Recent European Court of Human Rights Decisions and the Philosophy of Ronald Dworkin: An Issue Of “Ethical Independence” Versus “Freedom Of Religion?”

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I. Introduction

The case of Eweida, Ladele and McFarlane v. United Kingdom\(^2\) presented the latest instance in which the European Court of Human Rights (ECtHR) was confronted with the vexing task of reconciling the right to religion with the seemingly contradictory right to equality. The aforementioned case pertained to the right of Christian believers to refuse counseling or marriage registration services to homosexual couples. When caught on the horns of a dilemma in similar cases of this nature, the ECtHR attempted to resolve this conundrum by resorting to the “doctrine of proportionality” and the “margin of appreciation” tests.\(^3\)

Somewhat predictably, therefore, the ECtHR resorted to similar doctrinal tools in the Ladele decision as well. However both the doctrinal frameworks of proportionality and margin of appreciation are susceptible to criticism for their failure to adequately resolve the contentious issues raised.\(^4\)

In this Article, I argue that the ECtHR could have undertaken a new approach in the Ladele case. Instead of striving to reconcile the right to religion with the right to equality, the ECtHR could have undertaken an analysis of the right to religion itself. Ronald Dworkin has elaborated on some of the concepts discussed in this article in his recent draft paper.\(^5\) However, since the paper is still in a draft stage, I will be relying upon Dworkin’s earlier work in this article. I argue that the recent works of Dworkin present an interesting and under-analyzed theory that reframes the “right to religion” as “ethical independence” in the ECtHR context and that the ECtHR could have used this novel approach in resolving some of the vexing issues in the Ladele case.

II. The ECtHR’s decision in the Ladele case and Dworkin’s work on the right to religion as ethical independence

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\(^2\) Case of Eweida and others v. The United Kingdom, judgment of 15 January 2013, Strasbourg Court, Chamber (Fourth Section), Application no. 51671/10 and 36516/10.

\(^3\) Lautsi v. Italy, Strasbourg Court, Grand Chamber, Application no. 30814/06, Refa Partisi v. Turkey, Strasbourg Court, Grand Chamber, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, Dahlab v. Switzerland, Strasbourg Court, Grand Chamber, Application no. 42393/98, Leyla Sahin v. Turkey, Strasbourg Court, Grand Chamber, Application no. 44774/98.


The *Ladele* case pertained to the eponymous Ms. Ladele, who worked as a Registrar and refused to perform or register homosexual marriage ceremonies, citing Christian beliefs as a defense. Similarly, Mr. McFarlane refused to provide certain counseling services to same-sex couples, citing religious reasons.\(^6\) The services of both Ms. Ladele and Mr. McFarlane were terminated, as their actions were construed to be discriminatory to homosexuals. The Applicants cited a violation of their rights under Article 9 of the European Convention on Human Rights (Convention), which provides for freedom of thought, conscience, and religion. Article 9(2) provides that 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. The ECtHR has consistently held that the *forum internum*, or the inner sphere, of the right to believe in religion is sacrosanct, thus indoctrination or persecution of believers for holding religious views is abhorrent to Convention values. However the manifestation of the right to religion may be circumscribed in the event of compelling circumstances.\(^7\)

The ECtHR, in its majority judgment in the *Ladele* case, held that the Applicants’ right to manifest their religion may be circumscribed since authorities are afforded a wide margin of appreciation in cases of balancing competing Convention rights. The Court also held that the measures adopted by the authorities to pursue the aim of preventing discrimination of homosexual couples were proportionate to said aim.\(^8\) However, the balancing of two competing rights, as envisaged by the proportionality test, is an approach beset by difficulties.\(^9\) Commentators have likened it to comparing apples to oranges; it is difficult to balance two competing Convention rights that are different in nature and origin, and doing so often leads to the charge that one right was jeopardized in protecting another.\(^10\) For example, Judges Vucinic and De Gaetano contended in the dissenting opinion in the *Ladele* case that the Applicants’ rights were sacrificed for ‘obscene political correctness.’\(^11\)

In my opinion, the ECtHR could have adopted a new strategy in the *Ladele* case and questioned the nature of the right to religion itself. In “Life’s Dominion,” Dworkin contends that foundational beliefs people hold about life must be respected, irrespective of whether these are theistic in origin.\(^12\) For instance, Dworkin notes that the views of atheists should be equally respected.\(^13\) He cites examples of how conscientious objectors have opposed conscription and that their views are legitimate because their strong belief in pacifism is akin to “religious” belief *de hors* belief in God or any Supreme Being.\(^14\)

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\(^6\) The ECtHR also decided the appeals of Ms. Eweida and Ms. Chaplin in this decision. However as those cases did not pertain to a conflict between the right to religion and the right to equality, this article is limited in its purview to analysis of the *Ladele* and *McFarlane* cases.

\(^7\) *Supra* note 3.

\(^8\) *Supra* note 2, para. 105-106.

\(^9\) *Supra* note 4.

\(^10\) *Id.*

\(^11\) *Supra* note 2, Partly Dissenting Opinion of Judge Vucinic and Judge De Gaetano.


\(^13\) *Id.*

\(^14\) *Id.*
This is particularly true since not all religions hinge upon belief in God or a similar Supreme Being. For example, neither Buddhism nor Hinduism includes any commitment to a Supreme Being or “God” of any kind. In “Justice for Hedgehogs,” Dworkin states that morality must have a background premise of value and not be contingent merely upon the omnipresence or omnipotence of God. However, Dworkin does not denigrate or unfairly detract from the right to religion; instead he contends that a right to religion could be framed instead as a matter of ethical independence. Dworkin believes that the key responsibility of governments is to ensure that individuals are allowed dignity, which comprises self-respect and authenticity. Authenticity is damaged when a person is made to accept someone else’s judgment in place of his own about the values or goals his life should demonstrate. Therefore, if religion is interpreted as a question of ethical independence, religious believers are protected from abhorrent persecution and are availed the opportunity to determine their life goals according to their religious beliefs.

At the same time, this ethical independence can be infringed on moral grounds, e.g. where beliefs about providing homosexual couples respect and dignity and eliminating any discrimination they face are entitled to equal respect as a part of “ethical independence.” Such beliefs pertaining to the importance of respecting homosexual unions are foundational beliefs about the values and goals that individuals’ lives should demonstrate, thus such beliefs are “religious beliefs” even though they are not derived from “God.” In “Taking Rights Seriously,” Dworkin notes that arguments relating to the immorality of homosexuality do not hold water if morality is not derived from religious beliefs. Such arguments resort to personal biases, emotional reactions, or majoritarian preferences unsupported by a background theory of value. Therefore, it can be inferred that religious believers cannot be permitted to discriminate in the provision of their services to homosexual couples in a manner that offends the dignity of such couples.

III. Justifying the application of Dworkin’s work to the Ladele case in light of ECtHR jurisprudence

Since Article 9 of the Convention expressly includes the word “belief” along with religion, the ECtHR has the mandate to accord equal protection to both theist and non-theist beliefs. The ECtHR has consistently held that Article 9 includes a right to practice and preach atheism, for instance. The ECtHR’s jurisprudence arguably supports Dworkin’s views about not restricting the right to religion to deistic religions alone. In the Campbell and Cosans case, the ECtHR explained that the word “belief” in Article 9 referred to views that denoted a certain level of cogency, seriousness, cohesion, and

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15 Id.
17 Id. at 191-219.
18 Id.
importance.\textsuperscript{21} As such, it considers pacifism, veganism, and Communism, as well as newer religions that may not necessarily commit to the presence of God, eligible for Article 9 protection.\textsuperscript{22} In this respect, ECtHR jurisprudence has followed Dworkin’s principles. The phrasing of Article 9 of the Convention and pertinent case law is interesting, as not all jurisdictions incorporate the right to religion and the right to other, non-theist beliefs as part of the same clause. For example, the United States Constitution does not refer to the right to other, non-theist beliefs as part of the same right as the right to religion, and thus does not elevate other beliefs to the status of religion.\textsuperscript{23} ECtHR jurisprudence, on the other hand, allows for re-inventing the right to religion such that belief systems pertaining to respect for homosexual couples must be interpreted as being a necessary part of the right to “religion,” even though they are unrelated to any philosophy that pertains to God or any other Supreme Being. Therefore, when the ECtHR is confronted with a case pertaining to philosophies derived from the traditional Christian religion of Ms. Ladele and Mr. McFarlane, it must give \textit{equal} importance to the philosophies of other atheist or non-religious individuals who believe that homosexual couples are entitled to respect for choices affecting the courses of their lives. These choices, though not theistic, are also representative of “ethical independence” and therefore equally important under Article 9.

\textbf{IV. Conclusion}

In this article, I have summarized Dworkin’s views on ethical independence and attempted to justify their application in the \textit{Ladele} case. The benefit of framing the \textit{Ladele} case as a question of ethical independence as opposed to the right to religion is significant and not merely theoretical. This re-framing of the dispute in light of Dworkin’s theories would further legitimize the ECtHR’s decision and, as argued in Part III of this article, the Convention would support it. At the same time, this interpretation of the issue would not render theist religious believers susceptible to unfair persecution; it would merely circumscribe some religious practices on moral grounds.

\textsuperscript{21} \textbf{Campbell and Cosans v. United Kingdom}, Strasbourg Court, Grand Chamber, judgment of 25 Feb 1982, Series A no 48, 4 EHRR 293, 40
\textsuperscript{22} \textbf{Jim Murdoch}, \textit{Freedom of thought, conscience and religion: general considerations}, Human Rights Handbooks, No. 9 (June 2007)
\textsuperscript{23} \textbf{U.S. Const. Amend. I.}

\url{http://echr.coe.int/NR/donlyres/88B98643-09C1-4D80-EBBB51851747/0/DG2ENHRHAND092007.pdf}