

# **Lady Hale gives the Annual Human Rights Lecture for the Law Society of Ireland**

## **Freedom of Religion and Belief**

**13 June 2014**

Religion plays a paradoxical part in the life of my country (by which for this purpose I mean England). We have an established church. This means that our head of state, the Queen, is also head of the Church of England and 26 of its bishops have seats in the House of Lords. The Church of England also has special privileges and duties in relation to marriages and to burials. Until recently it enjoyed the special protection of the law of blasphemy. But England is one of the least religious countries in Western Europe. According to the British Social Attitudes Survey (No 28, 2011), affiliation to the Church of England fell from 40% in 1983 to 20% in 2010. Politicians are not encouraged to wear their religion, if any, on their sleeves. Self-identification as Christian fell from 72% (71.7) in the 2001 census to 59% (59.4) in 2011, while having no religion rose from 15% (14.6) to 25% (24.7). Insofar as adherence to any religion is holding up in my country, it is because of the growth of religions other than Christianity, most notably Islam, which rose from 3% (3.1) in 2001 to 5% in 2011.

Here in Ireland, as I understand it, the Constitution used to require the State to recognise the “special position” of the Roman Catholic Church “as the guardian of the Faith professed by the great majority of the citizens” (article 44.1), but this was removed as long ago as 1973. But the State is still required to hold the Name of Almighty God in reverence and to respect and honour religion (article 44.1). This sounds to me like a reference to the Christian God, rather than to any others. Nevertheless, freedom of conscience and the free profession and practice of religion are guaranteed to every citizen, subject to public order and morality (article

44.2.1); and the State must not impose any disabilities or make any discrimination on the ground of religious profession, belief or status (article 44.3). These and the other provisions of article 44 show a combination of respect for different religious denominations and non-discrimination between them. Further, the ban on religious advertising in the media was upheld here and in Strasbourg on the ground that such advertising could be divisive (*Murphy v Ireland* (2004) 38 EHRR 212). But along with this, the 2011 census revealed Ireland to be a much more religious society than England and overwhelmingly Roman Catholic: 84% (84.1) were Roman Catholic, 3% (2.8) were Church of Ireland, 2% (1.07) were Muslim, 1% or less belonged to a variety of other denominations and religions, and only 6% (5.88) were unaffiliated.

Once we stop giving preference to a State religion, and accord equal respect and protection to all religions and beliefs, all sorts of difficult questions begin to arise. There may be laws which conflict with particular religious beliefs or practices; there may be requirements imposed, most notably by employers, which conflict with particular religious beliefs or practices; and there may be other forms of discrimination against people because of their religion or beliefs; but in this case there is also the problem that some religious beliefs may lead people to want to discriminate against people with some other characteristic to which the law gives protection, such as their race, their sex or, most notably these days, their sexual orientation.

As we do not have a written constitution in the United Kingdom, we have until recently taken it for granted that Parliament may enact laws which conflict with sincerely held religious beliefs. An early example is *R v Senior* [1899] 1 QB 283. A father was convicted of the manslaughter of his baby by the illegal act of neglecting the child, contrary to the Prevention of Cruelty to Children Act 1894. He had

refused to provide his seriously ill child with medical aid or medicine, because he belonged to a sect called the “Peculiar People” which believed that to do so showed insufficient faith in God and the power of prayer. Nowadays, of course, we would rather take steps to protect the life and health of the child, for example by authorising the giving of blood products to the child of Jehovah’s witnesses despite the parents’ objections (*Re R (A Minor) (Blood Transfusion)* [1993] 2 FLR 757).

Since October 2000, however, it has been possible to challenge our laws on the basis that they conflict with religious beliefs. Like you, we have incorporated the European Convention on Human Rights into our domestic law (by the Human Rights Act 1998 in the UK and by the European Convention on Human Rights Act 2003 here). As is well-known, article 9 provides that:

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

Freedom of thought is unqualified: anyone can believe what they like. But article 9.2 provides that the freedom to manifest one’s beliefs can be subject to limitations, though only to those which are “prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. Article 9, like article 44 of the Irish Constitution, is mainly about protecting freedom of religion and belief against interference from the State; and so is article 14 of the Convention, which protects against discrimination by the State in the enjoyment of any of the Convention rights on a wide variety of grounds, including religion and belief.

We have had a few challenges to the law on the basis of article 9. Most notable, perhaps, was *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, where a group of Christian parents and teachers challenged the ban on corporal punishment in all schools, on the ground that it conflicted with their right to manifest their religious belief that to spare the rod was to spoil the child (the Bishop who said prayers in the House of Lords – another manifestation of the established religion - before we gave judgment in that case called them the “whackier” end of Christianity). They did not succeed, because we held the ban to be justified, in my case in order to protect the rights of the children involved. (It is interesting to wonder what we might have made of a Sikh challenge to the law requiring motor-cyclists to wear helmets, had they not already been granted an exemption in the relevant legislation.) We have looked for cases raising similar challenges to the laws in Ireland, either under the Constitution or under the 2003 Act, but we have not yet found any – why would that be?

The United Kingdom and Ireland are also both members of the European Union. European Union law aims to protect people with a variety of “protected characteristics” from discrimination by the providers of employment, occupation and vocational training, whether by the State or the private or the voluntary sectors. The UK has implemented the Framework Directive on Equal Treatment in Employment and Occupation (Council Directive 2000/78/EC) through the Equality Act 2010 (which brought together a number of different pieces of earlier legislation which already protected particular characteristics). I understand that Ireland has implemented also this. Our legislation goes further than required by EU law, because it protects against discrimination in the supply of goods and services, including accommodation, as well as in employment, occupation and vocational training. Religion and belief are, of course, among the characteristics

protected; but they are different from the other characteristics because, unlike your sex or your race, you can (or should be able to) choose what to believe.

You might therefore think that adherents of a religious faith, and in particular adherents of the majority religion in either country, would feel that they are well protected by these laws. But that is not how they feel in my country. An academic study of perceptions of religious discrimination in 2011 reported that “over the past decade there has, in general, been a reduction in the reported experience of unfair treatment on the basis of religion or belief”; the non-discrimination law may well have played a part in this (see Weller and others, *Religion or Belief, Discrimination and Equality*, Bloomsbury, 2013, p 208). However, new forms of unfair treatment were being reported, particularly by Christians. “Some Christians also articulated a sense of the marginalisation of Christianity compared to its historic position in society and spoke of what they felt was a comparatively fairer treatment of other religion or belief groups . . .” On the other hand, non-religious groups felt that Christianity and religion in general was still privileged in ways which could result in unfair treatment for them (p 210). A recent example of both phenomena is the protest of several leading scholars and public figures when our Prime Minister proclaimed that Britain is a Christian country.

An example of treatment which Christians may feel to be unfair is the recent Supreme Court case of *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741. This concerned a private hotel in Cornwall. The owners were devout Christians who believed that it was sinful for anyone, whether of the same sex or opposite sexes, to have sexual relations outside marriage. So their policy was to let their double-bedded rooms to “hetero-sexual married couples only”, although they would let single and twin bedded rooms to anyone. They made this policy plain on their website. The claimants, a same-sex couple in a civil partnership, booked a double

room over the phone, not having seen the policy. When they arrived they were told, politely but in the presence of others, that they could not have the room. They protested but left and were refunded their deposit (and later offered the difference in price between that room and the alternative accommodation they had found). They brought a claim for discrimination on grounds of sexual orientation. The defendants argued that the discrimination was justified by their religious beliefs.

One problem is that, under EU law, there is no general defence of justification for direct discrimination, whereas there is such a defence for discrimination which is merely indirect. Broadly speaking, it is direct discrimination if the criterion you use to single someone out for less favourable treatment is their religion or belief. “No Jews here” would be the obvious example. It is indirect discrimination if you employ a criterion which is neutral on its face, but in fact puts members of a particular group at a disadvantage because it is less easy for them to comply with it. Requiring all employees to work on Friday afternoons would be an example. But the distinction is by no means easy to draw. This is illustrated by the fact that the Court of Appeal held unanimously that what the hotel had done was direct discrimination (and the civil partnership made no difference); whereas in the Supreme Court we would all have held it to be indirect discrimination, were it not for the civil partnership; three of us thought that this did make a difference. The hotel were denying a marriage bed to a couple who were to be regarded in UK law as in the same situation as a married couple: they were doing that precisely because the couple were not heterosexual, in other words because of their sexual orientation.

The hotel argued that to interpret or apply the law in such a way as to deny them the defence of justification would be an interference with their right to manifest

their religion. Lady Justice Rafferty in the Court of Appeal did say that a democratic society must ensure that the defendants could still espouse and express their beliefs.

**“It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants’ beliefs). . . . Any interference with religious rights . . . must satisfy the test of ‘anxious scrutiny’. However, in a pluralist society it is inevitable that from time to time, as here, views, beliefs and rights of some are not compatible with those of others. . . . I do not consider that the defendants face any difficulty in manifesting their religious beliefs, they are merely prohibited from doing so in the commercial context they have chosen” (para 56).**

The same issues arose in *Black and Morgan v Wilkinson* [2013] EWCA Civ 820, except that the same sex couple were not in a civil partnership. Following *Bull v Hall*, the Court of Appeal found the discrimination direct, but also agreed that had it been indirect, it would not have been justified. First, Parliament had given careful consideration to whether there should be an express exemption (as there is for employment by religious organisations) and decided against it. Secondly, Mrs Wilkinson had not shown that the restriction on her right to manifest her religious beliefs would cause her serious economic harm.

Both cases were originally destined for the Supreme Court, but Mrs Wilkinson abandoned her appeal for personal reasons (a tabloid newspaper had revealed that her husband was not the devout Christian she believed him to be), so we only dealt with *Bull v Hall*. All of us agreed that the discrimination could not be justified.

Parliament had not enacted a specific defence for religious businesses. If you go into the market place you cannot pick and choose which laws you will obey and which you will not. I also responded to the comment by Lady Justice Rafferty, by suggesting that this was not oppression of Christian believers. Both homosexuals and Christians are subject to the same laws requiring them not to discriminate in the running of their businesses. So if homosexual hotel keepers had refused a room to an opposite sex or Christian couple, they too would have been acting unlawfully (para 54).

The reaction was interesting. The Attorney General of Northern Ireland commented that this shows that I do not understand religious belief. The objection which believers have to same sex relationships is morally and biblically based, whereas any objection which homosexuals might have to religious believers would be pure prejudice (I do not know what he would have said about other supposedly biblically based objections, for example to women or other races, or indeed to other religions). The former Archbishop of Canterbury, Lord Carey of Clifton, said much the same when he intervened in a case in the Court of Appeal concerning the dismissal of a relationship counsellor who would refuse to provide psycho-sexual counselling for a same sex couple (the *McFarlane* case, to which I shall return). Lord Carey wished to “dispute that the manifestation of the Christian faith in relation to same sex unions is ‘discriminatory’ . . . Further, . . . [to dispute] that such religious views are equivalent to a person who is, genuinely, a homophobe and disreputable”. This, he said, “illuminates a lack of sensitivity to religious belief” and “is further evidence of a disparaging attitude to the Christian faith and its values”.

Lord Justice Laws’ response to Lord Carey’s intervention was this ([2010] EWCA Civ 880):

**“In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. . . . the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society.”**

Lord Justice Laws was drawing an important distinction between the freedom to hold religious views and to practise one's faith and the power of any religious group to dictate what the laws should be. He prompted a response in the Daily Telegraph from Bishop Michael Nazir-Ali (30 April 2010). Not surprisingly, perhaps, Bishop Michael disputed the claim that religious faith is necessarily subjective and incommunicable: “There may be some faiths like that, but the Christian faith is not one of them. It is committed to a proper understanding of how the world is and who we are, but also what makes for a better world and better people”. Uncontroversially, he suggested that “there is an inextricable link

between the Judaeo-Christian tradition of the Bible and the institutions, the values and the virtues of British society”. He pointed out that the human dignity recognised by so many declarations on human rights was “squarely based on the biblical view that we are made in God’s image”, and that “our understanding of equality is derived from Christian teaching about our common origin, and our idea of liberty from the historical struggle to be free”. So, in his view, the law should give greater protection for freedom of conscience, for people whose objections to certain requirements, whether of the law or of employers were genuinely based in their religious beliefs.

He is not alone in that view. It may be that one of the reasons why the Church of England is feeling so beleaguered is that it is such a very undemanding Church. It has no dietary laws, no dress codes for men or women, and very little that its members can say is actually required of them by way of observance. So it is much harder for them to make demands equivalent to those of other religions, for example, to be allowed to slaughter meat in a particular way, to wear a turban instead of a crash helmet when riding a motor cycle, or a face veil when giving evidence in court, or even to take Sunday as a day of rest. Indeed, in *Mba v London Borough of Merton* [2013] EWCA Civ 1562, an employment tribunal held that even Sunday observance was not a “core component” of the Christian faith.

This raises the fundamental question of how far courts can be expected to evaluate the importance of a belief which the believer holds or the extent to which it is in fact required by the religion to which she adheres. Generally speaking, as the Court of Appeal held in *Mba*, we have refused to do that. We do not ask whether certain sects are correct to hold that the bible requires parents to beat their children (as in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15,

[2005] 2 AC 246) or whether the Islamic instruction to dress modestly in fact requires a girl who has reached puberty to wear a long concealing garment (see *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100). This uncritical approach, however correct in principle, compounds the problems created by treating all religions and belief systems with equal respect.

So given that we have to respect all beliefs that are genuinely held (at least if they reach a certain threshold of seriousness and coherence), what are we to make of a Christian who wants to wear a cross when her employers forbid her to do so? Or a Christian registrar of births, marriages and deaths, who refuses to conduct civil partnership ceremonies between same sex couples? Or a Christian relationship guidance counsellor who does not wish to offer couple counselling to same sex couples? These were all cases of Christian believers asserting their beliefs against their employers or the State. Unlike the case of the Christian hotel keepers, there was no competing equality right in play. So why should they not be afforded some reasonable accommodation for their beliefs?

The Strasbourg judgment in *Eweida and Others v United Kingdom* (2013) 57 EHRR 213, brought together the four cases of Ms Eweida, Ms Chaplin, Ms Ladele and Mr McFarlane, all Christians who complained that their right to manifest their religion under article 9 of the Convention had been unjustifiably limited or that they had been discriminated against on the ground of their religion, contrary to article 14, or both.

Ms *Eweida*, who worked for British Airways, a private company, and Ms *Chaplin*, a nurse working in the National Health Service, a public body, complained that their employers had not permitted them to wear a discreet cross at work; some other

religious dress requirements, in particular the Islamic headscarf, had been accommodated. The employment tribunals held that this was not even indirect discrimination, because Christians as a group are not put at a particular disadvantage by not being able to wear a cross. The group did not regard wearing a cross as an obligation. It was a matter of personal choice to manifest their religion in this way. Even if it were discrimination, the requirements were justified, either by the corporate uniform policy or on health and safety grounds.

Ms *Ladele* had been appointed a registrar before the introduction of civil partnerships for same sex couples in 2005. The local authority which employed her decided to designate all their registrars as civil partnership registrars, although they did not have to do this. They offered to accommodate her to the extent of requiring her to carry out signings of the civil partnership register and administrative tasks connected with civil partnerships but not to conduct ceremonies. Eventually she was dismissed. She complained to an employment tribunal of direct and indirect discrimination on grounds of her religion or belief and of harassment. The tribunal upheld her complaints, but both the Employment Appeal Tribunal and the Court of Appeal held that it was only indirect discrimination and justified as a proportionate means of achieving a legitimate aim.

She complained to Strasbourg of a breach of article 14 of the Convention – discrimination in the enjoyment of her convention rights because of her religion. She complained that the local authority should have treated her differently from staff who did not have a conscientious objection to registering civil partnerships. They could reasonably have accommodated her beliefs and their refusal to depart from their hard line was disproportionate. She also contended that religious belief should be included in the list of “suspect categories” (such as sex, sexual orientation, ethnic origin and nationality) where “very weighty reasons” are

required for discrimination to be justified. She accepted that the local authority's aim was legitimate, to provide non-discriminatory access to services and to communicate a clear commitment to non-discrimination. But she argued that the local authority did not adequately take account of its duty of neutrality: it had failed to strike a fair balance between delivering the service in a way which would not discriminate on grounds of sexual orientation, while avoiding discriminating against its own employees on grounds of religion.

Mr *McFarlane* worked for Relate, which used to be called the National Marriage Guidance Council but has long diversified into all forms of couple and relationship counselling. He had concerns about providing counselling services of any sort for same-sex couples but accepted that providing simple counselling did not involve endorsing their relationship. He then undertook a further qualification in psycho-sexual therapy. He would find it difficult to reconcile working with couples on same-sex sexual practices with his duty to follow the teaching of the Bible. Eventually he was dismissed because Relate concluded that he had said that he would follow their equal opportunities policies and provide sexual counselling to same-sex couples without having any intention of doing so. The employment tribunal found that this was indirect discrimination, because the charity's policy put people of his faith at a particular disadvantage, but it was justified. He complained to Strasbourg of a breach of article 9, either alone or in combination with article 14. Dismissal was one of the most severe sanctions which could be imposed upon any individual. Relate was a private organisation with no statutory duty to provide the service in question.

The Strasbourg court upheld the complaint of Ms *Eweida*, the British Airways worker, but dismissed all the others. However, it made two important points. First, it found that what the complainants wished to do *was* a "manifestation" of their

religion. It did not have to be a mandatory requirement of the religion. That is undoubtedly good news for members of the Church of England and indeed of the Church of Ireland, which impose so few mandatory requirements. Second, the court found that what the employers had done was an interference with that right. Earlier Strasbourg case law had held that there was no interference if the complainant could take steps to avoid the limitation – such as finding another job. But the court held that, given the importance of freedom of religion, the better approach was to weigh the possibility of changing jobs or otherwise avoiding the problem in the overall balance when considering whether or not the restriction was proportionate. This is also good news for those whose wish to manifest their religion brings them into conflict with their employers' requirements. Technically, there was a difference between Ms Eweida and Mr McFarlane, who were employed by private companies, and Ms Chaplin and Ms Ladele, who were employed by public authorities but the court held that the applicable principles were similar. "In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole" (para 84).

So the court then turned to justification. Unlike EU law, Strasbourg does accept that there may be a justification for both direct and indirect discrimination. Justification depends upon whether the difference in treatment has a legitimate aim and the means used bear a reasonable relationship of proportionality to the aim to be achieved. In Ms *Ladele's* case, the local authority's policy had a legitimate aim – bearing in mind that differences in treatment based upon sexual orientation require particularly serious reasons by way of justification and that same-sex couples are in a relevantly similar situation to opposite sex couples as regards their need for legal recognition and protection of their relationship. As to whether it was proportionate, the consequences for Ms Ladele were serious and the requirement was introduced after she had taken the post. But the policy aimed to secure the

rights of others which were also protected under the Convention. “The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights” (para 106) and this had not been exceeded.

But there was a strongly worded dissent from two of the Strasbourg judges in *Ladele*. They argued that this was not so much a case of freedom of religious belief as one of freedom of conscience, protected under Article 9.1 and not mentioned in Article 9.2. “Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and avoid evil”. As such it was different from and superior to religious doctrine: John Henry Newman had said that “conscience may come into collision with the word of a Pope and is to be followed in spite of that word”. Once a genuine and serious case of conscientious objection was established, the State was obliged to respect it both positively and negatively. It was not a case of discriminating against the service users – none of them had complained. The local authority should have treated her differently from those who did not have such a conscientious objection and could have done so without prejudice to the service offered. Instead of practising the tolerance and “dignity for all” it preached, the local authority had “pursued the doctrinaire line, the road of obsessive political correctness”. The dissenters had earlier said that it was “a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured ‘gay rights’ over fundamental human rights)” which had eventually led to her dismissal.

Mr *McFarlane*’s case was probably easier for the Court. He had voluntarily enrolled on the psycho-sexual counselling course knowing of Relate’s equal opportunities policy and that filtering clients would not be possible. But the most important factor was that the employer’s action was intended to secure the implementation of

its policy of providing a service without discrimination. The court also dismissed the nurse Ms *Chaplin's* claim. The ban on wearing loose jewellery was justified for health and safety reasons. There were restrictions on the type of Islamic headscarf permitted, for similar reasons. But they allowed Ms *Eweida's* claim. There was no real need for the rule and indeed British Airways had since changed it. The domestic courts had given too much weight to British Airways' desire to maintain a corporate image and too little weight to Ms Eweida's right to manifest her religion.

Fair-minded people may disagree about the application of these principles, but it is clear that we are in the territory of fair balance, between the interests of the individual and the community at large, and between the competing rights of individuals. The tools are comparatively clear: what is the importance of the right interfered with; what is the reason for the interference; is it legitimate; is the interference rationally connected to that aim; might a lesser degree of interference have been employed; and overall does the end justify the means?

All of these complainants had originally brought discrimination rather than Human Rights Act claims. Most of these complaints were – and are likely to be - of indirect discrimination: not that the employer had treated them badly because they were Christians, but because the employer had applied a rule or practice to them which had adverse effects upon them because they were Christians. So should we be developing, in both human rights and EU law, an explicit requirement upon the providers of employment, goods and services to make reasonable accommodation for the manifestation of religious and other beliefs? And even vice versa?

We may be able to get this out of the ECHR approach. In *Francesco Sessa v Italy*, App no 28790/08, judgment of 3 April 2012, a Jewish advocate complained to the Strasbourg court about the Italian court's refusal to adjourn his case to a date

which did not coincide with the Jewish holidays of Yom Kippur and Sukkot. This, he said, was an interference with his right to manifest his religion. His complaint was dismissed by a majority of 4 to 3. A powerful minority pointed out that, for a measure to be proportionate, the authority must choose the means which is least restrictive of rights and freedoms. Thus, seeking a reasonable accommodation may, in some circumstances, constitute a less restrictive means of achieving the aim pursued. Mr Sessa had given the Italian court ample notice of the problem and reorganising the lists to accommodate him would have caused minimal disruption to the administration of justice - “a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society” (para 13).

There are also some employment discrimination cases which explore the employer’s duty to accommodate religious practices. *Mba*, which was about Sunday observance, is one of them. It may be coming to the Supreme Court, so I had better say nothing more about it. But would it be an appropriate approach in reverse, for example for the providers of goods and services, including accommodation, to suggest that they had done all that could reasonably be expected of them to accommodate the same sex couple? It was argued in *Bull v Hall* that the hotel keepers had done all that could reasonably be expected of them – that there should be give and take on both sides. But we rejected that argument, holding that they were not justified in refusing to provide their services on a non-discriminatory basis. I wonder whether that is something of a relief or whether we would be better off with a more nuanced approach?

Another problem is that it is much more rational to protect one religion above all others – after all, most adherents of a particular religion believe that theirs is the one true faith. But the law now protects all religions equally, without discriminating between them and without attempting to determine which are forces for good and

which are not. Not only that, it also protects other belief systems, such as humanism and pacifism, and we have dropped any requirement that these be “similar” to religion. It also protects the lack of a religion or belief. In other words, while it protects freedom of thought, it does not give any special protection to religion as such – although it may be rather easier to claim that belief in a religion, especially one of the mainstream world religions, falls within its protection than it is for other less conventional kinds of belief. But those who argue that secularism has gone too far would usually like there to be special consideration given to religious belief as such, claiming that religious beliefs are different in kind from other kinds of belief.

It is not impossible to describe, if not to define, religion, as the Supreme Court recently had to do when deciding whether the Church of Scientology was a place of religious worship for the purpose of celebrating marriages. In *R (Hodkin) v Registrar of Births, Deaths and Marriages* [2013] UKSC 77, Lord Toulson described it thus:

**“I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with that belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science . . . Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science.”**

That is, of course, what Lord Justice Laws meant when he talked about religion being “incommunicable”.

Many believers do believe that their faith has a different quality from the secular beliefs of others. One of the first projects to hit my desk when I joined the Law Commission for England and Wales in 1984 was the proposed abolition of the common law offence of blasphemy. Everyone (including the Church of England) agreed that an offence which protected only the established church against critical or offensive speech could not be justified. Hence the Commission’s working paper, published in 1981, had recommended simply that the offence be abolished (WP No 79, *Offences against Religion and Public Worship*). Then the composition of the Commission changed. Some of those who had responded to the working paper (including the Church of England) argued for replacing it with a general offence of offending religious feelings, although without defining what constituted a religion for this purpose. The underlying premise of this proposal, as of the arguments of Lord Carey and the Attorney General for Northern Ireland, is that religious feelings are different from other kinds of feelings and deserve the special protection of the law. That view found favour with the new Commissioners. But their report had to wait for the Parliamentary draftsmen to find time to draft the proposed new offence, which they did not find easy. Then the composition of the Commission changed again. Hale and two others joined and we all strenuously objected to the proposed new offence as an unjustified interference with freedom of speech. So the report which was published in 1985 had three Commissioners recommending abolition without replacement – a majority dissent - and two recommending the replacement offence (Law Com No 145, *Offences against Religion and Public Worship*). Not surprisingly, nothing at all was done. But when promoting the reform of the law one should never give up hope entirely. In 2008, the offence

of blasphemy was eventually abolished without replacement (by the Criminal Justice and Immigration Act 2008). The National Secular Society held a “bye bye blasphemy party”.

So the moral of all this is that if the law is going to protect freedom of religion and belief it has to accept that all religions and beliefs and none are equal. It cannot realistically inquire into the validity or importance of those beliefs, or any particular manifestation of them, as long as they are genuinely held. It then has to work out how far it should go in making special provisions or exceptions for particular beliefs, how far it should require the providers of employments, goods and services to accommodate them, and how far it should allow for a “conscience clause”, either to the providers, as argued by the hotel keepers in *Bull v Hall*, or to employees, as suggested by the dissenting minority in *Ladele*. I am not sure that our law has yet found a reasonable accommodation of all these different strands. The story has just begun.