for state behavior in the same way as a finding of a violation” (ibid.: 353). Indeed, what the Court is saying in Ladele is that it abstains from offering any guidance because it is for the national courts/legislatures to do an in-depth examination of the issue at hand in the concrete context.

Notable approaches offered in legal scholarship to accommodate both sides of Ladele-like conflicts can be broken down along two broad lines. One of them involves constructing freedom of religion narrowly and, in so doing, establishing a belief/action distinction. On this view, Ladele can believe that same-sex partnerships are not permitted but she cannot act upon such beliefs by refusing to register same-sex partnerships. This view is in fact in line with prevailing legal accounts of religion – in the ECHR and elsewhere – that understand religion primarily as a matter of internal beliefs. The belief/action suggestion may at first seem like a reasonable compromise, the kind that allows both rights to co-exist without much hardship on either side. At the end of the day, Ms Ladele would be free to keep her beliefs and same-sex couples to get their partnerships registered without discrimination. On a closer look, however, one soon notices that, applied to Ladele, this approach restricts freedom of religion more than non-discrimination.

50 Ibid. § 105.  
51 Ibid. § 106.  
52 Ibid.  
53 Ibid.  
54 The problem, however, is that states interpret a “no violation” finding based on the margin of appreciation as “a license to proceed with a restrictive measure without having to perform their own in-depth evaluation” (Brems 2009: 353).  
55 See, e.g., Malik 2011: 34 and 38.  
56 Another form of constructing freedom of religion narrowly is by limiting it to the right to worship. This was in fact the approach adopted at the domestic level by the Court of Appeal ruling in the Ladele case: “Islington’s requirement in no way prevented her from worshiping as she wished.” ECHR, Eweida and Others v the United Kingdom, January 15, 2013 § 29. See, R. Trigg in Religious Freedom Project 2012: 16: “The courts tend to say when faced with this kind of case that you have freedom of religion because you are free to worship. This was in fact said in the case of the civil registrar in Islington. The authorities said that to have freedom of religion you do not have to worry about whether you can manifest a religion in your job. You are free to worship and that is freedom of religion.”  
57 Woodhead 2011: 123. For powerful critiques of this conception of religion, see, e.g., in the US context, Sullivan 2005 and in the ECHR context Evans 1999.
The application of this approach in *Ladele* ultimately carries serious hardship for her: job loss. Moreover, the alleged protection of her freedom of religion – by allowing her to hold her beliefs or to worship – appears rather illusory, as she was ultimately forced to either behave in a way contrary to her beliefs or be driven away from civil service.

As well intended as the belief/action suggestion might be, using this distinction as a device to establish compromise is, however, problematic for various reasons. First, and as it is increasingly acknowledged in legal scholarship, this distinction favors a conception of freedom of religion based on a protestant understanding of religion as belief at the expense of other understandings that emphasize practice instead (see e.g., Sullivan 2005: 7–8). The approach therefore risks being particularly detrimental to those religious people for whom religion is a combination of belief and practice more integrally. Second, the belief/action approach echoes the status/conduct distinction that has proven so problematic precisely in the context of discrimination on the basis of sexual orientation. This attitude implies that one can be gay but cannot have a same-sex relationship; one can be a Muslim but cannot engage in, say, prayers; one can hold a certain religious belief but cannot refuse to act in a manner inconsistent with such beliefs. This approach too easily assumes that condemnation of someone’s conduct does not undermine someone’s personhood or beliefs. Third, the belief/action distinction does not necessarily restrict the rights in conflict to an analogous extent; depending on the circumstances, sometimes one right may suffer more than the other like its application in *Ladele* illustrates.

Another approach to dealing with *Ladele*-like conflicts involves focusing on avoiding material harm to same-sex couples. On this view, what really matters is that people are not discriminated in the access to material benefits (e.g., that same-sex couples obtain the registration of their civil partnership). This approach may initially look like a reasonable compromise: religious civil servants are replaced by registrars with no objections to registering same-sex partnerships while same-sex couples obtain registration of their partnerships. Yet it does not take long to realize that under this approach one side is fully accommodated while the other one may only be partly so. Indeed, religious civil servants get full accommodation, as they get exempted from providing the service. Same-sex couples, however, may still suffer an affront on their status as equals, knowing that the state actually allows some civil servants to refuse services to them. The charge that expressive harm may subsist for sexual minorities – a historically discriminated group – is a serious one and should be taken into account when assessing whether a reasonable compromise has been achieved.

58 For a critique of the status/conduct distinction on both the side of religion and the side of sexual orientation, see e.g., Feldblum 2006.

59 For a discussion of this, see generally Religious Freedom Project 2012.

60 This is known as the expressive harm involved in discrimination. See, e.g., McCrudden in Religious Freedom Project 2012: 21 (explaining that this notion means that “harms are not only material harms, such as this person was denied employment, but also include harms that attack the essence of an individual’s identity in a way which is not just offensive but deeply wounding”).

61 On the subsistence of this kind of dignitary harm regardless of whether a sexual minority member gets the service elsewhere or by someone else, see Feldblum 2006: 119: “If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens.”
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Some proclaim that, in exempting registrars who religiously object to same-sex partnership, the state should not automatically be seen as acquiescing in sexual discrimination (i.e., communicating a message of denigration or exclusion to sexual minorities), if it is accompanied by certain measures. Others argue that religious civil servants situated in particular circumstances such as Ms Ladele’s – employed prior to the change in legislation permitting civil partnerships – should be accommodated but not subsequently employed registrars (see, e.g., Hill 2013).

In sum, if there is anything that discussions around Ladele-kind of scenarios illustrate, it is that achieving a reasonable compromise may sometimes be elusive: one side may end up sacrificing more than the other. Martha Minow nicely shows why these kinds of compromises may often prove so difficult:

Even carefully arranged accommodations for religious groups may make the government seem complicit in violations of civil rights or inadequately vigilant in their enforcement. Yet failing to accommodate religious groups carries its own risks. Failing to exempt religious groups directly threatens them with sanctions for beliefs. Nonaccommodation can coerce religious groups, or drive the groups away from public life.

(Minow 2007: 823)

Conclusion

Freedom of religion, like other human rights, raises tensions and apparent conflicts within the human rights regime. How we view and handle these tensions and conflicts depends, to a significant extent, on the ways in which we understand both religion and human rights. Once we recognize the heterogeneous and shifting nature of both of them, several of the apparent tensions and conflicts may dissolve and possibilities for mutual accommodation may be found. Yet, when notwithstanding these efforts conflicts emerge, as they will surely do, it is worth exploring avenues for co-existence before sacrificing one human right to the other.

Bibliography


62 See, e.g., R. Wilson in Religious Freedom Project 2012: 46. Wilson argues that the idea that accommodation condones bigotry does not have to be such if the “the sincere objection [and] the feigned one” can be distinguished or if the service is arranged in a way that same-sex couples do not experience rejection by the religious objector when they get referred to another registrar with no religious objections.


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