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Equality and Human Rights Update

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ISSUES IN TRANS-EQUALITY: PROBLEMS WITH THE BINARY IN THE PRISON SYSTEM

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Nomenclature

- Accepted terminology: Transgender, Trans, Trans person, Trans woman, Trans man, cisgender woman/man, gender identity, man/woman of trans-experience.
- Contested terminology: Transsexual, gender-reassignment (as a description of a personal/protected characteristic).
- Unacceptable: transgenders, transgendered, transgenderism – all imply a pathological condition or affliction.

The precursor to the domestic provisions

Goodwin v UK [2002] 35 EHRR 447

- Continued failure to recognize the chosen sexual identity of a gender-reassigned trans-person by its failure to accord legal recognition to the Applicant's change of gender, amounted to a breach of Articles 8 and 12.

"**In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which *post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable*.** "

Relevant Provisions of EA 2010 (1)

- **7 Gender reassignment**

(1) A person has the protected characteristic of gender reassignment if the **person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.**

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment—

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

Relevant provisions of EA 2010 (2)

Equality Act 2010 Code of Practice: Services, public functions and associations, EHRC

2.20

The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex ; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

- **Step forward from GRA 2004 – no requirement for process to be medicalised**

Relevant provisions of EA 2010 (3)

EA 2010:

prohibits, in so far as is relevant, in employment and provision of services and public functions:

- Direct discrimination (s.13)
- Indirect discrimination (s.19)
- Harassment (s.26)
- Victimisation (s.27)

Relevant provisions of EA 2010 (4)

Para 28, Part 7, Schedule 3, EA 2010:

28 Gender reassignment

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, **only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.**

(2) The matters are—

(a) the provision of **separate services for persons of each sex**;

(b) the provision of **separate services differently for persons of each sex**;

(c) the provision of a **service only to persons of one sex**.

Applicable Prison Law

Prison Act 1952

12.— Place of confinement of prisoners.

(1) A prisoner, whether sentenced to imprisonment or committed to prison or remand or pending

trial or otherwise, may be lawfully confined in any prison.

(2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time

direct; and may by direction of the Secretary of State be removed during the term of their

imprisonment from the prison in which they are confined to any other prison.

Applicable Prison Law (2)

Prison Rules 1999

6.— Maintenance of order and discipline

(1) Order and discipline shall be maintained with firmness, but with no more restriction than is

required for safe custody and well ordered community life.

(2) In the control of prisoners, officers shall seek to influence them through their own example and

leadership, and to enlist their willing co-operation.

(3) At all times the treatment of prisoners shall be such as to encourage their self-respect and a

sense of personal responsibility, but a prisoner shall not be employed in any disciplinary capacity.

Applicable Prison Law (3)

12.— Women prisoners

(1) Women prisoners shall normally be kept separate from male prisoners.

(2) The Secretary of State may, subject to any conditions he thinks fit, permit a woman prisoner to have her baby with her in prison, and everything necessary for the baby's maintenance and care may be provided there.

Applicable Prison Law (4)

23.— Clothing

(1) An unconvicted prisoner may wear clothing of his own if and in so far as it is suitable, tidy and

clean, and shall be permitted to arrange for the supply to him from outside prison of sufficient clean

Clothing

...

(3) A convicted prisoner shall be provided with clothing adequate for warmth and health in

accordance with a scale approved by the Secretary of State.

Applicable Prison Law (5)

PSI 7/2011, 'The Care and Management of Transsexual Prisoners" :

3.2 An establishment **must permit prisoners who consider themselves transsexual and wish to begin gender re-assignment to live permanently in their acquired gender**…

3.3 Permitting prisoners to live permanently in their acquired gender will include **allowing prisoners to dress in clothes appropriate to their acquired gender and adopting gender-appropriate names and modes of address**. See Annex B for more details. An establishment must allow transsexual people access to the items they use to maintain their gender appearance, at all time and regardless of their level on the incentives and Earned Privileges Scheme or any disciplinary punishment being served. See Annex C for a suggested compact which can be adapted for local use.

- 3.5 Any **risks** to and from a transsexual prisoner must be **identified and managed appropriately as would be the case with any other prisoner…**
- …

Applicable Prison Law (6)

PSI 7/2011, 'The Care and Management of Transsexual Prisoners" :

Dress Code

B.1 Prisons should obtain from an equivalent opposite gender prison a set of guidelines for what clothing and make up is acceptable. Such guidelines can be adopted almost entirely for transsexual prisoners.

B.3 **Female prisoners wear their own clothes – there is no uniform**. A male to female transsexual prisoner should be allowed to wear female clothing, regardless of any restrictions imposed through IEP. The only exception will be for relevant work clothes.

B.4. **Allowing male to female transsexual prisoners to wear their own clothes is not a privilege. This approach is necessary to ensure that such prisoners can live in the gender role that they identify with**. It may be helpful to explain this to other prisoners who are required to wear prison uniform.

B.7. **Both male to female and female to male transsexual people may use make up to present more convincingly in their acquired gender. Make up that is vital** to presenting in the acquired gender, such as foundation to cover up beard growth, may not be restricted. Other make up may be restricted within the framework of IEP.

Some cases of note

- **R(B) v Secretary of State for Justice [2009] HRLR 35**
- Transwoman with a gender recognition certificate had to be transferred to the female estate even though one of her index offences was attempted rape of a woman.
- **R(Green) v SSJ [2013] EWHC 3491 (Admin)**
- **Carpenter v Secretary of State for Justice [2015] 1 WLR 4111**

Where does this leave us?

- Challenge to Schedule 28 Equality Act 2010
- Challenge to PSI's which suggest location within the estate should be determined by reference to GRA 2004 rather than EA 2010
- Concerted challenge to structurally violent aspects of prison system which have particular impact on trans community; i.e. power to confer identity, prohibitions against same sex contact, use of segregation to 'protect'.

Stepping back from Secularism: Towards a Duty of Reasonable Accommodation in Religion and Belief?

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> 'A commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.'[1]

1. As the summer fades, so too the memories of armed policemen requiring a woman to disrobe on a beach in the South of France. Perhaps like nothing else in the recent debate over the right to dress in accordance with one's own autonomous beliefs and desires, the French burkini debacle galvanised many who had stayed silent in the face of public bans in France and Belgium to speak

[1] Opinion of Advocate General Poiares Maduro, *Coleman*, C-303/06, EU:C:2008:61, at para.11. See further on this subject: Rory O'Connell - The role of dignity in equality law: Lessons from Canada and South Africa Int J Constitutional Law (2008) 6 (2):267-286

out over what women wore in public. Much has been made, said (and misunderstood) about what happened, and the subsequent reaction of the French courts to the bans, which at the last count are said to have been put in place in about thirty French towns. Much less has been said about the two forthcoming decisions by the CJEU on religious discrimination in the workplace, which will be of far greater import and value to European jurisprudence in the cases of *Achbita*[2] and *Bougnaoui*[3].

2. The CJEU decisions in these two cases, coming from Belgium and France respectively, will be the first time the Court has had the opportunity to consider religious discrimination within the context of EU Directive 2000/78[4] ("the Framework Directive"). Ostensibly, the starting point in both cases is whether an employer is permitted to ban a woman from wearing an Islamic headscarf in the workplace, and if so, whether the employer can dismiss her if she refuses to comply. However, the import of the two judgments will be far wider than the question of workplace attire. It will be the first opportunity to examine how the Court intends to interpret the justification provisions in the Framework Directive in respect of religion, noting that it has interpreted justification restrictively in respect of other protected characteristics, whereas the parallel jurisprudence in Strasbourg has seen the European Court of Human Rights (ECtHR) instead adopted a very laissez-faire approach when the State relies on the margin of appreciation arguments in Article 9 cases. As we shall see, there may be a tension in the two regimes, and indeed a structural difficulty in deploying a margin of appreciation test within an equality framework. In any event, the two different approaches are perhaps replicated in two different opinions from two different Advocate-Generals in the *Achbita* and *Bougnaoui* cases, illustrating the conceptual tightrope ahead.

[2] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Case C-157/15.
[3] *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Case C-188/15.
[4] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303 p.16); 'Directive 2000/78', also known as the Framework Directive.

3. Some might ask whether any of this matters. Prime Minister May has announced a timetable for Brexit which, at the time of writing this paper, suggests Britain may be out of the European Union by 2019, at which point the CJEU will no longer be an apex court for British courts and tribunals.

4. It does matter, however – whether Brexit actually happens, or whether Britain remains in a state of limbo for some years ahead. If Brexit does happen, the indications appear to be that whilst the authority of the CJEU will be removed, nobody quite understands either how the law, through the Great Repeal Act or otherwise, will function. It seems unlikely that sufficient provision will be made to establish anything other than a piecemeal replacement for the EU legislation now been firmly embedded in UK law. Beyond the actual legislation, years of litigation potentially lie ahead to evaluate the relevance and persuasive influence that CJEU decisions will continue to have on the evolution of our own laws. Our own courts (and legislators) will need to determine the path which they should best follow. None of that will happen overnight.

5. If Brexit does not mean Brexit, then the impact of the CJEU decisions on religious discrimination will be important not only in the sphere of employment, to which the Framework Directive specifically relates, but is likely to set the tone by which equality, in respect of this specific protected characteristic, will be guaranteed more broadly and will set the tone by which religion is accommodated in the public sphere.

6. This paper will explore the competing trajectories of the ECtHR jurisprudence, the upcoming CJEU judgments and the position that domestic courts have adopted to date. I argue that the current framework of protection is hampered by an amplified margin of appreciation which overvalues the French constitutional principle of secularism at the expense of a considered analysis on reasonableness, necessity and proportionality. Further, I consider that the fear of elevating religious discrimination to a 'special status' within the hierarch of protected characteristics, as well as (often real) concerns about the challenge posed by certain religious beliefs to equality for other protected characteristics,

is allowed secularism, itself a normative system of beliefs, to trump other religious beliefs. Into that space, I will argue, there is room for the underlying values of pluralism to be accommodated into our public sphere, and particularly in the workplace, where people – and particularly minority groups - can become marginalised and isolated.

7. I will argue that many of the protected characteristics require some sort of differentiation in order to ensure equality protection is substantive and not just in form. Disability, whilst the obvious characteristic (and at present the only one using the language of reasonable adjustment), is not alone amongst those characteristics which require some nuance in order to make them effective, and particularly where rights are perceived to challenge the inherent value of other rights. Age discrimination, for example, often presents a straightforward apparent conflict between the rights of the young and old. Pregnancy and maternity discrimination requires, by definition, that no comparator be deployed.

8. I argue that the reasonable accommodation test, used in North America for example, carries an important 'mind-set' requirement that, in the current atmosphere of Islamophobia and increasing xenophobia in Britain[5], can shift public perceptions about 'them' and 'us'[6]. It can contribute towards the emphasis that is being lost in political and nationalistic debates which can and do influence the perceptions on values of tolerance and pluralism. Religious discrimination can be a form of covert (or overt) racism, which would otherwise not be tolerated in society[7]. This may be particularly important where intersectional discrimination remains unrecognised in domestic courts.

[5] See as just one example, Council of Europe 4 October 2016 report on rising racism in the UK. http://www.humanrightseurope.org/2016/10/united-kingdom-new-report-reveals-increasing-hate-speech-and-racist-violence/

[6] The latest data report that around 25 million persons born outside the EU currently live in Member States and represent 5% of the total EU population. The Eurobarometer Poll 2010 found that on average 51% of EU citizens believe in a God, 26% believe there is some sort of spirit or life force and 20% do not believe there is any sort of spirit, God or life force, 3% declined to answer. By contrast, according to a 2011 survey conducted amongst 27 EU member states, all immigrant groups tend to be more religious than the native born population of the host country: Statistics taken from Judit Baseurua Martí: *Freedom of Religion At Work in EU Migration and Policy,* European Labour Law Journal Vol. 7 (2016) No. 3.

[7] See further the Martí paper above.

9. Finally, I will consider whether the reasonable accommodation test requires new legislation, or whether it can be provided within the justification framework which currently exists.

European Court of Human Rights and its jurisprudence to date: Towards the path of least resistance?

10. Strasbourg has engendered a body of case law that treats the principles of constitutional secularism, laïcité, and religious neutrality with particular – perhaps undue – reverence by construing the margin of appreciation test very widely, allowing nationalist and cultural differences between Member States to be put forward as justifiable reasons for what would otherwise constitute discrimination. This has often been at the expense of any sufficient critical analysis of the explanation put forward. (See *Leyla Sahin v. Turkey*[8], for example, in which the ECtHR controversially and uncritically accepted the government's argument that a prohibition on students wearing headscarves on university campuses served the aims of the promotion of secularism and gender equality finding that there was no violation of Article 9, and in *Dahlab v. Switzerland*[9] in which the Court found wearing a headscarf to be contrary to the principle of equality). The Court singularly failed to grapple with any analysis of equality arguments, and in particular failed to consider the role of personal autonomy, or how a denial of access to education for millions of women who chose to wear the headscarf in Turkey would impact itself on gender equality[10]. Most of the Article 9 cases have taken place within an education context, and mostly emerge from France and Turkey.

11. It is my view that the principle of secularism has been elevated to the status of a belief itself, such that it now operates in Strasbourg as a first among equals. This

[8] *Sahin v Turkey* (App. no. 44774/98), 10 November 2005, GC
[9] *Dahlab v Switzerland* (App. no.42393/98), 15 February 2001, ECHR
[10] For further discussion, see Human Rights Watch, *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women Who Wear the Headscarf* , 29 June 2004; and Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*, EJIL (2008), Vol. 19 No.4 , 841 – 857.

elevation has led to unusually lenient analysis which, consequently, gives the impression that European minorities are not effectively protected by the Court. A brief analysis of the case-law demonstrates that whilst the principles of constitutional secularism have been deployed in case after case in which Islamic beliefs have been in cause, cases involving Christian beliefs have sometimes resulted strikingly in a more lenient appraisal from the Court, as examined below. This suggests, at best, that secularism, insofar as it is relied upon by the State, enables the dominant and prevailing culture (which includes Christianity) to remain protected as the status quo At worst, it suggests a two-tier level of protection. Consider the cases below.

12. In *SAS v France*[11], a measure in France criminalising the concealment of one's face in public was considered proportionate, principally because it targeted only the full-face veil, not other religious garments, and because the sanction was (in the court's view) relatively light. A feature of the judgment was its emphasis on the French government's argument that the ban promoted the concept of 'living together', which was criticised by the dissenting judges[12] as "far-fetched and vague."[13] *SAS* followed a relatively long line of Strasbourg authorities consistently upholding[14] secularist justifications for bans on religious clothing[15]. In *Dahlab*[16], the dismissal of a Muslim teacher who wore a headscarf to work was justified on the grounds that the garment breached the 'denominational neutrality of schools'. The Court found that the headscarf could have a 'proselytising effect'. A more recent judgment of the court which found that the

[11] *SAS v France* [2015] 60 EHRR 11, GC
[12] Judges Nußberger and Jäderblom
[13] There are two applications pending before the Court on the full-face veil ban in Belgium: *Belkacemi and Oussar v. Belgium* (App. no. 37798/13) and *Dakir v. Belgium* (App. no. 4619/12).
[14] Or dismissing at inadmissibility stage.
[15] There is a rare notable exception in *Ahmet Arslan v Turkey (App No 41135/98), judgment of 23 February 2010.* The criminal conviction of a group (members of a religious group known as *Aczimendi tarikatÿ)* for wearing items of a religious nature in public (other than for religious observance) was overturned by the Court for violating Article the applicant's freedom of conscience and religion through a ban on their clothing. Here, the Court held that the State had failed to rely on secularism as a justification through the domestic decision, although it might have been upheld if they had. The Court also distinguished between the other religious dress cases because here, the applicants had been punished for wearing their religious dress in public spaces open to all, rather than in establishments where the State's interest in neutrality could might outweigh the individuals' right to manifest their religion.
[16] *Dahlab v Switzerland* (App. no.42393/98), 15 February 2001, ECHR

headscarf could have a 'proselytising effect' is worth reading[17] for its dissenting (and partly dissenting) judgment: *Ebrahimian v France*[18] and will be considered below.

13. A number of joined French cases in 2008/9[19] upheld a nationwide ban on wearing conspicuous religious garments at school on similar grounds of laïcité, and in respect of identity documents.[20] So, too, in Turkish cases have bans on headscarves been upheld, principally to protect the state's constitutional secularism (for example, *Sahin v Turkey*[21] and *Kurulmus v Turkey*[22]).

14. By contrast, however, in *Lautsi v Italy*[23], the court upheld the lawfulness of hanging crucifixes in all Italian primary schools. Particular emphasis was placed on the fact that the crucifixes' presence was 'passive' and 'not comparable to that of didactic speech or participation in religious activities'. This fits uncomfortably with the charges in *Dahlab* that the mere presence of Islamic dress could have a negative and proselytising effect on young students. Indeed, the Court went further still and sought to distinguish *Dahlab*[24]. Similarly, in *Eweida v United Kingdom*[25], the Court was prepared to impose positive obligations on the state to protect a private Christian employee. Her employer had not permitted her to wear a cross on a chain for the reason of projecting its corporate image and there had been an absence of evidence of encroachment on the interest of others.

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[17] Judgment in French only.
[18] *Ebrahimian v France* (App. no 64846/11), 26 November 2015.
[19] *Dogru v. France* (App. no. 27058/05) and *Kervanci v. France* (App. no. 31645/04) were dismissed on health and safety grounds where both Muslim students attended physical education classes wearing their headscarves and refused to take them off. The school's discipline committee decided to expel them from school for breaching the duty of assiduity by failing to participate actively in those classes. See also *Aktas v. France, Bayrak v. France, Gamaleddyn v. France, Ghazal v. France, J. Singh v. France and R. Singh v. France*. These were all students enrolled in various state schools for the year 2004-2005. On the first day of school, the girls, who are Muslims, arrived wearing a headscarf. The boys were wearing a "keski", an under-turban worn by Sikhs. As they refused to remove the offending headwear, they were denied access to the classroom and, after a period of dialogue with the families, expelled from school for failure to comply with the Education Code.
[20] See *Mann Singh v France* (App. no. 24479/07).
[21] *Sahin v Turkey* (App. no. 44774/98), 10 November 2005, GC
[22] *Kurulmus v Turkey* (App. no.65500/01), 24 January 2006 – see the admissibility decision.
[23] *Lautsi v Italy* (2012) 54 EHRR 3, GC
[24] At paras.73 and 74 of the judgment.
[25] *Eweida, Chaplin & ors v UK* [2013] 57 EHRR 8; *Eweida v British Airways plc* [2010] ICR. 890, CA

15. However, *Eweida* also suggests that the Court may be changing tack, at least to some degree. This was the first religion or belief case that the ECtHR considered in the private sector. In a marked shift of approach the Court was prepared to challenge the 'secular equality' arguments put forward, instead requiring evidence that the wearing of the cross did in fact encroach on the rights of others[26]. Moreover, rather than dismiss the argument that the employee could simply resign and seek employment in another establishment which allowed her the freedom to wear a cross, the Court stated that the possibility of the applicant changing her job needed to be considered as part of the proportionality assessment overall, rather than amounting to a justification on the employer's part[27].

16. It is a shame, then, that the majority judgment in *Ebrahimian* reverts to the traditional Strasbourg approach towards the margin of appreciation in Islamic headscarf cases. The facts date back to 2000. The applicant was employed on a fixed-term contract as a social worker in a psychiatric wing of a public hospital. Her employment contract was not renewed on the ground that there had been complaints from patients and colleagues about her wearing the hijab. The Court held that the national authorities had not exceeded their margin of appreciation in finding that there was no possibility of reconciling Ms Ebrahimian's religious convictions with the obligation to refrain from manifesting them, and so gave precedence to the requirement of neutrality and impartiality of the State.

17. There are four interesting features of the judgment. Firstly, the Court regards the wearing of a headscarf as an "ostentatious" manifestation of the applicant's religious beliefs. This sits in contrast to its acceptance in *Lautsi v Italy* of the

[26] See para.95 of the judgement.
[27] Until *Eweida*, a consistent line of decision from Strasbourg and the Commission had been that employees had a choice as to whether or not they worked for the employer and thus there would be no prima facie violation of Article 9. See, for example, *Kontinnen v Finland (*App. No. 24949/94) or *Stedman v UK (1997) 23 EHRR CD 168 p*ara. 83 of the Court's decision reflects on that history and makes a conscious break with it in this case.

passive existence of symbols. In a giveaway line, it is perhaps the cause for the lax reasoning which follows[28].

18. Secondly, the case concerns employment in the public sector generally. Scanning the Strasbourg case-law on Article 9 and laïcité, most of the decisions concern the educational sector, in which different considerations may or could be said to apply in respect of the wearing of the niqab or hijab[29]. *Ebrahimian*, however, casually extend the reasoning of those cases to public sector employment generally. This is as striking in its application as the lack of critical analysis of the extension, or the justification to the extension, which the Court is permitting. Unlike its rationale in *Eweida*, where the Court required evidence to justify a restriction[30], the Court did not require any evidence to justify the arguments put forward by the French state. It accepted, *prima* facie, that France was entitled to say that its state neutrality was linked to the attitude of its agents, in this case its employees, and this required that patients could not doubt their impartiality. Instead of putting forward any concrete and legitimate aim, or indeed any evidence that patients doubted the State's neutrality by the employee wearing a headscarf, the Court allowed the government to rely on abstract principles in support of a blanket ban applicable to all public

[28] And note that Judge O'Leary also picks up on the comment, noting that it:- "Sits uneasily with the Court's tolerance in the most sensitive educational context in *Lautsi*, of what it regarded as mere passive symbols."
[29] Judge O'Leary, in her partly dissenting, partly concurring judgment in *Ebrahimian* says, of the relevant Strasbourg authorities: in aall of the cases cited, bar one, involved restrictions on the individual's right to manifest their freedom of religion in an educational context. As regards teachers, the Court in each case examined whether the correct balance had been struck between, on the one hand, the right of the latter to manifest their religious beliefs and, on the other, respect for the neutrality of public education and the protection of the legitimate interests of pupils and students, ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others. In these cases, the Court's reasoning, when finding no violation or rejecting the complaints as manifestly unfounded, was intimately linked to the role of education and teachers in society, the relative vulnerability of pupils and the impact or influence which religious symbols might have on the latter. In the case-law regarding pupils, the same concerns with the neutrality of state education and the need to protect susceptible and easily influenced pupils and students from pressure and proselytization emerge. In only one of these cases, *Kurtulmuş v. Turkey*, the Court expressed itself in broader terms, not apparently limited to the specificities of the educational sector, when it found that the applicant teacher had chosen to become a civil servant and the dress code with which she did not wish to comply applied equally to all public servants, irrespective of their functions or religious beliefs."
[30] Judge O'Leary: "The majority accept that there was no evidence that the applicant, through her attitude, conduct or acts, contravened the principle of neutrality-secularism by exerting pressure, seeking to provoke a reaction, proselytizing, spreading propaganda or undermining the rights of others. It is noteworthy that the majority judgment also criticizes the absence of detail regarding the alleged difficulties in the service referred to by the national administration as a result of the applicant's wearing a headscarf (see § 69)."

employees. Judge O'Leary considered the Court's rush to judgment in this way to be deeply problematic:-

> It is uncontested that secularism and neutrality in this context are essential principles whose importance has already been recognized by the Court, and repeatedly by the Grand Chamber. In France, the neutrality of the public service is recognized as a constitutional value. Nevertheless, such recognition does not release the Court from the obligation under Article 9 § 2 to establish whether the ban on wearing religious symbols to which the applicant was subject was necessary to secure compliance with those principles and, therefore, to meet a pressing social need. When it comes to the chamber's assessment of proportionality (see below), it can be seen that the abstract nature of the principles relied on to defeat the right under Article 9, tended also to render abstract this assessment. The risk is therefore that any measure taken in the name of the principle of secularism-neutrality and which does not exceed a State's margin of appreciation - itself very wide because what are at issue are choices of society - will be Convention compatible.

19. In short, once the barrier of secularism emerges as a supra-justification, the Court dispenses with any detailed and critical analysis of whether the restriction was necessary and proportionate[31]. Given the apparent enlargement of its rationale to public sector employees in France, this dismissive approach results in a critical failure in protection for potentially millions of employees across Europe. Moreover, it is a short step from that decision to allowing the same approach in private employers who cite secularism as a core value.

20. This, then, links to the second interesting feature of the case, which is the dissenting judgment (De Gaetano J), as well as the partly dissenting, partly

[31] It is also worth considering the interesting argument posed by Eva Brems: *Ebrahimian v France: headscarf ban upheld for entire public sector*, November 27th 2015, Strasbourg Observers. She argues that the Court echoes the objective impartiality of the judge arguments under Article 6 ECHR when repeating its assessment that the wearing of a headscarf could lead patients to doubt the State's impartiality. "It should be reminded that though in that context the Court consistently requires an objective verification of a perception of lack of impartiality: ' in deciding where in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (Grand Chamber *Micallef v Malta*, para 96). By foregoing this objectivity check in the present context, the Court fails to offer guarantees against anti-minority prejudice'.

concurring judgment (Judge O'Leary). It is worth reproducing the very short dissenting judgment in full:

> The thrust of the judgment is to the effect that the *abstract* principle of *laïcité* or secularism of the State *requires* a blanket prohibition on the wearing by a public official at work of any symbol denoting his or her religious belief. That abstract principle becomes in and of itself a "pressing social need" to justify the interference with a fundamental human right. The attempt to hedge the case and to limit its purport to the specific facts applicable to the applicant is, as pointed out by Judge O'Leary, very weak and at times contradictory. The judgment proceeds from and rests on the false (and, I would add, very dangerous) premise, reflected in paragraph 64, that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation - even though quite often, from the very name of the official displayed on the desk or elsewhere, one can be reasonably certain of the religious affiliation of that official.
>
> Moreover, it would also seem that what is prohibited under French law with regard to public officials is the *subjective* manifestation of one's religious belief and not the *objective* wearing of a particular piece of clothing or other symbol. A woman may wear a headscarf not to manifest a religious belief, or any belief for that matter, but for a variety of other reasons. The same can be said of a man wearing a full beard, or a person wearing a cross with a necklace. Requiring a public official to "disclose" whether that item of clothing is a manifestation or otherwise of his or her religious belief does not sit well with the purported benefits enjoyed by public officials as mentioned in paragraph 66 of the judgment.
>
> While States have a wide margin of appreciation as to the conditions of service of public officials, that margin is not without limits. A principle of constitutional law or a constitutional "tradition" may easily end up by being deified, thereby undermining every value underpinning the Convention. This judgment comes dangerously close to doing exactly that.

21. This damning assessment of the Court's judgment is, in my view, correct, and for the same reasons that Judge O'Leary emphasises.

22. Thirdly, as Judge O'Leary picks up in her separate judgment, the Court had an easy technical alternative in this decision, since it was questionable that the measure in question was proscribed by law in 2000. Rather than extending its remit into the public employment sector in a manner that seemed careless of its consequences, the Court could have found that the measures the State relied on

in 2015 were not in existence in 2000[32]. In choosing not to adopt that route, and to uphold an uncritical analysis of the State's laïcité reasoning, the Court may have elevated the principle to trump card status, on any question which falls within the remit of Article 9(2). This only makes the distinction in *Eweida* stand out further.

23. As Judge O'Leary stated in terms,

> "Traces of *Eweida and others* and any consideration of reasonable accommodation are somewhat lost in the judgment in the instant case."

24. Where then, does this leave the margin of appreciation and reasonable accommodation? An earlier judgment of the ECtHR suggests – although it is not clear and explicit authority for the proposition - that Article 14 could require religious differences to be accommodated unless there is an objective and reasonable justification not to do so: In *Thlimmenos v Greece,* the applicant was not appointed as a chartered accountant on the basis of a previous criminal conviction which comprised of him disobeying, due to his religious beliefs as a Jehovah's Witness, an order to wear military uniform. The Court held that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different". [33]

25. Far from considering whether any objective and reasonable justification could be found in *Ebrahimian*, such that reasonable accommodation could be

[32] Judge O-Leary: "It is difficult to conclude that when the applicant first signed a contract with the CASH, she could have foreseen that the wearing of an Islamic headscarf (which, furthermore, she wore in her interview and for several months after she first started work without comment), would lead to disciplinary proceedings and, effectively, to dismissal. Of course, as the Court has recognized, the meaning or impact of the public expression of a religious belief will differ according to time and context and the rules in this sphere will consequently vary from one country to another. However, the wider the margin of appreciation left to States, the more accessible and foreseeable the legal framework on which they rely should be. It is questionable whether this standard was met in 1999-2000 and the majority judgment could be read as assessing the requirement of lawfulness not with reference to the law as it stood then but with reference to the law as it stands now, following 15 years of a wide and undoubtedly sensitive debate in French society."

[33] ***Thlimmenos v Greece***, App N. 34369/97 (ECtHR, 6 April 2000), para.44

developed from an emphasis on proportionality, the Court has moved further away from its softened approach in *Eweida* and left the margin of appreciation test devoid of substantive effectiveness in Article 9(2) cases, in particular, perhaps, where minorities are concerned. It is worth repeating what Judge O'Leary recorded in *Ebrahimian:-*

> "A wide margin of appreciation must be supported by a legal framework which is both foreseeable and accessible. Equally, that same margin of appreciation must not absolve the Member States, at first instance, and, one step removed, the Court, of their obligation to ensure a concrete assessment of proportionality, particularly when what is at issue is a blanket ban which interferes with the rights of an individual, while also potentially affecting the employment opportunities of an entire collectivity."[34]

26. It is worth considering the extent to which the margin of appreciation works as a construct within an equality context. Cultural, historical and national reasons often form part of the entrenchment of traditions that give rise to inequality – such has been recognised, for example, within an equal pay framework. Equality law exists to put right those balances which have gone wrong, often engendered through historical, cultural and national traditions. Insofar as those reasons are put forward to explain away equality, within the context of the margin of appreciation, is it doubtful that such an approach works properly, or even at all, within the context of an equality analysis. To this degree, there is a tension between the stricter preventative provisions of an indirect discrimination analysis and the looser framework of the enabling provisions of the Convention.[35] It therefore requires particular care if extrapolation from Strasbourg case-law is to assist either domestic or EU development of equality law.

Is there any consensus between Member States on religion and belief?

[34] Judge O'Leary, *Ebrahimian v France*.
[35] See Lucy Vickers*: ECJ Headscarf series (2): The role of choice and the margin of appreciation,* 8 September 2016, Strasbourg Observers.

27. There is little doubt that Strasbourg's case-law has been heavily influenced by the French and Turkish approach that embodies secularism as founding principles. However, domestic case law in different European jurisdictions presents a more chequered landscape.

28. In *Leyla Şahin v. Turkey*, the Strasbourg Court observed that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society … and the meaning or impact of the public expression of a religious belief will differ according to time and context'. [36]

29. France has upheld as lawful any discrimination against religious dress in furtherance of laïcité. For example, the criminalisation of the burqa was upheld in the Court of Cassation in *SAS* before it went to Strasbourg. The same court has considered questions in the private sphere, most notably *Baby Loup* in 2014, a case concerning the dismissal of a woman from a private crèche for wearing a hijab. Her dismissal was found not to be discriminatory; the legitimate aim could not be laïcité per se, as that was a state matter, but similar principles were used to justify the dismissal.

30. Belgium has taken a similar stance, having criminalised the burqa in public since June 2011. The Belgian Constitutional Court upheld that ban[37] on the basis of the following legitimate aims: public safety, gender equality and a 'certain conception of "living together" in society'. However, a more recent judgment Council of State judgment[38] rejected a blanket ban on headscarves, in relation to the ban being imposed on pupils displaying religious signs in a Flemish public school, requiring justification by evidence where the neutrality of an organisation may impact on the rights of others[39].

[36] *Leyla Şahin v. Turkey* (App. No. 44774/98) 10 November 2005 § 109.
[37] Case number 145/2012
[38] Judgment of 14 October 2014
[39] Eva Brems asserts that notwithstanding that judgment, the network of public schools has not changed its policy and most of the public schools have upheld the ban in defiance of the ruling. She states that in 2015, several schools extended the ban to the wearing of long skirts by Muslim girls. For further consideration of the situation in Belgium, see *The Field in which Achbita Will Land – A Brief Sketch of Headscarf Persecution in Belgium*, September 16, 2016, Eva Brems. She describes: "The corporate anti-headscarf policy that is challenged in the *Achbita* case has to be situated in the context of a country that has seen headscarf bans expand like an

31. Germany has adopted a more nuanced approach. A similar conclusion has been reached in Germany, by a Constitutional court judgment of 27 January 2015[40]. The Court reviewed whether a Muslim teacher had been lawfully reprimanded for wearing a headscarf to work. Legislation prohibited school teachers from expressing political, religious or ideological views that could endanger the state's neutrality. The court found that the teacher's religious rights were engaged and that simply wearing religious clothing does not interfere with students' own freedom of faith. There was some support for students learning in a religious-pluralist and interdenominational setting. The court observed there was no right for people not to be exposed to someone else's exercise of their religion

32. Similarly, other jurisdictions have been more cautious. The Spanish Supreme Court, in a very progressive ruling considering the recent political landscape, has considered the criminalisation of full-faced veils[41]. Here, the regional law was struck down, in part because the regional government had produced no evidence that the legitimate aims pursued (public safety, order, and 'tranquillity') were satisfied by the ban. Indeed, it was recorded that social integration was likely to be hindered by the ban as it would have the effect of isolating Muslims[42], that the ban interfered unduly with the private rights of individuals as believers and moreover, that there should be no automatic presumption that the niqab was imposed on women by third parties[43]. This

oil stain from one sector to the next. This results in a situation which can, without exaggeration, be termed 'headscarf persecution'. Bans that affect mainly the Muslim headscarf are popping up in all sorts of environments, to the effect that the headscarf itself is de-normalized and is almost automatically problematized. In any context whatsoever, a real risk exists that someone will question whether the headscarf can be allowed, and a real risk exists that the answer to such a question will be negative. As a result, Muslim women who wear a headscarf in Belgium gradually become outlaws."

[40] *1 BvR 471/10 and 1 BvR 1181/10*

[41] Case number 693/2013, 6 February 2013.

[42] The Supreme Court referred to other international human rights standards, such as the UN Human Rights Committee decision against Uzbekistan (2004), which established that the prohibition of the use of religious garment can violate the freedom of religion, as recognized by the International Covenant on Civil and Political Rights.

[43] *For a detailed analysis of the decision, see Open Society Foundation Case Watch: Spanish Supreme Court Repeals City Burqa Ban* March 22, 2013 Maxim Ferschtman & Cristina de la Serna

judgment preceded *SAS*, however. Once Strasbourg had given the green light to such a ban, the Spanish government indicated an intention to introduce it. No national legislation has yet been enacted, however.

33. The UK is yet to encounter such bullish cases at appellate level. The leading authority remains *Eweida* in the Court of Appeal and in Strasbourg. In *Eweida*, the Court of Appeal found the claim failed on multiple grounds, including on the issue of justification. However, the matter was determined on facts indivisibly connected to the case and provides little precedent. In other cases, the UK courts to date have taken a more balanced view, with close findings of fact in each case, and usually with a disclaimer that general principles should not be derived from those judgments[44].

34. Overall, it seems that European countries with aggressive notions of secularism have led the international landscape on questions of manifestation of religion in the workplace and in the public sphere more generally. Will the CJEU be prepared to transpose that political ideology into its judgments on the Directive, or will it be prepared to take a harder look at justification, in line with its restrictive interpretation in respect of other protective characteristics?

CJEU: Putting the principle of non-discrimination firmly in front?

The legal framework

35. Equality is a founding principle of EU law, as now enshrined in in Article 21 of the Charter of Fundamental Rights and given specific expression in the Framework Directive. The legal framework to equality in the European Union is set out in Appendix 1.

https://www.opensocietyfoundations.org/voices/case-watch-spanish-supreme-court-repeals-city-burqa-ban.

[44] *R (on the application of Begum) v Denbigh School Governors* [2006] UKHL 15; [2007] 1 A.C. 100 or *G v St Gregory's Catholic Science College Governors*[2011] EWHC 1452 (Admin); [2011] Eq. L.R. 859; [2011] E.L.R. 446.

36. In the context of age discrimination, the Court has held that the principle of non-discrimination must be regarded as a general principle of EU law which has been given specific expression in the Framework Directive in the domain of employment and occupation[45].

37. In his Opinion in *Coleman*[46], AG Maduro noted that equality is one of the fundamental principles of EU law. Part of his Opinion is set out at the start of this paper and represents his view that the values underlying equality are those of human dignity and personal autonomy which dictates that 'individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options'.

38. The Recitals to the Framework Directive make plain that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential, and to that end discrimination in the field of work is prohibited[47].

39. It is, then, perhaps surprising that it has taken this long for the Framework Directive to reach Luxembourg in respect of religious discrimination. Two cases were heard by the Court in March 2016: *Achbita*[48] and *Bougnaoui*[49]. Although a little different on the facts, both cases essentially confront the question of whether employers are entitled to have bans on the headscarf, and if so, whether they are entitled to dismiss an employee who refuses to comply with it? In both cases, the employer was private. However, in *Achbita*, the employee started to wear the hijab at work, during working hours, after some three years of

[45] *Prigge and Others v Deutsche Lufthansa AG*, C-447/09, EU:C:2011:573, para.38.
[46] *Coleman v Attridge Law*, C-303/06, EU:C:2008:61, Opinion of Advocate General Poiares Maduro.
[47] The so-called Horizontal Directive, which proposes to equalise protection between the protected characteristics and thereby seeks to extend the non-discrimination provisions in respect of age, disability and religion or belief outside of the sphere or employment alone as for race and sex, remains stuck in the wheels of EU negotiations.
[48] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Case C-157/15.
[49] *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA,* Case C-188/15.

employment in which she had worn it only outside of working hours. In *Bougnaoui*, the employee had always worn her headscarf and her working time was divided between the employer's premises and visiting clients' premises. The questions for the Court are framed differently in that the Belgian referring court in *Achbita* asks whether the neutrality rule amounts to direct discrimination. In *Bougnaoui*, the French referring court asks whether the neutrality rule can amount to an occupational requirement where the clients request it. In grappling with these questions, the Court must now decide upon the direction and level of protection it will afford to this protected characteristic. There will be no shortage of controversy generated by its decision, whichever way it goes, as the two completely contrasting decisions of two different Advocate-Generals, demonstrates.

40. AG Kokott delivered the first Opinion, in *Achbita,* on 31st May 2016. It is open to many grounds of challenge. Arguably every stage of the reasoning relating to justification at once overstates the need and scope of religious neutrality and understates the violation of the integrity and religious rights of the employee. In that respect, the opinion resembles that of the majority judgment of the Grand Chamber in *Ebrahimian.*

41. What is particularly concerning is the ease with which she is able to find that, if there were to be direct discrimination, a genuine occupational requirement would be made out despite a complete absence of consideration as to whether wearing a headscarf is genuinely necessary and determining to perform the role of a receptionist. Art. 4(1) must be interpreted strictly[50], as both the provision Recital 23 of the Framework Directive provides. The occupational requirement exception would only apply in 'very limited situations'. The opinion appears to dismiss that emphasis and analysis.

42. Kokott's consideration of proportionality is limited and narrow. The opinion demotes religious discrimination among a hierarchy of protected characteristics

[50] See *Wolf* (C-229/08, EU:C:2010:3, para 35) , *Prigge and Others* C-447/09, EU:C:2011:573, para.66 and *Vital Pérez* (C-416/13, EU:C:2014:2371, para.36).

on the ground that manifestation of belief does not constitute an immutable feature and that it is a mode of conduct based on a subjective decision or conviction. The lack of proper analysis has the result that she accords the freedom to conduct a business (enshrined in Article 16 of the Charter) as essentially more important than one's religion or belief amongst a sliding scale of rights[51]. The violation to the individual's integrity is generalised, understated and based on unjustified assumptions. Nor is the analysis properly extended to its rational conclusions. Take the Sikh turban, for example, which is absolutely fundamental to the faith of many Sikh men. It is not something an employer can casually demand be removed in order to fit with the company's projected image.

43. There is a critical omission of any evidence-based approach on justification. Nor is there any proper analysis of why the customers' requirements carry such import, particularly when contrasted with *Firma Feryn*[52], where customers' preferences (not to allow 'immigrants' into their homes) dictated a company recruitment policy which the CJEU, following a detailed opinion from AG Maduro, found amounted to direct discrimination.

44. At para 76 of her opinion. AG Kokott states:

> 'Some undertakings may consciously set themselves the goal of recruiting a **colourful and diversified workforce** and turn the very diversity that it showcases into its brand image. However, an undertaking — such as G4S in this case — may just as legitimately decide on a policy of strict religious and ideological neutrality and, in order to achieve that image, demand of its employees, as an occupational requirement, that they present themselves in a correspondingly neutral way in the workplace.' (**My emphasis)**

45. Yet the two fundamental questions she omits to ask are:
    (a) Why should customers or end-users be permitted to object to the wearing of a religious item of clothing or jewellery? And

[51] See paras.81-4 of the Opinion.

[52] *Centrum voor gelijkheid van kansen v Firma Feryn NV* (Social policy) [2008] EUECJ C-54/07 (10 July 2008) [2008] 3 CMLR 22

(b) Why should end-users or clients assume that the wearing of an item of religious significance affects the employer's own secular approach?

46. The failure to address either of these questions, as the majority judgment of the Grand Chamber in *Ebrahimian* failed to do, appears both as lazy analysis and ideologically driven, minimising the value of pluralism in a democracy. Worse, the conclusions reached in both cases enable minorities to become easy targets for discriminatory prejudice and bias. Headscarves, kippahs, turbans are all visible signs of belonging[53] and/or belief, but that does not necessarily make them "ostentatious" (without more). The argument is no more than circular spin. Switch the religious target for a racial or gender target and see what happens. The very purpose of the Framework Directive is to recognise that minorities are in need of protection to ensure their integration into a socially and economically critical working life. By adopting an easy get-out clause, employers need do no more than cry secularism, and there is no need for an evidence-based approach to restriction.

47. This is what the CJEU effectively prohibited, and rightly so, in its *Firma Feryn*[54] judgment. Mr Feryn gave an interview in the following terms on Belgian television:

> '[W]e have many of our representatives visiting customers … Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: "no immigrants". … I must comply with my customers' requirements. If you say "I want a particular product or I want it like this and like that", and I say "I'm not doing it, I'll send these people", then you say "I don't need that door." Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done![55]

[53] Consider the argument of Wintemute (2014): *Accommodating religious beliefs: ham, clothing or symbols and refusals to serve others*, Modern Law Review 77: 223-253. Wintemute argues "public sector employees who wear religious clothing or symbols to work..are doing no more than making their cultural differences visible, and giving their workplace the same visible diversity as the street or public transport'.
[54] See previous fn.
[55] Taken from para. 4 of AG Maduro's Opinion.

48. At para. 17-18 of AG Maduro's Opinion, he says:

> 17. It would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive, because by implication Member States would be permitted, under the Directive, to allow employers to differentiate very effectively between candidates on grounds of racial or ethnic origin, simply by publicising the discriminatory character of their recruitment policy as overtly as possible beforehand. Thus, the most blatant strategy of employment discrimination might also turn out to be the most 'rewarding'. That would clearly undermine – rather than promote – conditions for a socially inclusive labour market. In short, it would defeat the very purpose of the Directive if public statements made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin would be turned down, were held to fall outside the concept of direct discrimination.
> 18. The contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies. Even if that contention were true, it would only illustrate that 'markets will not cure discrimination' and that regulatory intervention is essential. Moreover, the adoption of regulatory measures at Community level helps to solve a collective action problem for employers by preventing the distortion of competition that – precisely because of that market failure – could arise if different standards of protection against discrimination existed at national level.

49. This sits at complete odds with AG Kokott's analysis on legitimate aim. Although AG Kokott accepts that businesses must not "pander blindly and uncritically to each and every demand and desire expressed by a third party"[56] and accepts that a customer's requirements that he be served only by employees of a particular religion, ethnic origin, colour, sex, age or sexual orientation, or only by employees without a disability would "obviously not constitute a legitimate objective", she then goes on to find that the headscarf ban, as part of G4S's policy of religious and ideological neutrality and which the undertaking imposed on itself, neutrality "is absolutely crucial, not only because of the variety of customers served by G4S, but also because of the special nature of the work which G4S employees do in providing those services, which is characterised by

[56] At para. 90 of the Opinion.

constant face-to-face contact with external individuals and has a defining impact not only on the image of G4S itself but also and primarily on the public image of its customers."[57] In other words, she then elevates the place of corporate image itself to fundamental importance, this time in contrast with the findings of the Strasbourg court in *Eweida*. In concluding, as the employer urged, that 'external individuals might associate with G4S itself or with one of its customers, or even attribute to the latter, the political, philosophical or religious beliefs publicly expressed by an employee through her dress', AG Kokott finds that any such ban would be proportionate. Indeed, given all that came before, it would be surprising if she had not found that. In considering proportionality, she found that, for example, adopting a hijab in uniform colour and style would be "much less satisfactory, not to say entirely inappropriate, for the purposes of achieving the objective of religious and ideological neutrality which G4S has laid down as an occupational requirement. After all, an employee who wears an Islamic headscarf displays a visible religious symbol whether or not the headscarf matches the colour and style of his work clothes. What is more, if the religious symbol forms part of the uniform, the employer actually departs from the path of neutrality which it has itself elected to follow."[58]

50. She goes on explicitly to state that EU legislature generally provides 'reasonable accommodation' in relation only to persons with disabilities, 'in order to guarantee compliance with the principle of equal treatment' and that employers ought not to be required to make such provision because it would be too onerous, and that some "religious customs which the employee does not necessarily have to observe in the workplace but can generally perform outside work as well."[59]

51. In short, the *Achbita* Opinion significantly devalues the prohibition placed on religious discrimination in the workplace, through the use of the genuine occupational requirement exceptions or through a broader analysis. If she is right, and the CJEU follow suit, the result is a far weaker standard of protection

[57] At paras.93-5 of the Opinion.
[58] See paras.104-9 of the Opinion.
[59] At para.110 of the Opinion.

for those minorities whose attire may be visibly different. Moreover, it normalises the concept that to look different is to be different, and that such difference is either problematic or not acceptable in the workplace, It is to be hoped that the CJEU will not follow her judgment, and instead prefer the view of AG Sharpston in Bougnaoui[60], whose approach and intellectual rationale is completely different.

52. AG Sharpston works from the premise that "it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not."[61]

53. She stresses that the need for Article 4(1) to be interpreted strictly means that it cannot be used to justify a blanket exception since it must be limited to matters which are absolutely necessary in order to undertake the professional activity in question, such as in health and safety at work. Accordingly, she does not see "any basis on which the grounds which Micropole appears to advance in the dismissal letter for dismissing Ms Bougnaoui, that is to say, the commercial interest of its business in its relations with its customers, could justify the application of the Article 4(1) derogation"[62], particularly since the freedom to conduct a business was itself subject to limitations.

54. Her Opinion contains some fascinating discussion on the role of reasonable accommodation within an indirect discrimination, proportionality context:

> …there may be instances where the particular type of observance that the employee regards as essential to the practice of his/her religion means that he cannot do a particular job. More often, I suggest, the employer and employee will need to explore the options together in order to arrive at a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business. Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment. A solution that lies somewhere between those two positions is likely to

[60] *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA, AG Opinion of 13 July 2016.*
[61] At para.118 of the Opinion.
[62] See para.100 of the Opinion.

> be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential.[63]

55. The footnoted example which AG Sharpston gives to illustrate the point is helpful:

> Suppose, for example, that the employee regards himself as being under an obligation to pray three times a day. Against the background of a normal office day, that is relatively easy to accommodate: prayer before and after work and prayer during the lunch break. Only the latter is during the actual working day; and it is during the official free time (the lunch break). Now suppose the obligation is prayer five times a day. The employee argues that he needs to be allowed two more prayer times during the working day. The first question is whether that is really the case – can one or both of the additional times for prayer not also be scheduled for before or after he comes to work? But perhaps the prayer times are linked to specific times of the day. If so, perhaps there are coffee or smoking breaks during the working day that the employee can use for prayer; but probably he will have to agree to work later or arrive earlier in order to compensate the employer for his temporary absence from work in order to fulfil his religious obligation. If necessary, the employee will have to accept the additional constraint (a longer working day); the employer will have to allow him to do that rather than insisting that no accommodation is possible and dismissing the employee.[64]

56. Of course, the example given need not result in dismissal, or accommodating the 5 prayer times. There may be good reasons why it is not possible for the employer to offer two additional breaks. The point of a reasonable accommodation test, or a proper proportionality approach, is to ensure that where it is viable, a solution can be reached rather than through litigation or imposing isolation. It is, in effect, recalibrating mind-sets rather than allowing an immediate refusal.

57. If the Court is to follow the Opinion of AG Sharpston, it will be edging itself towards a test of reasonable accommodation, whether explicitly framed or

[63] At para.128 of the Opinion.
[64] At fn. 120 of the Opinion.

otherwise. A coherent, inclusive and pluralistic approach requires that the Court adopt a stance that pushes it beyond any assertion of neutrality, secularism or even of equality as a blanket explanation, without evidential justification, in order to provide effective equality to Europe's religious communities and minorities. By elevating secularism to a belief that requires nothing more, the Strasbourg courts (and indeed AG Kokott) leave a material and significant gap in protection for those whose beliefs make them visible targets. By focusing on policy rather than substance, whole communities can feel exposed and isolated by protection that seems to be denied to them. Moreover, it makes some equality more equal than others.

58. The CJEU judgments in both *Achbita* and *Bougnaoui* are eagerly awaited. Their impact will be important in a climate of increasing intolerance. There is a danger that, if the Court follows Strasbourg's restrictive jurisprudence, and the opinion of AG Kokott, that more subtle analysis that UK courts and tribunals have sought to adopt will disappear within a justification defence (even to direct discrimination by way of an expanded and expansive genuine occupational requirement) that will place neutrality at the heart of any analysis.

59. In a different legislative context, the CJEU has considered already that the accommodation of a religious belief was desirable: In *Prais v a Council*[65], the CJEU considered that, although he failed on the facts, it would have been desirable to accommodate a Jewish applicant who had asked for a competition date to be changed which clashed with a religious observatory day.

60. It is worth noting that, on the French secularism cases, the UNHRC has taken a notably different view, at least in the context of education, interpreting Article 18, the ICCPR equivalent of Article 9 ECHR[66]. These emphasise proportionality

[65] *Prais v Council* ECLI:EU:C:1976:142, Case 130/75

[66] *Bikramjit Singh v. France*, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (2013), at para. 8.7: "The Committee notes the author's statement, not challenged by the State party, that for Sikhs males, wearing a keski or turban is not simply a religious symbol, but an essential component of their identity and a mandatory religious precept. The Committee also notes the State party's explanation that the prohibition of wearing religious symbols affects only symbols and clothing which conspicuously display religious affiliation, does not extend to discreet religious symbols and the Council of State takes decisions

and an evidence-based approach to restrictions on the right to manifest religious belief through an analysis similar to that of the reasonable accommodation test, deployed, for example, in Canada.

61. This approach offers the CJEU a way out of promoting a narrow, and questionable, political doctrine of secularism which has been endorsed by Strasbourg to date. It puts an emphasis on the need for balancing prejudice with an evidence-based approach to justification and proportionality. Cases where there is a genuine difficulty emerging from distinct religious attire can be properly distinguished from a blanket position of prejudice dressed up in the language of necessity. In addition, it is to be hoped that the CJEU will revert to the strictly limited circumstances in which a genuine occupational requirement will be deployed to justify religious, or any, discrimination.

Towards a test of Reasonable Accommodation?

62. There are usually three key areas in which religious accommodation may be sought in the workplace:

    (a) Workplace attire and dress;
    (b) Working patterns or time off for religious observance;
    (c) Adapting duties (also known as conscientious objection cases).

in this regard on a case-by-case basis. However, the Committee is of the view that the State party has not furnished compelling evidence that, by wearing his keski, the author would have posed a threat to the rights and freedoms of other pupils or to order at the school. The Committee is also of the view that the penalty of the pupil's permanent expulsion from the public school was disproportionate and led to serious effects on the education to which the author, like any person of his age, was entitled in the State party. The Committee is not convinced that expulsion was necessary and that the dialogue between the school authorities and the author truly took into consideration his particular interests and circumstances. Moreover, the State party imposed this harmful sanction on the author, not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct. In this regard, the Committee notes the State party's assertion that the broad extension of the category of persons forbidden to comply with their religious duties simplifies the administration of the restrictive policy. However, in the Committee's view, the State party has not shown how the sacrifice of those persons" rights is either necessary or proportionate to the benefits achieved. For all these reasons, the Committee concludes that the expulsion of the author from his lycée was not necessary under article 18, paragraph 3, infringed his right to manifest his religion and constitutes a violation of article 18 of the Covenant."

63. The gateway to an indirect discrimination claim (which is the usual route for the area in which religion or belief are usually manifested in the workplace) requires there to be group disadvantage. An important aspect of *Eweida* is that there is now some resonance between an Article 9 approach, and that of indirect discrimination, which the Court appears to have accepted in its analysis[67]. However, where Strasbourg empowers an individual, indirect discrimination requires evidence of group disadvantage. Neither the Framework Directive nor the Equality Act 2010 intend to address individual disadvantage[68]. That can make bringing a claim of indirect discrimination particularly difficult[69], especially for those individuals for whom there is a more subjective element (always presupposing it is sincere and genuine), or for whom the embodiment of religious beliefs in a particular form of manifestation may be very difficult[70].

64. If the employee is able to get past the group disadvantage aspect, there remain competing tensions in the analysis above in the justification pursuant to both direct (by way of genuine occupational requirement) and indirect discrimination (as well as in respect of the margin of appreciation for Article 9 cases). Whilst the CJEU may yet resolve that tension in respect of the anti-discrimination framework at least, questions over the effectiveness of protection still remain, not least because it will remain for individual courts to analyse the legitimate aim.

65. The ease with which this can be met by the employer then makes it especially difficult to overcome the hurdle of that legitimate aim through an analysis of proportionality. Once it has been established that the protection of the rights of others, for example, is the aim of the PCP (particularly in clash of rights cases,

[67] At para.84 of the judgment.
[68] See paras.15-8 of *Eweida* [2010] IRLR 322 and the judgment of Sedley LJ. See further the majority as well as dissenting judgments of Bratza and Bjorgvinsson in ECtHR.
[69] See, e.g., *Mba v Mayor & Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562. The Claimant was a Christian employee who believed Sunday was a traditional day of rest. The Court of Appeal noted that there could be a diversity of beliefs within one religion or faith impacting upon group disadvantage.
[70] In *Eweida,* the Court of Appeal held that since the Claimant could not provide evidence of anyone else who shared her belief, there was no prima facie case of indirect discrimination because the employee could not show that the employer was applying a PCP (provision, criterion or practice) which 'put or would put persons of the same religion or belief as (the claimant) at a particular disadvantage when compared with other persons.'

but potentially also, for example in health and safety matters or any general equality argument), it becomes very difficult to show that the measure in question is not proportionate. The question of whether an accommodation could have been made, which was reasonable and provided a solution, often never arises in practice because by then the analysis has gone too far away from the solution. It is for that reason that an indirect discrimination framework was also insufficient to protect disability sufficiently, and thus the introduction of a reasonable adjustment framework.

66. In the wake of *Eweida,* it has been argued by some commentators that employers are having to meet a test of reasonable accommodation in any event.[71] The EHRC, in the wake of the landmark decision, produced Guidance to Employers, indicating[72]:

> Employers are encouraged to take as their starting-point consideration as to how to accommodate the request unless there are cogent or compelling reasons not to do so, assessing the impact of the change on other employees, the operation of the business and other factors.[73]

[71] See, e.g. *Taking Religion Seriously,* Gwyneth Pitt, ILJ Vol 42, 4th December 2013.
[72] *Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgements*, EHRC, 1st March 2014
[73] The Guidance states that in order to reach a fully considered, balanced, and reasonable conclusion, an employer should consider, amongst other factors:

- The cost, disruption and wider impact on business or work if the request is accommodated;
- Whether there are health and safety implications for the proposed change;
- The disadvantage to the affected employee if the request is refused;
- The impact of any change on other employees, including on those who have a different religion or belief, or no religion or belief;
- The impact of any change on customers or service users, and
- Whether work policies and practices to ensure uniformity and consistency are justifiable.

67. The reasonable accommodation test is controversial and faces significant opposition[74]. A common objection to a reasonable accommodation requirement is that religion or belief may be perceived as trumping other rights, which causes additional concern given the wide range of matters that have been held to be protected as a belief by the courts and tribunals[75].

68. However, in my view, the protected characteristics are not identical and may require some differentiation in order to ensure protection in substance and not just in form. Disability, whilst the obvious characteristic (and at present the only one using the language of reasonable adjustment), is not alone amongst those characteristics which require some nuance in order to make them effective, and particularly where rights are perceived to challenge the inherent value of other rights. Age discrimination, for example, often presents a straightforward apparent conflict between the rights of the young and old. Pregnancy and maternity discrimination requires, by definition, that no comparator be deployed. Inherent in the advancement of equality lies the fundamental notion that anti-discrimination measures are required to level the playing field. Different characteristics may require different measure to achieve that aim[76].

69. Moreover, the failure to recognise intersectional discrimination legally can leave minority groups particularly exposed and isolated through tolerating prejudice caused by visible difference.

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[74] See, for example, Edge and Vickers: R*eview of Equality Law relating to Religion or Belief, Research Report 97*, summer 2015 for EHRC: https://www.equalityhumanrights.com/sites/default/files/research-report-97-review-of-equality-and-human-rights-law-relating-to-religion-or-belief.pdf, which lists many of the objections, including the provision of too much protection for religious interests over and above the working rights of others. See further the position of the National Secular Society, e.g. at http://www.secularism.org.uk/blog/2015/10/the-unreasonableness-of-reasonable-accommodation. See also *Taking Religion Seriously,* Gwyneth Pitt, ILJ Vol 42, 4th December 2013 who argues against the introduction of the test because to do would prioritise religion in the hierarchy of protected characteristics.

[75] There remain outstanding difficult questions, e.g., as to whether political beliefs are or should be covered by this provision, notwithstanding the ECtHR decision in *Redfearn v UK* [2013] IRLR 51 and see further *Grainger v Nicholson* [2010] IRLR 4, EAT.

[76] See further Sara Benedi Lahuerta: *Taking EU Equality Law to the Next Level: In Search of coherence.* European Labour Law Journal Vol 7 (2016) No.3

70. Religion or belief is the only protected characteristic which is protected as a positive right within the international framework – Article 9(1) ECHR, for example.

71. It is also inherently different from other protected characteristics which are objective, whereas religion or belief is, or at least may be in the manifestation of that belief, inherently subjective, or individualised[77].

72. Perhaps the most controversial aspect in the debate over accommodating religious beliefs arises where a clash is perceived between competing rights. This has most-often taken place in the context of sexual orientation, but could impact on other protected characteristics, such as gender, as well. However, even in *MacFarlane* and *Ladele*[78], as Gwyneth Pitt argues[79], those media headlines were misplaced because the applicants were seeking permission to directly discriminate on grounds of sexual orientation, which is not permitted by law. Had the beliefs of Mr McFarlane[80] and Ms Ladele[81] been accommodated in the workplace (they believed that same sex partnerships conflicted with their interpretation of Christianity), that would have led ultimately to the employer refusing to serve same-sex couples and countenancing or facilitating discrimination against end-users. Insofar as any clash existed, it would be resolved through an application of the principles of indirect discrimination, which is capable of justification, rather than the preference of one right over another. Although the imposition of a reasonable accommodation test may not (or should not) have led to any different result in the individual circumstances

[77] As Sedley LJ pointed out in the CA in *Eweida*, para 40, and see Griffiths, above, who argues: "The manifestation of religious belief is potentially more like disability than sex or race are, because of the multifaceted nature of religious belief which..can often be interpreted by an individual belief in a variety of ways. Whether one believes that one should dress modestly in public or whether one believes Sunday must be a day of rest and is therefore wholly relevant to working hours, religious belief is complex and the requirements of indirect discrimination do not allow for a particular nuanced or individualized approach to eh manifestation of religious belief. Disability is similarly multifaceted and complex and the requirement of group disadvantage for indirect discrimination claims would similarly disadvantage employees.."

[78] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

[79] See above.

[80] Required to provide counselling to same-sex couples as well as heterosexual couples.

[81] Required, as a registrar, to register civil partnerships of same sex couples.

of those cases, the aim of a reasonable accommodation test is wider than an individual set of facts[82].

73. Some commentators suggest that a reasonable accommodation duty in religion or belief might provide for a more workable relationship between the public space of work and the private sphere of religion or belief which may be carried into it, even unwillingly. For example, Gibson argues that a duty modelled along the Canadian religious reasonable accommodation[83] test would help to 'facilitate better judicial engagement with individual interests as balanced with competing factors'[84].

74. I agree with the view expressed by Gibson[85], that where there may be a perceived conflict between rights, one of those may yet trump the other within an assessment of proportionality as part of an indirect discrimination claim but the introduction of the test provides a more 'transparent framework than indirect discrimination.'

75. An EHRC Research Report (Edge and Vickers, 2015), recognising the significant difference of opinion over the introduction of this test, suggests that one alternative to a fully-fledged duty of reasonable accommodation would be to introduce a right to request accommodation, similar to the right to request flexible working.[86] In my view, given the lack of teeth behind the flexible working, such an approach would be, in practice and effect, rather meaningless.

[82] Griffiths[82] argues that when the factors that would weigh in a reasonableness balance are applied to case-law already made, the results may not be that different and may be just a symbolic gesture but that it may advance the debate on religion in the workplace.
[83] For reasons of space, I do not explore the Canadian, or the US, system of reasonable accommodation in this paper. However, it is my view that the Canadian model has much to be commended.
[84] Gibson (2013) *The God, Dilution religion, discrimination and the case for reasonable accommodation*, Cambridge Law Journal 72: 578-616.
[85] See above.
[86] At pp.50-57 of the Report.

Conclusion

76. There is little doubt that secularism, and conversely religious or other belief, raises controversy and emotion, particularly in this heated political and social climate. But whilst secularism is an absolute founding principle, on both a legal and emotional level in France, it does not occupy the same space in British society and constitution. Rather, pluralism has been an important factor in the development of domestic jurisprudence on religion and belief, often on a case-by-case basis which calls for a proper analysis of individual circumstances and evidence. The discussion above suggests that there are, or may be, significant gaps in substantive protection for religion and belief. What is clear from the analysis above is that there are significant gaps in protection in respect of religion and belief.

77. If the CJEU does follow the AG opinion in *Achbita*, it will open the door to the UK, Spain, Germany and other countries that have previously taken a more nuanced and balanced approach to adopt a hard line on matters of religious tolerance. That would be an unwelcome step which would be difficult to reverse.

78. Whatever the CJEU now does, it seems likely that the United Kingdom will be exiting from its jurisdiction in the foreseeable future. With or without it (and noting that even the ECHR remains subject to attack from those in government presently[87]), the country is bound to provide effective protection.

79. There is now growing evidence of an increase in racial hatred, Islamophobia and intolerance across the UK and Europe. Discrimination law has always led the way in changing and tackling society's perception about minorities and equality.

80. The shift towards a test of reasonable accommodation test does not signify that every religious stance must be accommodated in the workplace. Part of the aim of the introduction of a reasonable accommodation test is to re-frame and

[87] On 4 October 2016, for example, Prime Minister May indicated that she "was not a fan of the European Convention on Human Rights".

recalibrate the balance of tolerance in positives, rather than negatives, leading to more open dialogue and communication about challenges in the workplace[88] and seeking to resolve them amicably rather than through a litigation forum, which the indirect discrimination framework often inevitably creates. If a difference is not made into a problem from the outset, it may not prove to be a problem to accommodate it.

81. The mere recognition that religion forms part of someone's identity which they carry with them everywhere neither implies that it is necessarily an immutable characteristic nor that it does or should be prioritised over other protected characteristics, merely that it must be factored both formally and substantively within a proportionality assessment[89]. The other part of the aim is to ensure effective protection for the individual, which at the moment risks being deprived through requirements of group disadvantage and the ease of an employer meeting a legitimate aim, rendering obsolete to all intents and purposes the proportionality requirement as the last step in a series of hurdles. Moreover, the elevation of secularism to a belief which is either first among equals or which trumps all others risks leaving those of religious belief and persuasion isolated or alienated from the workplace.

82. Bringing in a reasonable accommodation test shifts the societal (and the employer's) mind-set away from prejudging difference as an inherent problem, and enables a focus on individual dignity whilst nevertheless recognising the employer's need to run a business effectively. The introduction of such a test would ensure a substantive approach to equality rather than a purely formal, ensuring full participation in the labour market, particularly of those from minority religions.

83. It would also send a very strong, dynamic signal to society and courts alike, that tolerance and pluralism are valued in our diverse society, and that substantive equality must be both meaningful and inclusive.

[88] See, e.g. Edge and Vickers, at pp50-56.
[89] It appears that this is supported by the analysis of AG Sharpston in *Bougnaoui*, and see further *Lucy Vickers: ECJ Headscarf series (2): The role of choice and the margin of appreciation,* 8 September 2016, Strasbourg Observers.

October 4th 2016

APPENDIX 1

Relevant Legal Framework

Treaty on European Union

Article 3(3) TEU provides:

> **'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.**
>
> **It shall combat social exclusion and discrimination, and shall promote social justice and protection equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.**

Article 4(2) TEU states:

> **'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'**

The Charter of Fundamental Rights of the European Union

Article 10 of the Charter states, *inter alia*:

Freedom of thought, conscience and religion

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

Article 16 of the Charter, states:

Freedom to conduct a business

> **(1) 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'**

Article 21 of the Charter states:

Non-discrimination

(1) **'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'**

Article 52 of the Charter provides:

Scope and interpretation of rights and principles

(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

(2) Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

(4) In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Framework Directive 2000/78

The **Recitals** of Directive 2000/78 state, *inter alia,* and in particular:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International

Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination…

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State..

Article 2 of the Directive states, *inter alia*:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion

or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, ...

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

Article 3 of the Directive states, *inter alia*:

'**1. Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:**

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals and pay;

...'

Article 4 of the Directive states:

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 7(1) of the Directive states, inter alia:

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

‘Lion under the throne or rabbit from a hat? Equality as a constitutional right in the law of the United Kingdom’

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I. Introduction

1. You will all know that the United Kingdom has an ‘unwritten Constitution’, by contrast with every other democratic country in the world (and a few undemocratic ones) except Israel and New Zealand. You will also know that in fact we do have a written Constitution - one that, if you agree with Charles Dickens’ Mr. Podsnap[1], ‘*Was Bestowed Upon Us By Providence’* - but it is just not all written down in one place. It is to be found in a number of disparate statutes, conventions, international treaties and the common law. So while we do not have a constitutional right of equality set down in a document like the 14th Amendment to the US Constitution[2] or Article 3 of the German Basic law[3], the principle of equality before the law is protected under the law of the United Kingdom.

2. How is equality protected in our law? First, by the common law principle of equality, which will be the main focus of this talk. Second, it has been codified by a series of far-sighted pieces of anti-discrimination legislation[4], now consolidated in the Equality Act

[1] Charles Dickens, ‘Our Mutual Friend’
[2] Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.
[3] Article 3 [Equality before the law] (1) All persons shall be equal before the law. (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.
[4] Beginning in 1968 with the Race Relations Act (following recommendations made by the Street Report on Anti-discrimination legislation) and including the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995

2010. Third, equality is buttressed by binding provisions of EU law and of the ECHR, in particular Article 14, as given effect by the HRA and interpreted in the light of a series of international equality treaties to which the UK is party[5]. Article 1 of the UN Declaration of Human Rights proclaims '*All human beings are born free and equal in dignity and rights*'. And Article 26 of the International Covenant on Civil and Political Rights 1966, provides:

> *'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*

3. But is equality a 'constitutional right' under the domestic law of the United Kingdom? This question was asked by Prof. Jeffrey Jowell QC in a justly celebrated and much-quoted paper written in 1994[6] (and from which my title is drawn). Twenty years later, the question is still as apt and the answer is still the same: only partially. And does it matter? Yes, it does. We have been often reminded[7], in recent years, that where common law rights are available then it is to these the courts will wish to be referred before Convention rights are invoked. Moreover, the question whether common law and statute give adequate protection to equality will assume critical importance if (or when) Brexit occurs and the HRA is repealed, as it is under EU and Convention law that equality currently finds its clearest expression as a constitutional right.

4. I propose, then to explain first what I mean by a 'constitutional right of equality' before considering whether existing legal norms - common law, statute, EU, HRA – meet those

[5] Including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the UN Convention On the rights of Persons with Disabilities (UNCRDP) and the UN Convention on the Rights of Chidlren (UNCRC)

[6] Jeffrey Jowell, '*Is equality a constitutional principle?*' C.L.P. 1994, 47(2), 1-18

[7] *Osborn v Parole Board* [2013] UKSC 61, [2014] A.C. 1115, paras 54-62; *Kennedy v Information Commissioner* [2015] 2 AC 455, para 133 *A v BBC;* [2015] AC 558, paras 56-57; *R (Sturnham) v Parole Board* [2013] 2 AC 254, paras 28-29; *R (Guardian News and Media) v City of Westminster Magistrates Court* [2013] QB 618, paras 88-89, and *S v L* [2012] UKSC 30, paras 15-17, 76.

standards. I will then outline what, in my view, is necessary in order to give equality proper constitutional protection.

II. What is a constitutional right?

5. Laws LJ has called a constitutional or fundamental right '*one which conditions the legal relationship between citizen and state in some general, overarching manner*'[8]. It may be created by statute[9] or by common law. That much is uncontentious. In addition I would suggest a 'constitutional right' must meet the following criteria:

   5.1. It must be *inalienable* (i.e. it cannot be taken away) and *universal* (i.e. it is a right enjoyed by everyone, regardless of their status).

   5.2. It must be *interpreted in the light of up to date societal values*, not limited to those prevailing at the time the right was first minted

   5.3. It must be capable of *trumping other legal norms that are incompatible with it, including primary legislation*.

   5.4. It must be *'practical and effective'*. This means that certain rights may need to be implied from the express right, both procedural and substantive. In particular, a constitutional right requires two kinds of correlative duties to be placed on the state, both negative and positive. A negative obligation requires the state, by its agents, not to act in a way that is incompatible with a right. A positive obligation requires the State to take positive steps to protect individuals against human rights violations, including by third parties who are independent of the state and circumstances arising as a consequence of disability. Thus the state should (as under the ECHR) be under a substantive obligation to have in place laws (a 'law-making duty'[10]) and systems ('a systems duty') and to take operational measures

[8] *Thoburn v Sunderland City Council* [2003] Q.B. 151
[9] In *Thoburn*, ibid, Laws LJ described a constitutional statute as being one that 'enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights', giving examples including Magna Carta, the Bill of Rights 1689, the Human Rights Act 1998 and the European Communities Act 1972.
[10] An example of the law-making duty is *A v United Kingdom* (1999) 27 E.H.R.R. 611. The applicant, who had been severely beaten by his stepfather with a garden cane, complained that his rights under Article 3 had been violated after his father had been acquitted of assault by reliance upon the common law defence of 'reasonable chastisement'. The Strasbourg Court agreed, holding that there had been a violation of Article 3 because by

(an 'operational duty'[11]) that provide effective protection for individuals against breaches of their constitutional right. There should also be a positive procedural duty requiring the state to assist individuals whose rights may have been breached, including (where appropriate) by carrying out criminal or other investigations (an 'investigative duty'[12]), prosecuting those responsible ('a prosecuting duty') and making available judicial remedies to vindicate their rights (a 'judicial remedy duty').

5.5. It must be *actionable before a court* at the suit of an aggrieved individual. *Access to the court* should be practical and effective, which may require the provision of legal aid.

5.6. In determining whether there has been a violation of a constitutional right *the courts must be able to scrutinise state acts effectively*. While this does not mean the courts should be able to substitute their own views for those of the decision-maker it does require some consideration to be given to the merits of the decision. In practice this means that a proportionality review, rather than *Wednesbury* irrationality review, should be adopted.

5.7. It must give rise to an *effective remedy* for its breach including, where appropriate, financial compensation.

III. What would a constitutional right of equality look like?

6. A constitutional right to equality would have all these general elements common to other constitutional rights. But what specific features would a constitutional right of equality also have? I would propose the following:

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permitting the common law defence of reasonable chastisement the State had failed to provide adequate protection to the applicant against treatment or punishment contrary to Article 3. For an example of an asserted breach of the law-making duty under the HRA see *R (Collins) v SSJ* [2016] EWHC 33.

[11] *Osman v United Kingdom*, (2000) 29 E.H.R.R. 245 is an example of the operational duty in action and, indeed, the first of its kind. The Strasbourg Court held that the police may be under an operational obligation under Article 2 of the Convention to protect an individual that they know, or ought to know, is at a real and immediate risk of life-threatening harm from the criminal acts of a third party, breach of which sounds in damages.

[12] This investigative duty was first implied under Article 2 ECHR in the context of state killings in the 'Death on the Rock' case of *McCann v United Kingdom* (1996) 21 E.H.R.R. 97 but has since been implied in a number of other articles including Articles 3, 4, 5 and 8.

6.1. First, the state – through the acts of public authorities, including parliament and the courts – must be under a duty when *formulating* and *applying* both *law* and *policy* (including the distribution of scarce state resources) to treat everyone equally, unless the difference in treatment may be objectively justified. Equal treatment has two aspects. First, those in a materially identical position must be treated the same. Second, those in a materially *dissimilar* situation may need to be treated *differently*, which may require *reasonable accommodation* to be made. A failure to treat like cases alike, or to treat unlike cases differently, without objective justification constitutes *unlawful discrimination*.

6.2. Second, equal treatment requires not only that the state does not discriminate against people *directly*, i.e. by deliberately formulating or applying the law or policy in an unequal manner. It also requires that the state ensures that law and policy, both in content and application, do not discriminate against people *indirectly*, i.e. by impacting disproportionately upon certain groups who are, by virtue of some attribute inherent in their status, more likely to be adversely affected than others who do not share that attribute.

6.3. Third, when formulating law or policy the state must give due regard to the need to avoid discrimination and ensure that it has the information that is required in advance.

6.4. Fourth, the state must take positive steps to address entrenched inequality within society affecting particular groups. The concept is particularly susceptible to change over time but can now be said to include discrimination on grounds of race, colour, gender, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, age or birth. The list should not be closed.

6.5. Fifth, the state must take positive steps to ensure that third parties do not discriminate, whether directly or indirectly or by failing to make reasonable accommodation.

7. Let us look, first, at whether the common law principle of equality meets those standards.

IV. The common law principle of equality

8. Albert Venn Dicey, the grandfather of modern public law, cites 'equality before the law' as one of the underpinnings of the rule of law[13]. Former senior Law Lord, Tom Bingham, has called it a 'cornerstone of our society'[14]. Baroness Hale, our foremost judicial expert in equality and discrimination law, has said that it is a principle upon which democracy itself is founded[15]. There is no doubt that at common law a general principle of equality has been recognised by which a public authority will act irrationally, and therefore unlawfully, if it fails to treat *'like cases alike and unlike cases differently*', as Lord Hoffman put it in *Matadeen v Pointu* [1999] 1 A.C. 98[16]. The foundation for this proposition is Lord Russell CJ's dictum in *Kruse v Johnson* [1898] 2 Q.B. 91 that a byelaw could be struck down as '*unreasonable*' if it was '*partial and unequal in [its] operation as between different classes*'. This principle can be seen in operation in a number of cases since[17]. Perhaps the strongest statement of the strength of the principle of equality is to be

[13] *An Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan, London, 1959, ed. E.C.S. Wade), p.193

[14] Tom Bingham, 'The Rule of Law', Allen Lane; 1st Edition (4 Feb. 2010)

[15] *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557, para 132: 'Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. … . Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.'

[16] See also Lord Hoffman's reference in *Arthur JS Hall v Simons* [2002] 1 AC 615 to *'the fundamental principle of justice which requires that people should be treated equally and like cases treated alike'*.

[17] *R v Metropolitan Police Commissioner ex p Blackburn* [1968] 2 QB 118 (the police could not lawfully choose who to prosecute, or which laws it would enforce, without rational justification; the defendant's proposition that the police could not be compelled to enforce the law being met with the famous riposte: 'How ill it accords with the seventeenth-century assertion of Thomas Fuller that, "Be you never so high, the law is above you." The applicant is right in his assertion that its effect would be to place the police above the law'.); *R (Gurung) v MOD* [2002] EWHC 2463 (exclusion of Gurkhas on racial grounds from "ex gratia" payments of compensation to former P.O.Ws of the Japanese), *R (Limbu) v Home Secretary* [2008] EWHC 2261 (Admin), (discriminatory policy of refusing leave to remain to long-serving Gurkha members of the British armed services compared to other non-British soldiers); *R. v. Immigration Appeal Tribunal, ex parte Manshoora Begum* [1986] Imm. AR 385 (minimum income requirements for leave to enter unlawfully discriminated against those from poorer countries); *R (MM) v Home Secretary* [2015] 1 W.L.R. 1073 (minimum income requirements for leave to enter capable of being discriminatory, but no discrimination on the facts). See also *Edwards v SOGAT* [1971] Ch 354, a case

found in a speech given by Lord Steyn on 18 September 2002 in honour of Lord Cooke of Thorndon[18]. Having considered Article 14 ECHR, which he dismissed as a '*relatively weak provision*', he expressed the view that '*the constitutional principle of equality developed domestically by English courts is wider*' and that '*individuals are … comprehensively protected from discrimination by the principle of equality'*.

9. Other judges and commentators[19] are more sceptical. David Feldman[20] gives a number of examples of common law courts refusing to strike down even the most blatant discrimination by public bodies in Canada[21], East Africa[22], South Africa[23] and the United Kingdom[24] or interpreting statutes as *prohibiting* a public body from pursuing equality considerations, as in *Roberts v Hopwood* [1925] AC 578 (local authority acted unlawfully in introducing a minimum wage). Whether this is because of the common law's insistence on the principle of freedom of contract[25] or the baleful influence of the doctrine of

involving the withdrawal of trade union rights, in which Lord Denning said: 'The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them'. See Feldman, paras 11.53-11.60

[18] Cited by McCombe J in *Gurung*. The full quote: '*On the other hand, the constitutional principle of equality developed domestically by English courts is wider*. The law and the government must accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground. *Individuals are therefore comprehensively protected from discrimination by the principle of equality.* This constitutional right has a continuing role to play. The organic development of constitutional rights is therefore a complementary and parallel process to the application of human rights legislation.'

[19] E.g. R Singh QC, 'Equality - The neglected virtue', [2004] EHRLR 2; Gordon and Moffat, 'EU law in Judicial Review', Oxford, 2nd ed., para 7.123 and 7.127

[20] Feldman (Ed.), 'English Public Law' ('Oxford Principles of English Law' series), 2nd ed., paras 11.12-11.13

[21] *Co-Operative Committee on Japanese Canadians v AG for Canada* [1947] AC 87, PC (the Governor in Council had power to make orders for deportation of any person, whatever his nationality, and the deprivation, so far as the law of Canada is concerned, of his status under that law as a British subject or Canadian national)

[22] *Commissioner for Local Government Lands and Settlement v Kaderbhai* [1931] AC 652, PC (the Commissioner of Lands, appointed under the Crown Lands Ordinance of Kenya, in selling town plots by auction under ss. 15 and 18 of the Ordinance he can impose either or both the conditions (1.) that Europeans only shall bid or purchase, (2.) that the purchaser shall not permit the dwelling-house or outbuildings which are to be erected to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him)

[23] *Madrassa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* [1922] 1 AC 500, PC (upholding an order of contempt against the owners of an orphanage for Islamic children as being in breach of s. 4 (b) of the Vrededorp Stands Act, 1907, which provided that the owner of a stand at Vrededorp (Johannesburg) "shall not permit any Asiatic, native or coloured person (other than the bona fide servant of a white person for the time being residing upon the stand) to reside on or occupy the stand, or any part thereof.")

[24] For example in *Nairn v University of St. Andrews* [1907] AC 147 the word 'person' was construed to mean a man, and not including a woman, in the context of a provision conferring voting rights

[25] Baroness Hale, *'The Quest for Equal Treatment'* [2005] P.L. 571, page 572

Parliamentary sovereignty on the development of common law rights[26], according to these sources the common law principle of equality does not provide '*comprehensive protection from discrimination*', as Lord Hope made clear in *Rhys-Harper* [2003] 2 C.M.L.R. 44:

> *78. It is a remarkable fact that, although discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it from situations where those who were vulnerable to discrimination were at risk and ensuring that all people were treated equally. Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament.*

10. Lord Hoffman in *Matadeen,* having distinguished the common law principle of equality from the constitutional protection afforded to equality in other jurisdictions such as the United States, said this:

> *It by no means follows, however, that the rights which are constitutionally protected and subject to judicial review include a general justiciable principle of equality.*

11. He went on to observe that there was no reason under common law why it should be for the courts exercising powers of the kind wielded by the US Supreme Court to determine whether any difference in treatment might be justified, and that this was a matter more suitable for Parliament.

12. Jeffrey Jowell QC, writing in 1994[27], was troubled by the difficult issues that the courts would face in applying a constitutional principle of equality and asked whether it was wise to elevate it to a '*lion under the throne*'[28] (i.e. a constitutional principle) rather than '*just a well-disguised rabbit to be hauled occasionally out of the Wednesbury hat*'. He concluded that it *was* wise to do so, but it is implicit in the question that he considered that equality had not yet made the transformation from rabbit to lion. Baroness Hale, writing

[26] For which see Paul Bowen QC 'Does the renaissance of common law rights mean the HRA is unnecessary?' [2016] 4 EHRLR 361
[27] See fn 6
[28] After Francis Bacon, 1625, *Essays, Civil and Moral* 'Let judges also remember, that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.'

in 2005[29], agreed with Jeffrey Jowell that equality should have constitutional status (page 573), but concluded that the principle was still limited to its role in determining *Wednesbury* unreasonableness (page 575). Nor did it assist that a constitutional right to equality is enshrined in Article 26 ICCPR, because (as Lady Hale pointed out) there is no right of individual complaint to the UN Human Rights Committee. She might also have added that under our dualist UK constitution, international treaties – even once signed and ratified - do not give rise to enforceable rights unless they are incorporated by primary legislation[30], even in the sphere of international human rights conventions[31].

13. I see no reason why the position has changed in the ten years since Lady Hale's article. In my view the common law principle of equality still falls short of the standards that I outlined a little earlier in a number of respects.

    13.1. While equality may found challenges to the rationality of public-law decisions, and perhaps to the content of secondary legislation, it does not permit any challenge to the substance of primary legislation. Even if (which must be doubted) equality now has the status of a fundamental common law right, so that legislation must be read compatibly with that principle to resolve any ambiguity (the 'doctrine of legality'[32]), it does not empower judges to impose a compatible construction where there is no ambiguity as to its meaning (unlike under EU law[33] and s 3 HRA). Nor does it allow the Courts to declare the legislation to be incompatible with equality (unlike under s 4 HRA) and it certainly does not allow judges to strike down such

[29] Baroness Hale, *'The Quest for Equal Treatment'* [2005] P.L. 571
[30] *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, per Lord Oliver at 500B-C; *Moohan v Lord Advocate* [2015] 2 W.L.R. 141, paras 29-31
[31] *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, Lord Bridge of Harwich at pp 747G–748F; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16
[32] First recognized by the House of Lords in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, having been twice rejected before then: see Lord Sumption's speech to the ALBA Conference, 14 October 2014, 'Anxious Scrutiny'; though see also *Ahmed v HM Treasury* [2010] 2 AC 534, *Black Clawson International Ltd v Papierwerke AG* [1975] AC 591 at 638; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289, 309, 311; *Baker v Campbell* (1983) 153 CLR 52 at 9697, 104, 116, 123; Corporate Affairs Commission (NSW) v Yuill (1991) 172 CLR 319 at 348.
[33] Under the Marleasing principle, see Case C-106/89 Marleasing v La Comercial Internacional de Alimentacion [1990] ECR I-4135

legislation (by contrast with EU law). Where gaps in discrimination legislation are identified, the courts are powerless and the victim left without a remedy[34].

13.2. The common law principle does not impose any *positive* duties on the state of a substantive nature to have in place laws or systems or to take operational decisions to prevent discrimination by private persons (third parties) or arising as a consequence of disability. Nor does it bring any positive procedural duties to investigate any such discriminatory conduct after it has occurred.

13.3. It does not impose any positive obligation on public or private bodies to make reasonable accommodation (or reasonable adjustments).

13.4. A breach of the common law principle of equality, without more, does not sound in damages.

13.5. No right of legal aid may be derived from the common law, even where fundamental rights are in issue[35].

14. In short: still a rabbit, not a lion.

V. Why does it matter? The Equality Act 2010, EU law and the ECHR/ HRA

15. The question might be asked, why does this matter? Doesn't the combination of anti-discrimination legislation, EU law and the HRA, address these shortcomings? These, in very brief summary, provide as follows:

15.1. The principle of equality and non-discrimination is a fundamental constitutional right under EU law[36], enshrined in a number of provisions of the current EU

[34] As in *Amin v Entry Clearance Officer* [1998] Q.B. 65, *Farah v MPC Cmmr* [1998] Q.B. 65 (police decisions not to arrest or prosecute not covered by the Race Relations Act 1976) or, most recently, *Onu v Akwiwu* [2016] 1 W.L.R. 2653 (discrimination on grounds of immigration status; not direct or indirect discrimination under Equality Act 2010)

[35] *R v Lord Chancellor, Ex p Witham* [1998] QB 575

[36] Case C149-77 *Defrenne v Société Anonyme Belge de Navigation Aerienne (SABENA)* [1978] 3 C.M.L.R. 312 (sex discrimination) ('[26] The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. [27] There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.); Case C144-04 *Mangold v Helm* [2006] 1 C.M.L.R. 43, paras 74-75; Case C555-07 *Kucukdeveci v Swedex GmbH & Co KG* [2011] 2 C.M.L.R. 27, paras 21-22; *Test-Achats ASBL v Conseil des Ministres* (C-236/09) [2012] 1 W.L.R. 1933 (age discrimination); *Romer v Freie und Hansestadt Hamburg* (C-147/08) [2013] 2 C.M.L.R. 11, para 67;

Treaties[37] and the EU Charter on Fundamental Rights[38], Articles 20 and 21 of which provide in similar terms to Article 26 ICCPR[39]. Individuals who are affected by discrimination within the scope of EU law may bring proceedings in the domestic courts for compensation and may be entitled to legal aid to pursue their claim[40]. Any EU and domestic legislation falling within the scope of EU law must comply with the right of equality or risk being struck down either by the CJEU or (in the case of domestic legislation only) the domestic courts.

15.2. Article 14[41] of the ECHR prohibits any discrimination 'in the enjoyment of the rights and freedoms' protected by the Convention imposing negative duties on the State not to discriminate, whether directly or indirectly, and positive duties to take reasonable steps (including by way of legislation) to protect individuals from discrimination inflicted by third parties and as consequence of disability[42]. There may be a breach of Article 14 even if there is no breach of the underlying Convention article provided the conduct complained of falls within the 'ambit' of that Article[43]. A victim of discrimination may bring a claim under the HRA and obtain compensation, and may be entitled *as a matter of Convention law* to legal

Hay v Credit agricole mutuel de Charente-Maritime et des Deux-Sevres (C-267/12) [2014] 2 C.M.L.R. 32 (discrimination on grounds of sexual orientation); Case C 528/13, *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes* [2015] 3 C.M.L.R. 36; Case C 148/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie* [2015] 1 W.L.R. 2141; and see Colm O'Cinneide, 'The constitutionalisation of equality within the EU legal order', Maastricht Journal of European and Comparative Law', 22 (3) pp. 370-395

[37] Treaty of European Union (TEU), Articles 2, 3, 8, 9, 10, 21; Treaty on the Functioning of the European Union (TFEU) Articles 8, 10, 18*, 19*, 36, 37, 45, 48, 153, 157

[38] Articles 20*, 21* and 23

[39] Article 20 **Equality before the law** Everyone is equal before the law; Article 21 **Non-discrimination** 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

[40] *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, Case C-279/09)* [2010] ECR I-13849, paras 45—53; Gudanaviciene [2015] 1 W.L.R. 2247

[41] 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

[42] See, of many cases, *Thlimmenos v Greece* (2001) 31 EHRR 15, *DH v Czech Republic* (2008) 47 E.H.R.R. 3, *Eweida v UK* (2013) 57 E.H.R.R. 8,

[43] See e..g. *Abdulaziz v United Kingdom* (1985) 7 E.H.R.R. 471 (extending right of leave to enter to foreign wives, but not foreign husbands, was discrimination contrary to Art 14 though no breach of Article 8, as the couple could be reunited overseas); *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557 .

aid[44]. Article 14 is undoubtedly a free-standing constitutional right that, under the HRA, empowers the courts to read and give effect to legislation so as to remove its discriminatory effect or, if such a reading is not possible, to make a declaration of incompatibility (ss 3 and 4 HRA).

15.3. The 2010 Act prohibits direct and indirect discrimination by both public and private bodies on the grounds of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. A duty to make reasonable adjustments for a person's disability has been introduced. The Act imposes positive obligations on public authorities in the discharge of their public functions not to discriminate and (by s 149) to have due regard to the need to avoid discrimination (the public sector equality duty). Breach of these principles will give rise to an enforceable claim in a court or tribunal and, where discrimination is established, compensation is payable.

16. Under each of these regimes, equality is no longer a tool to be used in assessing whether a measure is unlawful on other grounds (the position at common law) but a substantive ground of illegality in its own right. Moreover, in assessing whether any difference in treatment is objectively justified the courts apply a proportionality test, rather than the *Wednesbury* test of unreasonableness or irrationality[45].

17. So does this combination of laws, taken together, mean that equality *is* now a constitutional right that meets all the criteria I outlined earlier? To a certain extent, yes. But there remain some shortcomings.

17.1. The principle of equality under EU law – whether under Articles 20 and 21 EUCFR[46] or as fundamental principle of EU law - applies only where what is in

[44] See *Gudanaviciene*, ibid, and the Convention cases there cited
[45] Although in assessing the proportionality of an interference with a substantive Convention right the fact that it is discriminatory will itself demonstrate that a measure is disproportionate: see *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] A.C. 700, para 25. In these cases the ECtHR will often not go on to consider whether there has also been a breach of Article 14. The ECtHR has on many occasions explained how it is unnecessary to consider Article 14 in circumstances where any inequality in treatment has been taken into account as part of the analysis under a substantive Convention article: see, e.g., *Jehovah's Witnesses of Moscow v Russia* (2011) 53 E.H.R.R. 4, paras 187-188; *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at para 67.
[46] Article 51 EUCFR

issue falls 'within the scope' of EU law[47]. This is a complex subject (which is itself a shortcoming) but it means the EU principle of equality has little impact on areas where discrimination rears its head such as police and the criminal justice system, health, housing, welfare and social security, education and family law[48]. Furthermore, all this corpus of EU law will fall away if and when the UK leaves the EU.

17.2. Article 14 ECHR applies only where the measure complained of falls within the ambit of another Convention article[49]; it does not confer the equal protection of *all* laws. Moreover, while Article 14 confers protection on a wider range of individuals than does the Equality Act 2010 as it prohibits discrimination on the grounds of 'other status', the question of what amounts to an 'other status' is a vexed one[50]. Furthermore, it is unclear whether and to what extent the Government's proposals to repeal the HRA and replace it with a British Bill of Rights will affect the equality and non-discrimination provisions of the ECHR.

17.3. That leaves us with the 2010 Act. There are two flaws. First, the list of protected groups is closed; unlike under the ECHR, EU law and the ICCPR there is no protection for groups with an 'other status'. For example, in the recent case of *Onu v Akwiwu* [2016] 1 W.L.R. 2653 the Supreme Court held that discrimination on grounds of immigration status was not prohibited by the Equality Act 2010. The second flaw is that the Act does not establish an overarching constitutional duty on the government to protect equality and to avoid discrimination against which

[47] A measure falls within the 'scope' *ratione materiae* of EU law where it (a) lies in an area the members states have conferred competency upon the EU to legislate (C-403/09 *Gueye*); and (b) involves either (i) directly effective EU law or the implementation of discretionary EU law (*NS*); or (ii) the exercise of a power to derogate from EU law (*Zagorski* [2011] HRLR); or (iii) domestic legislation in a field falling within EU law (C-617/10 *Åkerberg Fransson*); and (c) falls within geographical jurisdiction of EU (*R (Sandiford)* [2013] EWCA Civ 581); or (d) involves an EU citizen (*Zagorski*) (*ratione personae*)

[48] Moreover, as Colm O'Cinneide has written, '*The scope and substance of the principle remains unclear, and it seems to be an uncertain and limited concept of equality*' which '*needs to be more fleshed out and given a more substantive dimension*': see 'The constitutionalisation of equality within the EU legal order', Maastricht Journal of European and Comparative Law', 22 (3) pp. 370-395, concluding paragraph

[49] *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173

[50] Contrast the divergent approach of the House of Lords in *R (Clift) v Home Secretary* [2007] 1 AC 484 and the European Court of Human Rights in *Clift v United Kingdom* (7205/07), 13 July 2010 (whether a prisoner is an 'other status')

existing equality laws may be tested and found wanting. Thus in *Onu*, the courts had no power to determine whether the lack of protection for persons discriminated against on the grounds of their immigration status offended against the constitutional right of equality and to make a declaration accordingly[51]. This is a critical function of any constitutional right; the courts must be able to police existing legislation in the light of modern values and to bring it to Parliament's attention when the law requires updating, as graphically illustrated by US Supreme Court cases such as *Brown v Board of Education* 347 U.S. 483 (1954) and *Obergefell v Hodges* (2015)[52].

VI. Conclusion

18. So the principle of equality – and its more assertive sister, non-discrimination – are undoubtedly 'rights' that have been partially constitutionalised under UK law. Taken together the common law, Equality Act 2010, EU law and the HRA have taken matters some distance towards the kind of constitutional protection of equality afforded in countries like the USA and Germany. But it remains a work in progress. The common law principle of equality in its current conception is limited in its reach and, for the reasons I have explored in another recent paper[53], is unlikely to be developed by the courts to give equality the status of a constitutional right without Parliament's intervention, although that remains a possibility. Moreover, both Brexit and the proposed repeal of the HRA risk setting the clock back significantly. The United Kingdom has a proud history (at least in more recent times) of anti-discrimination laws. If the HRA is to be repealed, as constitutional, human rights and equality lawyers we should see this as an opportunity to press for a constitutional right to equality and non-discrimination – akin to Article 26

[51] Another example is disadvantage generated by socio-economic status is not a protected status, especially since the Coalition government decided not to bring the positive socio-economic equality duty set out in s. 1 of the Equality Act 2010 into force.
[52] This does not necessarily mean that the courts need to be able to strike down incompatible legislation, as the US Supreme Court may do and as the domestic courts can in respect of legislation that is incompatible with EU law under the ECA 1972. But it does require the courts to have jurisdiction to grant formal declarations of incompatibility as under s 4 HRA and so start a dialogue with Parliament that should (and usually does) lead to fresh legislation.
[53] See fn 26

ICCPR - to be developed by the courts or, failing that, to be enshrined in the proposed Bill of Rights. It is time for the lion to roar.

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SOME ISSUES IN TRANS-EQUALITY: PROBLEMS WITH THE BINARY IN THE PRISON SYSTEM

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Introduction

1. This short paper, or rather this short distillation of more or less inchoate thoughts, seeks to highlight some of the challenges for equality law which have arisen, or which may arise, in the context of the encounter of between transgender people[1] and the domestic legal architecture.[2]

2. One of the many reasons that the legal regulation of the lives of transgender persons is topical, and relevant to any discussion about the scope of equality protection, is that recent trans-activism - with its refusal to accept mere legal recognition and inclusion as conferring substantive equality[3], and its rejection of static legal classification - has threatened to torpedo some of the assumptions that inform even progressive equality law-making and practice. One might say that engagement with issues of trans-equality necessarily provokes thinkers about equality to consider what discrimination arises, and what equality is denied, when rights flow from membership of closed and primarily binary categories of being. In so far as trans-politics rails against rights being dependent upon gender conformity, it opens another door to thinking about whether the taxonomy upon which so many equality-oriented rights rest (in our own Equality Act 2010 rights are conferred by dint of possession of a "protected characteristic" such as race, gender, disability, sexual orientation and – a contested term in this context - "gender-reassignment") itself operates to dehumanize those who fail to fit and those practices that fail to fit. It pushes us to think more deeply, and legally, about the status of the "in-betweeners", the

[1] Nomenclature in this connection is of considerable importance. The term *transgender* is used throughout in preference to the term *transsexual* since the latter is now widely seen as associated with a medical/biological definition of identity based on "sex" rather than "gender" which is more often used in sociological/feminist theory to refer to the socially constituted distinctions between what is read as male and what is read as female.

[2] The domestic legal architecture is used here to connote all legal regulation affecting trans persons and not only equality law provisions.

[3] For a detailed disposition of the demands of trans-politics, see Spade, D, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law, Revised and Expanded Edition, Duke University Press, 2015.

"not-quite" and "not-right". It contributes also to an important discussion about what beings are materially "left out" of the "humanity" which we have come to see as creative of inalienable rights (speciesism). Gratefully, the more profound philosophical analysis which such a discussion would entail is beyond my expertise and therefore beyond the scope of this paper.[4]

3. As against the importance of the challenge posed to commonly understood equality law principles by an emergent trans-rights movement, the issues I intend to raise for consideration, my focus, may seem rather more pedestrian or mundane. Nonetheless, the difficulties attendant upon securing equality for trans persons in the context of the criminal justice and prison systems do have material consequences. A closer look at a sample of recent developments in these areas, framed by an awareness of the criticisms that trans-politics brings to equality law, may, I hope, help those interested in the law as a transformative tool to make it as pliant and responsive as it is possible for the law to be.

Nomenclature

4. As with many other "minority" groups seeking to self-define in the context of derogatory naming practices by the mainstream, what constitutes appropriate terminology has changed over time and in some cases rapidly. A useful glossary of terms that are or are not considered to be problematic can be found on the website of the US based LGBT media advocacy organization, the Gay and Lesbian Alliance Against Defamation (GLAAD): http://www.glaad.org/reference/transgender. In this paper "transgender" is used in preference to "transsexual" because of the focus on biology/pathology implied by the latter term. The term "cis-gender" is used to refer to those who are not transgender people[5] such that a person whose "gender identity" (that is their deeply embedded sense of their gender) conforms to their sex at birth is cis-gender and can be described as a cisgender man/woman. On the other hand, a person whose gender identity may differ or depart from that associated with the gender assigned at birth are transgender men, women or people.

5. Enactments as recent as the Equality Act 2010 ("EA 2010") use terminology that is now regarded as inapt. In particular, the very protected characteristic created to confer important anti-discrimination rights on transgender persons – "gender-reassignment" – served to

[4] For an interesting discussion about the way in which "humanity" depends upon a false dichotomy between "human" and "animal" not so dissimilar to the apparently immutable boundary between "man" and "woman" see Wadiwel, D "*The War Against Animals: Domination, Law and Sovereignty*", Griffith Law Review, Vol.18, No.2, pp.283-297.

[5] The prefix "cis" like "trans" has a Latin derivation. "Cis" is taken to indicate "on the side of" and "trans" to indicate "beyond or on the other side of".

reinforce the notion, contrary to the content of the right itself[6], that protection was only afforded to those who had undergone some form of medical treatment resulting in the re-alignment/re-assignment of their gender.[7] Indeed, standing-back from the fact that the provisions in the Gender Recognition Act 2004 and the EA 2010 represented significant milestones in the promotion and protection of the rights of trans people at the time of their enactment, the tenor and terminology in both statutes appears patronizing and pathologising.

The genesis of the mis-apprehension of what trans rights should be

6. Thinking along this theme it is perhaps not uncharitable to state that the authors of the relevant provisions may have regarded those upon whom rights were being bestowed as other than "normal". The juridical response to the call to/for rights, some would say, revealed a misunderstanding of something that is now considered to be at the core of the identity of many trans people: a rejection of gender identity as fixed and a contention that what ought to be respected is precisely the refusal to be categorized as one gender or the other; a sense that what ought to be celebrated was not merely the entitlement to be treated as a "man" or a "woman" but the "heteroglossic outpouring of gender positions from which to speak". Witness the significance attributed to the right of transgender persons to be treated as belonging to one or other gender rather than neither that is evident from the following passage in the watershed case of Goodwin v UK [2002] EHRR 447. It was in Goodwin that the European Court of Human Rights ("ECtHR") first held that the continued failure to recognize the chose gender identity of a transgender person, by failing to accord legal recognition to her change of gender, amounted to a breach of both Articles 8 (right to respect for private life) and 12 (right to marry). One of the most frequently cited passages in Goodwin states as follows:

> **In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone is not quite one gender or the other is no longer sustainable**. [90] [emphasis added]

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[6] See s.7 EA 2010 which affords protection against the forms of discrimination prohibited by that Act to those with the protected characteristic of "gender reassignment" which a person has if s/he is "proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of re-assigning the person's sex by changing physiological or other attributes of sex"

[7] See also and in particular the discussion of the confusing and outdated use of the term "gender reassignment" in the EA 2010 in the recent report of the House of Commons Women and Equalities Committee, Transgender Equality, First Report of Session 2015-16, HC-390, published on 14th January 2016.

7. Today, that "intermediate zone" that "is not quite one gender or the other", that unsustainable and unsatisfactory "no-man's land", is precisely the zone that many who identify as trans wish to be free to inhabit.

8. Despite its defects, the EA 2010 did afford transgender persons anti-discrimination rights that were broadly analogous to those that had existed in respect of race, sex and sexual orientation. The EA 2010 was a progressive measure in so far as it did not "require someone to undergo medical treatment in order to be protected."[8] Further, s.29 EA 2010 expressly prohibited a person concerned with the provision of a service to the public from discriminating against a person with the protected characteristic of "gender reassignment". Nonetheless, the exceptions to s.29 include the following referable to gender reassignment contained Schedule 3 to Act:

> **28 Gender reassignment**
>
> (1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, **only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.**
>
> (2) The matters are—
>
> (a) the provision of **separate services for persons of each sex;**
>
> (b) the provision of **separate services differently for persons of each sex;**
>
> (c) the provision of a **service only to persons of one sex.**

9. Instinctively, a pertinent question would be: Why would there be a need for an exception "because of anything done in relation to" the provisions of single sex services? Was not the point of creating anti-discrimination rights for transgender people to ensure that they were entitled to be recognized as being the sex/gender which best conformed to their chosen gender identity? So wouldn't the provision single sex services, once permissible, simply mean that transgender women should be entitled the same access to those services as was afforded to cisgender women? Attention to the law relating to prisons provides an answer.

The prison context

10. The prison context is an appropriate arena in which to explore the limits of equality law as it applies to transgender persons. The vulnerability of prisoners relative to their custodians is

[8] See para. 2.20 Equality Act 2010 Code of Practice: Services, Public Functions and Associations, EHRC (2011).

elemental to the functioning of most detention systems.[9] Where there is societal prejudice against specific groups, it has been considered reasonable to assume that such groups are amongst those that will be most vulnerable when incarcerated. In some senses, transgender prisoners could be seen to be a paradigm case of a class of persons whose experience of discrimination might involve unfavourable treatment for a number of different reasons (some amounting to discrimination based upon a protected characteristic and some not) which add to and compound the nature and extent of the injury. Gabriel Arkles' description of the myriad and intersecting ways in which incarceration might have a marked effect on transgender persons in the US is apposite: "*Transgender people are disproportionately exposed to the inherent violence of detention for multiple reasons. Loss of family support and severe and pervasive discrimination in every aspect of life, such as housing, health care, education, employment, identification, and public benefits, leads to widespread poverty and homelessness,...Because poverty and homelessness are themselves criminalized in many ways, transgender people are more likely to come into contact with the criminal legal system...Transgender women of colour are frequently presumed to be engaged in sex work, irrespective of any basis in fact for these presumptions. Transgender and gender non-conforming people are also often perceived to be violent and deceptive. Many transgender and gender non-conforming victims of domestic violence or hate violence are arrested instead of their attackers. Some transgender people are charged with crimes simply for using the restroom. In addition, transgender people are more likely to be subject to immigration detention because of barriers to legal status in the U.S. that have a disproportionate impact on transgender people.*"[10]

11. In UK law prisoners' rights are only circumscribed to the extent that such limitation is a necessary consequence of incarceration. A convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication: Raymond v Honey [1983] 1 AC 1. This principle has been applied such that it has been found that it was unlawful for a governor to sanction the routine reading of correspondence between a prisoner and his legal representative (ex p O'Dhuibhir [1997] COD 315) and for there to be a blanket policy disenfranchising all prisoners (Hirst v UK (No.2) (2006) 42 EHRR).

12. There is a clear requirement that the test for proportionality, a concept associated with rights under the ECHR, is to be applied whenever a prisoner's rights have been interfered with. The questions to be asked in this connection are whether the interference pursues a legitimate aim (e.g. security or good order and discipline) and whether the measure imposed is proportionate to the aim sought to be achieved.

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[9] See Arkles, G "*Safety and solidarity across gender lines: Rethinking segregation of Transgender people in detention.*", Temple Political and Civil Rights Law Review, Vol.18:2, pp.515-560 at p.523.
[10] i.b.i.d; pp. 525-6.

Prison Rules and other relevant instructions

13. Rule 6 of the Prison Rules 1999 (SI 1999/728) provides that good order and discipline is to be maintained "with firmness, but with no more restriction than is required for safe custody and well ordered community life".

14. Rule 23 provides that unconvicted prisoners may wear their own clothing if and in so far as it is tidy and clean. Women prisoners may also wear their own clothing.

15. PSI 7/2011, 'The Care and Management of Transsexual Prisoners", provides materially as follows:

> "3. Prisoners living in their acquired gender role
> ...
> **3.2 An establishment must permit prisoners who consider themselves transsexual and wish to begin gender re-assignment to live permanently in their acquired gender...**
>
> **3.3 Permitting prisoners to live permanently in their acquired gender will include allowing prisoners to dress in clothes appropriate to their acquired gender and adopting gender-appropriate names and modes of address. See Annex B for more details. An establishment must allow transsexual people access to the items they use to maintain their gender appearance, at all time and regardless of their level on the incentives and Earned Privileges Scheme or any disciplinary punishment being served. See Annex C for a suggested compact which can be adapted for local use.**
>
> **3.4 Establishments must produce a management care plan outlining how the individual will be managed safely and decently within the prison environment. Advice on producing this must be sought from the Equalities Group or women's team as appropriate.**
>
> **3.5 Any risks to and from a transsexual prisoner must be identified and managed appropriately as would be the case with any other prisoner...**
> ...
>
> Annex B – Guidance on prisoners living in their acquired gender role
>
> **Dress Code**
>
> **B.1 Prisons should obtain from an equivalent opposite gender prison a set of guidelines for what clothing and make up is acceptable. Such guidelines can be adopted almost entirely for transsexual prisoners.**
>
> **B.2. The following options for obtaining clothing may be available:**
>
> **If prisoners have funds available, they can purchase gender-appropriate clothing from the Argos Additions clothing catalogue.**

Visitors may bring prisoners clothing or other items that assist them in presenting in the in their acquired gender.
Prisoners may have clothing or other items that assist them in presenting in their other gender sent to them.
Otherwise you may be able to get clothing from that donated to nearby prisons appropriate to the transsexual prisoner's acquired gender.

B.3 Female prisoners wear their own clothes – there is no uniform. A male to female transsexual prisoner should be allowed to wear female clothing, regardless of any restrictions imposed through IEP. The only exception will be for relevant work clothes.

B.4. Allowing male to female transsexual prisoners to wear their own clothes is not a privilege. This approach is necessary to ensure that such prisoners can live in the gender role that they identify with. It may be helpful to explain this to other prisoners who are required to wear prison uniform.

Items used to present in the acquired gender

B.5. Transsexual people, particularly those who have not undergone surgery or extended hormone therapy, may use various items to assist with their presentation in their acquired gender. These can range from sophisticated prostheses to padded bras. Regardless of their level of sophistication, access to them can only be restricted in exceptional circumstances. IEP is not a justifiable reasons for restricting access.

B.6. These items may only be prohibited when it can be demonstrated that they present a security risk which cannot be reasonably mitigated. The test that is applied to these items is the same as that applied to other items in the prison in which the prisoner is held. Any restriction of these items could be subject to judicial review. If a prison decides to apply such restrictions, they must be able to provide a detailed and reasonable justification for doing so.

B.7. Both male to female and female to male transsexual people may use make up to present more convincingly in their acquired gender. Make up that is vital to presenting in the acquired gender, such as foundation to cover up beard growth, may not be restricted. Other make up may be restricted within the framework of IEP.

<u>Annex C – Compact template</u>

...

Dress Code

You will be allowed to wear clothing appropriate to your acquired gender and as permitted in establishments of your acquired gender subject to general decency standards.

...

You will be permitted to have in your possession those toiletries and cosmetics necessary to present in your gender role. These items can be purchased in the same manner as in an establishment of your acquired gender."

4. Location within the estate

4.1 Prison Rule 12(1) provides that women prisoners should normally be kept separate from male prisoners.

4.2. In most cases prisoners must be located according to their gender as recognised under UK law. Where there are issues to be resolved, a case conference must be convened and a multi-disciplinary risk assessment should be completed to determine how best to manage a transsexual prisoner's location. See Annex D for more details.

4.3. *A male to female transsexual person with a gender recognition certificate may be refused location in the female estate only on security grounds – in other words, only when it can be demonstrated that other women with an equivalent security profile would also be held in the male estate. In such circumstances she will be considered a female prisoner in the male estate and must be managed according to PSO 4800 Women Prisoners.*

4.4. A female to male transsexual person with a gender recognition certificate may not be refused location in the male estate. This is because there are no security grounds that can prevent location in the male estate.

4.5. If a prisoner requests location in the estate opposite to the gender which is recognised under UK law, a case conference must be convened to consider the matter. The case conference will consider all relevant factors and make a recommendation to a relevant senior manager above establishment level who will make the final decision. If there is any doubt, it is advisable to seek legal advice from the Offender Management Team in the Ministry of Justice Legal Directorate.

4.6. Before a prisoner is placed in custody, attempts must be made to determine which gender is recognised under UK law. This is a legal issue rather than an anatomical one, and under no circumstances should a physical search or examination be conducted for this purpose. If attempts are unsuccessful, the prisoner should be placed according to the best evidence available and the prisoner's gender status must be determined as soon as possible. If it emerges that a prisoner has been placed in the estate opposite to the legally recognised gender, a transfer must be arranged as soon as possible unless the prisoner requests location in this estate."

[Emphasis added]

16. PSO 4800 on "Women Prisoners", contains the following guidance of relevance:

> **"Access to toiletries or hair care products are more necessary to some women (i.e. from particular BME groups) and should not be restricted dependent on the woman's IEP status".**
> **"Self-esteem is linked for many women with personal appearance. Many women will want to have regular changes of clothing, to have varied clothing, to use make up and dress their hair. This means that women need greater amount of clothing than men and thus will need access to more property – including toiletries – particularly lifers and women serving long sentences" "Women can have as many toiletries as they wish within volumetric limits."**
> **"Establishments should consider the needs of all their population regularly and ensure that they locally stock a wide range of appropriate products from the national list".**

17. The problem in principle, and at a level policy, therefore is essentially this: The prohibitions against discrimination because of gender resassignment in the provision of services and public functions contained in the EA 2010 require, subject to the exceptions in Schedule 3, transgender persons not to be treated differently or less favourably because of the existence of that protected characteristic. But the exception contained in paragraph 28 of Schedule 3 is extremely widely drawn. Anything done "in relation to" the provision of single sex services will not contravene the anti-discrimination rule in s.29 EA 2010 once it is "a proportionate means of achieving a legitimate aim". Crucially, the provisions of paragraph 4 of PSI 7/2011 indicate, by way of example, that a transgender woman prisoner's entitlement to be located in the female estate – what might be regarded as an essential aspect of her entitlement to live permanently in her acquired gender – is highly circumscribed. The policy provides that most prisoners should be located in accordance with their "gender as recognised under UK Law". But gender recognition under UK law is conferred by a certificate ("GRC") issued pursuant to the Gender Recognition Act 2004 which requires there to be medical evidence of gender dysphoria in addition to evidence of living in the acquired gender for two years before the date of the application and an intention to do so until death.[11] Even the existence of such a certificate would not guarantee location in the female estate if there were "security grounds" for locating that person in the male estate (para. 4.3, PSI 7/2011). Further, there is a clear – if unexplained – difference in the way transgender women are treated in comparison to transgender men under the policy. location in the female estate for a trans woman with a GRC can be

[11] See sections 2(1) and 3 of the Gender Recognition Act 2004.

denied on security grounds (para. 4.3) whereas location on the male estate for a transgender man cannot (para. 4.4).

18. A number of difficulties for securing transgender equality are evident from consideration of the domestic law and policy in this are:

    a. The relevant exceptions to s.29 EA 2010 allow for a (too) wide discretion to interfere with the right of trans people to live in accordance with their chosen gender identity. Para. 28 does not identify either the kinds of measures - e.g. measures specifically targeted at mitigating real risks - which might amount to a proportionate means of achieving a legitimate aim in the prison context. This could lead and has led to the prison service refusing to locate trans prisoners appropriately without conducting an individual assessment of the risk posed by that individual.

    b. PSI 7/2011 makes no reference to the EA 2010 definition of gender reassignment in any event and the existence of a GRC (expressly not required by the EA 2010 in order for discrimination to be established) is regarded as a key determinant. The focus is on legal recognition rather than equality. This makes the nature of the protection afforded unclear and potentially inconsistent. A review of the policy ordered by the MOJ following the high profile death of two transgender women prisoners in late 2015 (associated with location in the male estate) is yet to be concluded.[12]

    c. There are obviously risk issues which need to be carefully analysed in the context of any attempt to secure the protection of trans and other prisoners within the prison system. There is an understandable concern that there are very real risks associated with housing transgender woman prisoners who have committed sexual offences against women within the female estate. However, an equality compliant response would involve assessing risk rigorously and not assuming risk based on past or present gender-identity.

[12] See Transgender Equality, First Report of Session 2015-16, HC-390, paras. 300-321.

d. The inconsistency/arbitrariness in the application of PSI 7/2011 is thought to be associated with discriminatory attitudes towards trans people. There is anecdotal evidence of refusals to allow transgender women prisoners to wear make-up or to dress in accordance with their chosen gender-identity irrespective of proper risk assessment. Challenges by way of judicial review to these practices tend to reveal that there is limited awareness amongst prison staff that these forms of expression are important aspects of trans people's right to respect for their autonomy and dignity.

e. Recent cases such as R(Green) v SSJ [2013] EWHC 3491 (Admin) appear to misunderstand fundamental principles of equality law and also reveal levels of attitudinal prejudice.

20. In the absence of policy revision and consistent application along the lines of the recommendations made in the Women and Equalities Committee's Transgender Equality report, there appears to be much scope for legal challenge in relation to dress, location, segregation and medical treatment for transgender persons in prison.

ULELE BURNHAM **13th October 2016**