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RELIGION AND LAW

Some Current Problems

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by

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1. It took English law some time to accept that different religious philosophies should be tolerated without arbitrary discrimination. In 1739, Elias de Pas made a will by which he left £1200 for the purpose of teaching Jewish children about their religion. Lord Hardwicke, the Lord Chancellor, held in 1754 that because the purpose of Mr de Pas' bequest was to promote a religion other than Christianity, the Attorney-General should identify a different purpose for which Mr de Pas' money should best be used. The Attorney-General decided that the most appropriate use of the funds was to support a preacher to instruct children about Christianity.[1] Applying that authority, and others like it, Lord Eldon, the Lord Chancellor, stated in 1819 that it was

   "the duty of every judge presiding in an English Court of Justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church or synagogue, to recollect that Christianity is part of the law of England".[2]

2. It is a long journey from Mr de Pas and Lord Eldon to the Human Rights Act 1998, which incorporated into our law Article 9 of the European Convention on Human Rights which guarantees the right to freedom of thought, conscience and religion.[3]

3. The European Court of Human Rights has emphasised that freedom of religion under Article 9 is "one of the foundations of a 'democratic society' ... [and] one of the most vital elements that go to make up the identity of believers and of their conception of life".[4] Such a general

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1 Da Costa v De Pas (1754) Amb 228, 27 ER 150.

2 In Re Bedford Charity (1819) 2 Swans 471, 527, 36 ER 696, 712.

3 See McFarlane v Relate Avon Limited (2010) 29 BHRC 249, Laws LJ (in the Court of Appeal) refused the applicant leave to appeal against the decision of the Employment Appeal Tribunal that he was not the victim of unfair dismissal or religious discrimination. His employer dismissed him as a relationship counsellor by reason of his refusal, in accordance with his Christian beliefs, to counsel same-sex couples on sexual matters. Laws LJ stated, at p.257, paragraph 22, that "The precepts of any one religion, and belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other".

4 Kokkinakis v Greece (1993) 17 EHRR 397, 418 at paragraph 31.

statement, however welcome, cannot disguise the fact that the scope of, and the limits to, the right to religion pose some of the most sensitive questions facing the courts, and society, in the twenty-first century. How should the law address, for example, the wish of schoolchildren, employees and others to wear clothes and symbols which express their religious beliefs; the dispute about the right to build a mosque near Ground Zero in New York; and the plan by a pastor in Florida to institute "International Burn a Koran Day"? When I started in practice more than 40 years ago, in England and Wales (and I suspect in most if not all other democratic societies) legal disputes involving issues of religion were collectors' items. In the last few years, they have become increasingly common. There is now a considerable body of Strasbourg and domestic jurisprudence on the subject. There is no sign that legal issues involving religion are abating.

4. The legal historian who is interested in the subject of religious freedom will be aware of the magnificent letter written in August 1790 by President George Washington to the Hebrew Congregation at Newport, Rhode Island, explaining that the Government "gives to bigotry no sanction, to persecution no assistance" and expressing the hope, with the use of biblical quotation :

> "May the children of the stock of Abraham who dwell in this land continue to merit and enjoy the good will of the other inhabitants - while every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid".[5]

If only I had the skill to couch my judgments in such inspiring language. But these days we are rightly expected to identify legal principles and analyse the facts and the law raised by a dispute with the precision of a surgeon rather than the colour and imagination of a poet. So what are the principles by which we should decide disputes between, on the one hand, what

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[5] The Papers of George Washington, Presidential Series, volume 6, pp.284-286 (ed. Mark A. Mastromarino, 1996, University of Virginia).

individuals regard as religious matters of fundamental importance to the way they conduct their lives and, on the other hand, the rights of others and important State interests.

5. The law draws a distinction between freedom of belief and freedom to take action in furtherance of your beliefs. It has been said that a court is not equipped to weigh the cogency, seriousness and coherence of theological doctrine. On the whole, a person can believe what he or she likes. Religious belief is none of the state's business. But freedom to practise your religious beliefs in ways that may conflict with the rights of others or with the interests of society is a different matter. Article 9 does not protect every act inspired or motivated by religious belief. The freedom to manifest belief is qualified. In a pluralist society, a balance has to be struck between freedom to practise one's own beliefs and the interests of others affected by those practices.

6. The easiest cases are those where the manifestation of religious rights causes physical harm to others. We cannot, and do not, allow people to abuse a child believed to be possessed by the devil, to set fire to an abortion clinic, to carry out genital mutilation of young girls[6], or to massacre infidels, however sincere the religious beliefs which motivate such action, and however important this may be to the faith of the believer.

7. In the Williamson case, the House of Lords held that Parliament was entitled to take the view that the protection of children required a prohibition on corporal punishment in schools, even in schools established to provide a Christian education in accordance with biblical doctrine, which the parents believed required corporal punishment. As Baroness Hale of Richmond concluded, the right of the child "to be brought up without institutional violence"

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[6] See the Female Genital Mutilation Act 2003.

must be respected "whether or not his parents and teachers believe otherwise" by reason of Proverbs 13:24 : "A father who spares the rod hates his son".[7]

8. Less easy are cases where the manifestation of religious belief does not physically harm others but nonetheless conflicts with others' rights and their inclusion in society. In December 2010, our Court of Appeal decided that a local authority was entitled to require its employee, a registrar of births, marriages and deaths, to conduct civil partnership ceremonies between persons of the same sex even though such unions were contrary to her religious beliefs. A registrar could not claim any right not to perform part of her job, and thereby discriminate against members of the homosexual community.[8] If you are employed by a public authority to perform specific duties, you cannot claim an entitlement not to perform any of those duties, as defined by Parliament, because you disagree on religious grounds. Either you perform your duties or you find another job. This may seem to have been a harsh decision, because so strong were the religious beliefs of the registrar that she lost her job as a result. But the decision of the Court of Appeal was upheld by the European Court of Human Rights. Just as the registrar cannot demand special treatment if she objects on religious grounds to a black man marrying a white woman (not an unrealistic example if your religious opinions were formed in parts of South Africa or the deep South of the United States), so the registrar cannot demand special treatment if she objects on religious grounds to the civil partnership of a gay couple.

9. Similarly, a Catholic adoption agency cannot refuse to consider placing a child with a gay couple if that is in the best interests of the child, however much this may offend against religious beliefs. In two other cases, our courts had to decide whether a couple could refuse

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7 R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 at paragraph 86.

8 Islington LBC v Ladele [2010] 1 WLR 955 at paragraphs 51-52 and 55.

to offer a double-bedded room in their bed and breakfast accommodation to a male homosexual couple. Their motivation was that, on religious grounds, they believed that monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations and that homosexual relations are sinful. The Court of Appeal held in both cases that this was discriminatory of homosexuals and unlawful. An appeal in one of them was dismissed by the Supreme Court. The couple had no difficulty in manifesting their religious beliefs generally in society, but they could not do so in the commercial context that they had chosen. The fact that the bed and breakfast was also their home made no difference.

10. Most recently, in the case of *Lee v Ashers Baking Co Ltd*[9], the county court in Northern Ireland had to consider whether a baking company, who had refused to make a cake for the plaintiff carrying a pro-gay marriage message, had directly discriminated against him on the grounds of sexual orientation or political opinion or religious belief. The defendants, the bakery, argued that the domestic provisions of the Equality Act prohibiting discrimination on the grounds of sexual orientation should be read down to take account of their right to manifest their religious belief under article 9 of the ECHR or their right to freedom of expression under article 10. The Judge found that there had been discrimination against the plaintiff on both grounds – sexual orientation (because he was gay) and political belief (because he supported same sex marriage). The judge found the restriction placed on the plaintiff's right to manifest their religion was legitimate and should not be read down. His appeal has been recently dismissed by the Northern Ireland Court of Appeal.

11. What we see from these cases is that the equality laws do not prevent people from *believing* that homosexual acts offend against the laws of God. But if you offer a service to the public, it must be on terms that do not discriminate against persons on grounds which society

[9] [2015] NICty 2 (19 May 2015).

generally finds unacceptable. The Pope's contention, on his visit in 2010 to England, that religious bodies must be "free to act in accordance with their own principles and specific convictions"[10] is unsustainable if those religious bodies are involved in the provision of secular services such as adoption or the provision of goods and services in the public domain.

12. Even where the manifestation of religious beliefs does not conflict with the fundamental rights of others, but with other interests which society considers of importance, the courts have given limited weight to religious interests. Applying such principles, the European Commission of Human Rights held in 1997 that there was no interference with Article 9 rights when an employee was required to work on Sundays as she was free to resign.[11]

13. There are many examples of such cases. In 2001, the Court of Appeal in England and Wales rejected the contention that Rastafarians should be exempt for religious reasons from the criminal laws which prohibit the sale and use of cannabis.[12] In 2010, the Supreme Court of Canada decided that it was not a breach of religious rights to require those who want a driving licence to provide a photograph, despite religious objections by the Hutterian Brethren to having a picture taken. They relied on Exodus 20:4 : "You shall not make for yourself an idol, or any likeness ...". The majority judgment concluded that, if you want the benefit of a driving licence, you must provide a photograph, which serves a useful purpose in preventing licences being used by those to whom they have not been issued.[13] In early 2016, the Fourth Section of the European Court of Human Rights had to consider whether the article 9 rights of a person who was under house arrest were breached by the decision to deny him leave to attend catholic mass once a week. The Court found that there had been interference but that this

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10 The Times 18 September 2010.

11 Stedman v United Kingdom (1997) 23 EHRR CD 168.

12 See, for example, R v Paul Simon Taylor [2002] 1 Cr App Rep 519 (Court of Appeal).

13 Alberta v Hutterian Brethren of Wilson Colony (2009) 28 BHRC 147.

was justified. The claimant's house arrest pursued the legitimate aim of protecting public order and ensuring his presence throughout the criminal proceedings.[14] There is also a distinction to be made between manifestation of religious beliefs and choices an individual may make consistent with their religious beliefs but which are not a requirement of their religion. Last year, the Employment Tribunal found the London Underground was not required to provide to an employee five weeks annual leave to attend a religious festival when that was more than the three weeks' leave to which all other employees were entitled. The Tribunal found that attending the festival was not a requirement of his religion. [15]

14. So you are entitled to believe almost anything you like. But society is entitled to impose the general laws which it considers necessary to restrict the manifestation of your religious beliefs, so long as society takes note of the conflict with religious rights and reasonably decides that the interests of society nevertheless require the application of those general laws. No doubt, as Justice Sachs suggested in the Constitutional Court of South Africa, "the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".[16] The importance of the principle "live and let live" should not be underestimated. But if the State does conclude that important State interests or the rights of others are advanced by interfering with religious freedom, then religious freedom must give way.

15. The wish to wear clothes or other items of religious significance has generated a good deal of litigation in recent years and will, I am sure, continue to do so. There may well be good reasons for imposing a dress code at a school, in a university or at the workplace.

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14 Suveges v Hungary [2016] ECHR 22 (05 January 2016)

15 Gareddu v London Underground Ltd [2015] ET/2201116/201.

16 Christian Education South Africa v Minister of Education [2000] 9 BHRC 53 at paragraph 35.

16. The Grand Chamber of the European Court of Human Rights decided in 2005 that it was not a breach of the right to religious freedom for a female university student in Turkey to be refused admission to lectures if she insisted on wearing an Islamic headscarf.[17] It may also be appropriate to require people to remove the covering from their face when entering a public building or dealing with an official from whom they are claiming a benefit. In reaching its conclusion, the court had regard to the Turkish state's principle of secularism.

17. In 2006, the House of Lords rejected the complaint of a schoolgirl who wanted to manifest her Muslim religious beliefs by wearing the jilbab, at school.[18] In 2010 in another case, the Court of Appeal had to deal with the BA policy whereby employees who wore a uniform were only permitted to wear a religious item, such as a cross, if it was concealed by the uniform, unless it was a mandatory requirement of their religion to wear such an item and it could not be concealed (eg a turban for Sikhs). The claimant, a devout Christian, wore a cross at work visible over her uniform as a personal expression of faith, although it was not a requirement of her religion. She was suspended and claimed that she had been discriminated against on the ground of her religious beliefs. Her claim was dismissed. But the court in Strasbourg allowed her appeal on the grounds that the ban was a disproportionate interference with her right to manifest her religious belief. The cross was small; it did not interfere with her ability to perform her duties and did not have any negative impact on BA's brand or image. In another case, a nurse refused to remove a rather large visible cross and chain when instructed to do so by her employers and was moved to a non-nursing position. The reason for the restriction on jewellery, including religious symbols, was to protect the health and safety of patients and nurses. Her complaint of discrimination was rejected by the Employment Appeal Tribunal. The European Court of Human Rights held that there was

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17 Sahin v Turkey (2005) 44 EHRR 5 at paragraphs 104-123. See also Dogru v France (2009) 49 EHRR 8.

18 R (SB) v Governors of Denbigh High School [2007] 1 AC 100.

no violation of the right to manifest religious beliefs, since the ban on the cross was proportionate.

18. In February 2010, the Strasbourg Court held that it was a breach of Article 9 for members of a religious group to be convicted of criminal offences in Turkey for wearing religious dress in public. The court emphasised that there is a distinction between wearing religious dress in public and wearing it in schools or other institutions such as government offices where there may be good reason to insist on religious neutrality.[19] There is no public interest to weigh against the manifestation of religious beliefs, only the unease of the non-believer that women should wish so to conceal themselves from the public. As against this, some might say that there is a public interest in being able to identify people who commit crimes in public places and that clothing that makes this impossible is contrary to that interest.

19. France with its strong secular tradition has generated some important cases in this area. In 2004, it passed a law prohibiting the wearing in public schools of symbols or clothing by which students conspicuously indicate their religious beliefs. In 2010, it passed a second law which effectively banned the wearing of the burka and the niqab in public. The lawfulness of both laws has been the subject of legal challenge. I should say that there seems to be little appetite for such measures in the UK or in most other European countries.

20. In 2009, the Strasbourg court considered the compatibility of the earlier law with article 9 of the Convention in six conjoined cases. The court held that, although the ban constituted a restriction on the applicants' freedom to manifest their religion, it pursued the legitimate aim of protecting the rights and freedoms of others and public order and was not disproportionate. It said that "a spirit of compromise on the part of individuals was necessary in order to maintain the values of a democratic society" and "expulsion was not

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[19] Arslan v Turkey (European Court of Human Rights, 23 February 2010).

disproportionate as a sanction because the pupils still had the possibility of continuing their schooling by correspondence courses". The ban did not in any event apply to private schools. The court dismissed the claims as "manifestly unfounded". This may seem rather surprising. The possibility of being educated by correspondence course is not an obviously satisfactory alternative to education by face to face teaching and some might not have the means to pay for private education.

21. The compatibility of the later law with various articles of the Convention (including article 9) was considered by the Strasbourg court in the case of *S.A.S. v France* in a decision given on 1 July 2014. The legality of the law had been the subject of much debate in France. The official position taken by the state was that the practice of wearing clothing which concealed the face was at odds with the values of the Republic as expressed in the maxim "liberty, equality, fraternity". A report of a parliamentary commission had concluded that the practice was a symbol of subservience and negated the principle of gender equality and of the equal dignity of human beings. The full face veil "represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living together ('le vivre ensemble')". On the other hand, the National Advisory Commission on Human Rights had said that it was not in favour of a general and absolute ban. It took the view that the principle of secularism alone could not serve as a basis for such a general measure. It was not for the state to determine whether a matter fell within the realm of religion; and public order could justify a prohibition only if it were limited in time and space. This report emphasised the risk of stigmatising Muslims and pointed out that a general prohibition could be detrimental to women, in particular because those who were made to wear the full-face veil would additionally be denied access to public areas. The *Conseil d'Etat* had questioned the lawfulness and the practicability of prohibiting the wearing of the full veil in public places, having regard to the rights and freedoms guaranteed by the Constitution, the

Convention and European Union law. Instead of a blanket ban, it had recommended a more nuanced approach which included prohibition of the full veil only where identification was necessary in the interests of public safety and in certain other specified circumstances.

22. Despite the advice of the *Conseil d'Etat,* the uncompromising law of 2010 was passed. A challenge was inevitable and was duly made in the Strasbourg court. The court did not dismiss the claim as being inadmissible this time. It had little difficulty in finding that the law interfered with the applicant's rights guaranteed by article 9 and that the interference was prescribed by law. The more controversial question was whether the interference was in pursuance of a legitimate aim and was proportionate to that aim. The French Government contended that the Law pursued two legitimate aims: public safety and "respect for the minimum set of values of an open and democratic society". The court accepted that the Law was passed in pursuance of the aim of securing public safety. It also accepted the second aim. It understood the view that individuals who are present in open places may not wish to see the development of practices or attitudes which "could fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question".

23. Finally, the court had to decide whether the interference with the applicant's Convention rights was necessary in a democratic society. As regards the question of public safety, it said that, in view of the impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban could be regarded as proportionate only in the context of a general threat to public safety. The aim of promoting public safety could be achieved by a mere obligation on the part of the women to show their faces and identify themselves where a risk to the safety of person or property is established or where particular circumstances entail a suspicion of identity fraud. This aim did not, therefore, justify a blanket ban.

24. The court then turned its attention to the other legitimate aim, namely the observance of the minimum requirements of life in society as part of the "protection of the rights and freedoms of others". It held that the ban could be regarded as justified in principle in so far as it seeks to guarantee the conditions of "living together". The question remained, however, whether the ban was proportionate to that aim. The court noted that, although the scope of the ban was broad, it did not affect the freedom to wear in public any garment or item of clothing (with or without a religious connotation) which did not have the effect of concealing the face. It was also relevant that the ban was not expressly based on the religious significance of the clothing, but only on the fact that it concealed the face. But the most important feature was that, in enacting the Law, the French Government was responding to a practice which the state considered to be incompatible with the ground rules of social communication and the requirements of "living together". The French State was seeking to protect a principle of interaction between individuals which in its view was "essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society". In other words, for the Republic of France the question whether or not the full-face veil should be permitted in public places constituted a choice of society. For this reason, the court said that it had a duty to exercise a degree of restraint in its review of Convention compliance "since such review will lead it to assess a balance that has been struck by means of a democratic process with the society in question". It followed that France had a wide margin of appreciation in this case. The court also took into account that there was little common ground amongst the member states of the Council of Europe on the issue of wearing the full-face veil in public. In the result, the court decided that, having regard to the breadth of the margin of appreciation to be afforded in this case, the ban could be regarded as proportionate to the aim of the preservation of the conditions of living together as an element of the "protection of the rights and freedoms of others".

25. I have spent some time on these two decisions of the Strasbourg court because they are recent cases and they deal with difficult and sensitive issues which I think are likely to come before the courts of different countries for some time to come. In my view, it is revealing of the attitude of the European Court of Human Rights to these issues that it felt able to dismiss the challenges to the first Law as manifestly unfounded. The challenge to the second Law was dealt with in considerable detail and with much care. But despite the length of the judgment, it seems to me that the challenge failed simply and essentially because (i) the Law was the product of the French democratic process and reflected the values of French society and (ii) it should therefore be accorded a wide margin of appreciation. Absent these factors, I would have been very surprised if any court would have concluded that the ban was necessary in a democratic society. The Strasbourg court has been criticised both by the UK and by other member states for being insensitive to their views and to local considerations. In my view, some of these criticisms are unwarranted. However, the judges of the Strasbourg court are well aware of them and of the need to accord the member states an appropriate margin of appreciation. The decision in the second case would appear to be a striking example of a positive and perhaps surprising response to the criticisms.

26. There is currently pending before the ECtHR an application complaining about a ban in Belgian law against the wearing of a full-face veil in public spaces.[20] Earlier this year, the court dealt with an application by a lawyer in Spain who had been asked by the President of the Spanish court to move to the area reserved for members of the public, as she was wearing a hijab and lawyers appearing before the Court were only permitted to cover their heads with the official cap (a biretta).[21] The ECtHR declared the application inadmissible on the grounds

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20 Belkacemi and Oussar v Belgium (No. 377789/13) (a similar application Dikir v Belgium (No. 4619/12) is also pending).

21 Barik Edidi v Spain (No. 21789/13).

that the way the applicant had conducted the domestic proceedings prevented the domestic court from being able to make a finding on the merits.

27. The wearing of religious clothing is perhaps the manifestation of religious belief that has given rise to the most litigation, certainly in recent years. Generally, the manifestation of religious beliefs is given very limited weight by the courts. Other rights and interests often outweigh them. This is surprising in view of the Strasbourg court's statement that freedom of religion is one of the foundations of a democratic society. But there is an important exception in European human rights law. It gives very limited protection to freedom of speech which insults religious beliefs. Exercising freedom of expression can be very dangerous when it offends religious sensibilities. After Ayatollah Khomeini issued a fatwa in Iran in 1989, the novelist Salman Rushdie faced death threats from Muslims because of his novel, The Satanic Verses. His Japanese translator was murdered, and others associated with the book severely injured. Rushdie himself had to live in secret destinations, with police protection.[22] All of this for writing a book.

28. In 2004, violent protests by Sikhs led to the closure of a play, Behzti (dishonour), being staged at the Birmingham Repertory Theatre.[23] The publication in Denmark in 2005 and 2006 of cartoons of the Prophet Mohammed led to riots around the word, in which nearly 250 people died.[24]

29. The United States Supreme Court adopted a very clear principle in 1952 when overturning the ban on Roberto Rossellini's film "The Miracle" issued by the New York Board of Regents authorities after Cardinal Spellman condemned its contents. The Board of Regents had

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22 Christopher Hitchens, God is not Great (2007) at paragraphs 28-30.

23 See R (Singh) v Chief Constable of West Midlands Police [2007] 2 All ER 297 (Court of Appeal).

24 Jytte Klausen, The Cartoons that Shook the World (2009) at paragraphs 106-107.

decided that the "mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State". Allowing an appeal by the film's distributors, Mr Justice Clark announced for the Court that

"it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches or motion pictures".[25]

That principle protects even those who use freedom of speech to provoke the faithful in an insulting and puerile manner which endangers the lives of others, such as Pastor Terry Jones, the leader of a small sect in Gainesville, Florida, who instituted "International Burn a Koran Day" in 2010 to reflect his opposition to Islam.

The European Court of Human Rights has, however, on at least three occasions refused to protect freedom of expression against strong religious feelings. In 1985, the Austrian courts ordered the seizure and forfeiture of a film because its contents would offend Christian religious feelings. God, Jesus Christ and the Virgin Mary were portrayed in a very unflattering light. The European Court of Human Rights held, by six votes to three, that there had been no breach of Article 10 of the European Convention on Human Rights, the right to freedom of expression, because of the need to protect people against insults to their religious feelings.[26]

30. Similarly in 1996, by a majority of 7 to 2, the court dismissed a complaint about the refusal of the Video Appeals Committee of the British Board of Film Classification to grant a certificate for a video work because it was considered blasphemous in that it portrayed a nun imagining sexual activity with Christ on the cross.[27]

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25 Joseph Burstyn Inc v Wilson 343 US 495 (1952).

26 Otto-Preminger Institute v Austria (1994) 19 EHRR 34.

27 Wingrove v United Kingdom (1996) 24 EHRR 1.

31. In 2005, the court upheld by 4-3 the decision of the Turkish courts to impose a fine on a publisher for a novel critical of the Prophet Muhammad. The book was, said the court, an "abusive" and an "offensive attack on matters regarded as sacred by Moslems". The three dissenting judges accepted that the novel could well cause deep offence to devout Muslims. But, they emphasised, "a democratic society is not a theocratic society" and they argued that the majority judgments "place too much emphasis on conformism or uniformity of thought".[28]

32. The religious and political tensions which are now arising in many European communities over issues such as immigration and refugees are likely to give rise to more questions in this area. It is likely that it will be necessary to explore further and define more precisely the boundary between offensive free expression (which is and should be tolerated in a democratic society) and expression which incites hatred (which is not and should not be tolerated).

33. Francoise Tulkens, a judge and Vice President of the European Court of Human Rights, has suggested that Article 17 of the Convention may be increasingly invoked in the context of 'the current resurgence of certain forms of extremism across Europe.' Article 17 provides that nothing in the Convention is to be interpreted "as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein". In practice, what this means is that a person cannot rely on the provisions of the Convention to assert that he may act in a way that destroys the rights of others.

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[28] IA v Turkey (Application No. 42571/98, 13 September 2005). See also Gunduz v Turkey (4 December 2003), paragraph 37, where the European Court of Human Rights said that in the context of religious opinions and beliefs there is "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".

34. In 2015, the Court invoked article 17 in the case of *M'Bala M'Bala v France*.[29] M'Bala, a well-known comedian, invited Robert Faurisson, an academic who had been convicted several times in France of Holocaust denial, to join him on stage. M'Bala then invited an actor, who was wearing a striped prison uniform with a yellow star sewn on it, to present M. Faurisson with a "prize" of a three-branched candlestick which had an apple on each branch. M'Bala was charged and found guilty of insulting a person or group of persons on the ground that they belonged to an ethnic community, nation, race or religion. M'Bala complained to the European Court of Human Rights that his conviction was in breach inter alia of his article 10 right of freedom of expression. The Court found that, by reason of article 17, M'Bala's show was not protected by article 10. His pursuit of an article 10 claim would be against the letter and spirit of the Convention.

35. In an earlier case in 2001, the British National Party's attempted reliance on article 10 was also rejected by virtue of article 17.[30] A regional organiser of the BNP had displayed in the window of his flat a sign which read 'Islam out of Britain – Protect the British People'. He was charged with, and convicted of, the offence of displaying a sign with hostility towards a religious or racial group. His application to the ECtHR was rejected as inadmissible. The Court said that "the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom' and 'Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination" The claim was therefore ruled inadmissible.

36. It seems to me that there is a danger that the use of article 17 could get out of hand. It is potentially wide-ranging in scope. I agree with the assessment of Francoise Tulkens that it

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[29] M'Bala M'Bala v France [2015] ECHR No. 25239/13.

[30] Norwood v The United Kingdom [2004] (No. 23131/03).

should be deployed carefully and with moderation. Otherwise, there is a real risk that it lead to the suppression of the right of freedom of expression.

37. When considering freedom of expression in the context of religion, we should not lose sight of the fact that, to use the language of the minority in *IA v Turkey*, "a democratic society is not a theocratic society" and a democracy does not insist on "conformism or uniformity of thought". Indeed, quite the opposite. When it comes to criticism of religious doctrine or belief, it is worth remembering that the law governing this issue in this country has its origins in the law of blasphemy. Blasphemy was an offence in English criminal law, protecting only the doctrines of the Church of England, until it was abolished by section 79 of the Criminal Justice and Immigration Act 2008. The last blasphemy case was an unsuccessful attempt to prosecute the Director-General of the BBC, Mark Thompson, for broadcasting Jerry Springer - The Opera.[31] Extreme cases of hostility to religion can now be addressed under the Public Order Act 1986. As amended in 2006[32], it makes it a criminal offence for a person to use threatening words or behaviour, or display any written material which is threatening if he intends thereby to stir up religious hatred. But section 29J of the Public Order Act contains a strong protection for freedom of expression :

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents ...".

Public order offences may be an appropriate basis for dealing with people like Pastor Terry Jones if they commit inflammatory acts with copies of the Koran in public, but it is very important to protect freedom of expression in relation to religion. Those who want to express

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31 R (Green) v City of Westminster Magistrates' Court, Thoday and Thompson (Divisional Court, 5 December 2007) [2007] EWHC 2785 (Admin).

32 See Part 3A of the Public Order Act 1986 as inserted by the Racial and Religious Hatred Act 2006.

religious beliefs (including Christian beliefs) which offend others are, of course, equally entitled to freedom of speech.[33]

38. Thomas Jefferson's statement of principle "It does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg"[34] recognises that my neighbour may praise the god of his choice. But equally I have the right to criticise his god, or his religious beliefs. Neither of us, however, has a right to manifest his or her religious beliefs in a manner which breaches the rights or interests of others. This balance of interests will not satisfy the devout who may wish to place religious law above civil law. But they need to have in mind the warning given by Mr Justice Jackson in the United States Supreme Court in 1952:

"the day that this country ceases to be free for irreligion, it will cease to be free for religion ...".[35]

39. It is time to draw this lecture to a close. The courts both here and abroad have been struggling in recent years to strike a satisfactory balance between freedom of religion and freedom of expression. The issues are legally difficult. They raise strong passions on both sides of the argument. You do not need to be a lawyer to have a view. I have no doubt that the issues will be the subject of litigation for many years to come. I am grateful to Lord Pannick QC for his permission to draw on parts of his F A Mann lecture 2010.

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33 Redmond-Bate v DPP (1999) 7 BHRC 375 (Divisional Court).

34 Thomas Jefferson *Notes on the State of Virginia* (1782), Query XVII, in Works of Thomas Jefferson 4:78 (Paul L. Ford ed, 1904).

35 Zorach v Clauson 343 US 306, 325 (1952) (Jackson J, dissenting).