

**“Making the EU Charter of Fundamental Rights a reality for all: 10th
anniversary of the Charter becoming legally binding”**

A view from the United Kingdom

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1. INTRODUCTION

- 1.1 In Case 26/62 *van Gend & Loos* EU:C:1963:1 the European Court of Justice first articulated the claim (at page 12) that what is now the European Union (EU) was intended to constitute a new legal order of international law for the benefit of which the States have *limited* their sovereign rights (albeit within limited fields) and the subjects of which comprise not only Member States *but also their nationals*.
- 1.2 Independently of the legislation of Member States, EU law therefore not only imposes obligations on individuals *but is also intended to confer upon them rights which become part of their legal heritage*. These rights arise not only where they are expressly granted by the EU Treaties, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals, as well as upon the Member States and upon the institutions of the EU.
- 1.3 If and when the UK ceases to be a member of the EU, UK nationals will no longer be able to rely on those rights. They will no longer be able to say “*civis europeus sum*”, and those nationals of the remaining Member States who have freely moved to the UK will no longer be able to invoke their status as EU citizens in order to oppose any violation of their fundamental rights by, or in, the UK. ¹

¹ See the Opinion of Advocate-General Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, famously observed (at § 46) that:

“... a Community national who goes to another member State as a worker or self-employed person under Articles 48, 52 or 59 EEC is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values... In other words, he is entitled to say “*civis europeus sum*” and to invoke that status in order to oppose any violation of his fundamental rights.”

1.4 The right of EU free-movers to vote in other Member States' municipal and European Parliamentary election was central to the realization of this vision of EU citizenship.² Post exit from the EU, an EU migrant worker in the UK will not be able to claim rights of (EU) citizenship vis-à-vis the UK authorities. It will become meaningless for the purposes of UK law. Their status, such as it is, will revert to the common law category of "alien *ami*", resident within the United Kingdom under sufferance³ rather than as of right.⁴ And by corollary UK nationals will become extra-Communitarians, third country nationals no longer able to claim the protections of EU law qua EU citizens before other Member States.

1.5 In *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2018 SLT 959 Lord Drummond Young noted (at § 53) that:

² See Article 20(2)(b) TFEU of the FEU Treaty and articles 39 and 40 of the Charter of Fundamental Rights of the European Union (CFR) as discussed in *R (Chester) v Secretary of State for Justice/McGeoch v Lord President of the Council* [2013] UKSC 63 [2014] AC 271 and in C-60/13 *Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648 [2016] 1 WLR 1223.

³ See *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61 [2009] 1 AC 453 per Lord Mance at §152: "152 The common law position relating to aliens differs significantly. 'One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s 231; book 2, s 125': *Attorney General for Canada v Cain* [1906] AC 542, 546; and see Chalmers *Opinions of Eminent Lawyers*, vol 1, p 4 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 111F-G, where Lord Scarman proceeded on the basis that 'an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode'."

⁴ In *Johnstone v. Pedlar* [1921] 2 AC 262 Lord Phillimore at pages 295-6 summarised the legal position at common law of "the citizen or subject of a friendly State residing in this country":

"As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. If his State is at war with ours his individual friendliness avails him nothing unless it enures to procure for him the special favour of licence from the King. If his State is in amity with ours he is considered an *alien ami* even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war.

By parity of reason neither does his individual hostility disentitle, him to the rights conferred by law upon an *alien ami*, once he has entered this realm with permission from the King. The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in *Musgrove v. Chun Teeong Toy* [1891] AC 272; and that permission may in some respects be conditioned. Every State may, according to international law, make special laws regulating the acts and property of aliens within the realm.

By the common law of England and Ireland an alien could not hold real estate, not even chattels real, for more than a short term. The *droit d'aubaine* existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts.

But an *alien ami* is never *exlex*, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The *alien ami*, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject."

“[T]he law of the European Union at present covers large areas of legal practice, including international trade, customs and transport; financial services, regional aid, industrial policy, and trading standards (notably in chemicals and pharmaceutical products); employment rights; higher education; nuclear energy; agriculture and fisheries; criminal justice (notably extradition); immigration; asylum (through the Dublin Regulations, which involve return of asylum seekers to the first country in which they are able to claim asylum); and the recognition of foreign judgments and other legal acts.”

1.6 Although from collective national perspective Brexit has been presented as “the nation” “taking back control” over all these areas of regulation and others, from the perspective of the individual Brexit may equally potential be seen to entail a loss of rights, with the stripping of EU citizenship from UK nationals, and the loss and diminution of the rights of individuals in the UK who retain their EU citizenship status. The battle lines may be said to be drawn.

2. THE EUROPEAN UNION AS A HUMAN RIGHTS/POST-NUREMBERG PROJECT

2.1 Some proponents of a more united Europe refer to the Second World War as the second “European Civil War”. It might rightly be said that the European Union project was born out of shame and horror (at the evident failings of the “modern” European State in the run up to, and during the prosecution of, the Second World War) allied, however, to an Enlightenment optimism in the perfectibility of man.

2.2 It would not be the only grand political project based on such a union of opposites: the United States of America, after all, at its 1776 foundation based its assertion to independence from the colonial power on claims to liberty and equality of all, but yet in its 1789 Constitution made express provision for slavery and for certain of its people to be treated as the property of others.

2.3 From one (perhaps paradoxical) perspective on what some might consider to be the ultimate capitalist venture, it might be said that the EU project is based on a classic Marxian analysis of human relation and society, in that it presupposes that economics will ultimately determine politics. Thus if one successfully creates a fully economically integrated cross-border customs union in Europe, national politics will eventually wither away, to be replaced by a new supra-national European polity. Where the single internal market leads, the people(s) will follow.

2.4 Certainly, the means originally envisaged for achieving the Treaty’s objectives of creating “an ever closer union among the peoples of Europe” and of deepening “the solidarity

between their peoples while respecting their history, their culture and their traditions” were indeed purely economic, through the establishment of a single internal market throughout the territory of the European Communities (and subsequently the European Union) in which the “four freedoms” might be secured. It is perhaps instructive to note that when first coined by US President Franklin Roosevelt, the phrase “the four freedoms” meant freedom of speech and expression, freedom of religion, freedom from want and freedom from fear.⁵ In the context of EU law, however, the phrase has been used, more prosaically, to mean the freedom of persons, goods, services and capital to be able cross, without let or hindrance, the national borders of the Member State countries within the Union.⁶ These freedoms remain fundamental to the European Union project.

2.5 Yet while an emphasis on the fundamental economic aims of the EU is necessary, it is most certainly not sufficient for a proper appreciation of the scope and ambitions of the EU project which – as is plain from the Preamble to and opening Articles of the post-Lisbon Treaty on European Union (TEU) – avowedly now seek to embody substantive values greater than simply those of *homo oeconomicus*. Consistently with the social democratic model outlined above, the economic model which the EU project promises to promote is not unbridled and unfeeling Anglo-Saxon capitalism – Nietzsche red in tooth and claw – but Euro-capitalism with a paternalist face, where the internal market which it establishes shall, in the words of Article 3(3) TFEU,

“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”

2.6 These aims are to be sought within the context of a supranational polity which in the words of Article 2 TEU is

⁵ President Franklin D Roosevelt, Message to Congress, 6 January 1941, (1941) 9 *Public Papers* 672: “We look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want ... everywhere in the world. The fourth is freedom from fear ... anywhere in the world.”

⁶ See the fifteenth recital in the preamble to the European Free Trade Association (“EFTA”) Surveillance Agreement (added by the Contracting Parties after the Court of Justice had held in Opinion 1/91 *Re Draft Treaty on a European Economic Area (No.1)* [1991] ECR I-6079 that the judicial system in the first version of the EEA Agreement which provided for a Court of Justice of the European Economic Area was incompatible with the EEC Treaty) stipulates that

“in full deference to the independence of the courts the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition”.

“founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”

Legitimising the EU among the people(s) of Europe

2.7 But quite how the *democratic* ideal of a government *of* the people(s) *by* the people(s) and *for* the people(s) is to be recognised by effective Continent-wide governance is the EU greatest structural weakness, in respect of which much remains to be worked out. So the European Union remains a work in progress even now after 60 years since its foundations in the European Coal and Steel Community by the Treaty of Paris 1951.

2.8 The attempts to give democratic legitimacy to the European Union as its legal competences have expanded ever more broadly at the expense of its Member States have involved, at the institutional level, increasing the powers of the European Parliament in the process of legislation and other norm formation at the EU level. But the powers of the European Parliament remain unclear to all but specialists in EU law, and there is little general popular regard for it as an independent institution of governance.

2.9 The second “big idea” for popular legitimation is European citizenship. Article 20(1) of the Treaty on the Functioning of the European Union (“TFEU”) confirms the idea of EU citizenship which is automatically afforded and which *supplements* the national citizenship of “every person holding the nationality of a Member State”.⁷ In *Konstantinidis v Stadt Altensteig*, Advocate General Jacobs suggested in his Opinion that wherever an EU national goes to earn his living anywhere in the EU, he should be”

“entitled to assume that, wherever he goes ... in the European Union he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that status in order to oppose any violation of his fundamental rights.”⁸

⁷ Case C-34/09 *Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-1177

“40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State ...

41 As the Court has stated several times, *citizenship of the Union is intended to be the fundamental status of nationals of the Member States...*

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union ...”

⁸ Case C-132/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191, at § 46 of the Opinion of the AG Jacobs.

2.10 The grandiloquence of this statement and the sentiments underlying it are rather belied by the subject matter of the case, which involved a dispute about the correct spelling or transliteration into the Latin alphabet by the German authorities of the petitioner’s Greek name. But what Advocate General Jacob’s statement does highlight is the *third* main legitimation idea which is that the EU is a guardian of fundamental rights, even against the Member State. Thus Article 6 TEU provides that

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

2.11 In Case C-64/16 *Associação Sindical dos Juizes Portugueses* (27 February 2018) EU:C:2018:117 the CJEU Grand Chamber ruled at §§ 29-34 (case law references omitted, emphases added):

“29. ... [A]s regards the material scope of the second subparagraph of Article 19(1) TEU, ⁹ that provision relates to ‘the fields covered by Union law’, *irrespective of whether the Member States are implementing Union law*, within the meaning of Article 51(1) of the Charter. ¹⁰

30. According to Article 2 TEU, ¹¹ the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, *inter alia*, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.

⁹ Article 19(1) of the Treaty on European Union (TEU) provides as follows:

“1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

¹⁰ Article 51 of the Charter of Fundamental Rights of the European Union (CFR) states:

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

¹¹ Article 2 TEU stipulates:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act.

32 Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, *entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.*

33 Consequently, *national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.*

34 The Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU,¹² to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law.”

2.12 In that context, it is for the national courts acting together with the Court of Justice to ensure the full application of EU law in all Member States even against those Member State. In Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* ECLI:EU:C:2018:874 (Grand Chamber 6 November 2018) the CJEU ruled at § 74 that those provisions of the EU Charter which are expressed in mandatory and unconditional terms need not be given more concrete expression by the provisions of EU or national law in order to have (both horizontal and vertical) direct effect in the domestic legal orders of the Member States, including before their national courts.

2.13 Human Rights when protected as a matter of EU law – whether as Treaty rights, Charter Rights or as general principles of EU law - gain all the characteristics of EU law generally, specifically direct effect in the absence of properly implementing national measures and primacy over any competing national measures. In order to ensure the provision of the “remedies sufficient to ensure effective legal protection in the fields covered by Union law” as required by Article 19(1) of the Treaty on European Union (TEU), national courts may be obliged as a matter of EU to disapply, if need be, any contrary statutory provision or common law doctrine of national law and/or to develop

¹² Article 4(3) TEU states:

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

its previous case law insofar as that past case law is inconsistent with the provision here and now by the court in the case before it of what EU law would regard as an “effective remedy”.¹³ And in Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* ECLI:EU:C:2018:257 (17 April 2018) the CJEU Grand Chamber confirmed (at paras 78-9) that Article 47 of the EU Charter on the right to effective judicial protection is sufficient in itself, and does not need to be made more specific by provisions of EU or of national law to confer on individuals a right to an effective judicial remedy and protection which they may rely on as such before the national court to protect the substantive rights conferred on them under the EU Charter.

2.14 Further, the CJEU has held that the appropriate remedy for a breach of the EU principle of equal treatment is *not* to level down by taking away the advantage to a privileged party but rather to level up, so that all parties were equally privileged. In Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43 (Grand Chamber, 22 January 2019) the CJEU confirmed (at §§ 79-80) that this applied was a general principle applicable to all situations in which a breach of the principle of equal treatment has not been found to be justified:

“79. ... [W]here discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only *by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned.*

80 In such a situation, a national court must set aside any discriminatory provision of national law, *without having to request or await its prior removal by the legislature*, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category. *That obligation persists regardless of whether or not the national court has been granted competence*

3. THE LONG HISTORY OF HUMAN RIGHTS

3.1 The idea of “Human Rights” has a very long history, certainly pre-dating the founding of the European Union. Some date the idea to the social and religious upheavals in 15th and

¹³ See e.g. Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S, v Estate of Karsten Eigil Rasmussen* EU:C:2016:278 (Grand Chamber CJEU, 19 April 2016) at § 34: “Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law *by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law*”.

16th century Europe primarily associated with the European “discovery” of the Americas. For example in his 2002 lecture “From Conquest to Constitutions: Retrieving a Latin American Tradition” Paolo Carozza states that the 16th century Dominican friar Bartolomé de las Casas,

“became the first notable American proponent of the idea of human rights. Admittedly, the way he meshed theory and practice can make it a little difficult to synthesize Las Casas’ views.

These views are *not* set out with the patient and systematic rigor of a philosopher, *but with a litigator’s focus on the practical results sought in the dispute at hand. He therefore grabs arguments to serve his cause wherever he can find them and is eclectic in choosing his sources.*”¹⁴

3.2 Let me set out my stall at the outset. Human Rights are an essential aspect of Constitutional Law, and Brexit will inevitably mean fundamental changes in our Constitution.

3.3 The thesis that I want to develop out in this paper is that the *Constitutions* are, in our post-Reformation/post-Nuremberg/post-Brexit European world, must remain mechanisms for *preserving Difference* and for *resolving Differences*.

3.4 What do I mean by that? Let me begin to unpack that idea by going back to the life and times of Las Casas. He was an 8 year old living in Spain when, in 1492 CE, the last Muslim kingdom in the Iberian peninsula, Granada, fell to the Christian Reconquista. In the same year the Alhambra Decree, or Edict of Expulsion of Ferdinand and Isabella, was pronounced, ordering that all Jews who refused to convert to Catholicism be forever expelled from Spain/*Sepharad*. If and insofar as the “Catholic monarchs” had a constitutional vision, it was one of *uniformity*. They gave no space for difference among their subjects. Those living in Spanish territory from a Jewish or Muslim background had abandon that faith, deny the traditions of their ancestors, or abandon the country.

3.5 In the same year of 1492 CE Christopher Columbus, on a mission funded by the Spanish Crown, “discovered” the West Indies and claimed the “New World” for Spain. When the Spain sought to make an empire of it and colonise the New World, they found it already to be inhabited. Coming from a constitutional culture whose governing theme was the need for uniformity and conformity, their reaction to the indigenous Americans’ differences from their own customs, language, religion, and civilisation was to deny that these differences were worthy of any respect. Indeed these very differences made the

¹⁴ “From Conquest to Constitutions: Retrieving a Latin American Tradition” (2003) 25 *Human Rights Quarterly* 281–313

Amerindians, in the eyes of the invading Spanish colonists and their apologists such as Juan Ginès de Sepúlveda, less than human, rendered them incapable of self-government and justified their being put to forced labour and enslaved.

3.6 Las Casas' response was to *deny* that "difference" in religion, language, laws, culture, or customs justified such difference in treatment. Instead he proclaimed a radical equality in stating that

"All the races of the world are men, and of all men and of each individual there is but one definition, and this is that they are rational. All have understanding and will and free choice, as all are made in the image and likeness of God ...Thus the entire human race is one."¹⁵

4. PRESERVING DIFFERENCE

4.1 So we have there the theme of this paper: Constitutions as a means not of imposing *uniformity*, but of *preserving Difference* and for *resolving Differences*.

4.2 But what do I mean by Difference? In this context it may sometimes also be referred to as "Diversity". The one rule in arguing in court is "know your judge", so that your argument can work both consciously and subconsciously on them. I remember appearing in a case before the UK Supreme Court a couple of years ago and what suddenly hit me, as my arguments before the court were bombing, was the astonishing uniformity of background of the people before whom I was presenting my case: five late middle aged, upper-middle class, privately educated white Englishmen - the British Establishment *en banc*.

4.3 I'm different, I thought. I bring another life experience, I told myself. But who do I think I really am? If I were to run together in one phrase or sentence the characteristics that I think are significant for my self-definition, together with those that others might think significant in identifying me, I could say something like, in no particular order in a Whitmanesque *Song of Myself* that I am:

a non-disabled, orphaned, white, childless, civilly-partnered, multiply-sibblinged, greatly-cousined, many-times uncle and great-uncle, cis-gendered, gay, male, lay, religiously informed, tertiary-educated, polyglot, Catholic, fifth-generation Scot of Irish labourer and Welsh mining stock, Lanarkshire-born in the 1960s to teacher parents, practising at both the Scottish and the English Bars, specialising in European law.

¹⁵ Bartolomé de Las Casas "Apologetic History", 3 *Obras Escogidas* 165–66

4.4 I am large. I contain multitudes. We all do. We all, and always, tell stories of where and how we are rooted. We can all build up our own list of such labels that we might apply to ourselves. These labels don't *capture* who we are – just because you know these things *about* me, doesn't mean you know *me* - but the labels might still be useful signposts in terms of indicating what we think important in terms of establishing our own particular identities and the things we regard as important for our own individual flourishing.

4.5 Interestingly and perhaps significantly, many (but not all) of the labels I have chosen correspond to “protected characteristics” which are covered by the substantive equality law of the EU which now applies to the following areas:

- (a) labour related ¹⁶ and public services provision ¹⁷ discrimination between men and women; ¹⁸
- (b) labour related and public services provision discrimination ¹⁹ based on racial or ethnic origin; ²⁰
- (c) labour related discrimination ²¹ based on religion or belief; ²²

¹⁶ See for example, the Equal Treatment (Employment) Directive 2006/54/EC; the Pregnant Workers Directive 92/85/EEC; the Equal Treatment (Self-employed) Directive 2010/41/EC; Equal Treatment (Social Security) Directive 79/7/EEC

¹⁷ Equal Treatment (Goods and Services) Directive 2004/113/EC.

¹⁸ Article 21(1) CFR sets out a general prohibition on the EU institutions (and on Member States when implementing EU law) effecting 'any discrimination based on any ground such as sex'. Article 23 CFR echoes the provisions of Article 157 TFEU by providing that 'equality between women and men must be ensured in all areas, including employment, work and pay', albeit that “the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”

¹⁹ See Race Discrimination Directive 2000/43/EC

²⁰ Article 21(1) CFR expresses, as a general principle, a prohibition against the EU (or the Member States implementing EU law) discriminating

“on any ground such as ... race, colour, ethnic or social origin, genetic features, language, ... membership of a national minority ... birth ...”

²¹ The Employment Equality Directive 2000/78/EC seeks to ensure the application by all in both the public and private sectors of the principle of equal treatment/non-discrimination on grounds of religion or belief in relation to: conditions of access to and promotion within employment, self-employment and occupation (Article 3(1)(a)), and vocational training and practical work experience (Article 3(1)(b)); employment and working conditions, including dismissal and pay (Article 3(1)(c)); and membership of professional and employer or employee organisation (Article 3(1)(d)). It does not apply to payments of any kind made by State social security or social protection schemes (Article 3(3)).

²² Article 21 CFR provides for a prohibition against the EU institutions or the Member States, when implementing EU law, acting on 'any discrimination based on any ground such as ... religion or belief, political or any other opinion'. Article 22 CFR also commits the EU to 'respect cultural, religious and linguistic diversity', while Article 10(1) CFR reflects the principles and terms of Article 9 ECHR in proclaiming

- (d) labour related discrimination ²³ based on disability; ²⁴
- (e) labour related discrimination ²⁵ based on age; ²⁶
- (f) labour related discrimination ²⁷ based on sexual orientation; ²⁸
- (g) labour related discrimination ²⁹ based on transgendered status; ³⁰

4.6 In July 2008, following a consultation exercise, the European Commission issued a proposal for a draft EU-wide Directive seeking to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market, notably in access to the commercial/professional supply of goods and services, and the public provision of housing, education, social security and health care. This proposal was not proceeded with.

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.

And the right of parents to ensure, in accordance with their national legal provisions, the education and teaching of their children in conformity with their religious convictions is also provided in Article 14(3) CFR.

²³ The Employment Equality Directive 2000/78/EC outlaws discrimination in or connected with the workplace which is based on, among other grounds, an individual's disability, although Member States may opt out of its provisions in relation to disability discrimination as regards their armed forces (Article 3(4))

²⁴ Article 21(1) CFR prohibits the EU or the Member States in implementation of EU law to discriminate 'on any ground such as ... disability'

²⁵ The Court of Justice has held that the prohibition against workplace age related discrimination is a general principle of EU law which is given particular expression in, but is not constrained by, the age discrimination provisions of the Employment Equality Directive 2000/78/EC: see e.g. Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 and Case C-555/07 *Seda Kucukdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

²⁶ Article 21(1) CFR forbids the EU and the Member States when implementing EU law from discriminating 'on any ground such as ... birth [or] age'.

²⁷ The Employment Equality Directive 2000/78/EC Directive outlaws harassment on grounds of perceived or assumed sexual orientation in the workplace, but also makes provision for the possibility of lawful workplace or work-related discrimination on grounds of sexual orientation. This may be justified as a matter of EU law only under reference to the general 'genuine occupational requirement' which is referred to in Recital 23 and for which provision is made in Article 4(1) of the Directive.

²⁸ Article 21(1) CFR prohibits 'any discrimination based on any ground such as ... sexual orientation' by the EU and the Member States when implementing EU law

²⁹ See e.g. Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143; Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 §§ 33–35; and Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

³⁰ There are no Charter provisions referring specifically to transgendered status. Article 1 CFR, however, proclaims that 'human dignity is inviolable [and] must be respected and protected', while Article 21(1) CFR expresses as a general principle a prohibition against any 'discrimination based on any ground such as ... social origin [or] genetic features' by the EU or the Member States when implementing EU law

4.7 The UK's Equality Act 2010 overlaps with, but in some instances (for example in relation to imposing general obligations of equality of treatment in relation to the provision of services to the public) goes further than the requirements of EU equality law. It is largely a consolidating measure which brings into the four corners of one statute these various grounds or characteristics which may now form the basis for a claim of unlawful discrimination. In principle, sex discrimination law requires that men and women be treated equally regardless of their sex. And race discrimination law aims at a form of "colour blindness". Age discrimination law seeks to protect the old and young alike. And sexual orientation discrimination law wishes the equality of treatment between gay and straight. The Equality Act's prohibition on discriminatory treatment against those identifying as "trans" gives legal protection only to those who would so identify themselves.³¹ The Equality Act does give equal protection to a woman making the transition to being a man, as to a man making the transition to being a woman; and it requires equivalent protection for those who have started out on the process of changing their gender with those who have completed the process, at least to their own satisfaction. And disability discrimination law does not pretend that the disabled and the non-disabled have the same abilities, but instead aims to protect the disabled against detrimental treatment as regards something arising in consequence of an individual's

³¹ In *R(C) v. Secretary of State for Work and Pensions* [2017] UKSC 72, Baroness Hale observed at § 1:

"'We lead women's lives: we have no choice'. Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debateable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self.

Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man.

Gender dysphoria is something completely different - the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that *a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history*. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

disability,³² as well as against treatment which is to a disabled person's detriment precisely because it fails to take account of – and make reasonable adjustments in respect of – that individual's particular disability or disabilities.³³ The prohibition in the Equality Act 2010 on married/civilly partnered status discrimination³⁴ protects only those who are married or civilly partnered³⁵ (and requires that the two states be treated equivalently³⁶). Now that the UK has legislated throughout its four nations to allow for the possibility of marriage between two individuals regardless of their sex or gender, then the full panoply of non-discrimination law would apply to prevent any discrimination among the married on the basis that their spouse was of the same sex or of the opposite sex. Any difference in treatment between the same sex married and the opposite sex married could be caught both by a prohibition against discrimination on grounds of sex³⁷

³² Section 15 of the Equality Act 2010 provides as follows:

15 Discrimination arising from disability

A person (A) discriminates against a disabled person (B) if—
A treats B unfavourably because of something arising in consequence of B's disability, and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

³³ Section 21 of the Equality Act 2010 provides as follows:

“21 Failure to comply with reasonable adjustments duty

A failure to comply with the first, second or third requirement [in Section 20 EA] is a failure to comply with a duty to make reasonable adjustments.
A discriminates against a disabled person if A fails to comply with that duty in relation to that person ...”

³⁴ There are no Charter provisions referring specifically to discrimination on grounds of matrimonial status. Article 9 CFR sets out a general right to marry and to found a family, 'in accordance with the national laws governing the exercise of these rights'.³⁴ But Article 21(1) CFR, which sets out a general prohibition against discrimination (by the EU or the Member States implementing EU law) on a number of enumerated grounds, does not make any specific reference to 'marital or family status', and differs from the parallel Article 14 ECHR in that it does not conclude with a reference to 'other status'.

³⁵ Section 8 of the Equality Act 2010 specifies “marriage or civil partnership” as one of the protected characteristics under the Act.

³⁶ See *Preddy v. Bull* [2013] UKSC 73 [2013] 1 WLR 3741 per Baroness Hale at § 36:

“Parliament has created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. They are also worthy of the same respect and esteem. The rights and obligations entailed in both marriage and civil partnership exist both to recognise and to encourage stable, committed, long term relationships. It is very much in the public interest that intimate relationships be conducted in this way. Now that, at long last, *same sex couples can enter into a mutual commitment which is the equivalent of marriage*, the suppliers of goods, facilities and services should treat them in the same way.”

³⁷ Compare *MacDonald v. Ministry of Defence* [2003] ICR 937, HL

and on grounds of sexual orientation.³⁸ Yet while the married and civilly partnered are protected against discrimination *because* they are married or civilly partnered³⁹ to (rather than simply in a close relationship with⁴⁰) a particular individual,⁴¹ the single - or those cohabiting without benefit of the law, whether gay or straight - are *not* expressly protected under the Equality Act 2010 against discrimination because unwed.⁴²

Preserving Community

4.8 The other thing to note about these labels or protected characteristics is that they can be used by individuals not only to proclaim their *difference* from others – I am white, you are black – but also to identify oneself as being part of a community of *like* people. *I am Black and Black Lives Matter*.

4.9 This idea of the individual's flourishing being dependent in part on their membership of a community of like, or indeed *like-minded* people, would point to the idea that the Constitution of the ideal polity (whether a nation state or a supranational community)

³⁸ See *Onu v Akwivu* [2016] UKSC 31 [2016] 1 WLR 2653 per Baroness Hale at § 29:

“In *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741... Christian hotel keepers would deny a double bedded room to all unmarried couples, whether of opposite sexes or the same sex. That would undoubtedly have been indirect discrimination, as same sex couples were not then able to marry and thus fulfil the criterion, whereas opposite sex couples could do so if they chose. But the majority held that *it was direct discrimination, because the hotel keepers expressly discriminated between heterosexual and non-heterosexual married couples. The couple in question were in a civil partnership, which for all legal purposes is the same as marriage.*”

³⁹ The categories of sex and marital status discrimination can be interconnected. In *Chief Constable of the Bedfordshire Constabulary v Graham* [2002] IRLR 239 (EAT), a challenge to a police force's policy restricting officers who were married to or in a (opposite sex) relationship with another officer from working together, was found not to be marital status discrimination but was, instead, discriminatory on grounds of sex, in that a higher proportion of women police officers were found to be in relationships with their male colleagues than the proportion of male constables in relationships with their female fellow officers.

⁴⁰ See *Hawkins v Atex Group Ltd* [2012] ICR 13157, EAT holding that the characteristic protected was the fact of being married. The appropriate comparator would be someone in a relationship akin to marriage, but who was not actually married.

⁴¹ See *Dunn v Institute of Cemetery and Crematorium Management* [2012] ICR 941, EAT holding that a person who was married, or in a civil partnership, was protected against discrimination on the ground of that relationship and on the ground of their relationship to the other partner.

⁴² Though see *In re P (A Child) (Adoption: Unmarried Couples)* [2009] 1 AC 173 where the House of Lords declared that it was contrary to fundamental rights for the Family Division of the High Court of Justice in Northern Ireland to reject the appellants as prospective joint adoptive parents on the ground only that they were cohabiting but not married to one another.

would make provision for the protection of the rights of individuals as part of particular communities.

4.10 Just as there are a multiplicity of identifying labels (some of them protected characteristics under the law) that help us make sense of our individual identity, so there may be said to be a multiplicity of possible types of community within which people can flourish and become more than themselves.

5. RESOLVING DIFFERENCES

5.1 Equality law in the modern era may be said to have begun with the enactment in the United States of America of the Civil Rights Act of 1964. The evil that that American federal legislation sought to remedy was not the oppressive use of State power against individuals, but the failure by the (federal) State to do enough to protect minority groups from the tyranny of the white majority. One could say that equality law arises from government *not doing enough* to protect those subjects to its law. Equality law is about the polity seeking to change society by legislating to instruct and educate institutions and individuals how they might act in their public interactions. It is about imposing positive obligations on, among others, employers, teachers and providers of goods and services to the public. It requires them to be: blind to differences in race, gender, age, sexuality; deaf to differences in religion or belief; and ready to make reasonable adjustments for the differently abled.

5.2 By contrast human rights *law* – which arose after the Second World War in the wake of the horrors of Nazi Germany, when Nuremberg “laws” were used as an instrument of discrimination and oppression of (Jewish) German citizens - is, classically, about limitations or “negative obligations” being imposed upon the State, to stop it from interfering in how individuals may choose to structure their lives. It is about carving out areas of freedom for individuals - privacy, expression, exercise of religion - which government should not interfere in (except for very good reasons).

5.3 So one could say that whereas equality law arises from the experience of government *not doing enough* to protect the people for which it has responsibility, human rights law arises from the perception that government may *do too much*, and oppresses those in its care and at its mercy.

5.4 The problem is of course that these two principles may appear to pull in quite different directions. Currently a white, male, middle-aged, married, heterosexual Christian can pray in aid anti-discrimination law if he is subject to detrimental treatment which is directly or indirectly referable to the fact that he is male, or middle-aged, or white or heterosexual or married or Christian. But there then arises the paradox. Is it not unlawful discrimination against, for example a committed Muslim or Christian, to prevent him from acting upon his religiously based beliefs by say: his asking to be relieved of his duties as a civil registrar to solemnise same sex civil partnerships;⁴³ or his seeking exemption in his job as relationship/marriage guidance counsellor from working with same sex couples⁴⁴; or in his refusing to rent a double-bedded room to a gay couple in the hotel which he owns⁴⁵ and runs; or in his wearing a religious symbol to work;⁴⁶ or in his seeking to foster⁴⁷ or to adopt⁴⁸ children within a home context which strongly emphasises a religiously based moral code of what it considers to be right behaviour?

5.5 It appears not.

5.6 The courts in the United Kingdom have analysed such cases from an equality and fundamental rights perspective by asking whether a person *without* religiously based views would have been permitted to act in any of these ways. If both a religious and a non-religious person would not have been permitted to do these things, then there is no discrimination on grounds of religion or belief.

5.7 For the religious, however, this feels like a false comparison and an empty exercise on the part of the courts. The point about religiously based beliefs is that, for their adherents, they are understood and experienced as being *justified* within their own terms. These beliefs are embedded within an overarching (religious) system. Their beliefs form an inextricable part of that religious world view. Their religious beliefs are intimately tied into the moral values to which they would adhere, by word *and* deed. Failing to act on

⁴³ *Ladele v Islington London Borough Council* [2010] WLR 955, CA

⁴⁴ *McFarlane v Relate Avon Limited* [2010] EWCA 880 [2010] IRLR 872, CA

⁴⁵ *Bull v Hall* [2013] UKSC 73 [2013] 1 WLR 3741

⁴⁶ *Eweida v British Airways plc* [2010] ICR 890, CA and *Eweida and others v. United Kingdom* (2013) 57 EHRR 81 ECtHR

⁴⁷ *McClintock v Department of Constitutional Affairs* [2008] IRLR 28, EAT

⁴⁸ See *Catholic Care (Leeds Diocese) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 (17 March 2010) and, after sundry further procedure, [2012] UKUT 395 (TCC), [2012] EqLR 1119, Upper Tribunal (2 November 2012)

those beliefs is not an option for the religious, because a failure so to act expresses for them a *denial* of their beliefs.

5.8 Thus, for the religious, their attitudes and judgments on right conduct are the very opposite of “prejudice” which anti-discrimination law was supposed to be aimed at. And, they would say, there can be no proper comparison between those who would discriminate on grounds of a religiously informed conscience, and those who so act simply from some unthinking incoherent prejudice or bigotry. The pretended comparison between the religious and the irreligious wrongly treats unlike cases alike. From the point of view of the religious, the law should, instead, respect those who act on the basis of religiously informed conscience and make some form of reasonable accommodation to allow them space, even within the workplace and the public marketplace, not to be required to act in a manner contrary to their conscientious religious based beliefs. The claim is that the law should not treat the religious and the irreligious as equivalent; rather, the law should respect the beliefs and consciences of the religious and allow for the possibility of their being able to act in accordance with those beliefs without fear of falling foul of the requirements of equality law or fundamental rights as interpreted by the secular civil courts.

5.9 And if one is serious about equality law also protecting religion or belief, then such protection cannot be one which banishes religious belief or practice to the *forum internum* with no place for any open expression in the public square. This is to condemn the religious to the very closet which equality law has done so much to liberate others from. This is where Charter rights law might have a distinct role to play.

5.10 The Strasbourg Court has held that discrimination on grounds of sex cannot be justified, even if based on conscientious and religiously based convictions.⁴⁹ And in

⁴⁹ On the rejection of religiously based discrimination on grounds of sex see the non-admissibility decision in *Reformed Protestant Party (Staatkundig Gereformeerde Partij) v. Netherlands* (2012) 55 EHRR SE 17:

76. The issue in the present case is the applicant party’s position, restated in the present proceedings before the Court, that women should not be allowed to stand for elected office in general representative bodies of the State on its own lists of candidates. It makes little difference whether or not the denial of a fundamental political right based solely on gender is stated explicitly in the applicant party’s bye-laws or in any other of the applicant party’s internal documents, given that it is publicly espoused and followed in practice.

77. The [Netherlands] Supreme Court, in §§ 4.5.1 to 4.5.5 of its judgment, concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together that the SGP’s position is unacceptable *regardless of the deeply-held religious conviction on which it is based*. ... For its part, and having regard to the Preamble to the Convention and the case-law the Court takes the view that in terms of the Convention the

Alekseyev v. Russia the Court denied that Contracting States (any longer) had any wide margin of appreciation on the issue of civil rights for gay men and lesbians, or that religiously based concerns could properly be prayed in aid as a justification to limit these rights.⁵⁰ In *Preddy v. Bull* [2013] UKSC 73 [2013] 1 WLR 3741 in holding that the refusal by the owners of a Bed & Breakfast/private hotel to rent a double-bedded room to a civilly partnered same sex couple was an unlawful act of discrimination sounding in damages, Baroness Hale noted as follows on this point (at paras 35, 38):

“Mr and Mrs Bull seek to justify their policy [to rent double-bedded rooms only to married couples] by reference to a deeply held belief that sexual intercourse outside marriage is sinful.Parliament did not insert a conscientious objection clause for the protection of *individuals* who held such beliefs. Instead, it provided a carefully tailored exemption for *religious organisations* and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation.”

5.11 However in *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 the UK Supreme Court held that equality law should not be read or given effect in such a way as to compel providers of goods, facilities and services such as Cornerstone to express a message with which they disagree. The fact that this particular message had to do with sexual orientation is irrelevant to *human rights* law which, under Article 9 and 10 ECHR, protects legal persons and association of natural persons from being obliged to manifest a belief or political opinion which they do not hold and which acknowledged and upholds the constitutional right to freedom of conscience.

5.12 Litigation in this area may therefore be seen as attempting to resolve differences, while preserving difference. As a result it will in many cases be markedly fact specific. There are general principles that can be prayed in aid in arguing them, among them subsidiarity, tolerance and respect for pluralism within the context of a democratic state.

same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14.”

⁵⁰ *Alekseyev v. Russia* [2010] ECHR 4916/07, 25924/08 and 14599/09 (First Section, 21 October 2010) at §§ 78-9:

“The Court observes that the mayor of Moscow on many occasions expressed his determination to prevent gay parades and similar events from taking place, apparently because he considered them inappropriate..... The [Russian] Government in their observations also pointed out that such events should be banned as a matter of principle, because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults. The Court observes, however, that these reasons do not constitute grounds under domestic law for banning or otherwise restricting a public event.”

5.13 The equality law based objection to allowing legally protected conscience/get-out clause from its provisions is that right thinking people simply do not want a society where, in particular, racist ideas and ideologies might gain traction and flourish. The analogy is then drawn from the obvious horrors of a society in which racism festers, to a society in which other breaches of equality principles may survive like viruses in the body politic, whether that be sexism, ableism, ageism, and more recently cis-sexism/trans-phobia and heterosexism/homophobia.

5.14 But the objection of those - usually religious - groups and individuals seeking a space for conscientious objection is that to proclaim all these various -isms which are now covered by equality law as being of the same and equal worth is itself a contestable value judgment. In fact, they would say, there are as many dis-analogies as analogies in this *omnium gatherum* and one should not so readily equate and conflate the now universally acknowledged evils of racism with what is often a religiously or conscientious based refusal to accept that there is no relevant difference between, say: the old and the young; or men and women; or born women and trans-women; or heterosexual and homosexuals that might justify, at least for the persons holding this belief, the possibility of different treatment among those categories (for example as regards marriage law). But if and insofar as individuals join together in associations formed for proclaiming or teaching or manifesting or practising religion, then there may be some greater scope for manoeuvre.⁵¹

6. HUMAN RIGHTS AS ANTI-TOTALITARIAN

⁵¹ See for the position under the South African Constitution *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 Sachs J. in the South African Constitutional Court at §§ 136-137:

“A State that recognises difference does not mean a State without morality or a State without a point of view. It does not banish concepts of right and wrong nor envisage a world without good or evil. It is impartial in its dealings with peoples and groups, yet is not neutral in its value-system. The Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded upon a deep political morality. *What is central to the character and functioning of the State, however, is the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*”

The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. *The first is that gays and lesbians cannot be forced to conform to heterosexual norms: they can break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reason of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet while the Constitution protects the right of people to continue with such beliefs, it does not permit the State to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.*”

6.1 The motto of the *totalitarian* State, as articulated by Mussolini (in a speech in La Scala Milan in 1925) was:

tutto nello Stato, niente al di fuori dello Stato, nulla contra lo Stato

6.2 In the 20th century the concept of human rights was developed curb the idea of the totalitarian State which the new ideology of Fascism proclaimed, by emphasizing the idea of society as being made up of a commonwealth of associations in which individuals participated and to which their loyalties could be given and, accordingly, in which there might be a multiplicity of identities.

6.3 This idea now bears the label of “subsidiarity”, which means at base that the State should not presume to arrogate all power to itself, but should respect the nature of society as a commonwealth by permitting power to cascade down to the lowest level at which it could most effectively be exercised.⁵² In denying the legitimacy of the absolutist State, this social democratic tradition also emphasized the possibility of a loyalty and belonging which transcended national boundaries, most notably in religion - rather than, as with the communist ideal that “workers of the world unite”, in terms of class.

6.4 The defeat of Fascism and the rise of Communism which marked the ending of the Second World War, gave a new impetus and urgency for this social democratic teaching

⁵² See Pope Pius XI *Quadragesimo Anno* (1931)

“79. Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

80. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of ‘subsidiary function’, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.

81. First and foremost, the State and every good citizen ought to look to and strive toward this end: that the conflict between the hostile classes be abolished and harmonious cooperation of the Industries and Professions be encouraged and promoted.

82. The social policy of the State, therefore, must devote itself to the re-establishment of the Industries and Professions.”

to be realised as a political force, against the background of a recognition that the pre-War democratic constitutions in much of Europe had simply not be strong enough to withstand the strains that they had been placed under, and also, more darkly perhaps, that democracy needed to be protected from itself.

6.5 The governing principle behind the formulation and the adoption of the European Convention of Human Rights (and other post-Nuremberg international human rights law instruments) is the *rejection* of this totalitarian State with its defining motto of:

“Everything within the State. Nothing outside the State. Nothing against the State.”

6.6 In *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 when striking down Scottish legislation which had been passed without any dissenting votes by the democratically elected and accountable Scottish Parliament and which required the universal appointment of State guardians to children in Scotland the Court noted (at para 73) that:

“The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world. Within limits, families must be left to bring up their children in their own way.”

6.7 To similar effect *In re B (Children)* [2008] UKHL 35 [2009] 1 AC 11 Baroness Hale noted at § 20:

“In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families *in all their subversive variety are the breeding ground of diversity and individuality*. In a free and democratic society we value diversity and individuality. As McReynolds J famously said in *Pierce v Society of Sisters* (1925) 268 US 510, 535: ‘The child is not the mere creature of the state.’

6.8 In this analysis the first community may be said to be families, or households. In a sense the protection against discrimination on grounds of being married or civilly partnered and/or on grounds of pregnancy and maternity may be said to be a partial recognition by the State of the respect to be accorded to families as community. But there are a whole host of other ways in which people form and participate in communities or associations, whether these be trade unions, charities, churches, or indeed limited liability companies.

6.9 As was observed in *O’Keefe v. Ireland* (2014) 59 EHRR 15 (in a joint and partly dissenting Opinion):

“According to the Preamble to the Convention, fundamental freedoms are best maintained in an effective political democracy. The notion of a democratic society encompasses the idea of subsidiarity. *A democratic society may flourish only in a state that respects the principle of subsidiarity and allows the different social actors to self-regulate their activities.* ⁵³

6.10 The post-Nuremberg/anti-totalitarian State is one which is obliged, at the level of fundamental constitutional principle, to recognise and respect freedom of association as perhaps the fundamental right of individuals to be free to form communities and join associations and have the freedom and privacy to enjoy family life. This is the principle of subsidiarity which may be understood *in the positive sense* as entailing constitutional obligations on the post-Nuremberg State to offer economic, institutional or legal support to those basic social associations which form the essential cells of society.

6.11 The flourishing of different associations, forms of life in society is the very definition of pluralism. And as the European Court of Human Rights noted in *Islam-Ittihad Association and Others v. Azerbaijan* [2014] ECtHR 5548/05 (First Section, 13 November 2014) at para 40:

“[P]luralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.

It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively”

6.12 In *Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy v. the former Yugoslav Republic of Macedonia* [2017] ECHR 532/07 (First Section, 16 November 2017) at paras 94-5 where it reiterated that:

“94. In the context of Article 11 of the Convention, the way in which national legislation enshrines freedom of association and *its practical application by the authorities* reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions

...

95. ..[T]he State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and groups within them. What is at stake here is the preservation of pluralism and the

⁵³ *O’Keefe v. Ireland* (2014) 59 EHRR 15 (Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at O-11-7)

proper functioning of democracy [W]here a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may work together and pursue common objectives collectively.

6.13 For example, in *St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator* ⁵⁴ the Scottish Charities Appeal Panel held that a religiously based adoption society could *not* lawfully be required to amend its published guidance to ensure no discrimination on grounds of religion and belief or sexual orientation in respect of prospective adoptive parents on the grounds that any such amendment would result in the withdrawal of Church support for the agency and its consequent closure. This decision was avowedly taken in order to comply with the principles which the Strasbourg Court has found to be embodied within Article 9 ECHR ⁵⁵ among them the following:

- that “associations formed for ... proclaiming or teaching religion, are also important to the proper functioning of democracy” ⁵⁶
- that “in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial” ⁵⁷
- that “in a pluralist democratic society, the State’s duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed” ⁵⁸

⁵⁴ *St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator* SCAP App 02/13 (Scottish Charity Appeal Panel, 31 January 2014)

⁵⁵ Article 9 ECHR states:

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

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

⁵⁶ *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at § 61

⁵⁷ *Barankevich v. Russia* (2008) 47 EHRR 8 (26 July 2007) at § 30

⁵⁸ *Zengin v. Turkey* (2008) 46 EHRR 44 (9 October 2007) at § 54

- that “states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs”⁵⁹ and
- that “the need to maintain true religious pluralism.... is vital to the survival of a democratic society.”⁶⁰

7. HUMAN RIGHTS AS ANTI-MAJORITARIAN

7.1 In contrast to the human rights instruments which have emanated from the UN Charter, the ECHR is replete with explicit references to “democracy” both in its preamble⁶¹ and in its substantive provisions.

7.2 It should never be forgotten that the European Convention on Human Rights is a “post-Nuremberg” document in the sense of having been drafted in conscious and complete rejection of two central aspects of the legal system which prevailed in Nazi Germany: first, the positivist/instrumentalist vision of the law’s absolute validity without reference to any moral values; and secondly the readiness of legislators to enact, and lawyers to enforce, laws which promoted inequality, deprived rights from and enshrined discrimination against persons deemed under those “Nuremberg laws” to be “Jews”.

7.3 The post Nuremberg constitutional polity was characterised in part by the express adoption of values in the various international Charters and Convention concerning human rights and fundamental freedoms. But as the European Court of Human Rights warned in *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1 (at para 99):

“Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole. In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, *after prospering under the democratic regime*, there being examples of this in modern European history.”⁶²

⁵⁹ *Lautsi v. Italy* (2012) 54 EHRR 3 (18 March 2011) at § 60

⁶⁰ *Bayatyan v. Armenia* (2012) 54 EHRR 15 (7 July 2011) at § 122

⁶¹ The fourth preamble to the ECHR refers to the Contracting States’

“profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend”.

⁶² The Welfare Party (“*Refah Partisi*”) was established in Turkey in 1983. It took part in local and general elections with increasing success and in the general election of 24 December 1995, it obtained

7.4 On this Strasbourg analysis, democracy involves more than the minimum procedural rights of the right to vote, to elect and be elected. In addition to these formal procedural democratic rights the claim is made that the authorities in a democratic State have an obligation to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the people may favour the deprivation or attenuation of rights for unpopular minorities.

7.5 It is the duty of the State authorities, *especially* in democratic systems, to stand up for and protect fundamental rights, often *against* majority opinion.

7.6 It might be said that the whole point about human rights is that, in some ways, they are anti-democratic, or at least anti-majoritarian, because they seek to protect - even in the face of opposition from a comfortable majority - the weak, the powerless, the destitute, the undeserving, and even those deemed socially useless. The State has to foster respect for *all* those within its care. Democracy can only be anchored in that respect by the State and by each and every individual of the fundamental rights of other individuals. Democracy is, on this analysis, a substantive moral enterprise and not simply a matter of head-counting or the taking and following of opinion polls.

7.7 This anti-majoritarian democratic ideal has many prizes. It means high standards of decision-making within government, which must respect the demands of proportionality as well as those of reasons and fairness. It is capable also of making democratic process more vigorous, by a heightened insistence on freedom of speech and associated political freedoms. It begins to shift us away from a coarse majoritarian view of democracy, which lacked any substantial theoretical underpinning for the imperative of the protection of minorities, especially unpopular minorities. In so doing, it promotes the virtue of tolerance.

8. HUMAN RIGHTS AND TOLERATION

22% of the vote and became the largest political party in the Grand National Assembly. On 28 June 1996, it came to power as the senior partner in a coalition government and its chairman, Necmettin Erbakan, became Prime Minister. In May 1997, proceedings were commenced in the Turkish Constitutional Court seeking *Refah's* dissolution on the grounds that leaders and representatives of the party had advocated and engaged in Islamist conduct and that the party had become "a centre of activities contrary to the principles of secularism" which constitute a central tenet of the Turkish Constitution

8.1 With pluralism, then, comes the need for toleration. Toleration is not historically a European value. Historically, toleration of alternative religious views as a principle of living within society is something which had to be imposed in Europe (not always successfully⁶³) by the *political* authorities of the State over the various Christian confessions in their territories in the aftermath of the Reformation and in the course of the Enlightenment. ⁶⁴

⁶³ See for example the *Declaration of Indulgence* (April 1687) of the British and Irish Catholic monarch James II and VII intended to effect within his kingdoms a general all-encompassing disapplication of the panoply of existing penal laws directed against all and any religious dissenters from the established Church of England. The Declaration expressly permitted people the right to worship as they chose, whether in private houses or in public chapels, and ended the requirement that people take various religious oaths before advancement to civil or military office, while confirming the King's commitment maintaining the existing Anglican ecclesiastical establishment. The Declaration noted:

“We cannot but heartily wish, as it will easily be believed, that all the people of our dominions were members of the Catholic Church. Yet we humbly thank Almighty God, it is and has of long time been our constant sense and opinion (which upon divers occasions we have declared) that *conscience ought not to be constrained nor people forced in matters of mere religion*; it has ever been directly contrary to our inclination, as we think it is to the interest of government, which it destroys by spoiling trade, depopulating countries, and discouraging strangers, and finally, that it never obtained the end for which it was employed. And in this we are the more confirmed by the reflections we have made upon the conduct of the four last reigns. For after all the frequent and pressing endeavours that were used in each of them to reduce this kingdom to an exact conformity in religion, it is visible the success has not answered the design, and that the difficulty is invincible.”

The following year in April 1688 he confirmed the terms of the Declaration of Indulgence and of his intention that this not be regarded as a temporary measure, but permanent, stating:

“[W]e have resolved to use our utmost endeavours to establish liberty of conscience on such just and equal foundation as will render it unalterable, and *secure to all people the free exercise of their religion forever, by which future ages may reap the benefit of what is so undoubtedly for the general good of the whole kingdom*. It is such a security we desire, without the burden and constraint of oaths and tests, which have been unhappily made by some governments, but could never support any; nor should men be advanced by such means to offices and employments, which ought to be the reward of services, fidelity, and merit.”

⁶⁴ That political imperative (and theological indifference) behind the move towards toleration in religion was more fully explained by John Locke in his 1689 *Letter on Toleration* - as translated by William Popple and reproduced in Paul E Sigmund (ed.) *The selected political writings of John Locke* (New York: Norton, 2005) at pages 157-8 - in which Locke allowed for the possibility of the law's toleration, among other matters, of the right “to worship God in the Roman manner”, including the use of Latin in Church services, provided that the same freedom could be extended by them to other Christian denominations and sects. Locke maintained, however, that toleration could not be extended to Catholics in England so long as the Catholic Church maintained certain objectionable *political* teachings which he characterised thus:

“We cannot find any sect that teaches, *expressly and openly*, that men are not obliged to keep their promise; that princes may be dethroned by those that differ from them in religion; or that the dominion of all things belongs only to themselves. ... [But] what else do they mean who teach that faith is not to be kept with heretics? Their meaning, forsooth, is that the privilege of breaking faith belongs unto themselves; for they declare all that are not of their communion to be heretics, or at least may declare them so whensoever they think fit. *What can be the meaning of their asserting that kings excommunicated forfeit their crowns and kingdoms? It is evident that they thereby arrogate unto themselves the power of deposing kings*, because they challenge the power of excommunication, as the peculiar right of their

8.2 There are now substantial Muslim minorities within the states of the European Union.

And, indeed, there are currently four state members of the Council of Europe where Muslims constitute the largest share of the population: Albania, Azerbaijan, Bosnia & Herzegovina, and Turkey (though but none of them have a *shari'a* based legal system). Of these, Turkey has long outstanding wish to join the EU and has entered into negotiations for such entry. A condition of EU membership is compliance with the EU's fundamental rights standards (standards with which Turkey should, in any event, largely comply as it is already bound by the European Convention on Human Rights, since Turkey was a founder member of the Council of Europe). In the face of the perceived rise in a more committed and engaged Islam among individuals within their jurisdiction, many States subject to the European Convention on human rights (France,⁶⁵ Germany,⁶⁶ Norway,⁶⁷ Turkey⁶⁸ and the United Kingdom⁶⁹ to cite just a few examples) have

hierarchy. That dominion is founded in grace is also an assertion by which those that maintain it do plainly lay claim to the possession of all things. For what do all these and the like doctrines signify, but that *they may and are ready upon any occasion to seize the Government and possess themselves of the estates and fortunes of their fellow subjects; and that they only ask leave to be tolerated by the magistrate so long until they find themselves strong enough to effect it? [...]* That Church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby ipso facto deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country and suffer his own people to be listed, as it were, for soldiers against his own Government. Nor does the frivolous and fallacious distinction between the Court and the Church afford any remedy to this inconvenience; especially when both the one and the other are equally subject to the absolute authority of the same person, who has not only power to persuade the members of his Church to whatsoever he lists, either as purely religious, or in order thereunto, but can also enjoin it them on pain of eternal fire.”

⁶⁵ See, for example, *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* which from September 2004 has banned school pupils from wearing “conspicuous” signs of belonging to a religion, which is interpreted as meaning any visible symbol meant to be easily noticed by others such as headscarves for Muslim girls, yarmulkes for Jewish boys, turbans for Sikh boys and (large) Christian crosses worn outside clothing by either sex. See generally *Dogru v France* (2009) 49 EHRR 8. In *SAS v. France* (2015) 60 EHRR 11 the European Court of Human Rights held that it was within the margin of appreciation” available to France for it to pass a law (Law No.2010-1192 - the Law of 11 October 2010)) making it a criminal offence for anyone to dress in a manner which conceal their face in public places, thereby banning Muslim women wearing the niqab in public.

⁶⁶ See *Hans-Christian Jasch* “State-Dialogue with Muslim Communities in Italy and Germany - The Political Context and the Legal Frameworks for Dialogue with Islamic Faith Communities in both Countries” (2007) 4 *German Law Journal* at 371-2 footnote 114:

“In 2003, the Federal Constitutional Court has ruled against the *Land* of Baden-Württemberg in its effort to ban a Muslim teacher wearing the headscarf, but left the door open for state level bans of the *hijab*. See *Bundesverfassungsgericht* 24 September 2003, 2 BvR 1436/02, available at: www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html. For a commentary see Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GLJ 1099 (2003).... A few months earlier the Federal Constitutional Court had upheld a decision of the Federal Labour Court which had ruled that it is impermissible to dismiss an employee in a department store because of wearing a head scarf, see

engaged in a variety of new legal and administrative approaches aimed at seeking to reconcile the perceived plurality of claims of loyalty between religious allegiance and the proper demands of citizenship (or of lawful residence) within a territory.

8.3 Against that background the case law of the European Court of Human Rights on substantive democratic values and the centrality of pluralism and the necessity for tolerance - particularly in its jurisprudence on Turkish political parties – may have served as a guiding rod to allow for the development of what may well be called a model for “Islamic Democratic” parties. The rise of the Islamic Justice and Development (AK) Party in Turkey and the dominance of the Erdogan government undoubtedly doubtless owes something to the willingness of the European Court of Human Rights to set down clear limits on what was considered to be an acceptable program for a democratic party within the context of the European Convention on Human Rights. There are tension of course, as the decision of the Strasbourg Court in *Dogan v Turkey* (2017) 64 EHRR 5 confirms (at paras 109-110):

“109 ... Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.

Pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and

BVerfG 30 July 2003, 1 BvR 792/03, available at: www.bverfg.de/entscheidungen/rk20030730_1bvr079203.html. The defendant had argued that he would incur financial losses because costumers were not accustomed to such a sight. The BAG had not engaged in a principled discussion of the role of fundamental rights like the freedom of religion in this case but argued simply that there was no evidence for the economic losses given. Compare *Bundesarbeitsgericht*, 10 October 2002, 2 AZR 472/01, available at: <http://lexetius.com/2002,3160...> Achim Seifert, *Federal Labor Court strengthens religious freedom at the workplace*, in 4 GLJ, 559 (2003), In an *actio popularis* the Bavarian Constitutional Court has ruled that the Bavarian law on public education does not discriminate against Muslims by banning symbols which might be seen in contradiction with "Christian western values", compare the decision of the *Bayerischer Verwaltungsgerichtshof* [Bavarian Administrative Appeals Court - BayVGh], 15 January 2007, Vf. 11-VII-05, résumé available at: www.bayern.verfassungsgerichtshof.de”

⁶⁷ *Folgerø and Others v. Norway* (2008) 28 EHRR 27 (Grand Chamber) holding the refusals by the domestic Norwegian authorities to grant the children of avowed atheist-/humanists full exemption from a compulsory subject in Christianity, Religion and Philosophy to be Convention incompatible.

⁶⁸ See for example *Leyla Şahin v. Turkey* (2007) 44 EHRR 5, ECtHR (Grand Chamber) upholding the ban on the wearing of Islamic headscarves by women university students;; and *Hasan and Eylem Zengin v. Turkey* (2008) 46 EHRR 44, ECtHR holding that lessons for Muslim school students in religious culture and ethics based on the tenets only of Sunni Islam and ignoring the doctrine and practices of adherents of Alevism to be Convention incompatible.

⁶⁹ See for example *R. (on the application of Begum) v Denbigh High School Governors* [2007] 1 AC 100, HL and *R. (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298 [2008] 1 All ER 249, QBD concerning the banning by school authorities against Muslim female pupils wearing the niqab, a veil that covered the entire face and head save for the eyes, to school.

artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.

Respect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment.

110 As indicated above, the right of a religious community to an autonomous existence is at the very heart of the guarantees in art.9 of the Convention and, were the organisational life of the community not protected by art.9, all other aspects of the individual's freedom of religion would become weakened.”

8.4 There is clearly a limit to the degree to which the European Court of Human Rights will afford respect to religious beliefs, even if held in community. Thus in *Dojan v Germany* the Fifth Section of the European Court of Human Rights, in a non-admissibility decision dismissed as “manifestly ill-founded” a complaint brought by a group of married couples, all members of the Christian Evangelical Baptist Church, that the refusal to exempt their children from mandatory sex education lessons (and in one case a participatory theatre workshop performed by children on the issue of child sex abuse) constituted a disproportionate restriction on the parents’ right to ensure that their children were educated in conformity with the parents’ religious convictions. The parents argued that that the sex education lessons were harmful to their children’s moral development, in that the parents felt that the lessons promoted a view of sexuality which ran counter to biblically based doctrines of the importance of chastity and undermined the idea of an absolute prohibition of all and any sexual activity outside (opposite sex) marriage. A number of the parents were fined for keeping them off school to avoid these lessons and some indeed served prison sentences for non-payment of the fines imposed upon them for failing to ensure their children’s school attendance (home schooling not being lawful in Germany). In dismissing this application the Strasbourg Court observed as follows

“[T]he aim of sexual education is to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. *Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity.*

This objective is also reflected in the decisions of the German courts in the case at hand, which have found in their carefully reasoned decisions that sex education for the concerned age group was necessary with a view to enabling children to deal critically with influences from society instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society—in particular, *with a view to integrating minorities and avoiding the formation of religiously or ideologically motivated “parallel societies”*. The Court finds that these objectives are consonant with the principles of pluralism and objectivity embodied in art.2 of Protocol No.1.”⁷⁰

⁷⁰ *Dojan v Germany (Admissibility)* (2011) 53 EHRR SE24 (13 September 2011)

8.5 In similar vein the European Court of Justice has confirmed that that religious bodies have no *carte blanche* to discriminate (at least in the workplace). There have to be weighty reasons before EU law at least will respect even a religious employer's decision to discriminate on religious grounds among those working for it, or seeking to work for it. Thus in Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257 (Grand Chamber, 17 April 2018) a charity associated with the Reformed church advertised a job which involved preparing a report on Germany's compliance with the United Nations Convention on the Elimination of All Forms of Racial Discrimination. One of the requirements for the position was relevant church membership. Vera Egenberger's application was unsuccessful, in spite of her qualifications and previous experience, and she claimed not to have been selected due to her lack of confessional faith. She argued that the hiring decision was discriminatory and in breach of EU law, in accord with which German law had to be interpreted and complied. The CJEU observed at § 63:

“[T]he lawfulness from the point of view of that provision of a difference of treatment on grounds of religion or belief depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may follow either from the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church or organisation to the outside world.”

8.6 And in Case C-68/17 *IR v. JQ* the employer was a company established under German law. Its purpose was to carry out the work of Caritas (an international confederation of Catholic charitable organisations) as an expression of the life and nature of the Roman Catholic Church through, among other things, the operation of hospitals. JQ, who was of the Roman Catholic faith, trained as a doctor and worked at one of IR's hospitals as head of internal medicine. He was divorced from his first wife, whom he had married in accordance with the Roman Catholic rite, but married his new partner in a civil ceremony without his first marriage having been annulled. IR dismissed him from his employment. JQ brought proceedings, claiming that his remarriage was not a valid ground for dismissal. He also argued that the dismissal breached the principle of equal treatment because a member of the Protestant faith in his position would not have had to suffer the same consequences on remarriage. According to IR, the terms of JQ's employment contract were such that he had breached his obligations under that contract by entering into a marriage that was invalid under canon law. The CJEU held that a

church or other organisation the ethos of which was based on religion or belief and which managed a hospital in the form of a private limited company could not decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differed according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review before the national courts. The Court further held that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees was consistent with that Directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they were carried out, the religion or belief constituted an occupational requirement that was genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and was consistent with the principle of proportionality, which was a matter to be determined by the national courts. The CJEU found

“57 In the present case, the requirement at issue in the main proceedings concerns the respect to be given to a particular aspect of the ethos of the Catholic Church, namely the sacred and indissoluble nature of religious marriage.

58 Adherence to that notion of marriage does not appear to be necessary for the promotion of IR’s ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed. Therefore, it does not appear to be a genuine requirement of that occupational activity within the meaning of the first subparagraph of art.4(2) of Directive 2000/78, which is, nevertheless, a matter for the referring court to verify.”

9. THE FREEDOM OF NON-EXPRESSION

9.1 Toleration of pluralism may also require respect to be given to not joining in, to keeping one’s counsel and staying silent. In *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 the UK Supreme Court was faced with a case which was brought with the backing of the Equality Commission for Northern Ireland at the instance of Gareth Lee against a limited company, Ashers Baking Company Limited, which was convened as a defendant together with its directors Colin and Karen McArthur. The plaintiff’s case was that the defendants had acted unlawfully in turning away his order, after full pre-payment for it had been made to them, to supply him with a cake bearing the slogan in icing: “Support Gay Marriage – Queerspace born 1988”. Although his money was refunded in full, the plaintiff sought £500 damages for injury to feeling, loss and damage sustained by him as a result of this refusal (although it is to be noted that he did manage to find another bakery able and willing to provide him a cake to his design). He also sought a declaration that his treatment by the defendants constituted unlawful

discrimination by the defendants against him on grounds of his sexual orientation (contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006) and/or on grounds of his political beliefs in same sex marriage (contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998).

9.2 The directors of Ashers Baking Company Limited, Colin and Karen McArthur, are both committed Christians. Their contention was that it was not unlawful for them or their business to refuse to promote a particular moral or political cause to which they have a fundamental objection. They argued that legislation did not, on its ordinary and natural application require them to do so, but even if it did, the legislation would have to be construed compatibly with their Convention rights protecting freedom of thought, conscience and religion (Article 9 ECHR) as well as freedom of expression (Article 10 ECHR).⁷¹ Furthermore it was noted that there was as yet no Europe-wide consensus on same sex marriage.⁷² Neither is there as absolute Convention right not to be

⁷¹ Compare with *Ontario Human Rights Commission v Brockie* (2002) 22 DLR (4th) 174 in which a commercial printing company, Imaging Excellence Inc., was required by order of Ontario Superior Court of Justice to afford its general printing services in a non-discriminatory manner to a gay rights group (as regards the production of letterheads and business cards and the like), but was expressly not placed under any obligation to print leaflets which actively promoted “an homosexual lifestyle” and/or which was dismissive of the Christian beliefs of Mr Brockie, the president and directing mind of the company. The Ontario Superior Court of Justice held that, otherwise, there would be a disproportionate interference with Mr Brockie's freedom of religion in being forced to act in a manner contrary to his religious beliefs.

⁷² See *Hämäläinen v Finland* [2014] ECHR 37359/09 (Grand Chamber, 16 July 2014) at §§ 31, 71, 74, 96:

“31. From the information available to the Court, it would appear that ten member States of the Council of Europe permit same-sex marriage (Belgium, Denmark, France, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (England and Wales only)).

...

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf v. Austria* (2011) 53 EHRR 20 § 101).

...

74. ...[I]t cannot be said that there exists any European consensus on allowing same-sex marriages.

...

96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v. United Kingdom* (1987) 9 EHRR 56 § 49). While it is true that some Contracting States have

offended⁷³ nor is it “possible to deduce from the Convention a right not to be exposed to convictions contrary to one’s own”.⁷⁴

9.3 It is not entirely clear that Ashers Bakery could properly be described and understood as being a “faith based” company or corporation, much along the lines described by one author as follows:

“Recognising the power and ubiquity of the corporate form, certain individuals have combined to build and sustain corporations that adhere to their most deeply held convictions of all: their religious values.

Motivating these individuals has not been a desire to proselytize per se, but rather a desire to serve their own needs—and the needs of other people of faith. This should not be surprising, as many people of faith, from a variety of religious backgrounds, feel alienated from if not downright excluded from a marketplace and corporate world driven primarily by the pursuit of profit.

....

extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf v. Austria*, cited above, § 63).”

See to like effect *Oliari and others v. Italy* [2015] ECHR 18766/11 & 36030/11 (Fourth Section, 21 July 2015) at § 192:

“[D]espite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.”

⁷³ *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 § 49

49. As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to Article 10(2) ECHR, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.

⁷⁴ *Appel-Irrgang v Germany* [2009] ECHR 45216/07 (8 October 2009 – non-admissibility decision). See to similar effect *Doojan v. Germany* (2011) 53 EHRR SE24 at §68:

“The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one’s own convictions”

Contrast however *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 [2014] PTSR 758 per Lord Dyson MR at §88 opining that a Stonewall advertisement on the side of London buses bearing the slogan “Some people are gay. Get over it !” was intended to promote tolerance of homosexuals and discourage homophobic bullying. That was a lawful aim consonant with the objects of section 149 of the Equality Act 2010 and the policy adopted by TfL. The court noted that “Some people are gay” was a correct statement of fact. The phrase “get over it” was a graphic way of saying that people should accept the principles of tolerance in the 2010 Act. The claimant’s proposed advertisement with the slogan “Not gay! Ex-gay, post-gay and proud. Get over it!” was a riposte to the “gay acceptance” message of Stonewall and was seen as countering that message and encouraging “gay rejection” by implying, offensively and controversially, that homosexuality can be cured. TfL therefore were found to have acted lawfully in refusing to carry the advertisement.

Predictably, they have created niche enterprises where individuals of shared religious convictions can pool resources, coming together as directors, and employees, investors and customers. These corporations are commonly committed not simply to honourable business practices broadly speaking, but rather to the principles of certain, particular religious traditions.

...

[T]hey do not consider themselves beholden to profits alone. Their shareholders bargain around the rules that arguably require them to strictly maximize shareholder profits. They embrace certain principles and values as ends in themselves, willing to sacrifice potential financial gain, and to accept decreased profitability, in pursuit of them.”⁷⁵

9.4 In any event, the issue of whether and how commercial companies can pray in aid religious liberty rights of freedom of religion under and in terms of Article 9 ECHR remains unclear,⁷⁶ though on one Papal analysis, they should be able to do so. As Pope John Paul II noted:

“In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business.”⁷⁷

9.5 There is, however, no doubt that legal persons (companies etc.), just as much as natural persons, may pray in aid the protections of Article 10 ECHR.⁷⁸ The fact that Asher Ltd

⁷⁵ Ronald J Colombo *The First Amendment and the Business Corporation* (Oxford University Press 2014) at pp xv and 95.

⁷⁶ See the (5 to 4) majority decision in the US Supreme Court *Burwell v Hobby Lobby Stores Inc.* 134 S Ct 2751 (2014); 573 US (2014)

The principal dissent . . . [Justice Ginsburg et al] stat[es] that ‘[f]or-profit corporations are different from religious non-profits in that they use labour to make a profit, rather than to perpetuate the religious values shared by a community of believers.’ ...The first half of this statement is a tautology; for-profit corporations do indeed differ from non-profits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek ‘to perpetuate the religious values shared,’ in these cases, by their owners. Conestoga’s Vision and Values Statement declares that the company is dedicated to operating ‘in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business.’ . . . Similarly, Hobby Lobby’s statement of purpose proclaims that the company ‘is committed to . . . [h]onouring the Lord in all we do by operating . . . in a manner consistent with Biblical principles.”

⁷⁷ Pope John Paul II *Centesimus Annus* (Encyclical Letter, 1 May 1991) section 35 (emphasis in original) (available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.pdf)

⁷⁸ See *Markt Intern v Germany* (1989) 12 EHRR 161. In an EU law context see *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* [1997] ECR I-3689. See too Case C-71/02

was a business which charged for its services does not mean that its activities are not covered by the protections of human rights. This states, so far as relevant that

“Everyone has a right to freedom of expression. This right shall include the freedom to *hold opinions*”

9.6 In protecting the right to *hold* an opinion the ECHR also protects what might be termed “negative freedom of expression”,⁷⁹ which is to say a right not to be compelled to express or commit oneself to a particular view point (or to be forced to assent in or appear to give support to another’s views) but, instead, to keep one’s own counsel on a matter.⁸⁰ This might also be termed *the freedom of non-expression*. The United Nations Human Rights Committee has observed as follows, under reference to Article 19 of the International Covenant on Civil and Political Rights (ICCPR):

“9 ... No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. *All forms of opinion are protected*, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with Article 19(1) ICCPR [which states that “everyone shall have the right to hold opinions without interference”] to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19(1).

“10. *Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one’s opinion necessarily includes freedom not to express one’s opinion.*”⁸¹

9.7 By analysing the situation in *Lee v. Ashers Bakery* not as a discrimination against the messenger, but as disagreement with the message, the UK Supreme Court was able to hold that the defendants were being asked to endorse an opinion – support for same sex marriage – which they do not in fact hold. Their refusal to endorse this opinion – to protect their negative freedom of expression – has resulted in the State, in the form of the Equality Commission for Northern Ireland, funding court action against them. This freedom not to forced or required express support for a particular opinion or political position was, indeed, the very one which Sir Thomas More strove to uphold in declining

Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025; and Case C-421/07 *Frede Damgaard* [2009] ECR I-2629.

⁷⁹ See *Gillberg v. Sweden* [2012] ECHR 41723/06 (Grand Chamber, 3 April 2012) at § 86

⁸⁰ See *Strohal v. Austria* (no. 20871/92, Commission decision of 7 April 1994) at § 2:
“[T]he Commission recalls that the right to freedom of expression by implication also guarantees a ‘negative right’ not to be compelled to express oneself, i.e. to remain silent (see *K. v. Austria* (16002/90, Commission Report of 13 October 1992, § 45.)”

⁸¹ UN Human Rights Committee *General comment No. 34 on Article 19: Freedoms of opinion and expression* (12 September 2011) at §§ 9-10

to sign the Act of Supremacy declaring Henry VIII to be the Supreme Head of the Church of England. And, as the Strasbourg Court has explained:

“Bearing witness in words and deeds is bound up with the existence of religious convictions.”⁸²

10. BREXIT

10.1 The European Union (Withdrawal) Act 2018 seeks to “grandparent” into domestic (English, Welsh, Northern Irish and Scots) law after the United Kingdom leaves the European Union all the law that is currently in application in the United Kingdom by virtue of being required or imposed by EU law. The European Union (Withdrawal) Act seeks to convert much of the substance of EU law as it currently exists into purely domestic UK law on the day of withdrawal.

10.2 It is intended that the past decisions of the CJEU will continue to be binding on the domestic courts at the level before the UK Supreme Court.⁸³ And indeed in her speech of 2 March 2018 Theresa May conceded that:

⁸² *Kokkinakis v Greece* (1993) 17 EHRR 397

⁸³ Section 6 of The European Union (Withdrawal) Act 2018 provides so far as relevant as follows:

“6 Interpretation of retained EU law

(1) A court or tribunal—

(a) is not bound by any principles laid down, or any decisions *made, on or after exit day* by the European Court, and

(b) cannot refer any matter to the European Court on or after exit day.

(2) Subject to this and subsections (3) to (6), a court or tribunal *may have regard to anything done on or after exit day by the European Court*, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—

(a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

(4) But—

(a) *the Supreme Court is not bound by any retained EU case law*,

(b) the High Court of Justiciary is not bound by any retained EU case law when—

(i) sitting as a court of appeal otherwise than in relation to a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal

“[T]he Withdrawal Bill will bring EU law into UK law. That means cases will be determined in our courts. But, where appropriate, our courts will continue to look at the ECJ’s judgments, as they do for the appropriate jurisprudence of other countries’ courts.

And if, as part of our future partnership, Parliament passes an identical law to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that we both interpret those laws consistently. ...[I]f we agree that the UK should continue to participate in an EU agency the UK would have to respect the remit of the ECJ in that regard.”

In repatriating existing EU law, however the previous scrutiny and transparency that was given to draft EU legislation (regulations and directives proposed by the European Commission) by the European Parliament and other EU institutions will, however, be lost. ⁸⁴ All that public(ly accessible) debate and democratic accountability that was previously available at the EU level will be replaced by rubber stamping at best by the UK Parliament of a host of regulations made by the UK executive with no possibility for any effective prior public debate or scrutiny.

10.3 Further under the EU (Withdrawal) Act 2018 the remedial rights based on the primacy of EU law that could be prayed in aid before the UK courts in areas falling within the ambit of EU law (for example environmental law, consumer law, health and safety, employment protection, equality law, data protection, intellectual property, and public procurement) will all be lost. This is because it will no longer be possible to rely upon the principle of the primacy of EU based fundamental rights against any (EU or UK) incompatible legislation. ⁸⁵

Procedure (Scotland) Act 1995) or a devolution issue (within the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998), or

(ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995, and

(c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

(5) In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.”

⁸⁴ See for example *Janah v. Libya/Benkharbouche v. Sudan* [2017] UKSC 62 [2017] 3 WLR 957 ruling that individual employees could rely, for the vindication of their employment and equality rights founded on EU law, upon the EU fundamental right of access to court contained in Article 47 of the EU Charter to require the disapplication of statutory immunity from suits otherwise granted to foreign embassies under UK law.

⁸⁵ Section 5 of The European Union (Withdrawal) Act 2018 provides so far as relevant as follows:

“5 Exceptions to savings and incorporation

10.4 The individual will now only have those rights which the UK Supreme Court considers that the UK Parliament has not expressly and unequivocally stripped from her.

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10.5 Among those rights which the Westminster Parliament wishes expressly to strip from individuals is their current right to claim (*Francovich*) damages against the UK State and associated public authorities for breach of those individuals' EU law rights.⁸⁷

10.6 The issue of whether the EU Charter of Fundamental Rights should have any continuing effect in a post-Brexit UK precipitated a degree of constitutional conflict in the UK with the Welsh Assembly⁸⁸ and Scottish Parliament⁸⁹ passing legislation which

(1) The principle of the supremacy of EU law does *not* apply to any enactment or rule of law passed or made on or *after* exit day.

(2) Accordingly, the principle of the supremacy of EU law *continues to apply on or after exit day* so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made *before* exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

(5) *Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).*

⁸⁶ Compare *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2017] ICR 1037.

⁸⁷ Paragraph 4 of Schedule 1 to the European Union (Withdrawal) Act 2018 states that:

“4 There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.”

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 provided in Section 8 as follows:

“8 Rule in *Francovich*

(1) There is no right in Scots law on or after exit day to damages in accordance with the rule in *Francovich*.

(2) Subject to any transitional, transitory or saving provision made by regulations under section 32, subsection (1) does not apply in relation to any right of action accruing before exit day.”

⁸⁸ Although the Welsh Assembly passed The Law Derived from the European Union (Wales) Bill 2018 was passed by the Welsh Assembly on 21 March 2018, negotiations were entered into between the Welsh devolved institutions and the UK Government to avoid a constitutional conflict and ensure the

sought to preserve the possibility of continuing reliance upon the EU Charter, at least in relation to those legal matters falling within the legal competence of these devolved legislatures and governments.⁹⁰ by Section 5(4) of European Union (Withdrawal) Act 2018 which stipulates that “The Charter of Fundamental Rights is not part of domestic law on or after exit day” the Westminster Parliament expressly and unequivocally strips the EU Charter of Fundamental Rights of any legal effect in a post-Brexit UK, thereby depriving individuals of the possibility of claiming the protections of the fifty substantive rights contained therein.

primacy and precedence of the provisions of the European Union (Withdrawal) Act 2018 as passed by the Westminster Parliament.

⁸⁹ The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 which was passed by the Scottish Parliament on 21 March 2018 sought to retain the Charter rights in a post-Brexit Scotland by providing as follows in Section 5:

“5 General principles of EU law and Charter of Fundamental Rights

(1) The general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day so far as they—

- (a) have effect in EU law immediately before exit day, and
- (b) relate to anything to which section 2, 3 or 4 applies.

(2) Accordingly—

(a) to the extent that there is a right of action in Scots law immediately before exit day based on a failure to comply with any of the general principles of EU law or the Charter, there is, on and after exit day, an equivalent right based on a failure to comply with any of the retained (devolved) general principles of EU law or the retained (devolved) Charter, and

(b) to the extent that a court or tribunal or another Scottish public authority has power, immediately before exit day to—

(i) disapply or quash any enactment or rule of law, or

(ii) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law or the Charter, the court, tribunal or authority has, on and after exit day, an equivalent power based on incompatibility with any of the retained (devolved) general principles of EU law or the retained (devolved) Charter.

(3) Subsection (1) applies in relation to a general principle of EU law only if it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case).”

⁹⁰ In the *Reference by the UK Attorney General and the Advocate General for Scotland re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [2019] 2 WLR 1, 2019 SLT 41 the UK Supreme Court held that while the Scottish Bill was on this matter within its competence when passed, the powers of the Scottish Parliament to preserve the effect of the EU Charter in Scots law were retrospectively removed by the Westminster Parliament’s enactment of the European Union (Withdrawal) Act 2018.

10.7 The stripping of individuals' rights continues in Paragraphs 2 and 3 of Schedule 1 to European Union (Withdrawal) Act 2018 which respectively provide that

“No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case)”

and separately

“(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.”

11. CONCLUSION

11.1 Having set out above my *ideal* that Constitutions are intended, in our post-Reformation/post-Nuremberg world, to *preserve Difference* and to *resolve Differences*, I have to end with a few brief remarks about our own UK constitution. In particular how well it measures up to that ideal in the light of Brexit.

11.2 Constitutional law in the UK is, of course, the Law that Dare not Speak its Name. Not so much because we do not have a constitution (as is so often and so inaccurately said) but because we have competing and perhaps irreconcilable constitutional traditions.

11.3 The inchoate competing and messy nature of the UK constitution was brought out in the argument before, and the decision of, the UK Supreme Court in *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2017] 2 WLR 583. The case arose out of a provision of EU law, Article 50(1) of the Treaty on European Union which provides that: ‘Any Member State may decide to withdraw from the Union *in accordance with its own constitutional requirements.*’ Once it was decided by the UK Government, in the light of the Brexit referendum result, to pull the UK out of the EU, it became necessary (ironically, as a matter of EU law) to identify just what were the ‘constitutional requirements’ imposed by the ‘United Kingdom constitution’ as necessary to initiate the art 50 TEU withdrawal procedures.

11.4 In its account of the constitutional position of the UK within the EU the Court's majority, in a first for a UK court, unequivocally endorsed the claim, oft-pressed by the Court of Justice of the European Union ('CJEU'), that:

the founding treaties of the European Union, *unlike ordinary international treaties, established a new legal order*, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.⁹¹

11.5 The *Miller* majority accepted that the essential characteristics of the EU's 'new legal order' were its primacy over the laws of the Member States and the possibility of it having direct effect both in relation to individuals as well as 'emanations' of the Member States. Accordingly, the majority was able to hold that the EU institutions – and *not* Parliament were direct sources of law and of individuals' EU law rights. It appears then that the Court discovered our (European) constitution (including all the provisions contained in the 50 substantive article of the Charter of Fundamental Rights of the European Union) only as we prepare to lose it.

11.6 Having achieved a revolutionary modification of the traditional dualism which was said to characterise the UK's constitutional relationship with ordinary international law,⁹² the remainder of the Court's account of the UK constitution as it will be after Brexit proceeds on the assumption that the 19th century English constitutional tradition as formulated/invented by Dicey – the mythistory of Victorian England, as it may be termed in which the 1689 Glorious Revolution gave birth to our constitutional principle, the absolute and untrammelled sovereignty of Parliament – was the fount and only origin of the contemporary UK constitution, ignoring the alternative readings of the constitution from the Scottish and Irish perspectives.

11.7 The Court's dismissal of the arguments (raised by, among others, the Northern Ireland claimants in the interventions of and in support of the Scottish and Welsh Governments) about the need to involve the peoples, legislatures and governments of *all* the constituent parts of the UK in any decision for the UK to leave the EU, was inevitable yet unsatisfying. The issue raised by them was whether the devolved legislatures (whose electorates, unlike that of the UK Parliament, encompass EU citizens from other Member States settled here) *together with* the UK Parliament had the right, *as a matter of UK*

⁹¹ The Full Court of the CJEU reiterated this long held position in its Opinion 2/13 *On the proposed accession of the EU to the European Convention on Human Rights* ECLI:EU:C:2014:2454 at §157.

⁹² Compare *Pham v Home Secretary* [2015] UKSC 19, [2015] 1 WLR 1591, per Lord Mance at § 80.

constitutional law and principle, to be involved in the decision that, and the basis upon which, the UK leave the EU.

11.8 In the Scottish constitutional tradition, previous case law is said to be binding not, as in English law, by reason of its authority, but because of the authority of its reasoning. *Miller I* on devolution simply fails to persuade. But, on the devolution aspects, it is a unanimous 11-judge decision of the highest court in the land. The UK Supreme Court's vision in *Miller I* of an untrammelled sovereignty of the UK Parliament left us with a very thin constitutional framework, which was however built up by the subsequent decision of the UK Supreme Court in *R (Miller) v Prime Minister/Cherry v Advocate General for Scotland* [2019] UKSC 41 ("*Cherry/Miller 2*") in which the Supreme Court held that the constitutional principle of the accountability of the Executive to Parliament was also an enforceable legal rule. But still on the Supreme Court's current analysis the UK's constitution still exists in a perpetual present. It has no past, and no future. Ultimately the UK constitution can, for the Supreme Court, be nothing more than a *description* of whatever UK Parliament does, or allows for, on any particular day. Westminster Parliamentary sovereignty is apparently absolute, unless it seeks to bind its successor Parliaments. It means that there are no constitutional foundations, no guarantees that Difference will be respected and fundamental rights preserved in the future, and no mechanism (at least before the courts) for the resolving of Differences with the governing authorities.

11.9 Brexit therefore involves, in effect a wholesale bonfire of the "vanities" which this UK Government evidently regards EU law rights to be. And even if it were proposed by the UK Government that it would seek to insert into any Withdrawal Agreement with the EU a legally binding commitment obliging the UK to match EU standards in terms of say workers' rights or other social/environmental protections, this is *not* an obligation which could be directly enforced or insisted upon by individuals before our courts, as it would be a matter of international law only. But international law cannot be enforced before the UK domestic courts as such. International law obligation have to be incorporated into national law to be enforceable by and before the domestic courts. So should the Government fail to abide by any such international law commitment to match the levels of protection for individuals' rights with those of the EU, individuals in the UK would be left without any domestic legal means of enforcing it.

11.10 Without EU law, there is no possibility of laws being set aside to ensure that individuals rights are fully protected ("direct effect") and no general right of damages

against the State. In sum are no longer any legal remedies which truly *bite* against public authorities, whether the UK Government or the Westminster Parliament. We are therefore left with the very kind of absolutism in power which Las Casas warned against - and a consequent inability to ensure the continued protection of minorities against majoritarian tyranny. The future's bleak – the future's Brexit.

11.11 Let the last word be with the English poet and cleric John Donne who in his “Meditation XVII” in his *Devotions upon Emergent Occasions* of 1624 CE, wrote that

“No man is an island entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less”.

25 October 2019

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