

Chelmsford Cathedral

The Keene Lectures 2007

*3. Law and religion in England:
tensions in constitutional (and Christian) values?*

The Revd Professor Brigid Hadfield

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The Revd Professor Brigid Hadfield is Professor of Constitutional Law at the University of Essex and is Associate Priest in the Parish of All Saints with St Cedd's Shrub End, Colchester.

(Please note that this is the spoken form of a much longer article that is to be published elsewhere. The italicised parts below are from the draft of that article).

I am aware that although, for me, Constitutional Law is a topic of great interest, often law is regarded as dull and boring; so I want to try to put some of the Law into context and refer to some of the cases which I hope you have come across in the news recently. And I'm looking at this exclusively in the context of the Christian faith. I'm not looking at other faiths at all, and I'm dealing with it in the context of England, which may have separate issues to address from other parts of the United Kingdom.

The Law and religion are becoming much more intertwined. Let me give you one or two illustrations of recent issues which have either come before the courts or are about to do so.

You will all have heard of the story of Nadia Eweida, the employee of British Airways, who was originally suspended from her employment for wearing a Cross. That was a high-profile case and concerns dress codes, which, for faiths in addition to the Christian faith, are becoming a matter for the law.

There was a case in July in which a National Health Service Trust was in court over a baby girl for whom the doctors were recommending a lengthy, distressing and painful course of treatment, but without which the little girl might die. Her parents did not want the treatment to go ahead, because they had the hope, the conviction, the faith that the child would be miraculously cured by God. The issue for the court was how to resolve the medical recommendation for the treatment and the parents' faith or conviction that God would heal the child. As you can imagine, the decision in the case was for the medical opinion, as it will always be in that kind of situation [The decision of Holman J in the *NHS Trust v A* in July 2007].

Some of you will have read of the case of the Cardiff employment tribunal concerning the decision of the Bishop of Hereford, Anthony Priddis, not to appoint to the post of Diocesan

Youth Officer a man who had been (but was not, at the time of the interview) in a same-sex relationship [The decision of the Cardiff Employment Tribunal in *Reaney v Hereford Diocesan Board of Finance (Bishop Priddis)* which unanimously held, on one ground, that the respondent unlawfully discriminated against the claimant under the employment equality regulations, on the ground of sexual orientation.] That case got a lot of publicity in the newspapers – some supporting the bishop and some against.

Another case that has had a lot of publicity recently concerns a Justice of the Peace in Sheffield who does not want to place children for adoption with same-sex couples, a matter which the law now requires him to consider. He actually “chose to resign” from the Family Panel. And there is a debate, by the way, about the facts of the case. It is going on appeal to the Court of Appeal and will be heard there, probably, in January. Part of his argument was that he did not want to place children with same-sex couples until he has received enough information that that was as much in the interests of their well-being as placing them with heterosexual couples. Later, his freedom of religious conscience became an issue, but the facts as found by the original tribunal were not a conscience question but an evidence question: whether or not he was prepared to regard the welfare of the child as actually being equally well-served by same-sex couples as by heterosexual couples [The decision of the Employment Appeal Tribunal in *McClintock v the DCA*].

Today (November 21) and yesterday the judicial review case brought by *Christian Voice*, who wish to bring a private prosecution for blasphemy against the producer and broadcaster (BBC2) of *Jerry Springer - the Opera*, has been heard in the High Court. City of Westminster magistrates have refused permission for the private prosecution to proceed and they are seeking a judicial review of that decision. [*This will give rise to a debate about the public space for the sacred, the secular and the profane and articles 10 and 9 of the ECHR.*]

You may have read in the newspapers about the Roman Catholic Archdiocese of Liverpool, who wished to suspend the headmaster of one of their schools after he had entered into a civil partnership, but were advised that they could not do so. They wished to suspend him as they believed that relationship to be against the ethos that the school taught or should teach.

And while all these cases were going on, the news was full of Shambo, the bull or bullock (variously described) owned by a Hindu community in Wales. Shambo was believed to have bovine TB. The community regarded him as a god, but the Welsh Assembly ministers issued a destruction order.

There are now many cases (if only relatively speaking) involving Law and religion. The laws are changing. There are new laws all the time. There are new rules with regard to employment equality: with regard to one’s religion or belief, and with regard to sexual orientation, both of which have certain religious exemptions.

There are new laws with regard to religion and belief and the provision of goods, facilities and services. There are new laws with regard to sexual orientation and the provision of goods, facilities and services. There’s a new Charities Act 2006.

It always used to be assumed that a religious charity was for the public benefit. That presumption has now gone. All religious charities will now have to show that they are for the public benefit. And the Charities Act has also provided one of the few definitions of religion. In the new definition of religion in the Charities Act, it can involve belief in more than one god – it used to be monotheistic – and also a religion does not have to mean belief in a god. Of course, this is for the Buddhists, primarily.

[*In England there is no statutory definition of religion, although some indicators are given in the Charities Act under section 2(3): religion (now) includes belief in more than one god and includes a religion that does not involve belief in a god.*

The word religion is usually left undefined. So in the Employment Equality (Religion or Belief)

Regulations SI 2003/1660, article 2(1) on interpretation originally provided:

2 (1) In these Regulations, "religion or belief" means any religion, religious belief, or similar philosophical belief. ("Similar" was removed by section 77(1) of the Equality Act 2006).

Section 44 of the Equality Act 2006, which is at the beginning of part 2 of the Act dealing with discrimination on the grounds of belief or religion and covering both direct and indirect discrimination (e.g. re the provision of goods and services), provides: "In this Part—

(a) "religion" means any religion, (b) "belief" means any religious or philosophical belief, (c) a reference to religion includes a reference to lack of religion, and (d) a reference to belief includes a reference to lack of belief. The explanatory notes to the Bill (paragraph 170) indicate that this is a broad definition in line with article 9 of the European Convention on Human Rights [ECHR], adding that the main limitation is that what constitutes a religion for those purposes must have a "clear structure and belief system".)

The definitional question is thus a matter left primarily to the courts. Under the European Convention on Human Rights [ECHR], article 9 largely obviates the need for a definition by covering together "thought, conscience and religion", hence being deemed to include pacifism, veganism, atheism and, probably, druidism, the Divine Light Zentrum and the Church of Scientology. There is, however, the need for belief to obtain a certain level of cogency or cohesion, seriousness or importance (as well as being compatible with human dignity) before attracting article 9 protection, thus obviating the giving of protection to what might be considered to be unreasonable or unduly individualistic belief.]

So we have a whole string of cases, a whole raft of laws (and I've only mentioned a few of them), and we've got to decide how the Law seeks to resolve the tensions between freedom of religion and religious conscience on the one hand and the equality principle on the other.

If you take the (just over) sixty years since the Second World War, you have, I would suggest, three eras in which these questions of law and religion have been addressed:

1. CONSTITUTIONALLY PRAGMATIC (1945-65)
2. CONSTITUTIONALLY PARADOXICAL (1965-1990)
3. CONSTITUTIONALLY PRINCIPLED (1990-2007)

In case anyone is thinking 'we don't have a constitution, so how can we have constitutional values?', it should be stated that we do have a constitution. It doesn't take the same form as other constitutions, but we have a constitution.

[Whether the UK (specifically here England) has a constitution or not is a rather weary debate dependent on what is meant by constitution (a document or series of documents having special legal sanctity or otherwise) and reflecting the historic nature of the UK's/ England's unbroken constitutional history since the 17th century. Of much greater import are the consequences of the absence of a special document that would allocate institutional power and contain both descriptive and prescriptive principles for the exercise of public power viv a vis the individual and possibly, but by no means necessarily, determine the hierarchy of constitutional norms. Because the UK/England does not have a written/codified constitution in that narrow sense, we need to identify the controlling/ main principles or values from several sources. The substance of those principles and their sources have changed over the last 100, indeed 50, years.]

1945-65 The Constitutionally Pragmatic Era

The first era lasted from 1945 (though it existed before that as well) until, say, 1965. During that time, within the constitution and the constitutional values, everything was essentially ad hoc and there were no overarching values other than the Sovereignty of Parliament and a procedural Rule of Law. That is, we had what is called a 'sovereign parliament', a doctrine which means there are no legal limits (c.f. political or moral limits) to the powers of Parliament. The House of Commons was dominated by the Government and most constitutional change was effected on an ad hoc, usually legislative basis. The House of Lords, the legislative chamber, was essentially moribund. It did very little. Life peers were appointed under the Life Peerage Act (1958) and this changed matters a great deal. Prior to

that, it really was (relatively speaking) a moribund house. The judges were quiescent. The Kilmuir Rules (1955) required judges to have a very low profile. It wasn't the case, as it is today, of 'Harry Woolf' and 'Tom Bingham'. It was 'Lord Reid', 'Lord Wilberforce', 'Lord Diplock' – nobody knew their first names. Judges had a low profile; they decided cases, but they were not public figures.

[Hence: the constitutional values or hallmarks were a quiescent judiciary /a dominant executive / constitutional "invigoration", both internally engendered and exceedingly limited. There was a paucity of constitutional legislation (e.g. Parliament Act 1949, Life Peerages 1958, Peerage Act 1963) and a Parliament sovereign in naught but name.]

Freedoms were what are termed residual. What is meant by that is that you essentially have whatever freedom is left when the restrictions or the qualifications are taken away. So the 'residual' approach to freedom of speech would be that you have freedom of speech except for the obscenity, contempt of court, blasphemy, incitement, defamation laws. You subtract the qualifications and you have the residual freedoms. The residue may be extensive. A millionaire who leaves his housekeeper a hundred pounds and his wife the residue has left his wife a hundred pounds less than a million.

It is important to note, however, that during this era the "subtraction" did not have to be justified (an onus question) and it did not have to be justified according to any "higher" laws or principles. If Parliament wanted to legislate on contempt of court, it legislated on contempt of court. And if Parliament wanted to legislate on obscene publications, it legislated on obscene publications. It was all very ad hoc. It was all very pragmatic. It was all very practical. There were really no higher constitutional values beyond sovereignty and a procedural rule of law.

The theologians have a word 'metanarrative', by which they mean the big story that we're all a part of. And what is very interesting really if you track the constitution and England's metanarrative, at the time when society was cohesive – those twenty years immediately after the Second World War - the constitution had no big story to tell. As society has fragmented more, as values have become different, as people talk about 'identity politics', the constitution and its values are becoming the big story, as I hope to show in the next two phases of constitutional change. But for those twenty years immediately after the War there was no freedom of religion issue, because (to put the matter very generally indeed) essentially most people at one level or another were Church of England; and where people were not Church of England they had (or were perceived as having) freedom of religion within their own contexts.

1965-90 The Constitutionally Paradoxical Era

From 1965-66, I think everything changes. Although many constitutional lawyers will tell you that since Mr Tony Blair became Prime Minister in 1997 that has been *the* era of constitutional change, I would argue very strongly that the key era was 1965-1990 – less overt, but hugely significant; and in fact I would narrow it even more to 1966-1976. I'll give a reason for the precise dates in a moment. In this second era, which I would call the *constitutionally paradoxical* we joined the Common Market. One of my favourite little sub-themes is you can learn a lot about the constitution from the words that are used. The Common Market became the European Economic Community, became the European Community, became the European Union. The European Assembly became the European Parliament. A great deal of baggage goes with these words.

On 1st January 1973 we joined the European Economic Community and from that moment our constitution and our laws became open to the influence of other legal sources. These sources were not only important, and of increasing importance, but the jurisprudence of the European Court of Justice emphasized that Community Law was supreme over the conflicting laws of the member states. The United Kingdom, like all the other member states,

came under the obligation to receive directly into the legal system, or to implement fully into domestic law, community obligations especially the treaties, regulations and directives. Now I don't want to over-emphasise the point (for there are still divergent views on the sovereignty issue) but when push comes to shove, for at least as long as we are a member of the European Union, Community Law prevails over national law. Since we joined the European Community, the EC has become an increasingly important source of law both in terms of protection for religious freedom and also in terms of equality in other areas such as gender and sexual orientation, discrimination, age, and disability. We thus have a possible paradox that Parliamentary sovereignty was used (the enactment of the European Communities Act 1972, as amended) to affect fundamentally the sovereignty of parliament (at least according to some of the arguments).

Also, in January 1966, Mr. Harold Wilson, who was then Prime Minister, made two very important and related decisions. In the late 1940s and early 1950s the United Kingdom, with many of what were once called Western European countries, had drafted the European Convention on Human Rights. (This Convention was *not* a part of the European Community – the two systems are quite distinct: in fact it is only in the Treaty of Lisbon – the reform treaty that we're all told isn't a constitution – that the EC is signing up to the ECHR.) In the post-war era, David Maxwell Fyfe/Lord Kilmuir the British Home Secretary / Lord Chancellor, perhaps best known as one of the Nuremberg prosecutors (and perhaps equally infamous for not recommending a pardon for Derek Bentley), was instrumental in drafting the ECHR. The opinion of the British government at that time, and for a long time subsequently, was that the European Convention on Human Rights represented or reflected domestic law; there was no discrepancy between the rights under English law and those contained in the ECHR. What was in the Convention was in our law – so no problems of compliance with different norms should arise. The ECHR indeed remained as an international treaty with which we were bound to comply under international law and not as an “incorporated” part of domestic law until the enactment of the Human Rights Act in 1998.

In January 1966, however, Harold Wilson reached a particular decision. I am stressing it was Harold Wilson, because (as Anthony now Lord Lester has pointed out) this issue didn't go to Cabinet and it didn't go to Cabinet Committee; it was decided only on correspondence between certain ministers. Harold Wilson decided that the United Kingdom would accept the right of individual petition for an individual to bring his or her case to what was then the European Commission on Human Rights; and also the United Kingdom would accept the jurisdiction of the European Court of Human Rights. Not Cabinet; not Cabinet Committee, but the Prime Minister. And those decisions, which were at the beginning renewable on a five yearly basis, have had a fundamental impact upon our Law. Not just because of decisions – obscenity, the rights of the mentally ill, the rights of prisoners, contempt of court, obscene publications

[The list is a very long one: prisoners rights, obscene publications law, contempt of court law, telephone tapping, the rights of patients detained under the mental health legislation, nationalisation, the rights of suspected terrorists, the closed shop, aircraft noise and local residents, transsexuals, same sex rights, asylum, freedom of expression etc.].

– not just because of the areas of our Law that have been affected in the traditional areas of civil and political rights; but also because the European Court of Human Rights (and as I've already said under international law we are duty-bound to comply with its judgments) takes what is called (and I don't like the word) an ‘evolutive’ approach. That is, the European Court of Human Rights interprets the substantive rights contained in the ECHR as changing concepts to reflect evolving rights values.

So, to give two illustrations: in the immediate post war era the right to privacy (under article 8 of the ECHR) would not have been regarded as conferring rights upon same sex relationships, but article 8 was interpreted later as protecting those relationships from state interference through the criminal law. In the immediate post war era the prohibition on

inhuman or degrading punishment under article 3 would not have covered corporal punishment, but the article was interpreted later as covering that. So, the United Kingdom is not only subject to the jurisdiction of the European Court of Human Rights, it is also subject to its evolutive changing jurisprudence.

Because it usually took between four and six years for a case to go from the original lodging of the complaint to resolution by the Court of Human Rights (if it reached the Court under the then system), it was around the early 1970s that the jurisprudence started to come through against the United Kingdom. And the UK kept on losing cases, not all cases, certainly, but a sufficient number to raise the profile of the ECHR and its (in)compatibility with domestic law. The idea that there was a total fit between our law and the ECHR was being exposed as a fallacy. So that was also happening in this key period.

A third key thing that happened, and in many ways I regard this as most significant in the context of this lecture if not more widely, was the enactment of laws by the Westminster Parliament in the area of horizontal relationships. This happened in two related ways. The United Kingdom Parliament during this era of direct rule in Northern Ireland was the sole lawmaker for Northern Ireland and one of the key Acts which Westminster passed for Northern Ireland was the Fair Employment Act 1976, (later amended) which required employers not to discriminate on the grounds of religious belief or political opinion in terms of whom they employed (with certain exemptions for "small" businesses). Thus constitutional law moved from its traditional role of regulating vertical relationships (that is, the state and the individual) or institutional powers to regulating what were previously regarded as matters for the private law (if for the law at all).

The year before that, the Sex Discrimination Act 1975 was passed, from which organized religion was given an exemption. The Act, by section 19, provided that "(1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers".

[This was amended by the Employment Equality (Sex Discrimination) Regulations, article 20, 2005, SI 2005/2467: "so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers"].

All organised religions were able to exempt themselves from those provisions. And that, by the way, is fundamentally important for what is happening now. The Sex Discrimination Act outlawed for most areas sex discrimination, discrimination on the grounds of gender, in employment, and goods, services and facilities.

The Race Relations Act in 1976 did the same with regard to discrimination on the grounds of race, colour, nationality, ethnic or national origins (grounds which in subsequent case law were held to give some protection to some but not all faiths, specifically to Sikhism and Judaism). There had been two earlier Race Relations Acts in 1965 and 1968, but they were far from being as comprehensive as the three Acts in 1975-6.

Now this is significant because the State's constitutional law now intervenes in private relationships. Constitutional Law was always about vertical relationships – the State, the citizen, freedom and to what extent **the State** should infringe upon our freedoms. That's Constitutional Law. It also of course has public institutional dimensions in the sense of establishing/regulating the powers of the Monarch, Parliament, the Cabinet and the Prime Minister.

But Constitutional Law after the mid-1970s becomes a branch of public law that speaks of horizontal relationships too. What happens with these three Acts of 1975-6 is that Constitutional Law now moves along the *horizontal* plane. You cannot discriminate on grounds of gender, if you are an employer, in terms of whom you employ. You cannot discriminate, as an employer, on grounds of race in terms of whom you employ. Similarly in

terms of goods, facilities and services.

I vividly remember the debates which we had every year from this time and for some years concerning the syllabus: do we teach this topic in Constitutional Law or do we not? Is it not labour law? Is it not a special category called anti-discrimination law? In what ways is it Constitutional Law?

These three Acts regulated private relationships in terms of the new values of the State, new not only in terms of substance but also in terms of their reach. No longer is the State saying, 'You have these freedoms, subject to what we subtract, in **our dealings with you**'. It's the State controlling private relationships in terms of the key values of non-discrimination, later phrased in terms of equality.

An inevitable corollary of this, of course, was that the 'new private' had to be defined. It would generally be deemed undesirable to dictate to people that if, for example, they chose to have a dinner party they must balance those invited in terms of gender or race. So the new, and narrower, private, that beyond the reach of the equality laws, included small businesses, certain social clubs and organized religion. Organised religion, including of course, the Church of England, is allowed, partly on conscience grounds, but partly because it is deemed to be a private matter, to discriminate against women. Non discrimination or equality are now public values and most exemptions are permitted only under the new private rubric. To enter the public domain is to be controlled by public law's values.

Before the enactment of these Acts, you also had two very key decisions, also in this area, of what is private and what is public: and they are two Private Member's bills which passed into law in 1967. And if ever a government abdicated moral responsibility in terms of legislation, it was (arguably but only just!) the Labour government from the mid 1960s, because they too often used a private member's bill to legislate on a moral matter. (Such Bills cannot pass into law without some form of government support or, to put it at its weakest, when they evoke no government opposition. For that reason, they are sometimes called a peculiar form of government legislation). The government could and in many ways should at least have had the openness itself to introduce these bills and put them to a free vote.

The two bills I am talking about here are the Sexual Offences Bill Act 1967, sponsored by Leo Abse (and Lord Arran), which decriminalized some homosexual acts in England and Wales, and the Abortion Act also 1967, which was sponsored by David Steel.

In the context of the new private and the new public, the Abortion Act didn't just privatize abortion but it 'medicalised' it. It took the matter virtually completely out of the arena where the law-makers, Parliament and the judges, could debate the right to life of the unborn versus the mother's right to choose. It became, on certain conditions (amended in 1990 and maybe about to be amended again – the Bill is before Parliament) a medical matter; not just private but beyond private, so that, with the exception of a smattering of cases, the matter has not been addressed in England through constitutional values.

There is however, one part of the Act that does have a public law dimension, or better a balancing of public and private (or individual conscience) values, and that is the conscientious objection provision. The Act in section 4 (and later section 36 of the Human Fertilisation and Embryology Act 1990) carries a conscientious objection clause:

"(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman”.

This will be returned to towards the end of the lecture.

The other Act of 1967 – the Sexual Offences Act 1967 - decriminalized certain homosexual acts in England and Wales. It did so on the famous Wolfenden basis of privacy: what goes on in a person’s private life is not the Law’s business: there have to be areas of human activity that fall beyond the reach of the criminal law. What the debate subsequently has shown is that what was granted on the *basis* of privacy was not granted on the *condition* of privacy. In other words, the law was first changed because it was a private matter, but the changes were not (ultimately) granted on condition that they stayed a private matter. Later law, by changing the starting point of public consideration from privacy to equality, has changed the issues, or reflected the changes, as phrased in the public debate. (*This can be seen from the Local Government Act 2003 (section 122 repealed in England the prohibition on the promotion by councils and schools of homosexuality under section 28 of the LG Act 1986), the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, the Civil Partnership Act 2004 and the Equality Act (Sexual Orientation) Regulations 2007, SI 1263 (goods, facilities and services, education, disposal and management of premises, and the exercise of public functions).*)

I would, therefore, suggest that from 1966 (the right of individual petition granted and the jurisdiction of the Human Rights Court accepted under the ECHR), through the enactment of the two Acts of 1967, the enactment in 1972 of the European Communities Act to 1976, when, through the Fair Employment Act for Northern Ireland and the other two Acts for Great Britain (in 1975 and 1976), private relationships were regulated, the whole face of Constitutional Law changed. Some of this, of course was not clear in 1976 – but some of it was. But that’s when everything changed about Constitutional Law and in many ways the seeds of the present creativity and tensions were sown then.

So what you have in the second era are the seeds sown for what is happening now in addition to significant changes in their own right. There are many other changes during this time which cannot be discussed here, not least the fact that judges also then began re-awakening the ancient principles of judicial review, which are centuries old but which have also been fundamentally enlarged to give the rule of law a more substantive and substantial form. The judges began to discover a new voice. This, combined with the United Kingdom’s membership of the EC, the acceptance of the right of individual petition under the ECHR and the jurisdiction of the European Court of Human Rights, and the anti-discrimination legislation changed the face of Constitutional Law.

1990-2007 The Constitutionally Principled Era

Then you move into the third era: the 1990s to the present day. I call this the *principled constitution*, not because everyone would necessarily agree with the principles (although they might) but because they are principles that need to be considered and in many ways overarch the content of other laws and state or public practices.

What’s happening in the ‘constitutionally principled’ era is that certain key principles begin to emerge from the EC (now the European Union), from the ECHR (with its evolutive jurisprudence), from our own legislature, and from the judges (who are given greater prominence and constitutional authority by the Human Rights Act of 1998).

What begins to emerge is a series of principles which, if not overarching, are at least highly influential: autonomy, dignity, the rule of law, equality.

If you look at the Charter of Freedoms from the EU, from 2000, it reflects these principles. The Charter is concerned with the dignity, equality and autonomy of the human being. It’s

about the human being being given civil and political rights, as well as cultural rights and arts rights and some economic and educational and social rights.

The whole ethos of the Charter is that everybody should be equal and from these broad principles the detail of the EC's equality directives are drawn. We are bound to comply with EC directives - and we have complied with these EC directives - and that is why we have now got employment equality in the field of sexual orientation, and religion and belief, as well as age and disability. Equality is a dominant principle. Any action taken that infringes equality in the public sphere is not acceptable. So if there is a clash of an individual's conscience – the JP who doesn't want to place children with same sex families (as I said earlier in the one case that has arisen there is an argument about the facts – that has to be resolved and will be resolved) what does he or she do? The Roman Catholic adoption agencies which want to place children for fostering or adoption only with heterosexual couples but which exercise their powers under contract with a public body for "public money", what do they do? Do they, should they be allowed by the law to go with their conscience? Or do they go with the principle that the State pays the money and the person who pays the piper calls the tune?

A lot of these laws are coming from the EC, the United Kingdom is bound to implement fully the EC directives into national law and EC law (which claims/which has supremacy over conflicting national laws) is quite clear: autonomy, equality and dignity are key principles. The only exceptions that will be permitted must, in its terms, be narrowly defined. An overarching or guiding principle can be phrased generally thus: where you move closer to the ethos of a religion (to preserve an organized religion's doctrine, or to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers), more exemptions from the equality principle will be permitted, but where it is a question of religious practices impacting upon the rights and freedoms of others in the public domain fewer exemptions will be permitted.

The closer you get to the core of the religious doctrine, the more exemptions the Church will be given, *because it's private*. It's a conscience matter. And notice I'm only talking about secular law. I don't want to get sucked into internal debates! I'm talking about secular law. And the closer you get to the core values of organised religion, the more exemptions secular law will grant. Conversely as you move away from the core, the fewer the granted exemptions by the secular law.

The law too here draws the distinction between organised religion and religious organizations and again this matter can only be expressed here on the very general level. A religious organization, which is a phrase found in some parts of this area of the law, is a body with a religious ethos but which is not part, if you like, of the priests, the ministers, the clergy, or one or two other core workers who represent the church – like the diocesan youth officer mentioned in the Bishop of Hereford case. Employees of a religious organization, for example, and illustrations given usually include cleaners, secretaries, librarians (?), are treated differently under employment equality law exemptions from the clergy.

The second heading from the paradoxical era was the European Convention on Human Rights. Article 9 of the European Convention of Human Rights and which gives us freedom of thought, conscience and religion, has two things to say that are relevant here.

Article 9 provides:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

This article is relevant in very many ways to the theme of this lecture. Shortage of time means we must concentrate on only two points.

The first is that there is a distinction between **manifestation** and **motivation**. If a person manifests his or her faith in teaching, observance, worship, it seems relatively clear that article 9(1) subject to sub-paragraph 2 gives protection. The word “practice” has to be closely regarded, however. For practice, there has to be a direct and intimate link between what a person believes and what he or she is doing. So, if a person attends Church on a Sunday, that is worship – that is a direct manifestation of a person’s faith. But if a person goes to one of the big supermarkets on a Sunday and distributes ‘Keep Sunday Special’ leaflets, that is not a manifestation of belief. It is motivated by belief but it is not a manifestation of it. And the Law insists, very carefully, upon that distinction. It’s in some regards a way of keeping religious matters carefully confined to ‘the private’.

[In Arrowsmith v UK (1978) Pat Arrowsmith, a pacifist, distributed leaflets to soldiers urging them not to serve in Northern Ireland (incitement to disaffection rather than pacifism per se): it was held by the European Commission on Human Rights to be an action motivated by her pacifism and not a manifestation of it. This distinction has been confirmed in subsequent jurisprudence. The act thus has to be a direct expression of belief not simply motivated by it.]

The second relevant matter from the ECHR concerns the phrase “the rights of others”; and the rights of others includes their equal rights to yours. They may not even be Convention rights. So when you’re thinking about asserting religious freedom, remember the distinction between manifestation and motivation; and remember the controlling factor of the rights of others. There are other controlling factors – this is only a general excursus.

So, in the third era, the ‘principled era’, we’ve got the EC (now the EU), emphasizing the centrality of freedom, equality, dignity, autonomy. We’ve also got the ECHR, which has in article 9 the right to religion but with restrictions both in article 9(2) and in the wording of 9(1) seeking to balance differing rights. Also the domestic judges increasingly extrapolate more fundamental principles from the ECHR, such as dignity and autonomy, although “dignity” as one commentator has said, ‘is very malleable’ and dependant upon time and place. You only have to look at the way the destitute, slaves, women, have been treated over the years, to see how things can change. What was regarded as acceptable once is no longer regarded as acceptable now. Think about Sir/Lord Learie Constantine, who was turned away from an hotel in 1943 because of the colour of his skin. This gave rise to a very famous case. So the judges are saying. ‘It’s not just about freedom of speech, freedom of association, rights of respect for your family, freedom of thought, conscience and religion. It’s about dignity. It’s about equality. These are the overarching principles.’

And meanwhile there has been legislation such as the Equality Act 2006. So what is emerging are values: values that, if you want to enter the public domain, you must live by.

[The significance of this here is the expansion of this European dimension into the area of human rights and therefore its probable impact upon the substance of human rights law within England. This is most manifest in the Charter of Fundamental Rights of the European Union of 2000 and related directives. The Charter’s preamble states that the Union is founded on the “indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”. The first of the Charter’s six sections (or chapters) is given to dignity. The other five are freedoms, equality, solidarity, citizens’ rights and justice. Its first article states that human dignity is inviolable and must be protected. The first chapter rights are the right to life, prohibition of torture and of slavery and the right to integrity of the person. Chapter 2 rights are the standard civil and political rights, including article 10 (freedom of thought, conscience and religion) and article 11 on freedom of expression. Also in this chapter are the freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, conduct a business etc. Chapter 3 on equality leads with the statement that everyone is equal before the law (article 20) and follows with the non-discrimination provision:

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority,

property, birth, disability, age or sexual orientation shall be prohibited”.

This Charter was and at the present time is technically devoid of legal force. The Lisbon (or Reform) Treaty (not constitution?) of October 2007, however, which may possibly come into force in 2008 and which in its Preamble states that it draws its inspiration from the “cultural, religious and humanist inheritance of Europe”, provides in new treaty article 6 that the Union recognises the Charter rights, freedoms and principles which “shall have the same legal value as the Treaties”. The Charter itself does not actually appear in the Treaty not even as an annexe but this bears no legal import. The Union also will accede to the ECHR (see article 6(2)). The UK has entered an opt-out to the Charter rights primarily regarding labour law and social security rights (Protocol 7). European jurisprudence with its supremacy and its hierarchy of values will, therefore, increasingly influence the substance of English human rights law.]

What next?

May I draw one or two concluding comments to try to bring this together? We've had the pragmatic constitution, the paradoxical constitution. We've now got the principled constitution. What next?

Mr. Gordon Brown, the Prime Minister, has ** launched the nation on a national conversation. There's one going on in Scotland as well at the moment about the form of their constitution. In other words, we'll talk about the constitution. Now by the way, you may wonder why politicians come into power and talk about constitutions. It's usually because it costs nothing. Really it's often as simple as that. A lot of constitutional reform may be nothing better than high-profile fluff but there's a lot of material in the July 2007 Governance of Britain green paper that may lead to change. One of them is the national conversation on citizenship which the former Attorney General Lord Goldsmith is looking at at the moment. What is meant by British citizenship? What is our national identity? Can the government continue, in the devolved United Kingdom, perpetually ignoring the English Question? These questions are taking place. Further as part of the debate on the need for a British Bill of Rights (and Responsibilities), 'Liberty' on Monday 19th November launched its British Bill of Rights, talking about the possibility of having 'directive principles' – principles that describe our constitutional values.

So what's the Church going to do in all this? What kind of stance are the Church leaders going to take? We've got the twenty-six Lords Spiritual at the moment. Twenty-three of them, so far as I can gather, didn't attend the debate/vote on the sexual orientation regulations debated in Parliament, and specifically here the House of Lords, earlier this year. Certainly they didn't vote, except for the Bishops of Southwell and Nottingham, Winchester and the Archbishop of York. If bishops continue in the Lords or whatever a reformed second chamber will be called, they and we have really got to think about why they're there and what kind of issues they want to, better should, contribute to. It is important that they bring to bear a Christian expertise on things like climate change or social housing but they are not the only people who can do this. What contribution rather can they make to the consideration of moral issues that they qua Bishops and peculiarly as Bishops can and should make?

If the national conversation is taking place, there has to be a spiritual dimension. There are two things I would suggest that need to be aired. One is that there is a Christian formulation of the principles of autonomy, integrity, personal identity, dignity, freedom, equality. It's sometimes too easy to say - and sometimes it's true and sometimes it is fundamentally false - that some of the liberals in the Church go with the secular values because it saves thinking and it goes with what they believe anyway. But you know there is a Christian dimension to these important overarching principles that must be formulated and addressed and aired in the public forum.

The other thing is that people worry about the conflict of values. There may be a single equality Bill pending, and the Archbishops' Council has issued a paper saying they are worried about the freedom of religion being downplayed in terms of other values. Others in the Church may not be (as) worried.

When it comes to dominant values, however, it may well be that freedom of expression is *the* most dominant value. That's *the* freedom – especially political expression. And I think if people have a religious argument to make - and increasingly there at times seems to be a coalescing public view that people that have a religious argument to make shouldn't be making it in public - let the religious people use article 10 on freedom of expression, because if article 10 thrives for the Church, article 9 on Freedom of Religion will be fine. Stifle the Church's public expression and you have stifled many aspects of freedom of religion.

You only have to look at the reaction to the Cardinal's sermon in the Roman Catholic Cathedral in Edinburgh on the Feast of the Visitation, where in a sermon in his cathedral he aired the possibility that Roman Catholic politicians who voted for abortion shouldn't receive Communion. And what were the headlines? He should stop bullying. He should stop hectoring. He should stay out of politics. Well whether you agree with him or whether you don't, surely he's entitled to express his opinions not only as a general proposition but also specifically on a topic such as abortion. Whether his views prevail or not is a quite separate issue from his right to air them.

It was the same with the Archbishop of Canterbury and his article in the *Observer* on 21st October; on the 40th Anniversary of the Abortion Act. 'Let the Church stay out of politics!' Well, arguably the government of the day stayed out of politics when that bill was passed! 'Let David Steele introduce the Bill in case there's electoral fallout. We don't want to be labeled as the government that introduced the bill.' So if the Church and individual Christians want to stay in the public forum, they have to use article 10. They have to show that it is justified and indeed right for the presentation of a religious dimension to be made to any matter of public concern.

And the other thing: conscientious objection. There is such a thing as conscientious objection even in time of war. Even in the Second War when the very existence of this nation was threatened, conscientious objection from front line fighting was permitted and I would say was rightly permitted. And those men weren't cowards: they often bravely served as air wardens and paid with their lives. They were conscientious objectors and the state permitted it.

[The challenge for the Christian faith is the establishment of itself in the public forum resisting the move towards an aggressively secular state. Religious freedom is not the concession of a democratic state but a central component of it and this needs to be established and accepted under freedom of expression as well as freedom of religion. There are Christian dimensions to or articulations of the values of dignity and autonomy and they need to be fully expressed and heard in the public forum. Equality, integrity, justice and inclusiveness are not only secular values to be easily accepted by so-called liberal Christians, a charge that is sometimes made. A distinct Christian formulation of such values is essential.

There are, however, also those who find that the balance between conflicting rights, especially in the areas of sexual identity and sexual orientation and religious conscience and freedom of religious, and between freedom of expression and freedom of religion/religious sensitivities expression wrongly drawn.]

So, I think the State has got to start thinking very carefully about the range of conscientious objections that it will allow to public values on religious grounds. Professor Ronald Dworkin, a very eminent jurisprudence scholar, has written a short article in *Prospect* magazine (17 March 2007) in which he refers to the Abortion Act conscience section that was mentioned earlier. This section enables people on conscientious objection grounds to opt out of providing abortion services, provided they can prove that this is being done on conscience grounds (the onus is on them) and, centrally important, provided it does not cause harm to the life or health of the pregnant woman.

Ronald Dworkin, who draws a clear distinction between bigotry and "convictions that are matters of concern across religious traditions because they touch the meaning of human life",

writes that if we're looking at religious exemptions and conscience clauses - and he's thinking of the context of the Roman Catholic adoption agencies, which now have an opt-out until the 1st January 2009 but not beyond – the position will then be that they must either take State money and live by State values, or they must stop arranging adoptions. It should be noted that during the transitional period they must refer same sex couples to other agencies that do provide adoption or fostering services to same sex couples. In this way the overall legislative scheme will not be impaired.

Dworkin asks why such bodies as the Roman Catholic adoption agencies should not be allowed the weight of freedom of conscience, conscientious objection, always provided that in so being facilitated they do not thwart or significantly impair the State's policy/law and they do not significantly damage anyone.

This debate and the wider debates will no doubt continue.

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