



Equality and
Diversity Forum

**‘From conflict to cohesion’:
competing interests in equality
law and policy**

A paper for the Equality and Diversity Forum

2008

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Executive Summary

This paper examines conflicts of rights and competing interests in the context of the equalities framework. The expansion of the grounds of discrimination law beyond the traditional categories of race and sex to also include disability, sexual orientation, gender identity, religion or belief and age has made this an important issue. In addition, the increasing recognition of 'equality' and 'non-discrimination' as significant rights raises the spectre of conflict with other human rights such as the right to freedom of expression. This is potentially a vast area for analysis. This paper is a selective treatment of some of the main issues. It sets out these issues and some general principles for reform as a first step in developing a principled approach to conflicts in equality law and policy.

The main argument of the paper is that competing interests and conflicts in equality law and policy are a reality, however, there are also political forces that exaggerate the extent and nature of these conflicts. In particular, the principles of gender equality and secularism are sometimes used as a weapon with which to attack minority communities rather than acting as a guide to pursuing a coherent equalities framework. At the most general level, this paper recommends that competing interests and conflicts should be resolved by treating human rights standards as the non-negotiable floor within which all equalities law and policy analysis takes place. At the national level, this requires that equalities law and policy is related to constitutional and human rights law, which can be done through the introduction of a purpose clause in the proposed Equality Act. These principles can also be translated by local authorities into concrete policies through the introduction of a harmonised equality duty.

Potential conflict between freedom of speech and protection of minorities puts at risk the values of free speech as well as creating an atmosphere in which minorities are stigmatised. In this context, it is preferable to address hate speech through more active use of non-legal measures that target prejudice in the mainstream public sphere as well as the most extreme forms of speech. In addition, policies that focus on empowering minorities through giving them 'voice', rather than restricting the speech of others, can ensure that a conflict between fundamental rights is avoided.

In relation to age and disability, one of the main issues concerns the fair distribution of resources to individuals and groups that are often victims of social exclusion. There may also be conflict between, as well as within, racial and religious groups that needs to be addressed by a coherent and principled policy of community cohesion. The introduction of a harmonised equality duty across all the equality grounds is one of the main legal policy instruments that can assist national and local government in addressing these types of community tensions.

Religion or belief/culture is a particular focus for this discussion because many recent political incidents and cases have involved a conflict between these grounds and sex

or sexual orientation. Where there is a conflict between religion or belief/culture and sex or sexual orientation discrimination, it is important to take a dual track approach. Discriminatory belief may be given a wider latitude because it is protected as the individual right to religion or belief; however, discriminatory conduct should be strictly regulated. In some cases, the conflict can be resolved by taking a more complex view of the definition of equality or the ground of discrimination (e.g. ensuring the category 'woman' includes the viewpoints of Muslim women, or the category religion or belief includes the viewpoint of lesbian, gay, bisexual and transgender (LGBT) faith-holders). In other situations the issue can be resolved by taking a more complex view of membership of the group and empowering 'minorities within minorities' (such as women and LGBT people) who often lack the power to pursue their interests. In cases of conflicts between religion or belief/culture and women's equality where there is a risk of harm or coercion there should be a policy of zero tolerance which requires state intervention to protect women. Situations where women choose to be members of communities that maintain discriminatory practices may be resolved by applying the principles of autonomy and by empowering women within communities.

General principles can guide decision-making in order to avoid, minimise or resolve conflicts in equality law and policy. These principles include, inter alia: respecting human rights as a non-negotiable floor for the analysis of conflicts; maintaining the belief-conduct distinction; and ensuring that derogations from the principle of non-discrimination should be avoided in favour of narrowly drafted provisions that are annually supervised by Parliament, for example, by the Joint Committee on Human Rights. The paper supports the introduction of a purpose clause in the proposed Equality Act and a harmonised equality duty as legislative reforms that can make a significant contribution to addressing conflicts in ways that are consistent with human rights and equality principles. The paper also recommends the increased use of some non-legal responses, e.g. alternative dispute resolution, training of managers and negotiation.

Introduction

Whilst the main emphasis of this paper is on law, it is important to place the issue of competing or conflicting rights in its wider social, economic and political context. Britain is increasingly a diverse society, with the consequence that the nature of prejudice and discrimination – as well as the perceptions and social attitudes of individuals and social groups – is becoming more varied and complex. This has led to a significant increase in concern about integration and shared values, as some commentators argue that diversity is not compatible with social cohesion. Yet, at the same time, many individuals and social groups seek the affirmation of some of their ‘differences’ as a positive rather than merely a negative value. State policy has increasingly focused on definitions of citizenship that have to address not only issues of equality but also the issue of the accommodation of difference, as well as the need for a ‘greater sense of citizenship, based on (a few) common principles which are shared and observed by all sections of the community.’¹ This shift of emphasis is reflected in the focus on integration, community cohesion and ‘citizenship’ ceremonies. The equalities and human rights framework is sometimes presented as one possible source for this framework of shared values, and it is argued that what is required is ‘a balance to be struck between the need to treat people equally, the need to treat people differently and the need to maintain shared values and social cohesion.’²

There is a widespread public perception that an increase in the protection of equality through human rights and discrimination law has led to an increase in ‘conflicts’ between different social groups. This perception has been encouraged by a number of high profile public events and legal cases. For example, a Christian registrar of marriages has argued that a requirement for her to carry out a civil partnership between a same sex couple constituted discrimination on the ground of religion or belief and a Muslim taxi driver has refused to accept a passenger with a guide dog. Moreover, the *Behzti* play, Danish Cartoons and Jerry Springer controversies have raised questions about the relationship between freedom of speech and protecting religious groups from offence. The ‘Catholic adoption agencies’ debate led to public discussion about whether organised religion can provide public goods and services without fully complying with the requirements of equality law and policy in relation to equality for women and LGBT people. At the European level, the debate about the headscarf and the *niqab* has focused on the accommodation of religious symbols in a secular public sphere, as well as raising questions about a potential conflict between these religious forms of dress and gender equality.

The issue of conflicts and competing interests in equality law and policy is a potentially vast area for analysis. This paper does not seek to discuss all the relevant issues or to provide a definitive blueprint for resolving these conflicts. Nor does it focus on areas such as abortion where it is argued that there is a potential conflict between gender equality or the right to privacy (e.g. through a woman’s right to choose) and religion or

belief (e.g. claims that this breaches a right to life). Moreover, although the paper does place the discussion in the context of the 'social cohesion' debate, it does not focus on how there can be a fairer distribution of political, social and economic power between different social groups. The main focus of the paper is on the legal issues and the equalities framework. Part I is a discussion of the context and background for the debate about conflicts of rights. Part II sets out the main legal and policy issues that are relevant for analysis. Part III is a discussion of the special contribution of public policies of consultation and accommodation to minimising or resolving conflicts. It makes proposals for reform that either prevent or minimise these conflicts from arising, or allow conflicts to be resolved in a way that is consistent with the principle of equality and non-discrimination.

Part 1: Context and Background

1.1 Conflicts and Competing Interests

Conflicts or competing interests can arise in equality law and policy in a number of ways.

(a) Multiple Discrimination

In some cases, an individual can bring themselves within more than one protected ground: e.g. an African woman may be able to argue for legal protection under sex, race and religious discrimination law. These types of situations can be called *multiple discrimination* because the presence of more than one ground of discrimination 'adds' to the nature of the discrimination. If there are two grounds the quantity is doubled, and if there are three grounds, it is trebled.

(b) Intersectional Discrimination

There can also be situations where the presence of more than one ground of discrimination leads to a qualitative transformation in the nature of the discrimination experienced. In these situations, the sex and race components of an African woman's discrimination cannot be easily distinguished. It could be argued that the presence of both these categories at the same time transforms the grounds of both sex and race: i.e. she experiences discrimination as a woman in a way that is distinct from other women who are not African; and she experiences discrimination as an African in a way that is distinct from other Africans who are not women. Where an individual falls within more than one protected group, and where there is a qualitative change in the nature of the discrimination, we can call this *intersectional discrimination*.

(c) Conflicts of Rights

There may be situations which give rise to a conflict between equality rights and other types of rights. Where fundamental human rights conflict this raises a serious problem because the foundational principles of constitutional and human rights law seem to be irreconcilable. This can lead to an overall weakening of the system of liberal democracy. *Conflicts of rights* can arise when it is not possible to reconcile two or more competing rights.³ There often seems to be an overlap between 'conflicts of rights' and 'conflicts of grounds' (discussed below) especially in those situations where equality norms are protected in a constitutional or human rights document (e.g. the Canadian Charter). However, it is worth keeping these two types of conflict separate. Conflicts of rights which involve constitutional and human rights norms can and do arise in the context of a wide range of constitutional settlements, including the Human Rights Act 1998. These conflicts cannot be resolved permanently because no constitution or bill of rights can provide an answer to all situations.

It is worth pointing out that the issue of conflicts of these rights needs to be distinguished from other situations, such as the issue of disagreement about rights or the question of limits to rights. For example, many constitutional or human rights can be limited in some circumstances (e.g. public health or national security) which gives

rise to disagreement about how to safeguard individual rights and collective goals. These are disagreements about rights rather than conflicts of rights because it is possible to define the scope of the human rights involved in these cases in ways that do not conflict with other human rights. These situations do not create a problem of inconsistency for the whole system because they do not give rise to the problem of two incompatible constitutional or human rights norms: e.g. where *either* one or the other can be followed, but not both, because the two norms contradict each other. Moreover, issues concerning fair distribution of resources may raise questions about distributive justice (and therefore some aspects of equality); these may be difficult questions for government and public authorities, but they do not raise an issue of conflicts of rights or conflicts of grounds.

(d) Conflicts and Tension between Grounds

In some cases it may be impossible to reconcile the claims of one group to non-discrimination on one protected ground (e.g. sex) and the claims of another group that is also relying on a right in discrimination law on a different protected ground (e.g. religion). This can be an example of a *conflict or tension between grounds* of discrimination. In some cases, discrimination law has recognised that there may be such conflicts and made exceptions for these situations by creating specific exclusions (e.g. the appointment of ministers of religion is not covered by the prohibition on sex discrimination in employment).

The problem of conflicts of grounds raises a different set of questions. This problem arises when there is an incompatibility or conflict between giving effect to the principle of non-discrimination to protect one group (e.g. women) at the same time as protecting another group (e.g. believers in a particular religion). In some cases the failure to consider the grounds of discrimination (e.g. sex) in a sufficiently wide way to accommodate all those who may fall within its protection (e.g. women who are also racial or religious minorities) means that a situation is misleadingly treated as a conflict of grounds or rights.⁴

1.2. The Exaggeration of Conflicts

Public discussion has sometimes presented the problem of conflicts in equality law and policy as widespread and intractable. High profile media coverage of these issues has contributed to this image. There are, however, a number of ways in which this picture of a 'vast and intractable' conflict between individuals and groups is an exaggeration of the problem.

One reason for this exaggeration is the role of racism, which has played a part in misrepresenting the nature of some types of social problems, e.g. forced marriages or 'honour' killings. Although in some situations there may be a potential tension or conflict between gender and racial or religious equality, what is often presented is an intractable conflict of values. Anne Phillips has summarised this particular problem in the following terms: '[...] principles of gender equality were being deployed as part of the demonisation of minority cultural groups. Overt expressions of racism were being

transformed into a more socially acceptable criticism of minorities said to keep their women indoors, marry off their girls young to unknown and unwanted partners and to force their daughters and wives to wear veils'.⁵

The exaggeration of the problem of 'conflict' between different groups – and especially races, cultures and religions – gives rise to an assumption that there is a radical difference of values between different social groups in society. This source of 'competing interests' is likely to continue as past and present patterns of migration into Western Europe from non-Western cultures are mapped on to majority/minority asymmetries of power. The representation of social problems such as forced marriage or 'honour' killings as deeper problems of culture also dovetails with state policies in areas such as immigration. In the area of forced marriage, for example, a number of commentators have noted that presenting these issues as part of a problem of minority cultural values has provided a justification for the introduction of more restrictive immigration rules, which may in fact exacerbate problems for minority women.⁶ In many cases what seem to be deep-seated conflicts about fundamental rights or values are in fact issues about how best to design policy responses to what is recognised by all those involved (including the minority culture) to be a problem.

To give an example, the problems of 'honour' killings or forced marriages are often presented as being an example of a deep value conflict between the rights of women and cultural or religious equality. This assumes that there is a wide ranging consensus within the cultural or religious group that the use of violence or coercion against women or young girls is justified. This, in turn, 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. This is problematic because it does not recognise the diversity within racial, cultural or religious groups. Moreover, this approach under-estimates the extent to which there often a great deal of consensus about the value of consent or the rights of women in minority cultural or religious groups, although there may be disagreement about the appropriate public policy response to problems such as 'honour' killings or forced marriages.⁷

1.3. The Human Rights Act and the proposed Equality Act for Great Britain

The key areas of law which are relevant to a discussion of conflicts in equality law and policy are the Human Rights Act 1998 (HRA) (which has now incorporated the European Convention on Human Rights into domestic law) and European and British discrimination law. The relationship between the HRA and discrimination law is complex. At the constitutional and human rights level, the HRA introduces the individual rights of freedom of speech, privacy and religion into domestic law, as well as safeguarding equality through the European Convention on Human Rights (ECHR) Article 14 which requires non-discrimination (e.g. on grounds such as race, sex, religion and sexual orientation) in the enjoyment of these rights. There is a very specific protection of 'freedom of religion or belief' through provisions such as Article 9 ECHR, whilst at the same time the enjoyment of other rights without discrimination on grounds of religion is protected through Art 14.

This constitutional and human rights structure operates alongside a complex system of European Union (EU) and statutory discrimination law which prohibits discrimination on the grounds of race, sex, sexual orientation, religion or belief, disability and age in a wide range of sectors. Public authorities are required to safeguard the rights introduced by the HRA, as well as complying with the standards of EU and statutory discrimination law. Public authorities are also subject to a positive duty to promote equality of opportunity and eliminate discrimination in the areas of race, gender and disability in carrying out their public functions.

The discussion of conflicts in equality law and policy also needs to take into account the proposed Equality Act for Great Britain. The Discrimination Law Review (DLR), published in June 2007, was the Government's consultation before the introduction of the Equality Bill.⁸ It contained proposals to extend the positive duty into a single harmonised duty that applies across the equality grounds to cover sexual orientation, religion or belief and age. A framework equality law emerging from Great Britain at this time may also have influence internationally and throughout the European Union.

The Government has now published its response to the DLR consultation in 'The Equality Bill – Government Response to the Consultation'.⁹ Most significantly, the Government has reiterated the approach of the DLR which treated the Equality Act as a project that is distinct from the constitutional and human rights framework. To this end, the Government has rejected calls for a purpose clause which would set out the goals of the Equality Act in terms which relate it to 'constitutional' values such as equality or dignity. This ignores the experience of jurisdictions such as Canada and South Africa where a 'purpose clause' setting out the goals and underlying aims of equality legislation has provided an important 'steer' for interpretation by courts and tribunals. The Government's Response concludes that:

One of the main aims of the Bill is to set out the law in clear and unambiguous terms. A purpose clause would undermine that aim because there would be an inevitable tension between a general statement of purpose and specific provisions in the Bill. [...] So while appreciating the desire for clarity and consistency which underlies the call for a purpose clause from many of the respondents on this issue, we do not believe that ultimately it will lead to an improvement in the way the courts or tribunals interpret the legislation or provide guidance to others. In fact, we believe it is likely to have the opposite effect. Instead we consider that the right place for a statement on the objectives of the Bill is in Parliament, typically at Second Reading. [...] We are shortly to publish proposals for a Bill of Rights and Responsibilities for the United Kingdom, building on the Human Rights Act. There will be a public consultation on these proposals, which will include the possibility that a Bill of Rights and Responsibilities should include a constitutional equality provision, reflecting the central place of equality in our society as one of the values which informs governmental and public authority decision-making.¹⁰

The Government's strategy, therefore, suggests treating a purpose clause (with references to the constitutional value of equality) as a matter for the Bill of Rights rather than the Equality Act. This is odd because the institutional structure of a single equality commission – the Equality and Human Rights Commission (EHRC) – which merges constitutional and statutory approaches is endorsed by the DLR.¹¹ Moreover, despite the firm rejection of the constitutional model on page 62 at para 10, the DLR goes on to acknowledge in the next paragraph that the HRA is a source of equality norms:

Legislation must be interpreted in the light of these rights. [...] The application of human rights in an equality context has been demonstrated in a number of cases dealing with disability, sexual orientation, gender reassignment and religion or belief and in some cases has led to new discrimination law being brought forward.

Therefore, at the same time as explicitly rejecting constitutional equality models, the Government's approach implicitly accepts the symbiotic relationship between constitutional (e.g. Article 14 ECHR) and statutory (e.g. the Race Relations Act 1976, Sex Discrimination Act 1975 or Disability Discrimination Act 1995) discrimination law. This relationship is an inevitable outcome of the different sources that produce the 'multilayered' nature of discrimination law.¹²

The Government's approach ignores the critical ways in which these two sources – the HRA and domestic discrimination law – are related. The constitutional value of equality, as contained in a purpose clause, provides a value based guide as to why it is important to protect individuals from discrimination. For example, one proposal for reform in the DLR is that transgender people should be protected from indirect discrimination which arises when organisations do not change their records to show the individual's new name or gender.¹³ Protecting transgender people in these cases is important because forcing them to reveal their personal history would be a breach of dignity and of their right to privacy. The law should offer this protection to transgender people because this ensures compliance with the right to privacy which is protected by Article 8 ECHR. The deeper foundations of human rights in the HRA, as well as the constitutional value of equality in Article 14 ECHR, provide the justification for domestic discrimination law and social policy.

The DLR and Equality Bill proposals could have emphasised the importance of, and connection between, the 'constitutional' sources of discrimination law, as the prism through which all domestic discrimination law needs to be understood, without the wholesale abandonment of the British statutory model. One way of doing this would be to adopt a purpose clause that links the Equality Act to the constitutional and human rights norms contained in the ECHR that are a guide for government and public authority decision-making. This more explicit acknowledgement of the importance of ECHR and EU sources would also ensure that the Government reform of discrimination law moves beyond the minimalist standard that it sets for itself in stating

that ‘we want to make sure that British discrimination law meets the requirements of European law’.¹⁴

Of course, an Equality Act will not be able to resolve all the complexities arising from the overlap of constitutional and statutory sources. However, providing these ‘deeper’ human rights and constitutional foundations for equality law and policy is particularly important in the area of competing interests and conflicts of rights in equality law and policy. This is because often the only way to resolve tensions or clear conflicts in some situations (e.g. between a cultural practice and gender equality) will be by treating human rights norms in the HRA as the non-negotiable floor of rights which bind all the relevant parties. These human rights values will also provide all decision-makers – including public authorities – with a substantive set of positive values with which to design their social policy to implement the harmonised positive duty to promote equality.

An appropriately drafted purpose clause could also serve other important aims of equality law and policy. Most importantly, it could set the ‘tone’ for the legislation by encouraging those charged with interpreting and applying equality law and policy to view it as not just another area of private law. Instead, this area of law needs to be understood as part of the fundamental principles of the human rights and constitutional values framework. This ‘steering’ function of a purpose clause has the potential to be effective at a number of different levels. Legislatures, and especially courts, could refer to these principles in interpreting equality law and policy. In some situations such an approach could make a significant difference. In cases such as *Copsey*, for example, a purpose clause that encouraged the integration of human rights and discrimination law analysis would lend strength to Mummery LJ’s reservations about an approach that requires an individual to leave their current employment in order to practice their religion.¹⁵ Although judges in the higher and appellate courts are already interpreting equality law by reference to its more fundamental purposes (e.g. individual dignity or reducing social exclusion)¹⁶ there is still some need to provide further guidance. This is necessary not only for tribunals, but also for public authorities who now have to interpret the concept of equality and non-discrimination as part of their public sector equality duty. It is also important to give non-judicial bodies and officials some ‘steer’ about equality law and policy. This includes all those who are involved in applying equality law and policy (e.g. human resources personnel in the public and private sector), as well as the general public who may benefit from understanding why legal regulation is necessary in this context. This ‘steering’ function is especially important in the context of competing interests and conflicts because those who are being asked to make a compromise for the sake of promoting equality law and policy need to understand the fundamental principles that justify their ‘sacrifice’.

1.4. A Harmonised Public Sector Equality Duty

One of the proposals in the Equality Bill is to harmonise the equality duty that at present applies in the context of race, disability and gender to the other grounds of

discrimination, i.e. sexual orientation, religion or belief, and age. The equality duty was first introduced by the Race Relations (Amendment) Act 2000 requiring public bodies to take proactive steps to achieve racial equality. Duties covering disability and gender were subsequently introduced. The equality duty is the main policy lever that requires national and local government to mainstream equality and non-discrimination into national and local public structures.

In the present context, the mechanism of the public sector equality duty could provide a unique opportunity to consult widely with local groups in the design of public policies to ensure that potential conflicts are minimised or resolved before they become entrenched. This is a proactive promotion of equality which can prevent conflicts that could lead to costly litigation and tensions in community relations. Moreover, a harmonised positive duty has the potential to ensure that less powerful groups within religious or racial minorities – e.g. women, LGBT people, young and older people – are consulted as part of the process of public consultation prior to the design of public services. The duty also requires public authorities to gather baseline evidence on discrimination and equality across their functions. It provides a mechanism for monitoring, consultation and training that has the potential to cover all discrimination grounds. This allows the development of public services that are more appropriate for their users, potentially taking into account any tensions and conflicts between groups before policy decisions are finalised.

The more inclusive public institutions which should result from a harmonised public sector equality duty would also better promote equality, integration and community cohesion. The duty can contribute to cohesion and help to minimise conflict by ensuring that the needs of minority religious groups are aligned with the needs of other religious and non-religious social groups in the community through a process of consultation, negotiation and compromise.

It has been argued that the new duty should not cover religion or belief in the same way that it covers the other equality grounds. However, merely consulting with religion or belief groups does not mean that public authorities have to implement all of the demands of such groups. And consultation or accommodation does not in itself breach the principle of secularism which is a principle that applies to the institutional separation of religion and state.

This process of mainstreaming the needs of religious minorities is a disincentive to them setting up parallel community structures where there is no regulation and no protection for vulnerable groups. It also provides an opportunity for public authorities to promote the wider goals of equality and non-discrimination within religious minorities. The process of consultation, negotiation and compromise with the local community ensures that members of both majority and minority communities are involved in this decision-making process. This process also ensures greater transparency so that local people feel involved in and can challenge public decision-making. As the public sector is a leader in shaping attitudes, the positive duty could

help ensure that individuals are treated as equal citizens, and this focus on equality will also shape broader social attitudes

It is also sometimes argued that there should be no public sector equality duty in relation to religion or belief because of a risk of harm to women. In fact, the exact opposite is true: a harmonised public sector equality duty is essential to prevent harm to women in religious minorities. As the later discussion suggests, tackling violence against minority women requires appropriately designed services that meet the needs of women in religious communities – e.g. domestic violence support that targets Muslim or Hindu women – designed after full consultation with women from those communities. A harmonised equality duty should require public authorities to cross-refer gender with religion or belief to ensure that vulnerable women are protected through appropriate service delivery.

Part 2 – Overview of Present Law and Policy

In theory, it is possible for conflicts of rights and conflicts of grounds to arise in multifarious ways. For example, there could be a conflict of rights between the right to privacy and the right to life (in the case of abortion) or between freedom of association and the right to non-discrimination on the ground of sexual orientation (e.g. where a gay boy or man asserts the right to belong to an organisation such as the Boy Scouts Association).

There may be a potential conflict of grounds in a number of different ways. Theoretically, any of the six protected grounds of discrimination law may conflict: e.g. disability versus sexual orientation; disability versus race or religion; gender versus race or religion; or sexual orientation versus age. However, in practice the problem of the conflict of grounds has arisen in a more uneven way. Recent case law and practice suggests that one key area is where there are claims between religion (and culture associated with race) on the one hand, and claims to non-discrimination on the grounds of gender and sexual orientation on the other. Therefore, these issues are discussed in detail as the main focus of analysis in this paper, although other potential conflicts are also discussed.

The discussion of conflicts of rights and conflicts of grounds is structured in the following way. Section 2.1 is a discussion of conflict of grounds. It starts with a general discussion of conflicts of grounds, and then moves on to an analysis of a) Race, Religion and Culture; b) Religion or Belief/Culture and Sex Equality; and c) Religion or Belief/Culture and Sexual Orientation. Section 2.2 is a discussion of conflicts of fundamental legal and human rights, with a special focus on hate speech. Section 2.3 considers the relationship between religious equality and the principle of secularism which are often presented as antagonistic concepts.

2.1. Conflicts of Grounds

In practice, as mentioned above, the main areas in which there has been a conflict between different grounds has been where there has been an intersection between race, culture or religion on the one hand, and sex or sexual orientation on the other. Nevertheless, before moving on to that discussion it is worth outlining the specific sources of competing interests and conflicts in the other equality grounds.

It is often assumed that there will be a wide-spread consensus within the area of sexual and gender equality. However, as the *Vancouver Rape Relief Society v Nixon*¹⁷ case illustrates, there may be situations where there is a conflict over resources and social policy in this context. In this case the Supreme Court of British Columbia found that a women's rape crisis relief centre had not discriminated on the ground of sex when they refused to hire a male to female post-operative trans-sexual because she lacked the 'life experience' as a woman to deliver an appropriate level of advice and care to victims of rape. This case illustrates the way in which transgendered individuals are often at particular risk of being involved in conflicts of grounds because

they are often excluded from both men's and women's groups. The case also illustrates the way in which freedom of association, and the right to organise women's groups, can be undermined if the principle of equality and discrimination is applied to 'force open' all social groups who seek to define their membership according to criteria such as race, sex or sexual orientation.

It is also possible to envisage a number of scenarios which could result in a conflict between race and other grounds of discrimination. For example, there may be a conflict between race and religion in cases where a religious organisation bases its doctrine on the belief in the superiority of one race over another. Common examples may include anti-Arab prejudice or anti-Semitism within part of the Asian Muslim community or ideas of 'white supremacy' or anti-Semitism in some Christian organisations. One context in which this may become a relevant issue is the ability of faith schools to make appointments and select pupils. It is also possible for any of the other grounds to conflict with belief (and political belief in the case of Northern Ireland). This has arisen in the context of challenges by members of the British National Party who claim that they are protected by discrimination law.¹⁸ The potential for a conflict between race and gender is considered in detail in later discussions.

There can also be conflict within the equalities grounds themselves: e.g. a conflict between or within religion or belief (in particular, belief in the context of secularism or humanism). These types of conflicts within grounds, especially within race or religion or belief, will raise critical questions of social/community cohesion policies. The EHRC has a mandate to promote good relations between individuals and groups which allows it to address this issue directly. The Department of Communities and Local Government (CLG) has also developed policies to promote community cohesion, in part through the Cohesion Directorate, the Commission on Integration and Cohesion and more recently work on 'Preventing Violent Extremism'. The CLG guidance also provides criteria for monitoring tension and preventative strategies to prevent tensions developing into wide scale conflict.¹⁹ The introduction of a harmonised public sector equality duty, discussed earlier, could be one of the key policy levers to address conflicts within grounds because it will allow local authorities to plan strategies of consultation or accommodation that reflect a consensus about issues of recognition or allocation of public goods within local communities.

Age discrimination is now prohibited in a number of different areas, including employment and training, and there are proposals to extend the positive duty and protection from discrimination in the provision of goods, facilities and services to include age. Government, employers and service providers are often reluctant to regulate age discrimination because of the perceived complexity and potential costs.²⁰ However, age-based stereotyping is a wide-spread phenomenon that can cause significant social harm including but not limited to those harms that are regulated by discrimination law. Not only does age discrimination have damaging consequences in the field of employment (where it is now prohibited), it may also lead to higher levels

of poverty, social exclusion and the denial of important goods such as medical treatment or social welfare for older people. Issues concerning fair distribution of resources may raise questions about distributive justice. These conflicts over scarce resources raise difficult questions for government and public authorities. Intra-group conflict, e.g. between younger and older people, may also be a relevant factor in relation to age, which will require particular attention in the form of social policy and special protection for younger and older people.

It is also possible to envisage a potential conflict of grounds between disability and the other protected grounds of discrimination law. In particular, certain types of ideas that are protected on the grounds of religion or belief may entail discriminatory attitudes or conduct in respect to disability. For example, religion or belief may include the belief that reincarnation with a disability is a consequence of sins from a previous life. This occurred when a previous England football manager was sacked for his remarks based on his 'spiritual belief' that disabled people were responsible for their own suffering.²¹

A second example of potential conflict relates to the view of some Muslims that dogs are 'unclean', with consequences for the accommodation of guide dogs. This second scenario has materialised into practical conflicts in a number of situations, e.g. Muslim restaurant owners who refused to allow guide dogs on their premises. More recently, a Muslim cab driver refused to accept a blind passenger with a guide dog because he claimed that his religion considered dogs to be 'unclean'. Licensing laws require all licensed cab drivers to carry guide dogs. Magistrates at Marylebone fined the minicab driver £200 and ordered him to pay £1,200 for failing to comply with regulations set out under the Disability Discrimination Act 1995.²² The specific risk of a conflict between Islamic belief on dogs and the possibility of direct or indirect disability discrimination against blind people has been resolved through non-legal mediation and proactive policies. The issue has been considered by the Muslim Council of Britain who, after advice about Islamic rulings on dogs, issued a ruling that British Muslims should allow guide dogs to enter taxis and restaurants. Moreover, this clarification in the position of Islam in relation to guide dogs has also led to special training for a retriever who is in training to become the first dog in Britain to be permitted to enter a mosque, acting as a guide for its blind Muslim owner.²³

There may be a special role for social policy to address stereotypes and prejudice about age and disability issues. These stereotypes may be based on narrow conceptions of what constitutes 'beauty' or acceptable physical characteristics, or about the capacity of older people. In some cases, commentators have noted that there may be negative attitudes towards disability in Asian communities which are attributed to lack of knowledge, and which lead to low access to services among some ethnic minority communities.²⁴ In these circumstances, a targeted campaign to raise awareness and tackle prejudice may be the most appropriate response. Legal regulation to prevent the expression or creation of these stereotypes in the public sphere may not be appropriate, but the government and public authorities can

legitimately campaign to challenge the formation and hardening of these viewpoints before they manifest themselves as discriminatory conduct. Once again, a harmonised public sector equality duty that covers age and disability can be useful in achieving this aim.

(a) Conflicts of Grounds associated with Race, Religion and Culture

Race and religion or belief are two distinct grounds of equality and non-discrimination which raise a specific risk of conflict with sex and sexual orientation. There is a significant overlap between race and religion or belief which makes it necessary to consider them within one discussion. The boundaries between race, culture and religion (and between religious minorities that are also ethnic groups and those that are not) have also become more fluid in the Government's own strategy for dealing with racial equality and community cohesion. This current strategy acknowledges both the way in which diversity is becoming more complex and the overlap between race, religion and a range of cultures as aspects of the broader category of 'racial equality'.²⁵ However, British discrimination law fails to recognise that there is an overlap between race, culture and religion. Moreover, the present structure of the law exacerbates problems because of different levels of protection relating to race as compared with religion. For example, there is a race equality duty but no equivalent (at the time of writing) in relation to religion and belief. This means that ethnic religious minorities (e.g. Jews and Sikhs) enjoy a greater degree of protection than non-ethnic religious minorities (e.g. Muslims or Rastafarians).

Here it is worth noting the close relationship between these different criteria. In particular, race and religion overlap to form distinct cultural practices and groups. There is a complex overlap between these different factors: they cannot be reduced to either colour, ethnicity or nationality (in the case of race) or aspects of belief and religious practice (in the case of religion). Commentators have argued that increased contemporary migration (rather than merely a history of past immigration and the presence of established immigrant groups) makes cultural diversity a critical issue for discrimination law.²⁶ It is also significant that as well as containing provisions on equality and non-discrimination, the EU Charter of Fundamental Rights affirms that 'The Union shall respect cultural, religious and linguistic diversity'.²⁷ Therefore, although race and religion are treated as distinct grounds for protection in human rights documents and discrimination law, in reality there is a considerable overlap. The term 'religion or belief/culture' is used in this discussion to encapsulate a range of criteria – religion or belief, ethnicity, race and culture – which sometimes raise problems of conflict with grounds such as sex and sexual orientation.

The protection of freedom of religion or belief in international, regional and domestic human rights documents is well established. The expansion of European and British discrimination law to protect the ground of religion or belief has been more recent. Although these two sources for the protection of religious beliefs and the religious life of the individual and groups are related, there are also important differences between them. A number of conceptual distinctions need to be established to avoid the potential

for confusion in discussing religious discrimination. There are two sources of norms of equality and non-discrimination on the grounds of religion. One source is the long standing demand of religious tolerance which is represented in constitutional guarantees of freedom of religion, such as Article 9 ECHR, the Free Exercise Clause of the US Constitution, and Article 2 of the Canadian Charter. This normative standard can be called 'freedom of religion or belief'. The second source of norms is the emerging body of constitutional and statutory discrimination law that includes religion or belief as a protected ground of discrimination in certain spheres, for example constitutional norms such as Article 14 ECHR and section 15 of the Canadian Charter; and statutory norms such as the Employment Equality Directive²⁸ and the Employment Equality (Religion or Belief) Regulations 2003.

These types of provisions are based on normative standards that can be called 'non-discrimination on the grounds of religion or belief'. Although there will be an important relationship between norms that protect 'freedom of religion or belief' and those that protect 'non-discrimination on the grounds of religion or belief', there will also be important differences between these two sources of protection for religion. For example, it may be problematic to extend provisions that guarantee 'freedom of religion or belief' to cases where demands for the accommodation of religious difference require significant reallocation of resources or social power. An analysis of conflicts involving religion or belief will need to take into account the fact that freedom of religion is a distinct human right which is safeguarded by the HRA and other constitutional documents.

(b) Religion or Belief/Culture and Sex Equality

It has been argued, most forcefully by Susan Moller Okin, that an inherent part of 'traditional' cultures, and especially religions, is that they are misogynist and sexist.²⁹ Okin argued that liberal theories and policies that encourage the state to 'accommodate' the practices of minority cultures invariably introduced a risk of harm to women and young girls. It is worth observing at the start that although oppressive practices are often perceived as limited to 'minorities', it is also intelligible to speak about the way in which a majority culture can oppress women and may contain violent or discriminatory practices. Moreover, the perception that minority cultures are themselves more or irredeemably misogynist or patriarchal may itself be based on stereotyped (or racist) views of minority cultures which it is the task of equalities law and policy to challenge. This is particularly important because the idea that 'multiculturalism is bad for women' has often been deployed in ways and contexts that replicate racist stereotypes and that encourage policies that are an attack on vulnerable minorities.³⁰ It is also worth noting that whilst the main focus of the discussion is on the harm that patriarchy within religion or belief/culture causes to women, these forms of gender relations may also cause harm to men forced into social roles that are damaging. Nevertheless, this discussion concentrates on women because they are predominantly at risk in these contexts.

The 'Sexual and Cultural Equality' Research Project at the London School of Economics sets out the considerable number of British cases where there is a

potential conflict between gender equality and claims based on religion or belief, race or culture.³¹ A number of the cases relate to forced marriage or violence against women which arise not only in criminal law proceedings, but also in wardship proceedings in the family courts and petitions for the annulment of marriages. Other cases relate to divorce or the dissolution of marriages. Problems about the status and suitability of traditional norms have also arisen in cases where the parties (often members of religious minorities) have chosen to submit to foreign jurisdictions in preference to English law in the regulation of divorce. In the UK context, areas in which there have been perceived conflicts between race, religion and culture and the rights of women include those where there is a clear use of violence, force or invasion of bodily integrity. These areas include 'honour' killings, forced marriages and female genital cutting.³²

The issue will be easier to resolve in relation to these areas than where women consent to practices that cause them harm or discrimination. Difficult questions may also arise in cases involving the upbringing of children where that child or its parents are from a 'traditional' culture or religion. The possibility that traditional practices may cause harm to young girls makes this a particularly important issue for law and policy relating to children.³³ Young girls are vulnerable to harmful traditional practices within their cultures for two reasons: because of their sex and because of their age.³⁴ Of course parents are rightly concerned about the environment in which their children are raised but can they impose practices on their young female members that may cause these children harm? John Eekelaar has recently discussed this issue and concluded: 'Perhaps we should acknowledge that, at least normally, (that is outside cases of persecution), communities may have no specific interests as *communities*. Their individual members most certainly do, and this includes the interest in passing on their culture to their children. But that interest is limited, and it is limited first and foremost by the interests of the communities' own children.'³⁵

Conflicts which involve children will be easier to resolve than those situations where women choose to remain members of cultures or religious groups that may cause them harm or which may include practices that are discriminatory. It is often argued that many women choose to remain members of a group despite traditional rules and practices that undermine their interests. 'They have a right to exit but they freely choose to remain' is the response to any challenge.³⁶ But this right to exit argument is not a realistic solution to the problem of oppression within groups. It offers an *ad hoc* and extreme option to what is often a systematic and structural problem within traditional cultures and religions. It puts the burden of resolving these conflicts on individual women and relieves the state of responsibility for the protection of the fundamental rights of its citizens. Most significantly, the right to exit argument suggests that an individual woman at risk from a harmful practice should be the one to abandon her group membership, her family and community.³⁷ The complexity of the choices that women face in these circumstances makes it more likely that they will continue to consent to practices despite the fact that they experience harm. This internalization of harmful practices is exactly what exacerbates women's vulnerability in these contexts. Emotional attachment, economic

circumstances and sometimes religious commitment makes the right to exit not only an unrealistic but also a tragic choice for many women from minority communities.³⁸ Therefore, in cases which involve violence or coercion against women the government and public agencies need to take a zero tolerance approach. It is sometimes argued that 'traditional culture' is the problem in these cases. One leading practitioner in this area, Hannana Siddiqui, has summarised the dangers of placing an over-emphasis on 'traditional culture' in the following terms:

While the recognition of culturally specific forms of harm is welcomed, it has also created a climate where virtually all killings of South Asian and Middle Eastern women by family or community members are redefined as so called 'honour killings' rather than domestic murders. By extension, all domestic violence (incorporating forced marriage) within minority communities is likewise increasingly being defined as HBV ['honour'-based violence]. The result of this tendency is that a parallel universe where domestic violence against minority women is considered 'different' to that experienced by white women, requiring 'different' analysis and solutions is created. Cultural values within minority communities are regarded as the underlying cause of violence against ethnic minority women rather than patriarchy. This means that proposed solutions are based on changing minority cultural and social attitudes rather than empowering women by changing gender power relations.³⁹

Placing violence against ethnic minority women in its proper context may, therefore, require a dual approach: the context of religion or belief/culture requires a distinct solution in the form of specific policy provision; and also placing this type of violence in its broader context of 'violence against women' that encompasses the range of violence experienced by both majority and minority women. Social policy, therefore, may need to use a twin track approach that allows specific services for minority women, whilst at the same time also making sure that service provision for all women accommodates the needs of minorities.

In some situations an apparent conflict between religion or belief/culture and the rights of women will fall short of violence or coercion. Many women choose to remain members of a cultural or religious group and they voluntarily adopt practices that are perceived to conflict with equality and non-discrimination norms. For example: women may choose forms of dress that many people consider to be patriarchal; they may enter into intimate relationships – such as arranged marriages – which are considered to embody unequal relationships between men and women; or they may choose to regulate their personal affairs in forums – such as Muslim arbitration or *Beth Din* forums – where the rules of inheritance or divorce are discriminatory.

The problem in these situations is not that it is difficult to categorise the practice as being unequal or discriminatory, but rather that these practices fall outside the jurisdiction of constitutional, human rights or criminal law, as well as the scope of discrimination law. Nevertheless, it is possible to identify a number of principles that

can be applied in these situations. Most significantly, it is important to balance the continued advocacy of the principles that underlie constitutional and human rights principles, as well the commitment to equality and non-discrimination, with a recognition of respect for women's autonomy. This balancing requires a more complex response to conflicts between religion or belief/culture and sex equality: i.e. a response that recognises that women can make a legitimate choice to remain members of a group that may sometimes contain discriminatory practices. At the domestic level, the comments of Baroness Hale in the *Sabina Begum* case endorse a more complex analysis of the headscarf as a matter of individual choice.⁴⁰ Baroness Hale emphasised the importance of taking into account the full context of reasons as to why a young adolescent woman may adopt the headscarf. She made the following explicit statement confirming that gender equality should prioritise an individual woman's autonomy: 'If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticize or prevent her.'⁴¹

Another way of framing this analysis is to say that women have the right (e.g. as part of their right to freedom of association, their associational right to freedom of religion or belief, or their right to membership of a cultural group via Article 27 of the International Covenant on Civil and Political Rights) to remain in a group that may contain practices that discriminate against them on the ground of their sex.⁴² This, in turn, requires law and policy to continue to support women who choose to remain members of a cultural or religious group, despite the fact of discrimination within that group. For example, in areas such as the choice of intimate relationships or dress or religious forums for dispute resolution it may be inappropriate to introduce legal regulation. There may, however, be a number of non-legal responses that can be used to protect women and promote sex equality in these contexts, such as offering financial and practical support to minority women's groups. Regarding complex areas such as the choice of *Beth Din* or Muslim family arbitration, it may be necessary for the state and public agencies to provide resources which encourage self-regulation and training that emphasise the importance of values such as gender equality.

(i) Separate Forms of Dispute Resolution

This last example is particularly significant in the light of recent controversies about 'Islamic law'. It is often argued that women who choose Muslim arbitration forums are subject to pressure and that these forums should be prohibited. However, two leading researchers on Muslim family arbitration, conclude that these forums fulfil an important need for Muslim women.⁴³ Muslim women want to continue to have access to these forums, although they want to see important 'internal' reforms. It may also be necessary to require a more explicit articulation of the need for consent and the limits of arbitration in those cases where women choose to use these forums. If it is correct that there is real demand for these forums from women themselves, this suggests that a strategy of abolition is unlikely to be successful, and it speaks instead to the need for reform and training to transform these forums into a more 'user friendly' environment for women.

There may be several options for reform in this context. One would be to prohibit these forms of alternative dispute resolution altogether. This would tackle the problem of coercion. However, if it is true – as suggested by the research – that women are using these tribunals because of a need and out of choice, then it is likely that a blanket prohibition would merely lead to informal use of these tribunals that may increase women’s vulnerability. The present approach of allowing these tribunals to operate as another form of arbitration is also not ideal because it does not take into account the specific risk to women of being ‘conciliated’ back into violent or coercive relationships. One solution would be to accept that human rights law provides the minimum floor which binds all the parties in this context and which justifies state intervention to secure the rights of women. This may require training of staff, inspection and procedures to ensure that women are fully informed about the nature and consequences of their choices. Marion Boyd’s proposals in Ontario recommended the use of alternative dispute resolution in these contexts, but they also set out other recommendations and safeguards. Boyd’s report, released in December 2004, came after meeting with more than two hundred people and receiving almost forty submissions. Boyd made forty-six recommendations, including: regulations to ensure proper record-keeping, mandating written decisions, and training of arbitrators; imposing a duty on arbitrators to ensure that parties understand their rights and are participating voluntarily; providing for greater oversight and accountability, including empowering courts to set aside arbitral awards for various reasons including unconscionability, inadequate financial disclosure or if a party did not understand the nature or consequences of the arbitration agreement; public education and community development; expanded appeal possibilities; and further policy analysis to determine whether additional safeguards are required.

At present, there is no evidence that the UK Government is willing to allocate the resources that would be necessary to provide these safeguards. Any discussion about special family law tribunals must take seriously the risks that such a strategy poses for vulnerable individuals such as women. Bypassing mainstream family law procedures and safeguards in favour of traditional forms of justice in special tribunals is a serious decision which deserves sober reflection. An additional advantage of an approach that permits some recourse to these tribunals, but which regulates them to meet safeguards, is that the social group is encouraged to reform its practices from within. This may provide a more effective way of transforming social group norms that may harm women, as well as empowering women within these communities to demand and initiate change without abandoning their group membership.⁴⁴

(ii) Dress Codes and the Headscarf

The debate about the ‘headscarf’ and the *niqab* has been one of the most high profile issues of a conflict between values: e.g. religion and gender equality; or religion and secularism in the public sphere. The prohibition of all religious symbols by the French in 2003, has been followed by the often asymmetrical ban on symbols that specifically targets the headscarf in some German states. The position of the European Court of

Human Rights (ECtHR), as outlined in *Leyla Sahin v Turkey*,⁴⁵ is that a state can legitimately ban the wearing of a headscarf under Article 10(2) ECHR which permits exceptions to freedom of religion. In some cases, such as *Dahlab v Switzerland*,⁴⁶ the ECtHR has endorsed the view that the headscarf is a symbol of gender inequality or gender subordination in ways that suggest that this is an example of a conflict of grounds. This way of constructing the issues is misleading because it converts a problem of intersectional discrimination (women who wear the headscarf may fall into a number of categories such as 'woman' and Arab and Muslim) into a problem of conflict about religious symbols.

Here it is worth placing this case in the context of the earlier discussion of the difference between multiple discrimination and intersectionality on the one hand, and conflicts of rights on the other. This distinction is important because in many cases, the problem of religious symbols such as the headscarf is being presented as an intractable problem of conflicts between religion and gender when in fact these are problems of multiple discrimination and intersectionality. *Leyla Sahin*, and other dress code cases are not 'conflicts of rights' cases. At first sight, it appears that there is a conflict between religion and gender equality in these cases because the category 'gender' is defined from the point of view of majority women without taking into account the perspective or choices of minority women (e.g. women who choose to wear the headscarf).

There are an increasing number of legal decisions which have challenged the use of a reductionist analysis that constructs the headscarf as a symbol of gender inequality. In *Shabina Begum v Denbigh High School* in the House of Lords, Baroness Hale specifically endorsed the right of Shabina Begum to choose to wear the *jilbab* as part of the exercise of her 'autonomy'.⁴⁷ In *Ludin*, the German Constitutional Court refused to automatically categorise the headscarf as a practice of gender inequality.⁴⁸

As stated earlier, there is a need to ensure that the state responds appropriately, through the use of the criminal law where necessary, to protect women against violence and coercion. However, a blanket prohibition on wearing the headscarf is an over-inclusive and disproportionate response to the risk of the intimidation and manipulation of some Muslim women. Such bans risk oppressing those Muslim women who wear the headscarf as an autonomous choice. Moreover, if the real mischief that concerns legislators is the intimidation and manipulation of women, then it is possible to design legal rules and social policy that addresses these harms in a precise way. Cases of violence and explicit coercion will be easy to address; it is more difficult to formulate a state response to other forms of 'pressure' which may lead Muslim women to adopt the headscarf. This suggests that social policy, rather than a legal rule that prohibits all Muslim women from wearing the headscarf, is the appropriate response to feminist concerns about the social context within which Muslim women exercise choice. As Pnina Werbner observes: 'Moral [and social] pressure is inevitable in close-knit communities. But even if this is so, from a British perspective such pressures are perhaps best tackled through public debate and

education within schools'.⁴⁹ The appropriate response, therefore, is to address issues of male control in the private sphere: by offering women full protection against coercion in the private sphere; and by strengthening public policy that safeguards individual women's choices.

More generally, strategies that empower women within communities are more likely to be effective than insisting that all 'traditional' groups are misogynistic and patriarchal – whether or not this is true. In addition, there is also a strategic argument against such a wholesale rejection of 'traditional' practices. As well as avoiding the problem of stigmatising minorities by reinforcing racist stereotypes, indiscriminate attacks on minorities are likely to put minority women on the defensive by reintroducing the stark dilemma of 'your rights or your culture'.⁵⁰ And vehement and indiscriminate attacks on traditional practices may make a community defensive, thereby weakening the position of women who seek to challenge harmful practices as 'insiders'. It is essential that women are given an opportunity to formulate a criticism of their practices from within their own tradition because they have the potential to be the most effective and devastating social critics of harmful traditional practices. Their knowledge and experience gives them an authority that cannot be replicated by 'outsiders'. This may require additional support for collective organisation 'within' the group because individual women in minority communities may find it difficult to challenge the status quo or disrupt power relations. A harmonised public sector equality duty which requires the gender equality duty to be cross-referred to race, religion or belief provides one opportunity for public authorities to give this type of support to women.

(c) Religion or Belief/Culture and Sexual Orientation

Conflicts may also arise between religion or belief/culture and sexual orientation. The EU and British approach to a potential clash between religion or belief and sexual orientation is to create a specific exemption which allows organised religion to discriminate on the grounds of sexual orientation in certain circumstances. Like the exemptions granted to religion under the Sex Discrimination Act 1975, this uses the technique of a derogation from the principle of non-discrimination on the ground of sexual orientation to accommodate religion or belief. The EC Employment Equality Directive, which has been transposed into UK law through the Employment Equality (Sexual Orientation) Regulations 2003, introduces a specific genuine occupational qualification (Regulation 7) which seeks to balance freedom of religion or belief (especially associational rights) and the right of non-discrimination on the ground of sexual orientation. The introduction of the Employment Equality Directive, which prohibits sexual orientation discrimination in employment and training, explicitly deals with this conflict. It introduces a narrow range of categories in which the rights to freedom of association of a group will take precedence over the right to non-discrimination on the grounds of sexual orientation in employment and training: this narrow exception is available only for (a) organised religion; and (b) religious organisations. There are also exemptions from the prohibition on discrimination on the ground of sexual orientation in the provision of goods and services which are contained in the Equality Act (Sexual Orientation) Regulations 2007 (Regulation 14).

Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, which allows 'organised religion' to discriminate against gay and lesbian people in employment and training in some circumstances, has been held to be compatible with EU discrimination law in *R (Amicus) v Secretary of State for Trade and Industry*⁵¹ which is discussed below. Nevertheless, there is an argument that the existing Regulation 7(3) exception is drafted too widely and should be narrowed by introducing an explicit requirement of 'proportionality', as required for all derogations in EU discrimination law. It would have been appropriate for a consultative document such as the DLR to remain more open to the need to reconsider these types of derogations and exceptions. This is particularly important in the context of the exception for 'organised religion' because Stonewall, an organisation that addresses the needs of lesbians, gay men and bisexuals, has stated that Regulation 7(3) has 'been flagrantly abused by some organisations who have used it to hound gay employees in a way which was certainly not envisaged when it was introduced'.⁵²

The present approach, then, provides a wide ranging prohibition on sexual orientation discrimination in specified areas such as employment or the provision of goods and services, but at the same time permits derogations for a genuine occupational requirement in relation to religion or organised religion (Regulations 7(2) and 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 (SOR).

The key question is whether these provisions resolve conflicts between religion and sexual orientation by striking the right balance between (a) individual rights to freedom of religion and belief; (b) freedom of religion as an associational right; and (c) the right to non-discrimination on the ground of sexual orientation. In the *R (Amicus) v Secretary of State for Trade and Industry* case⁵³ it was held that the UK legislation does strike the appropriate balance. This case involved a challenge to the compatibility of SOR Regulation 7 on the basis that this was incompatible with the Employment Equality Directive and also with Articles 8 (right to privacy) and Article 14 (right to non-discrimination) ECHR. It was held that the regulations were compatible with both EU law and the ECHR, and more specifically that these provisions struck the right balance between the right to freedom of religion or belief and equality on the one hand, and the right to non-discrimination on the ground of sexual orientation on the other. Mr Justice Richards confirmed that these provisions acted as a derogation and, therefore, they operated in very limited circumstances. Consequently, they had to be interpreted narrowly and purposively to give effect to the purpose of the Directive which seeks to prohibit sexual orientation discrimination in employment and training (para 115).

Mr Justice Richards made the following observation about the exceptions. He stated (at para 31) that:

The right not to be discriminated against on grounds of sexual orientation is not, however, an absolute right. Much of this case is concerned with the striking of

the balance between that right and other interests. In the case of regulation 7(2) the interests in issue are those of employers for whom being of a particular sexual orientation is a genuine and determining occupational requirement. There may, for example, be an occupational requirement for a homosexual (as for certain posts in gay or lesbian organisations) or an occupational requirement for a heterosexual (as for certain religious posts). It is in relation to employment for purposes of an organised religion, however, that issues of particular sensitivity and difficulty may arise. That is why regulation 7(3) seeks to make specific additional provision in relation to employment for such purposes.

Richards J's approach also suggests that courts and tribunals do not, and should not, stray into the area of interfering with the content of religious belief. Although he did not draw specifically on the belief and conduct distinction, he was reluctant to interfere with issues of theology about the status of gay and lesbian people in religious traditions, and he reiterated (for example at para 36) the importance of the church/state divide. He also concluded that the Regulation 7 exemption was a lawful implementation of Article 4(1) of the Directive because (para 123) there has already been a 'legislative striking of the balance between competing rights. It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field.'

The case of *Reaney v Hereford Diocesan Board of Finance*⁵⁴ also illustrates the impact and interpretation of the exceptions in SOR Regulation 7. In *Reaney*, a Church of England Diocesan Bishop had refused to employ the applicant, a gay man, as a Diocesan Youth Officer on the basis that he was not convinced by the claimant's assurance that he would remain celibate during his employment as required by Church of England policy. In reaching its decision the Tribunal found that (i) the post did fall within the scope of Regulation 7(3) because the post was bound up with representing the Diocese and the Church of England; and (ii) it also found that the prohibition on employing someone who was in a gay relationship met the doctrines of the Church of England regarding celibacy of LGBT people. However, and most importantly, the Employment Tribunal found that the claimant met the requirements of the religious doctrine of the Church of England because his past relationship had ended some months ago and he had made a commitment to not entering into a sexual relationship while he was working for the Church of England. This decision is significant because it shows that tribunals are willing to enter into a close factual scrutiny of the circumstances before they allow organised religions to rely on the exceptions in Regulation 7.

Most recently, in *Ladele v London Borough of Islington*⁵⁵ a Registrar of Births, Deaths and Marriages successfully claimed that her employer had subjected her to direct discrimination, indirect discrimination and harassment on the grounds of her religion by requiring her to participate in civil partnership services against her orthodox Christian beliefs. The Employment Tribunal found in favour of the applicant on all three

grounds: direct and indirect discrimination on the ground of religion or belief, as well as harassment on the ground of religion or belief. The Employment Appeal Tribunal has upheld an appeal against this decision in favour of the London Borough of Islington.⁵⁶

In applying *Amicus*, the Employment Tribunal had noted that Richards J had based his decision on the fact that the legislature had already struck the appropriate balance between religion or belief on the one hand, and sexual orientation on the other, by specifying the exact circumstances under which there would be an exemption. On one analysis, these circumstances are limited to the exemptions that are granted under SOR Regulation 7(3). These exemptions protect religion or belief through the technique of granting an exception (derogation) from the general rule of non-discrimination on the ground of sexual orientation in narrowly specified areas: where there is a genuine occupational requirement; or where there are associational rights that are being claimed by organised religion. In *Ladele*, the applicant's post as a registrar of marriages would not fall within either of these exceptions to allow her a defence to an act of sexual orientation discrimination for failure to perform (same sex) civil partnerships as compared with other forms of marriages. Moreover, given the ECtHR case law which endorses the 'contracting out' approach, it is unlikely that she can argue that there has been an interference with her Article 9 ECHR right because she has the option either not to take up that form of employment or to leave her employment altogether.⁵⁷ Restrictions on acting on religious conviction in employment are not, per se, a restriction of freedom of religion or belief. It may also be worth considering whether the fact that the applicant in *Ladele* was a public official carrying out a symbolically important function (public marriages) may justify a narrower scope for acting on her religious conviction than other types of employees. As the decision of Mummery J in *Copsey*⁵⁸ confirms, although there have been some reservations about this approach by him and some members of the House of Lords, it is likely that UK courts will apply this analysis.⁵⁹ The Employment Tribunal decision in *Ladele* considers the importance of the Article 9 ECHR right to freedom of religion, but it fails to apply the limits placed on Article 9 in the context of employment by the 'contracting out' doctrine.

The Employment Appeal Tribunal decision in favour of Islington re-affirmed the belief-conduct distinction and the limited and narrow scope of Article 9 ECHR as acknowledged in *Copsey*. This narrower approach confirms that Article 9 ECHR does not require that one has the right to manifest religious belief at all times and in all contexts. More specifically in the context of a conflict between the grounds of religion and belief and sexual orientation, Elias J stated that 'the right to manifest religious belief must give way to rights of same sex partners to have their partnership recognised by law'.⁶⁰

The first instance decision of the Employment Tribunal had relied on the fact that Islington Council gave insufficient weight to the religion or belief of the applicant in making decisions about how to manage this conflict in the workplace, and had failed

to consider whether there were ways of ensuring that the applicant's religion or belief could be accommodated. Moreover, there is some evidence that the management failed to consider alternative ways of resolving the conflict because they had already reached the view that the failure to perform a civil partnership was per se a form of homophobia which breached their 'Dignity for All' equal opportunities policy.⁶¹ The Employment Appeal Tribunal decision also recognised that there had been poor 'human resources' management of this particular case. Elias J stated that 'There were clearly some unsatisfactory features about the way the Council handled this matter. The claimant's beliefs were strong and genuine and not all of management treated them with the sensitivity that they may have done.'⁶² This suggests that there is a role for specific guidance by ACAS, as well as greater training for human resources personnel, in cases that involve conflicts between religion and belief and other rights or equality grounds (e.g. gender or sexual orientation equality).

So far, the main domestic cases on the conflict between religion and sexual orientation have arisen in the context of statutory discrimination law. Cases from other jurisdictions provide some useful guidance on how this conflict can be managed or resolved. One example of exactly such a clash is *Trinity Western University v British Columbia College Teachers*⁶³ in the Canadian Supreme Court that raised the issue of a conflict between freedom of religion and the constitutional right to equality. Trinity Western University (TWU) is a private institution in British Columbia (BC) which was associated with the Evangelical Free Church of Canada. TWU had a teacher training course and applied to the BC College of Teachers (BCCT) for permission to assume full responsibility for teacher training, in part to give a Christian view of the world. BCCT refused citing as its reasons that it was contrary to public policy to approve a teacher training programme offered by a private institution which appears to follow discriminatory practices. BCCT's concern was that TWU Community Standards applicable to all staff embodied discrimination against homosexuals. At first instance, the BC Supreme Court found that there was no reasonable foundation to support the BCCT's decision with regard to discrimination and granted mandamus allowing approval of the TWU proposed teacher training programme subject to a few conditions. The BC Court of Appeal found that the BCCT had acted within its jurisdiction, but affirmed the trial judge's decision on the basis that there was no reasonable foundation for the BCCT's finding of discrimination. The Canadian Supreme Court dismissed the appeal and found that the BCCT had jurisdiction to consider discriminatory practices in dealing with the TWU application.

Much of the discussion in the Canadian Supreme Court turns on issues of the standard of review used by the BCCT and Canadian Administrative law. There is also, however, some discussion of the conflict between a right to freedom of religion or belief and the right to equality on the ground of sexual orientation which is set out below. One significant aspect of the decision of the Canadian Supreme Court is the weight that they gave to the constitutional right to freedom of religion (para 31). The majority stated (at Para 29 – 33) that:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict [...] Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

Therefore, not only should the BCCT have considered the importance of sexual orientation equality they should have also given weight to freedom of religion. The Canadian Supreme Court went on to state there was a particular need to understand the importance of freedom of religion in the context of Canada as a diverse society, and of maintaining a private sphere of freedom of association for religious groups and individual believers (Para 25):

Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so called student contract at a considerable private cost. TWU is not for everybody: it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage in s. 15 would be inconsistent with freedom of conscience and religion which co-exist with the right to equality.

Finally, the majority of the Canadian Supreme Court stated that one key concept devised for resolving a conflict between rights such as freedom of religion or belief and sexual orientation equality is to use the distinction between belief and conduct (para. 36):

The proper place to draw the line in cases like the one at bar is between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. [...] The BCCT rightfully does not require public universities with teacher training programmes to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. [...] Acting on those beliefs however is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. [...] I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of a more onerous moral standard of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a

corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

It is possible to extract a number of principles from the decision of the majority in *Trinity Western University v British Columbia College*. First, in cases where there is a potential conflict between two constitutional rights, a hierarchical analysis which tries to decide which right is more important should be avoided in favour of an analysis that seeks to balance and give importance to both sets of rights. Second, the Canadian Supreme Court confirmed the importance of the public-private distinction in an analysis of constitutional and human rights law by confirming that freedom of religion is an important constitutional right which entails respecting a private sphere which is not subject to the requirements of non-discrimination on grounds such as sex and sexual orientation. Third, and related to the private-public distinction, there is a wider margin of appreciation for freedom of belief as compared with the freedom to act upon beliefs. Therefore, an individual or group has a wider sphere of freedom to hold or express beliefs that are discriminatory (e.g. believing that LGBT people should be subject to discrimination) as compared with acting on those beliefs (e.g. discriminatory acts against LGBT people).

This final point would help to resolve some of the issues in cases like *Ladele*, because it confirms that whilst Ms Ladele had the right to believe that civil partnerships should not be permitted, she did not have a right to act on these beliefs by refusing to perform civil partnerships. This analysis would also endorse the ECHR 'contracting out' doctrine which confirms that Ms Ladele's Article 9 right to freedom of religion or belief is not breached where an employer requires her to perform an essential part of a job that she has taken up voluntarily, because she is able to exercise her right to freedom of religion or belief by taking up another job. This analysis recognises that some forms of conflicts will have to be resolved by limiting the extent to which spheres such as employment can be an arena where an individual can insist on the accommodation of all of their conscience. It is preferable that areas such as the workplace or public service delivery are designed to prevent individuals being put into a position where their religious conscience is tested. The *Ladele* case suggests the reasons that the conflicts emerge may be because of the failure of management to take proper steps to resolve the dispute.

It is also worth pointing out that there was a strong dissent by L'Heureux-Dubé J against the majority decision and reasoning in *Trinity Western University*. Specifically, L'Heureux-Dubé challenged the separation of the private and public sphere by arguing that the beliefs and actions in the private sphere can have a considerable impact on the public sphere and stated at para 62:

...freedom of religion like any other freedom is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion [...] there is a similar intersection

between the asserted private religious beliefs and the public interest in the present appeal. Actions in the private sphere can have effects in the public realm. Everyone must assume the legal consequences of his or her private beliefs, so long as these consequences do not violate fundamental rights.

She also stated at Para 70, relying on *Bob Jones University v US*.⁶⁴ that ‘there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary justice’. Finally, she was sceptical about the use of the belief-conduct distinction as a basis to allow discriminatory beliefs a much wider margin of appreciation, and also questioned why the code of conduct in this case was construed as a matter of belief rather than conduct (at Para 72): ‘with respect, I do not see why my colleagues classify this signature as part of the freedom of belief as opposed to the narrower freedom to act on those beliefs.’ A different line of analysis is, therefore, represented by the L’Heureux-Dubé minority dissent which suggests a greater willingness to intervene in the affairs of religious organisations, even those in the private sphere, who can be said to breach the right to sexual orientation equality.

The belief-conduct and private-public distinction place limits on the role of the law in addressing claims made on the grounds of religion or belief that may conflict with sexual orientation equality. One solution may be through non-legal policies that can be used to empower both ‘minorities within minorities’ such as LGBT people who are members of religious organisations or communities. It may be worth considering the use of alternative dispute resolution methods or mutually agreed procedures that give LGBT people the right to organise and to be ‘heard’ by a tribunal within the religious organisation. This would help to ensure that the ‘right to exit’ is not presented as the only option for these individuals, who often want to remain members of their religious community and who do not want to resort to litigation against that religious community.

2.2. Conflicts of Fundamental Legal and Human Rights

Conflicts of fundamental legal and human rights can arise in a number of ways. In the context of equality law and policy one of the most controversial issues is the potential conflict between freedom of expression and the protection of racial or religious minorities though the use of the criminal law (e.g. the Danish Cartoons or Jerry Springer controversies). The issue of hate speech is discussed below. Before moving on to that discussion it is worth observing that there can also be a conflict of the freedom of association with equality rights. In US constitutional case law, for example, the freedom of association of the Boy Scouts Association to exclude a gay man has been upheld.⁶⁵ In EU and British discrimination law the potential conflict between freedom of association and sex or sexual orientation equality has been addressed through the technique of granting religious organisations a derogation from the general requirement of non-discrimination. For example, the SOR grant a special exemption which permits religious organisations to discriminate on the grounds of sexual orientation. The fact that this technique is specified within statutory discrimination law may obscure a crucial point. These are derogations and exceptions that seek to strike a balance between key fundamental human rights: in some

cases the associational freedoms associated with freedom of religion; and the right to non-discrimination on the ground of sexual orientation. Once the analysis is set up in this way, it becomes clear that whether or not the exception strikes the right balance, and the impact of the exception in practice, are crucial issues about 'constitutional balance'. This suggests that wide ranging exceptions to the principle of equality and non-discrimination should be supervised more closely (for example, through the scrutiny of the Joint Committee on Human Rights).

(a) Hate Speech Regulation

There are complex provisions which prohibit hate speech on a number of different grounds such as race, religion and sexual orientation. This raises the prospect of a conflict of rights between freedom of speech on the one hand and equal protection for minority groups on the other. It is clear from *Jersild v Denmark*⁶⁶ that an appropriately drafted statute which targets the actual perpetrators of hate speech will not necessarily breach Article 10 ECHR. In *Otto-Preminger v Austria*⁶⁷ the Court draws on a number of justifications which include the argument that certain types of hate speech constitute a special category that can be prohibited because of its impact on the social (racial or religious) groups who are its targets. In addition, the Court also gives a special status to religious belief as a special category which deserves protection and refers to states being left a margin of appreciation in relation to speech which is directed at the 'religious *feelings* of others'(author's emphasis).

Although ECHR jurisprudence permits national authorities to introduce hate speech legislation, the use of the criminal law to protect freedom of religion or belief clearly raises the risk of a conflict between freedom of expression and equality norms.⁶⁸ One solution to this conflict is to avoid the use of the criminal law altogether in favour of non-legal responses that aim to achieve some of the goals of protection for minorities, but that do not create the possibility for a conflict with a fundamental human right such as freedom of speech. A focus on the use of the criminal law to protect minorities, especially given the controversial British debates on incitement to racial and religious hatred legislation can also obscure an analysis of whether or not the use of the criminal law is an appropriate or sufficient response in the context of hate speech. And there are very few prosecutions under these criminal provisions.

Free speech and the protection of minorities can also be reconciled as compatible values. David Richards argues that free speech is an important constitutional and legal tool for minorities who have suffered injustice. It allows them to criticise and challenge dehumanising stereotypes and:

empowers the legitimacy and integrity of the politics of identity in the reasonable understanding and remedy of structural injustice of group and national identity whose political power has rested on invisibility and unspeakability of such injustice.⁶⁹

This enables a focus on the structural disadvantage of minorities who are the targets

of hate speech. It also suggests that giving more voice to all members of minority communities is a more appropriate response to instances of hate speech by individuals from those communities than criminalising them.

It is also significant that incitement to racial or religious hatred targets the most extreme forms of speech. Whilst these are serious forms of hate speech, prejudice and stereotyping in the mainstream media will often have a more widespread influence and may be more pernicious because these views and representations are 'normalised'. The use of media regulation may, therefore, be a more successful way of addressing this 'normalised' source of hate speech. For example, clause 13 of the Press Complaints Commission Code of Practice which deals with discriminatory speech states that '(i) the press must avoid prejudicial or pejorative references to an individual's race, colour, religion, gender, sexual orientation or to physical or mental illness or disability; (ii) Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.' While the Code of Practice is limited in that only named individuals can make a complaint, media self-regulation has a potentially useful role to play here. Such approaches have the potential to generate a public sphere that is more conducive to empowering and giving 'voice' to minorities rather than restricting or criminalising the 'speech' of others in ways that pose a risk for freedom of speech.⁷⁰

2.3. Religion or Belief and Secularism

The principle of secularism is an important organising framework for equality law and policy. However, this principle relates to the exclusion of religion from political institutions rather than the exclusion of all signs of religion in the public sphere. Moreover, changes in the status of religion in the contemporary period raise a question about whether small concessions to the most urgent needs of religious minorities who face specific disadvantages can now be justified within a general framework of liberal secular democracy, as compared with earlier historical periods when religion had greater political power and could have been a viable alternative to liberal secular democracies.⁷¹ This point is important because in some cases the principle of secularism is used to argue against the inclusion of religious views in ways that are in potential conflict with Article 9 ECHR.⁷²

This is an especially important point because some high profile 'conflicts of rights' cases concern religious symbols in the public sphere. Cases involving headscarves are a prominent example. In addition, there have been cases in Canada involving the accommodation of a Sikh dagger in schools⁷³ and the recent decision of the High Court that a Sikh school girl had the right to wear her bangle as required by her religion.⁷⁴ The British approach has been permissive in relation to 'headscarves', turbans and other forms of religious symbols, in contrast with the French prohibition of all religious symbols in public schools since 2003. There have, however, been limits to public accommodation which include prohibitions on the *niqab* in employment and schools, as well as the *Shabina Begum* case about the *jilbab*.

The *Shabina Begum* case illustrates the way in which the complex social and political challenges of multiculturalism and identity politics have made their way into legal processes. There are a myriad of ways in which these claims can arise.⁷⁵ In the British context, for example, the claims vary: for example, the call for a change to neutral dress codes to accommodate the wearing of turbans by Sikhs;⁷⁶ an exemption for Sikhs from the statutory obligation to wear protective head gear on building sites;⁷⁷ a claim by a Muslim school teacher for time off to attend a mosque on a Friday;⁷⁸ a claim by a Christian employee for time off on a Sunday as a day of rest.⁷⁹ The translation of the political critique of liberal neutrality into legal claims in these cases occurs through a mechanism whereby claimants argue for a 'rule exemption': so that, they argue that what seems to be a neutral rule applicable to all citizens places them at a particular disadvantage when they manifest their religious belief which is 'different' to the public norm.⁸⁰ Of course, this is most acute in the case of minority religions but, as *Williamson* illustrates, the issue is also relevant for Christian 'majority' faiths faced with an increasingly secular public sphere.⁸¹ *Williamson* also confirms the limits of religious accommodation because the case concerned the use of corporal punishment against children. Cases involving violence against children will fall outside the scope of reasonable accommodation in the public sphere.⁸² However, cases that do not raise any issue of substantial harm to minors or that do not entail any significant costs for anyone other than the individuals will be more difficult to resolve. More recently, it has been held in *R (Suryananda) v Welsh Minister*⁸³ that the killing of a cow that was sacred to Hindus was permissible for health and safety reasons.

These cases raise a more fundamental question about the potential use of equality law and policy as a mechanism for accommodating religious difference in the public sphere. Such a strategy will also raise important questions about the redistribution of resources and power between majorities and minorities. Any solution to the problem of the accommodation of religious claims within secular societies requires compromise by both the majority and minority. The institutional context within which these compromises are debated and agreed is critically important in all these cases. There is, therefore, a strong argument that legislative and representative bodies are the best institutional forum for reaching decisions on these issues. There are examples of minorities using political processes to advance their most pressing claims for the accommodation of their distinct needs.⁸⁴ It is also worth noting that legislatures and political processes may be more appropriate institutions to deliver wide ranging social reform to address the needs of minorities than courts and litigation.⁸⁵ Political processes, and representative assemblies, have a key role to play in this sphere.⁸⁶ The debate about accommodating religious groups, and the resulting negotiation between the majorities and minorities, needs to be carried out within mainstream political and legal institutions.

Civic society and the media are also important actors within this process, to ensure the broadest range of participation in public debate and political negotiations. Future legal and policy responses to the accommodation of difference based on religion or belief need to put into place frameworks that reduce the conflict between private

conscience and full public participation by taking a reasonable and proportionate approach to what religious differences can be accommodated in the public sphere in order to 'provide space for people to transform their deepest priorities from being a source of self-estrangement into elements of a sense of personal progress.'⁸⁷

The public sector equality duty is the key policy lever for allowing such a dialogue to take place – one that considers the needs of the majority and the needs of the religious minority as well as other social groups. This is because it can provide a framework for a 'dialogue' between minorities and majorities that ensures decisions are consensual. Agreeing on controversial decisions about allocation of economic and social power through a process of consultation and negotiation may also ensure a greater degree of commitment by all individuals and groups in the community.⁸⁸

It has been argued that the extension of the positive duty to religion or belief raises distinct problems by undermining the principle of secularism. However, the principle of secularism relates to the separation of powers of religion and the state as an institutional principle and it does not prevent the modest accommodation of religious difference as part of a strategy of equality law and policy.

It is possible for public bodies to give effect to a positive duty to eliminate discrimination and promote equality in the area of religion or belief, that takes into account concerns for human rights and maintains secularism in the public sphere. The HRA already applies to public authorities, who need to make explicit that in dealing with religious diversity in the public sphere, they should take a minimum standard of constitutional and human rights as the basic floor to be safeguarded. Moreover, the HRA requires that public institutions should not deprive individuals of the right to free exercise of religion or belief as guaranteed by Article 9 ECHR. Public bodies should also distinguish between the view that state policy and public institutions should maintain a non-negotiable separation between state and religion and the need to consult with religious groups and individuals to accommodate their rights to conscience and religious practice in the public sphere (which is required by Art 9 ECHR and the HRA); to determine how to accommodate the most pressing needs of socially excluded groups, particularly in the design of public services; and to recognise the place of religion or belief in political argument and civic life.

Developing processes of consultation between religious groups and a range of other social groups within civil and local communities provides an invaluable forum for establishing a dialogue and better relations between groups in conflicts, for example with religious organisations and women's groups. This, in turn, can provide some basis for resolving prejudice and disputes before they manifest themselves into more entrenched forms of conflict. Government proposals to extend the positive duty provide an opportunity for developing these forms of consultation across all the different equality strands.

Part 3 – Concluding Comments and Reform Proposals

The main argument of this paper is that it is impossible to eliminate altogether conflicts in equality law and policy. However, it is possible to design legal principles and social policy in ways that prevent some conflicts from arising. Where conflicts do emerge it is possible to manage or resolve them through the application of the principles of human rights law, as well as equality principles. This paper seeks to open up this issue for further discussion rather than providing a blueprint for reform. Nevertheless, there are some common principles that have emerged from the analysis that can guide decision makers and reform.

- The paper suggests that a purpose clause in the proposed Equality Act could be useful in bringing together constitutional and statutory discrimination law principles into one coherent framework. One consequence of the present separation is that it makes it difficult to resolve conflicts of grounds and rights by referring to equality and non-discrimination as the fundamental and minimum floor of rights.
- Where there is a conflict of rights it is important to take an approach that does not create a hierarchy between rights or equality grounds. As Judge Tulkens stated in the context of the headscarf cases: ‘In a democratic society, I believe it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.’⁸⁹
- It is also important for equality law and policy to recognise diversity within social groups. This should make decision makers more sensitive to power relations within groups, recognising the issue of ‘minorities within minorities’ who are often not fully represented in formal consultations with equality groups and the need to ensure that these individuals are empowered *within* their communities rather than expecting them to ‘exit’ their preferred social group.
- Where there are conflicts between religion or belief/culture and sex equality it is essential that the state obligation to protect women and children from violence and harm is taken as the starting point. This requires a zero tolerance approach to practices that involve violence and coercion of women. In this context, there is also a need to recognise women’s autonomy so that policies empower women within the communities concerned and facilitate their agency in working towards improved protection. This approach also speaks to the need for better resources to enable women’s groups to carry out research and funding for education and public service provision.
- Where there is a conflict between religion or belief/culture and sexual orientation discrimination there may be a need to respect the rights of belief and conscience,

whilst at the same time taking a strict approach to discriminatory conduct by limiting the scope of exceptions as well as evaluating the impact of these exceptions in practice.

- Some conflicts of grounds and conflict of rights cases could be resolved in a forum other than courts. In some situations, it may be appropriate to have a more wide ranging debate that allows greater public participation about the appropriate balance between conflicting equality groups or between equality and other human rights. In some limited contexts, it may be possible to give greater powers of investigation and supervision to national and local assemblies: for example, the UK Parliament and local authorities, as well as the Scottish Parliament and the National Assembly for Wales. In the context of the exemptions that have been granted to religious organisations to discriminate on the ground of sexual orientation (SOR Regulation 7) the Joint Committee on Human Rights could hear evidence from a wide range of individuals and groups in civil society (including organisations such as Stonewall) about their experience of the exemptions granted to religious organisations. The Committee could then evaluate and report on the impact of these exemptions in an annual review that would be an open and transparent procedure.
- Local authorities implementing an equality duty that covers religion or belief, and sexual orientation or gender should be encouraged to devise processes of consultation with local communities and civil society that bring together a wide range of groups and individuals *before* significant conflicts arise. An early process of consultation may help to resolve conflicts within and also between different groups. It could also inform the design and implementation of an equality action plan.
- Cultural policy which encourages the participation of minorities in ‘free speech’ should be supported as a key way of addressing hate speech in the public sphere. Supply side investment which increases capacity within minority groups to respond to ‘hate speech’ may be preferable to the use of the criminal law. This could be an alternative to incitement to hatred legislation which often causes a conflict between equality and freedom of speech.
- This paper also suggests that if there is to be use of resolution of family law disputes in religious courts, this must be conditional on the allocation of greater resources to ensure better training, monitoring and advice for women users. In some cases, this model of alternative dispute resolution could also be used to address the problems of conflicts of grounds and rights on other equality grounds. For example, women and LGBT people may be able to raise their grievances *within* their religious communities through procedures that have the consent of all the parties. This could be done through forums where the government or public authorities provide support for representation, political advocacy or training of staff.

- In some cases it may be possible to use consultation with groups and individuals to resolve an ongoing and recurring problem that causes a conflict. For example, in the case of Muslim objections to guide dogs, a proactive strategy of co-ordinating a response from Muslim representative organisations who re-stated a religious norm to ensure that it is compatible with disability discrimination legislation has successfully and permanently eliminated the conflict.
- Better training and management in the workplace should be supported to prevent disputes (for example, between religious conscience and sexual orientation equality) becoming acrimonious. In some cases, the reallocation of work duties and rosters can address the issue without the need for disciplinary proceedings or litigation. ACAS should consider whether there is a need to issue guidance or a code of practice about how employers can reconcile their responsibilities under the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003.

Conflicts in equality law and policy require a range of responses. The institutional context is critically important in all these cases. The debate about how to resolve conflicts, and the resulting negotiations between groups, needs to be carried out within mainstream political and legal institutions. Civic society and the media are also important actors within this process. We must recognise diversity within groups as well as being vigilant about the risk of harm to vulnerable individuals from oppression within groups. This procedure is likely to ensure the broadest range of participation in public debate and political negotiations. In this way the painful compromises that are an inherent part of equality law and policy are more likely to command the consent of all those involved. Points of difference and friction between individuals and groups can often act as a catalyst towards a stable form of integration that avoids the worst injustices of forced assimilation. In some cases we must be satisfied with an outcome that is a patient and resigned *modus vivendi*. More optimistically, this technique also has some potential to generate a deeper and more meaningful identification with national and local institutions, in a joint enterprise, that creates social cohesion and sustains a coherent political community rather than a plethora of self-interested splinter groups. Discussions about competing interests and conflicts that are conducted in this spirit may be able to contribute to a sense of belonging on the part of all citizens, which can be effectively hammered out through debate and compromise carried out in the public sphere.

References

- 1 Home Office, 2001, Chapter 2, s.2.1.
- 2 Commission on Multi-Ethnic Britain, 2000, p. 40.
- 3 For a detailed discussion of the term 'fundamental legal rights' and conflicts of such rights, see Zucca, 2007.
- 4 Zucca, 2007, pp.50-53.
- 5 Phillips, 2007, p. 2. On Multiculturalism see Modood, 2007.
- 6 Moosa, 2008, p. 46; Dustin, 2007, p. 8.
- 7 For a detailed discussion see Phillips, 2007, pp. 65-67.
- 8 Communities and Local Government, 2007. The Bill is expected to be published in spring 2009.
- 9 Government Equalities Office, 2008.
- 10 Ibid, paras 14.3 – 14.6.
- 11 Communities and Local Government, 2007, p. 63, para 11.
- 12 Bamforth, Malik and O'Connell, 2008, at Chapter 1.
- 13 Communities and Local Government, 2007, p. 37, para 1.13.
- 14 Communities and Local Government, 2007, p. 13.
- 15 This case involved an applicant who was opposed to working on Sunday on religious grounds. *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789. See also Collins, 2006, p.619.
- 16 See Moon and Allen, 2006, p. 610; Collins, 2003, pp. 16-43. For cases where this purposive approach has been developed see: *Ghaidan v Mendoza* [2004] UKHL 30 per Baroness Hale; and the application of the purposive approach to develop the concept of reasonable accommodation in the DDA in *Goodwin v The Patent Office* [2004] UKHL 32.
- 17 2003 BCSC 1936.
- 18 The potential for a conflict between race and political belief has been minimised by the decision in *Baggs v Fudge* (2005) which held that the British National Party was not a political party that was protected as a 'philosophical belief' under Regulation 2 of the Employment Equality (Religion or Belief) Regulations 2003. *Baggs v Fudge* (Chair: AC Tickle), ET, 24 March 2005, Case No: 1400114/05, unreported, see Equal Opportunities Review, October 2005, 157, at pp. 31-32.
- 19 Communities and Local Government, 2008.
- 20 Bamforth, Malik and O'Connell, 2008, at p. 1120.
- 21 'Huddle Sacked for Slur on Disabled', The Daily Telegraph, 3 February 1999. Glen Huddle subsequently issued a statement and apologised for his comments.
- 22 'Unclean Blind Dog Banned by Muslim Cab Driver', The Daily Mail, 6 October 2006.
- 23 'Muslims Break Taboo To Allow Guide Dog Into Mosque', The Times, 23 December 2007.
- 24 Begum, 1992.
- 25 Home Office, 2005.
- 26 Juss, 2004, at pp. 332-335.
- 27 Article 22. See also the South African Constitution 1996 which protects cultural, religious and linguistic communities, section 33(1).
- 28 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
- 29 Okin, 1998, p. 661.
- 30 See Phillips, 2007.
- 31 See 'Women and Cultural Diversity: A Digest of Cases' at <http://webdb.lse.uk/gender> (accessed on 20 May 2005).
- 32 Dustin, 2007.
- 33 It should be emphasised that female genital cutting is illegal under the Female Genital Mutilation Act 2003; any difficult questions relate only to the most appropriate measures for addressing it.
- 34 Susan Moller Okin, makes the point that leaving young girls to be raised in a culture which does not respect their autonomy can cause them harm, even – and especially – where these young girls internalise the values of the culture (Okin, 1998, p. 661).
- 35 Eekelaar, 2004, at p 191.
- 36 The right to exit argument is defended by Chandran Kukathas, 1995. For the opposite view, see Leslie Green, 1995. In the particular context of women's right in minority cultures, see Ayelet Shachar, 2001.
- 37 Shachar, 2001, Chapter 3. For a critique of the right to exit argument in the specific context of minority women see Susan Moller Okin, 1998.
- 38 The LSE Gender Institute's Grant Report on the Nuffield Foundation Project 'Sexual and Cultural Equality: Conflicts and Tensions' states in the context of forced marriage: 'The UK initiatives have focused very heavily on exit, and more specifically, on assisting individuals forced into marriage with an overseas partner. ... our research suggests that exit only works up to a point. It leaves too many individuals with what they perceive as no choice, for when the choice is between rejecting an unwanted marriage partner or being rejected by one's family (and as many experience it, then having to abandon one's cultural identity), the costs are set impossibly high.'
- 39 Moosa, 2008, p. 45-46.
- 40 The case involved a Luton schoolgirl who was excluded from school after adopting the *jilbab* in contravention of the school's uniform policy (*Shabina Begum v Denbigh Schools* [2006] UKHL).
- 41 *Shabina Begum v Denbigh* [2006] UKHL 15, per Baroness Hale at para 96, p. 39.
- 42 International law also recognises the right of a woman to both sex equality (Article 26 of the International Covenant on Civil and Political Rights – ICCPR) and to membership of a cultural group (Article 27 ICCPR), see *Sandra Lovelace v Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).
- 43 Bano, 2007. See also Shah-Kazemi, 2001.

- 44 See Shachar, 2001.
- 45 See Shachar, 2001.⁴⁵ The case concerned a student's right to wear an Islamic headscarf at university (*Leyla Sahin v Turkey*, *European Court of Human Rights*, Decision of 10 November 2005, Application No. 44774/98).
- 46 The case concerned a primary school teacher's right to wear the *hijab* when teaching (*Dahlab v Switzerland*, Application No. 42393/98, ECHR 2001 – V).
- 47 *Shabina Begum v Denbigh* [2006] UKHL 15, per Baroness Hale at para 96, p. 39.
- 48 The case concerned a schoolteacher in Baden-Wuerttemberg who was denied a teaching post because she wore the *hijab*. (*Ludin BverfG*, 2 BvR 1436/02. 24 September 2004; decision of the German Federal Constitutional Court). For a detailed discussion of the *Ludin* case (both the decisions of the Federal Administrative Court and the Federal Constitutional Court) see Mahlmann, 2003, pp. 1099.
- 49 Werbner, 2007, at p. 177.
- 50 Taylor, 1992.
- 51 [2004] WL 741919 (QBD).
- 52 *Stonewall* 2007 at p. 5.
- 53 [1994] EWHC 869, I. C. R. 1176.
- 54 *Reaney v Hereford Diocesan Board of Finance*, ET Case No. 1602844/2006. Discussed in Bamforth, Malik and O'Connell, 2008, at p. 715.
- 55 ET 2203694/2007 (unreported). ET Judgment of 3 July 2008 (copy of case with the author).
- 56 *London Borough of Islington v Ladele* (Liberty as Intervenor), Appeal No: UKEAT/0453/08/RN, Decision of 10 December 2008.
- 57 See *Darby v Sweden*, 187 Eur. Ct. H. R. (Ser A) (1990). See the discussion by Carolyn Evans, 2001, at p. 127. Another example of permissible 'contracting out' of the right to freedom of religion or belief is the case of the Muslim school teacher who was found to have limited his right to religious freedom when he accepted an employment contract which included set working hours which prevented him from taking time off for Friday prayers. See *X v United Kingdom*, App. No.8160/78, 22 Eur. Comm'n H. R. Dec. & Rep. 27 (1981).
- 58 *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789.
- 59 Three out of five members of the House of Lords endorsed the 'contracting out doctrine' in *R. (On the Application of Shabina Begum) v. Headteacher and Governors of Denbigh High School (Shabina Begum)* [2006] UKHL 15, although there were strong reservations about this doctrine by Lord Nicholls and Baroness Hale.
- 60 *London Borough of Islington v Ladele* (Liberty as Intervenor), Appeal No: UKEAT/0453/08/RN, Decision of 10 December 2008 (at para.126).
- 61 ET 2203694/2007 (unreported). ET Judgment of 3 July 2008 (copy of case with the author), paras 27-28.
- 62 *London Borough of Islington v Ladele* (Liberty as Intervenor), Appeal No: UKEAT/0453/08/RN, Decision of 10 December 2008 (at para 130).
- 63 *Trinity Western University v British Columbia College Teachers* [2001] 1 SCR 772.
- 64 461 US 574 (1983).
- 65 *Boy Scouts of America v Dale* 530 U.S. 640.
- 66 The case concerned racist statements made as part of a Danish Broadcasting Corporation television programme (*Jersild v Denmark* (A/298) (1995) 19 E. H. R. R. 1, ECHR).
- 67 The case concerned the Austrian state's confiscation of a film on the grounds that it would offend Catholic religious feeling (*Otto-Preminger v Austria* (1995) 19 E. H. R. R. 34).
- 68 Hare, 2006, pp. 521-538; Heinze, 2006, p. 543.
- 69 Richards, 1999, at p. 237.
- 70 For a discussion of these issues in the context of media freedom see Rowbottom, 2006, pp. 489-513.
- 71 See Seamus Milne, 'The struggle is no longer against religion, but within it', *The Guardian*, 16 December 2004.
- 72 Laborde. 2008.
- 73 *Multani v Commission Scolaire Marguerite-Bourgeoys*, [2006] SCC 6.
- 74 *R. (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School*.
- 75 For a full discussion of these issues see Poulter, 1998.
- 76 *Mandla v Dowell Lee* [1983] 2 A. C. 548.
- 77 Section 11 of the Employment Act 1989.
- 78 *Ahmad v ILEA* [1978] Q.B 36.
- 79 *Copsey v Webb Devon Clays Ltd* [2005] I. C. R. 1789.
- 80 For a strong argument against accommodating these types of rule-exemption claims see Barry, 2001, at Chapter 2.
- 81 *R v. Secretary of State for Education and Employment and Ors ex parte Williamson and ors (Williamson)* [2005] H.R.L.R. 14.
- 82 For example, the criminalisation of the practice of ritual flogging of children during the *matam* ceremony (self-flagellation) which is part of some Shia Muslim religious practice. See 'Muslim guilty of cruelty over boys' ritual flogging', *The Times*, Thursday 28 August 2008.
- 83 [2007] EWCA Civ 893.
- 84 See for example the example of Sikhs discussed in Poulter, 1998, at Chapter 8.
- 85 Rosenberg, 1991, esp. at pp. 20-25.
- 86 See Malik, 2001, for a more detailed analysis of this issue.
- 87 Leader, 2007, at p. 730.
- 88 Malik, 2001, p. 292.
- 89 *Leyla Sahin v Turkey*, *European Court of Human Rights*, Decision of 10 November 2005, Application No. 44774/98, per Judge Tulkens, para 4.

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List of Abbreviations

CLG	Communities and Local Government
DDA	Disability Discrimination Act 1995 (amended by the Disability Discrimination Act 2005)
DLR	Discrimination Law Review
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EU	European Union
HRA	Human Rights Act 1998
LGBT	Lesbian, Gay, Bisexual and Transgender
JCHR	Joint Committee on Human Rights
SOR	Employment Equality (Sexual Orientation) Regulations 2003
RBR	Employment Equality (Religion or Belief) Regulations 2003

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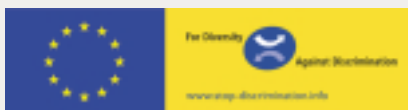
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