**Religious Accommodation Law in the UK: Five Normative Gaps**

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This article offers a normative analysis of the state of religious accommodation law in the UK. It identifies five ‘normative gaps’ in the law where the legal discussion could benefit by employing the analytical lens of political theory. These gaps concern (i) what sorts of religious (or non-religious) beliefs should enjoy protected status; (ii) how the law should address issues of individual choice and responsibility; (iii) whether is there a genuine distinction between manifesting and being motivated by one’s beliefs; (iv) what sorts of interests count against accommodation claims; and (v) the relationship between human rights and discrimination law, the two pillars of religious accommodation law in the UK. The first half of the article sets out these issues, while the second half offers some preliminary conclusions and ways of resolving them. The Conclusion traces the contours of a satisfactory theory of religious accommodation law.

**Keywords**: Religious Accommodation; Human Rights; Discrimination; Partiality; Religious Manifestation; Responsibility.

**1. Introduction**

Religious accommodation is distinguished from other issues of multiculturalism by the extra-temporal sources of authority represented by religious doctrines and the pre-emptory force of religion’s demands. Religions ground requirements and obligations as peculiarly stringent sources of normativity. They instruct their adherents that they must or ought to engage in certain practices, that they are not only matters of custom, ritual or tradition. Hence the presence of minority faiths within liberal democracies such as the UK prompts not just general policy goals such as social cohesion and the promotion of diversity, but urgent issues of principle where religious adherents claim that they cannot in good faith submit to laws at odds with their conscientious convictions. Beyond the immediate legal resolution of these conflicts stand larger issues of religious impartiality and the status of minority faiths in a nominally Christian society. However, Christians too have alleged that some laws and regulations are not sufficiently accommodating; thus debates over religious accommodation spill over multiculturalism, conceived as the protection of minorities’ identities.

I don’t in this paper to survey the interaction between law and religion as such and hence shall say nothing about issues such as faith schools, incitement to religious hatred or the ethics of establishment more generally. My focus is religious accommodation. This is a more general idea than legal exemptions, that is, legislatively mandated opt outs from the law. In the UK doctors can exempt themselves from performing an abortion or conducting embryo research and need not claim any specifically religious reason to do so. Sikh men enjoy an exemption from laws that require the wearing of crash helmets and hard hats, as well as from the law forbidding the carrying of knives in public. Jews and Muslims are exempt from animal welfare legislation so that they can slaughter animals in accordance with kosher and halal custom. All these exemptions are also forms of religious accommodation. But so too are cases where a good or service is provided for some constituency by an authority which takes care to ensure that it is available to individuals with different religious convictions. For example, a university might offer Church of England and Catholic chaplaincy services but then extend that to Muslim and Jewish students too. My interest here, however, is not in service- and good-based accommodation. It is in cases where courts and tribunals have to determine whether an applicant with strong religious convictions should legally be obliged to comply with a uniform law or rule to which there is, as things stand, no formal exemption. Accommodation raises questions about the interpretation, application and enforcement of laws and other rules. Here courts and tribunals have had to negotiate the difficult terrain between the universalist logic of the law and conscientious convictions of strong believers, as competing sources of normative authority.

In surveying some cases below, I shall outline and illustrate five ‘normative gaps’ in the law, that is, instances where the legal discussion raises philosophical issues which merit further investigation. Such gaps arise when a distinction or an assumption made by lawyers, or the way they have delineated a concept, prompt further questions which political theory is suited to address. Employing political theory in this way might improve our reasoning in accommodation cases. I make a start in doing this in what follows. In looking at accommodation from this perspective, I don’t at all deny that the rather abstract approach of political theorists, preoccupied as they are with formulating general principles and precisely demarcated concepts, doesn’t have a good deal to learn from the practical, case-based, empirically rich analyses of religious accommodation offered by academic lawyers. Nonetheless my focus is in normative gaps in the law, and how political theory might help fill them. I set these out in Section 2, and seek to address them more philosophically in Section 3. Before that, I offer a very brief sketch of religious accommodation law in the UK.

It is commonly said that there are two pillars of such law (Sandberg 2011, p.115).[[1]](#endnote-1) One is human rights law, the other is discrimination law. Since the passing of the 1998 Human Rights Act, Courts in the UK have been obliged to interpret UK legislation in a way that is so far as possible consistent with the European Convention on Human Rights, though there is a margin of appreciation by which national standards of protection for religion can legitimately vary. Most relevant for religious accommodation is Article 9 of the Convention on freedom of thought, conscience and religion Article 9(1) gives each person an absolute right to believe what she wishes, and to change her beliefs, and a qualified right to manifest her religion or beliefs ‘in worship, teaching, practice and observation’. The right is qualified because Article 9(2) subjects the freedom to manifest one’s religion of beliefs ‘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 the protection of the rights and freedoms of others’.[[2]](#endnote-2) The right to manifest one’s religion or beliefs is therefore a prima facie right which is then balanced against a range of other considerations.

An applicant who requests that a law or rule be interpreted in such a way that it allows them to manifest their religion or beliefs must pass over two hurdles. First, she must demonstrate that the manifestation of her religion or belief has been genuinely interfered with, and second she must successfully argue that the right to manifest her religion or belief over-rides the legitimate considerations which Article 9(2) marshals against it. However, before even the first stage an application can fail if the European Court of Human Rights (ECtHR) which interprets the Convention judges that an applicant’s beliefs, religious or otherwise, are not of the normatively right sort. I consider that in Section **2.1** below.

Direct discrimination in UK law, in the provision of employment, goods and services, is always illegal. In the 2003 Employment Equality Regulations and the 2006 Regulations on the provision of goods and services – both later incorporated with minor revisions into the 2010 Equality Act - religion and belief were formally included as a ‘protected characteristic’ and potential grounds of discrimination, along with gender, race, ethnicity and so on. Indirect discrimination, by contrast, where a ‘provision, criteria or practice’ (PCP) would put persons sharing a protected characteristic at a particular disadvantage compared with other groups, may sometimes be legal. For example, an employer which required its employees to work on Sunday mornings, thus disadvantaging Christians who attend church on Sunday mornings, can offer a legal defence if it can show that the PCP is a ‘proportionate means of achieving a legitimate aim’. The UK is also subject to Article 14, the anti-discrimination clause of the European Convention. Article 14 does not however articulate a general right not to be discriminated against. It states instead that every person should enjoy all the other rights and liberties under the Convention without discrimination. Thus Article 14 claimants need to show that one of their other Convention rights has not been respected to the same degree as other citizens.

**2. Five Normative Gaps**

***2.1 Religion or Belief?***

Article 9(1) gives special protection to manifesting religion or belief. The ‘or’ is odd as belief is surely central to many (if not all) religions.[[3]](#endnote-3) Further, since just about everything we do manifests our beliefs, in practice or observation, Article 9(1) is in danger of collapsing into a general right to liberty, a right represented by Article 5(1) of the ECHR, though also one which some political philosophers have argued strenuously that we do not have (for example, Dworkin 1977, pp. 266-7). The question is therefore what sorts of belief should count?

The ECtHR has stated that the sorts of belief appropriate for accommodation under Article 9(1) must represent ‘a coherent view on fundamental problems’ and be of sufficient seriousness and importance.[[4]](#endnote-4) In practice, however, it has virtually never ruled out any kinds of beliefs as inadmissible under Article 9(1). A rare exception is Pretty v. UK (2002) where the Court ruled that a belief in assisted suicide was not admissible.[[5]](#endnote-5) By contrast, Scientology, druidism, pacifism, atheism, communism, Divine Light Zentrum, the Moon Sect and even Nazism have all passed the religion or belief test (see Sandberg 2011, p.49). The ruling of the House of Lords in Secretary of State v. Williamson (2005) clarified the meaning of Article 9(1) for courts in the UK.[[6]](#endnote-6) The case concerned the teachers and parents at four private Christian schools who argued that administering mild corporal punishment to children, outlawed in the UK since 1987, was in accordance with Christian doctrine as they understood it. Lords Nicholls and Bingham both stressed that the purpose of Article 9(1) was to protect the subjective beliefs of the individual, and emphasised that it was not for Courts to evaluate the legitimacy of individuals’ subjective beliefs. At the same time, though, Lord Nicholls stated that in order to qualify for Article 9 protection, beliefs must satisfy some ‘modest objective minimum requirements’:

The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. ….The belief must also be coherent in the sense of being intelligible and capable of being understood.[[7]](#endnote-7)

A more recent UK employment case offer some insight into the accommodation of non-religious belief.[[8]](#endnote-8) Tim Nicholson, head of sustainability for Grainger, a large London property company, had refused to take a flight in order to deliver to his boss a Blackberry mobile phone which his boss had left in the office as he had strong convictions about the need to mitigate anthropogenic climate change. For this he lost his job. At the Employment Appeal Tribunal Nicholson argued that his environmental convictions were philosophical beliefs and therefore entitled to protection under the 2003 Regulations. Mr Justice Burton, citing Lord Nicholl’s modest objective minimum requirements, concurred. He suggested that beliefs in such doctrines as pacifism, vegetarianism, communism or free market capitalism might in future also qualify for protected status, a rather capacious list.[[9]](#endnote-9) In other recent discrimination cases, the belief that fox hunting is wrong, the spiritualist belief that it is possible to contact the dead using psychic powers, and a belief in the BBC’s public service ethos were all accorded protected status (see Gibson 2013, p.581). Such an approach risks opening the floodgates to a wide variety of disparate beliefs all of which qualify for protected status. The question therefore is what criteria should we employ to give some, but not other, sorts of beliefs protected status? This is the first normative gap.

***2.2 The Specific Situation Rule***

One of the most high profile religion and law cases in recent years was Begum v. Denbigh High School (2006).[[10]](#endnote-10) The case concerned a fourteen year old Muslim girl, Shabina Begum, who wished to wear the *jilbab* to her co-denominational state school, in contravention of its rules on school uniform.[[11]](#endnote-11) Begum was initially unsuccessful in the lower court but won at the Court of Appeal only for the decision to be reversed at the House of Lords. Their Lordships were impressed by the fact that Denbigh High School permitted the *shalwar kameez*, that its uniform policy had been agreed with local mosques and that other schools which Shabina Begum could have attended did allow the *jilbab*. On that basis, the majority decision was that Denbigh High School had not interfered with Shabina Begum’s Article 9(1) right to manifest her religion; there was therefore no need to consider Article 9(2) (though it was also judged that Article 9(2) would have over-ridden Article 9(1)). In deciding the case, their Lordships invoked what lawyers have called the ‘specific situation’ rule – that an individual seemingly waives their Article 9(1) right because she voluntarily puts herself in a situation which restricts the manifestation of her religion or belief in some way. The key point was that Shabina Begum could straightforwardly have attended other local schools which did permit the *jilbab*.

The legal authorities in an indirect discrimination case a few years later took a rather different view, implicitly rejecting the specific situation rule.[[12]](#endnote-12) When Bushrah Noah applied for a job at a hair salon run by Sarah Desrosiers, the interview was swiftly terminated when it became clear that Ms Noah was not prepared to remove her Muslim headscarf while at work. Ms Desrosiers’ view was that her stylists’ ‘ultra modern’ hair styles were themselves an advert for the salon. Nevertheless, the employment tribunal found that Sarah Desrosiers had indirectly discriminated against Bushrah Noah. Her de facto no headscarf rule imposed a significant burden on headscarf-wearing Muslim women which was, in the view of the Employment Tribunal, a PCP that was not a proportionate means of achieving a legitimate aim. There are, however, very few jobs in the UK not open to women who wear a headscarf, including, I expect, at least some hairdressing jobs. The logic of Begum would suggest that Ms Noah could have taken one of those. Conversely, the logic of Noah v. Desrosiers applied to the Begum case was that Denbigh High School indirectly discriminated against girls who wore the *jilbab*.

The ECtHR has also employed the specific situation rule on many occasions. However, in the landmark case of Eweida and others, which the ECtHR decided in early 2013 the specific situation rule was explicitly dropped.[[13]](#endnote-13) The case concerned four Christians, Shirley Chaplin (a nurse) and Nadia Eweida (a check in clerk for British Airways) who both wished to wear a visible cross round a chain at work, contrary to their employer’s rules, and Lillian Ladele (a civil registrar) and Gary McFarlane (a relationship counsellor) who had both been dismissed for, respectively, refusing to officiate at same sex civil partnership ceremonies and refusing to counsel same sex couples on the sexual aspects of their relationship. With respect to all four cases, the ECtHR Justices ruled that it was not sufficient that the applicants could have changed their job, commenting that the specific situation rule was not applicable in the case of Article 10 which protects freedom of expression. Noting in the case of MacFarlane that the loss of his job was a ‘grave sanction’, the Court said that ‘the better approach was to weigh that possibility [of changing jobs] in the balance in considering whether or not the restriction [on manifesting one’s religion] was proportionate’.[[14]](#endnote-14) This was a notable departure from previous ECtHR jurisprudence where in numerous cases involving religious applicants it was ruled that the right to resign one’s job was sufficient protection for the manifestation of religion. These apparent inconsistencies and changes of view about the proper role of individual choice are a second normative gap in the law.

***2.3 Manifestation or Motivation?***

The ECtHR has also drawn a distinction between actions that manifest a person’s belief and actions which are merely motivated by a person’s beliefs in order to rule out the latter as inadmissible. Thus in much cited case of Arrowsmith v. the United Kingdom (1981), it was held that a pacifist’s actions in distributing leaflets to soldiers discouraging them from accepting postings in Northern Ireland did not constitute a ‘practice’ of pacifism but instead represented political opposition to government policy.[[15]](#endnote-15) However, since pacifism is distinguished by its opposition to violent conflict it is not exactly clear what sorts of actions could be its particular manifestations, and the Commission (the forerunner of the ECtHR) did not illuminate this question. Arrowsmith was surely motivated by her beliefs and arguably felt obliged to act because of them: is this not a case of manifesting one’s beliefs?

The ECtHR revisited the manifestation/motivation distinction in Eweida and others. The UK Government in its submission to the ECtHR argued that ‘behaviour or expression that is motivated or inspired by religion or belief, but which is not an act of practice of religion in a generally recognised form, is not protected by Article 9’.[[16]](#endnote-16) The last clause omits the practice of (non-religious) belief and confuses the issue by introducing the further question of whether an individual acts according to a consensus view of religion, which is separate from the manifestation/motivation distinction where both categories may be interpreted in an individualistic form. The ECtHR restated the distinction in principle, citing the ruling in Arrowsmith, but expanded the category of manifestation so as to include some practices which it might previously have considered to be merely motivated by belief. Thus it held that for an act to count as a manifestation of religion or belief, it must be ‘intimately linked’ by a ‘sufficiently close and direct nexus’ to that belief. The same paragraph states that ‘there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.[[17]](#endnote-17) (Similarly, in the Williamson case, Lord Nicholls argued that a person who acts from a ‘perceived obligation’ that arises from his beliefs is by that token manifesting his beliefs). [[18]](#endnote-18) Accordingly, the Court held that Article 9(1) was engaged in the case of all four applicants. Once again, however, this seems to confuse the issue. The question of whether there is or isn’t a close and direct nexus between beliefs and actions which manifest them is separate from the question of whether individuals manifest their beliefs out of duty or not. Presumably, individuals acting out of perceived religious duty are able to demonstrate a close connection between their beliefs in such duties and the actual performance of them. But a close and direct nexus between beliefs and actions, need not imply the latter are regarded as matters of duty.[[19]](#endnote-19) I return to this normative gap in **3.3**.

***2.4 Countervailing Interests***

The Article 9(2) considerations I listed earlier which can over-ride the right to manifest one’s religion or belief are rather disparate, with some more convincing than others. The protection of ‘morals’ for instance might suggest a legal moralistic position, obnoxious to liberals, where the mere fact that some activity is regarded as immoral by the relevant authorities, even if it harms no one, counts against permitting it .The protection of public order can also be invoked in a corrupted way. If some activity is regarded as offensive by sufficient numbers of people, and the state can anticipate that there will be disorder if it is permitted, then public order considerations tell against a minority’s freedom to engage, even if other citizens have no right to be offended. Finally, the rights and freedoms of others may seem an overly narrow way of construing the interests which do tell against Article 9(1), at least if those rights and freedoms refer to the ECHR itself. For example, same sex couples are not able to argue that Lillian Ladele discriminated against them, in refusing to officiate at civil partnerships, because the Convention itself only recognises heterosexual marriage, in Article 8, and hence there is no Convention right which has not been applied to them, and hence no basis for a claim of discrimination. One might argue that Ladele inflicted an expressive harm on gay and lesbian citizens by not according them the equal civic dignity to which they were entitled, but again, the Convention does not recognise a freestanding right to dignified treatment or civic equality, nor are dignity or equality listed in Article 9(2).

As far as indirect discrimination is concerned, the considerations which may permit it are of a weaker form than in the case of Article 9. As I said, for an indirect discrimination claim to be over-ridden, at least in the employment sphere, an employer has to show that the discriminatory PCP is a proportionate means of pursuing a legitimate aim. Though Sarah Desrosiers lost her case against Bushrah Noah, in other cases employers have been able to meet that test. A rather different indirect discrimination case, lost by the applicant, was Azmi v. Kirklees Metropolitan Council (2007).[[20]](#endnote-20) Aishah Azmi worked as a bi-lingual support worker at a Church of England junior school in Yorkshire. Though she did not make it clear at her interview, Ms Azmi wished to wear the *niqab* at work, principally because she did not wish her male colleagues to see her face. The Employment Tribunal agreed that the local authority’s PCP was indirectly discriminatory, but ruled this was over-ridden by the legitimate aim of children’s effective education. Unlike in Noah v. Desrosiers, Azmi’s actions impeded her role and she consequently lost her case.

One difference between Noah v. Desrosiers and Azmi v. Kirklees relates to the relevant requirements of the job in each case. It’s not really necessary to show off one’s hair in order to work as a hairdresser while having one’s face visible seems essential for anyone who looks after small children. This might explain the contrasting verdicts in the two cases. But perhaps there is a little more we can say. Whatever the subjective value of running a business, there is no interest in justice in doing so. It is simply a legitimate aim, and *in itself* morally neutral (notwithstanding the duties to others that employers might acquire). This might explain why Desrosiers’ aim fell before Noah’s more moralistic religious convictions. In Azmi, by contrast, the aim which her employer sought to protect, the effective education of young children, represents a much stronger interest. Children (and their parents) have an interest in justice that they receive an adequate education; we might judge that young children at least will fail to receive an adequate education if communication with their teacher is inhibited by a face veil. Educating children is not merely a legitimate aim; it is an aim in justice which society owes its young people. That sharply distinguishes the Azmi case from Noah.

In ruling against Azmi, the Tribunal protected this interest. UK discrimination law does not make the distinction between legitimate aims which are permissible preferences and more basic kinds of aims which protect moral interests. Yet this distinction can be very important to make. If we return to the Ladele and MacFarlane cases, for example, it makes a substantial difference whether their discriminatory actions tell against the legitimate preferences of same sex couples for a civil registration ceremony or assault their more basic interests in civic dignity as I suggested above. If it were only the former, then Ladele and McFarlane could defend themselves through the argument that most counsellors and civil registrars are happy to extend their services to all non-discriminatively.

Allied with my comments above about the disparate considerations which count against the right to manifestation, the upshot is that we need a more nuanced understanding of countervailing interests which tell against the accommodation of religion or belief. That is the fourth normative gap.

***2.5 Human Rights Law and Discrimination Law***

Human rights law and discrimination law are, as I said, the two central parts of legal machinery at work in religious accommodation. What is the relationship between them? That might seem a straightforward question insofar as human rights and non-discrimination are distinct ideals each with its own normative basis. However, the relationship between these two branches of law is not straightforward because a great many cases can be brought under both headings. Four of these are the cases in Eweida and others where all the applicants applied under both Article 9 and Article 14. Consider also the landmark American case of Sherbert v. Verner.[[21]](#endnote-21) Adell Sherbert, a Seventh Day Adventist, successfully brought a case for wrongful denial of unemployment benefits to the US Supreme Court after her employer, a textile mill, required her to work on Saturdays, her Sabbath.[[22]](#endnote-22) The Supreme Court viewed this through the lens of freedom of conscience. The point was that Sherbert was not able to practise her faith (at least not while working at the mill). There is no need to cite the fact that Catholics and Anglicans were able to attend church on Sundays, their one rest day from working. If they too had been required to work on their Sabbath, and thus were not advantaged with respect to Sherbert, the latter would still have been wronged. However, it also seems equally plausible to evaluate the Sherbert case through the lens of non-discrimination. On this view, Sherbert’s complaint would be that, while she could not fulfil her duties as an employee consistent with her faith, employees of other faiths could do so, hence she is disadvantaged *with respect to them*. The fundamental appeal would have been to a notion of fairness or equality. Similar questions can be raised about many of the other cases we have discussed above. For example, Bushra Noah brought a complaint of indirect discrimination, but could she not equally have claimed that her right to manifest her religious convictions at work by wearing her headscarf was not respected by Sarah Desrosiers?

The puzzle arises, then, because while the human rights and discrimination approaches seem distinct in theory, in practice we can often advance them together. Do we simply have two pillars holding up the religious accommodation edifice when each of them would do the job on its own? Or is there some subtle difference between them? That is the final normative gap.

**3. Political Theory and the Normative Gaps**

I now want to look at the principles and values which these normative gaps raise. Even though we cannot resolve all the issues here, re-evaluating them in what follows will enable us to at least to trace the contours of a satisfactory theory of religious accommodation, something I do briefly in the Conclusion.

***3.1 Partiality and Inclusion***

In investigating what sorts of belief qualify for protected status one place to start is with Lord Nicholls’ ‘modest objective minimum requirements’, since incorporated in to The Equality Act (2010). Protected beliefs must refer to a weighty and substantial aspect of human behaviour, and must attain a certain level of cogency, seriousness, cohesion and importance. The cogency and coherence criteria could be interpreted in third personal terms in the sense that others should be able to understand the basis of a person’s religious or philosophical beliefs even if they do not share them. A person who could not in principle articulate her beliefs to others in a way they can comprehend could not, I suggest, reasonably claim any legal accommodation for them. We might add to this that the category of beliefs must occupy a fairly central place in a person’s life, and not be fleeting, peripheral or inessential.

However, necessary though these filters are, they describe only procedural stipulations that the category of protected beliefs must meet. What they do not do is articulate the substantive account of human interests or flourishing which underlies and justifies a certain category of protected beliefs. This account, I suggest, needs to avoid two difficulties which stand at polar ends of a scale. On the one hand, we need to explain why certain sorts of religion and belief are important in a non-sectarian way, one that does not favour any particular religion or interpretation of religion, or indeed religion in general. Some philosophers (e.g. Finnis 2011; George 1993) have claimed that religion in general is a basic good, but this plainly disfavours non-religious believers such as Tim Nicholson in the case I cited above. What’s required instead is to incorporate religion but to defend it in more ecumenical terms for the wider constituency of citizens, some of whom have to bear the cost of religious accommodations. This pushes us towards conceptualising the good of religion through some other interest. Candidate interests proffered by political philosophers include ‘ultimate meaning’ (Nussbaum 2008), integrity (Bou-Habib, 2006) and self-respect (Taylor and Maclure, 2011). There is not the space to consider their theories here, suffice to say that they raise potential problems of both under-inclusion and over-inclusion. An issue of under-inclusion arises because religious experience, diverse and disparate as it is, may not be capturable by one central good. For example, Paul Bou-Habib defines integrity as the fulfilment of one’s subjectively defined duties. Yet we might think that religion is just as much about living a virtuous life, about private contemplation, about following custom or tradition or about various forms collective participation, depending of course on what religion is at issue. Too many goods, of course, raises issues about their relative strength and importance.

At the same time, explicating the value of religion through one (or a few) central interest(s) risks over-inclusion because other human activities – ones which, intuitively at least, do not merit special accommodation – also promote those interests. A person might for example, find ultimate meaning in communing with the environment, integrity in pursuing a political cause and self-respect through success at work. Without delineating further what these goods involve, in a way which is not partial or under-inclusive, we risk inflating the category of protected beliefs and hence undermining the idea that laws should generally apply equally to all, with accommodation only in special cases. I am not arguing that this cannot be done, Taylor and Maclure (2011, pp.91-7) in particular recognise the problem. I am only suggesting it raises difficult issues delineating and circumscribing the relevant interest in a way that lawyers, pre-occupied with what the law says and how it’s been interpreted, have not generally attempted.[[23]](#endnote-23)

***3.2 Individual Responsibility***

The specific situation rule raises, as I said, larger issues of individual responsibility. In fact, there are two levels of responsibility involved in religious accommodation. First, there is our personal responsibility for coming to have certain beliefs and values. As epistemic agents, we interpret and evaluate the world we experience to form our moral, religious and other beliefs. This corresponds to our Article 9(1) right which protects our interest in deliberating on and endorsing religious or non-religious convictions. We are responsible for our convictions in the sense that we are accountable for them; we could have formed others. Second, as practical agents, we pursue aims and projects which are shaped and orientated by those beliefs. Such expression is what’s protected by Article 9(1)’s reference to manifestation. At the same time, though, the two senses of responsibility explain the limits to Article 9(1). As epistemic agents, we could have formed other beliefs and can revise those beliefs we currently have. As practical agents, we are responsible for our actions, whatever our underlying beliefs. Faced with a person whose actions impose costs on others we can require her to internalise those costs – often, by insisting on a uniform rule – both on the grounds that she can revise the beliefs which animate her aims, and on the grounds that she can choose whether or not to pursue those aims, whatever her real beliefs. Either way, the basic idea is that it is fair to impose on people the costs consequent on their behaviour when they can be held to account for those costs.

Regarding persons as epistemic agents, raises the question of whether we should regard religious convictions as something akin to tastes or preferences which individuals can change if they wish or commitments which cannot be easily be shed or discarded. If we take the former view, it is quite easy to see why we should bear the costs of endorsing them. At the same time, though, if individuals strongly identify with their most important convictions, then that too is a reason why they should bear the cost of manifesting them. Our basic convictions are not afflictions which assault us from without, but rather help constitute our normative identity because we invest them with meaning and moral significance. Thus a person whose life was orientated around her deeply held environmental commitments, for example, arguably should bear the external costs of those commitments just because they are deeply held and central to her identity. Thus a view of agency where beliefs are revisable objects of choice *and* one where they are deeply held commitments both give us reason to think that the individual believer should bear the costs of her beliefs rather than having them especially accommodated through legal or other measures. Both views are united in regarding individuals as agents, not patients, and as responsible for their religious or other beliefs.

There is an important caveat to this assertion of individual responsibility, however, one which concerns the fairness of the circumstances in which individuals bear certain costs consequent on their beliefs. The caveat is that even if individuals are responsible for their beliefs, they cannot be held responsible for those circumstances in which different costs and benefits are attached to different beliefs. This concern is articulated by Peter Jones (1994) in his discussion of the case of Ahmad v. UK (1981).[[24]](#endnote-24) Mr Ahmad, a Muslim schoolteacher, requested paid leave from work on Friday afternoons in order that he could attend Friday prayer at his local mosque. Jones points out that even if Mr Ahmad is responsible for holding his beliefs, he is not responsible for the structure of the working week in the UK which favours Christians. Thus a Christian working in a Muslim country would need to request Sunday morning off work in order to attend the service at a church. The genesis of the social, cultural and religious norms which inform the structure of legal opportunities that individuals face in different societies is plainly a complex matter, but the basic normative point is quite a simple one: the legal opportunity set in even democratic societies is something which largely confronts individuals, and hence their responsibility for bearing the costs of those beliefs is mitigated to some degree. In the case of Mr Ahmad, it might seem that to restore equality of opportunity between him and Christian (and other non-Muslim) teachers the fairest response would have been to allow him paid time off work on Friday afternoons.

This conclusion can be contested from a number of directions, not the least of which is that there is a great difference between the material social and economic circumstances which disable people from enjoying fair opportunities (such as being born into poverty), and being religiously unfree to enjoy an opportunity. The latter only arises because of the way objective circumstances (such as the structure of the working week) interdict with individuals’ normatively-laden beliefs. Poverty or disability are belief-independent objective states; by contrast religious beliefs or the behaviour which they animate may be revised, as I suggested (cf. Barry 2001, pp.44-5).

To complicate matters, while the individual responsibility principle pushes us towards requiring that individuals bear the costs of their beliefs, it is too open-ended to inform us exactly which costs an individual believer should bear as a result of their beliefs. Mr Ahmad’s education authority offered to release him for work on Friday afternoons in return for a ninety per cent contract. Is this ten per cent salary reduction fair? The education authority could instead have offered him Friday afternoons off and paid him half his salary for that time. That might seem a fair compromise between individual responsibility, on the one hand, and guaranteeing opportunity, on the other. Arriving at a non-arbitrary answer to this sort of question raises difficult issues about the moral division of labour between individuals and the design of the institutions in which they pursue their aims.

***3.3 Manifestation or Motivation***

I earlier took issue with the manifestation/motivation distinction and urged that it be considered separately from the distinction between acts performed or not performed out of perceived duty. The distinction is an anomalous one which does seem apposite to the exercise of other rights. For example, it makes little sense to say that individuals should enjoy lesser protection under their Article 10 ECHR right to freedom of expression when their speech or writings is only motivated by their beliefs as opposed to manifesting them. All that can explain the anomaly of Article 9 is that, unlike political beliefs, for instance, religious doctrines invariably involve distinct and recognisable acts by which adherents express their inner beliefs in the world they share with others. For that to be allowed to circumscribe the proper boundaries of Article 9(1), however, is highly problematic, for a number of reasons. First, as we’ve seen, it gets confused with the issue of religious duty, with possible accusations of bias against religions with fewer obligations than others. Second, it involves Courts making judgements on highly contentious issues about the definition of religion, which they have been traditionally reluctant to do. Third, even supposing that those definitional issues could be resolved, it would not help stem the proliferation of possible accommodation claims, as the manifestation/motivation distinction is designed to do, because a person pursuing a very unorthodox kinds of religious practice could argue that he is both manifesting and motivated by his beliefs, and that courts should not be biased towards orthodoxy. Finally, the distinction also introduces possible bias towards religious and against non-religious beliefs, contrary to the framing of Article 9.

The manifestation/motivation distinction is intended to delimit the number of accommodation claims by introducing a further filter on the legitimacy of those claims. Part of the work that, however, can be achieved through a more precise articulation of the interest at stake in accommodation claims, as I discussed in **3.1**. Whether that interest – in ultimate meaning, integrity or self-respect for example – is threatened by non-accommodation is the real issue, not whether or not a person is genuinely manifesting their beliefs. Clarifying the appropriate baseline of individual responsibility, as I suggested in **3.2** above, will also filter out some claims, those that are in reality ‘expensive tastes’. Thus there seems little to be lost in abandoning the distinction.

***3.4 Indirect Discrimination and Legitimate Interests***

In **2.4** I suggested that it is helpful to distinguish between indirect discrimination against a religious adherent that advanced a legitimate aim, and indirect discrimination which was justified by an interest in justice, as in the Azmi case. Some apparent costs do not even meet the former, weaker criterion. A person’s discomfort at working with a headscarved colleague shouldn’t count as a legitimate interests, for instance, and nor arguably should citizens’ alarm that cremations were being conducted nearby on an open funeral pyre, as the tribunal initially ruled in Ghai v. Newcastle (2009).[[25]](#endnote-25) Legitimate interests, then, do not reflect individuals’ raw preferences; they have already been filtered by a theory of justice.

The distinction between legitimate interests and interests in justice is also apposite in Article 9(1) type cases of religious manifestation. In the Williamson case which I mentioned, the House of Lords protected children from the harm of physical punishment, also an interest in justice. In other kinds of religious manifestation cases, by contrast, the countervailing considerations do not represent interests in justice. In Eweida, the countervailing argument was really only British Airways’ wish to maintain a certain brand image, no more than a legitimate aim. By contrast in Chaplin, her employer judged that a cross around a chain was a health and safety risk to her and the hospital’s patients. If this is correct, then failing to discharge its duty of care towards patients and staff, would be a failure to treat them with justice.

The distinction between interests in justice and legitimate interests is not always entirely clear, however. For one thing, when individuals get used to organising their lives around certain role-related expectations, one could argue that their interest that arrangements continue as they are is not simply a preference. Legitimate expectations that have developed over time might have some independent normative weight, for example if employees are used to working certain days. There may also be considerations of fairness involved. If one member of a small team is no longer prepared to work Sundays for religious reasons, it may seem unfair for the other team members to have to step in more often. The fairness of having anyone work on Sunday can in part be defended by the fact that everyone takes their turn in doing so. But while is no watertight seal between interests in justice and legitimate interests, it remains a useful organising tool. When a policy of accommodation only sets back permissible interests, it becomes much easier to defend; when an applicant’s justice-based interest in manifestation is set against third parties’ interest in justice then we have the most difficult kinds of accommodation cases to resolve.

***3.5 Human Rights Law and Discrimination Law***

Our final normative gap was the relationship between human rights and discrimination law. One reason the two types of law become entangled is that the majority of accommodation cases occur at work or in education and in these domains applicants who wish to manifest their convictions can always find other people against whom to compare themselves. An applicant who is employed, for example, can usually claim that some rule or practice unfairly burdens her, where that burdening arises from her desire to manifest her convictions, the latter being also a stand alone claim. Suppose, for example, an organisation insisted that all its employees lived within a two mile radius of its offices. Employees who lived further away for family reasons could raise a non-comparative human rights claim on the grounds of the right to family life (Article 8 of the ECHR), as well as a comparative claim, that they were being indirectly discriminated against compared to employees who already lived nearby. But if that makes the intertwinement of these two approaches more vivid, it cannot be the whole of the answer because we can also find cases beyond work and education where both approaches seems apposite. I mentioned earlier the case of Ghai v. Newcastle City Council which concerned a Hindu man who wished to be cremated on an open funeral pyre upon his death.[[26]](#endnote-26) Mr Ghai, wished to follow the customs of his faith, as he interpreted it. But the argument that he was being treated less favourably than deceased Christian, Muslim or other religious individuals whose interests were already catered for does not seem implausible.

The parameters of the right to manifestation are not clearly defined, subject as they are to continuous legal definition and resting (I argued in **3.4**) on justice-based and other considerations. Thus if the boundaries of a person’s right to manifest her convictions are in question, it seems natural to examine how other individuals’ rights to manifestation are treated by comparison. If this is correct, then an initial concern with non-comparative human rights will often swiftly take us towards a comparative assessment of the extent of different people’s religious liberty. It also suggests that the two approaches get entangled because applicants typically argue that they are discriminated against with *respect to their rights* where that is not all there is to discrimination. Article 14 of the ECHR sets out a right not to be discriminated against but only with respect to the other rights set out in the Convention. In my imaginary employment case above, an applicant could claim that her Article 8 right was not afforded the same protection as other citizens right to the same. But we can also think about discrimination in a broader way. Thus the UK’s Equality Act sets out a wider range of impermissible discrimination: in the provision of goods, services and employment, regardless of the applicants’ human or other rights.[[27]](#endnote-27)

If there are good reasons why rights and discrimination are intertwined in religious accommodation cases, it may not be helpful to seek to arrive at some over-arching distinction between them. In his analysis of the ECHR, Russell Sandberg suggests that Article 9 is concerned with *positive* religious liberty - the liberty above all to manifest one’s beliefs – while Article 14 is concerned with *negative* religious liberty, the liberty not to be coerced or discriminated against on the grounds of one’s religion or belief (Sandberg 2011, p.115). In their much cited commentary on religious freedom and the law, Rex Ahdar and Ian Leigh take a very similar view (Ahdar and Lee, 2005, p.100). This way of drawing the distinction draws in part on the ECtHR’s suspect manifestation/motivation distinction. Yet however manifestation is construed, the positive/negative liberty distinction is problematic as a way of marking the distinction between human rights and non-discrimination law just because people with religious conviction may also suffer discrimination on account of their choice to manifest their beliefs. Thus a Muslim man who chose to grow a beard would suffer discrimination if his employer has a no beards rule.[[28]](#endnote-28) Of course, the Muslim man could suffer discrimination even if he did not manifest his religion in any way, if his employer had an anti-Muslim animus. But given that wrongful discrimination, like violations of the Article 9 human right, can involve positive manifestation, we cannot use the latter criteria to distinguish the two.

There are some cases of the right to manifestation which have nothing to do with discrimination. If the state sought to ban Christian’s religious services then it would violate their right to observe their religion. Unlike the cases we’ve looked at above, there is no informative notion of discrimination at work.[[29]](#endnote-29) More difficult is the question of whether there are discrimination cases which do not involve manifestation.

We might reflect on the fact that in discrimination cases individuals with religious convictions are principally concerned with securing opportunities in employment and so on; it is not as if they see their workplace as another venue to manifest their convictions. Peter Jones suggests this way of thinking when he distinguishes between the religious and non-religious goods which are at issue in manifestation and discrimination cases (Jones, forthcoming). The basic contrast is between the right to manifest one’s religious convictions, on the one hand, and religious people’s opportunities to secure a variety of non-religious goods, on the other. Some accommodation cases seem centrally concerned with the practice and observation of religion, however that is defined by the individual believer. By contrast, other sorts of cases involve people’s abilities to secure more general kinds of opportunities. Consider again the Sikh motorbike helmet exemption. There is nothing in the Sikh faith which requires or encourages riding a motorbike. The exemption is instead concerned with securing the opportunity to ride a motorbike which, without an exemption, Sikh men are religiously unfree to do. Riding a motorbike is a non-religious good and hence, on this understanding, the exemption is best interpreted through the lens of equality of opportunity, of which non-discrimination is a narrower part. However, though Sikh men don’t think of motorbike riding as a way to manifest their convictions, the issue only arises because they wish to wear their turban at the same time, so it is not as if manifestation has no relevance to the case. It is the religious good which is mandatory for them, and the non-religious good – riding a motorbike – which is optional. Moreover, even in cases where it is religious observation which is at issue, such as Christian Sabbatarians required to work on Sundays, applicants will typically wish to secure a non-religious good as well, such as maintaining themselves in employment.

In sum, the relationship between human rights and discrimination law is somewhat elusive. Though the two have different logics, they also seem inextricably bound up with one another.

**4. Conclusion**

I have suggested that an account of religious accommodation needs to (i) overcome the partiality versus over-inclusion dilemma; and (ii) explain why and in what circumstances individuals’ responsibility for their beliefs is consistent with third parties bearing the cost of an accommodation. An adequate account of (i) and (ii) should (iii) obviate the need for any distinction between acts which manifest and acts which are motivated by one’s beliefs, a distinction which is hard to draw. However, (iv) it is useful to distinguish between costs to third parties which set back interests in justice from those that merely set back legitimate aims. The latter generally give way before claimants’ interests; by contrast, cases where both claimants and third parties had interests in justice were the most difficult kinds of accommodation dilemmas to resolve. Finally, (v), in investigating why so many accommodation cases could (and had) been pursued through the lens of both freedom of conscience and non-discrimination, I suggested that both approaches were often apposite because they are often ready comparators available and because the vagueness of the right to manifestation pushes us towards finding them. The fact that religious discrimination cases often involve rights also makes them hard to separate. In fact, since it is difficult to delineate the proper boundaries of stand alone right to manifestation, it is useful to bring to bear the resources of liberal egalitarian justice where the strength of a person’s accommodation claim depends on how far she is disadvantaged, compared to others, as well as an assessment of the fairness of the costs for third parties which rectifying that disadvantage involved. [[30]](#endnote-30) These observations do not of course add up to a general theory of religious accommodation. However, I hope they show how normative reflection on the values and principles at stake in accommodation cases of the kind offered by political theory is a useful counterpoint to the particular, precedent based and case rich analysis that the law has to offer.

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**Disclosure Statement**

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**Notes**

1. Sandberg (2011) is an excellent commentary on the relationship between law and religion in the UK. I have also drawn on Doe (2011), Poulter (1998), Rivers (2010), and Vickers (2008). [↑](#endnote-ref-1)
2. <http://www.echr.coe.int/Documents/Convention_ENG.pdf> [↑](#endnote-ref-2)
3. The UK Equality Act defines belief as ‘any religious or philosophical belief’ (2010, Pt 2, Ch. 1, s. 10). [↑](#endnote-ref-3)
4. On the ‘coherent view’ criterion see X. v. Germany (1981) 24 D&R 137; on cogency and seriousness, see below. [↑](#endnote-ref-4)
5. Pretty v. United Kingdom (2002) 35 (EHRR) 1. One might think that Diane Pretty’s belief that her spouse be allowed to take her life to save her years of suffering from Motor Neurone disease is a coherent response to a fundamental problem [↑](#endnote-ref-5)
6. UKHL 15 (2005) 2 A.C. 246. [↑](#endnote-ref-6)
7. Ibid, para 23. The House of Lords ruled that the Williamson applicants’ beliefs met these standards, but they rejected the case under Article 9(2) on the grounds that protecting children from physical punishment over-rode any manifestation of Christian beliefs which included corporal chastisement of them. [↑](#endnote-ref-7)
8. Grainger plc v. Nicholson UKEAT/0219/09 [↑](#endnote-ref-8)
9. Grainger plc v. Nicholson UKEAT/0219/09, paras 27-28. [↑](#endnote-ref-9)
10. UKHL 15 (2006). [↑](#endnote-ref-10)
11. The *jilbab* is a long gown, sometimes worn by Muslim women, while the *shalmar kameez* consists of loose-fitting trousers and tunic. [↑](#endnote-ref-11)
12. ET 2201867/07 (2008) [↑](#endnote-ref-12)
13. Eweida and others v. the UK - 48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR 37. [↑](#endnote-ref-13)
14. Paras 109, 83. This change in ECtHR jurisprudence is highlighted by McCrea (2014). [↑](#endnote-ref-14)
15. Arrowsmith v. United Kingdom (1981) 3 EHRR 218. [↑](#endnote-ref-15)
16. Eweida and others v. the UK, para 58. [↑](#endnote-ref-16)
17. Ibid, Para 82. [↑](#endnote-ref-17)
18. Ibid, para 32-3. [↑](#endnote-ref-18)
19. Indeed, Chaplin took issue with the distinction between acts required by religious belief, and those which were not, arguing that it set too high a threshold for religions such as Christianity which consist of fewer formal requirements than others (see ibid, para 67). [↑](#endnote-ref-19)
20. ET 1801450/06 (2006); UKEAT 0009 07 30003 (2007). [↑](#endnote-ref-20)
21. See the discussion in Laborde (2014, pp.52-3). The other two cases are Wisconsin v. Yoder (1972) [406 U.S. 205](http://en.wikipedia.org/wiki/Case_citation) and Oregon v. Smith, 494 [U.S.](http://en.wikipedia.org/wiki/United_States_Reports) [872](http://supreme.justia.com/us/494/872/case.html) (1990). [↑](#endnote-ref-21)
22. Sherbert v. Verner (1963) [374 U.S. 398](http://en.wikipedia.org/wiki/Case_citation). [↑](#endnote-ref-22)
23. I defend a view of self-respect as an appropriate basis for accommodation claims in Seglow (forthcoming). [↑](#endnote-ref-23)
24. . Ahmad v. UK [(1982) 4 EHRR 126](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1981/9.html). [↑](#endnote-ref-24)
25. [Ghai v. Newcastle City Council (2009) EWHC 978](http://www.bailii.org/ew/cases/EWHC/Admin/2009/978.html). [↑](#endnote-ref-25)
26. [Ghai v. Newcastle City Council (2009) EWHC 978](http://www.bailii.org/ew/cases/EWHC/Admin/2009/978.html). [↑](#endnote-ref-26)
27. The Equality Act also permits some discrimination, for example religious organisations constrained right to discriminate in favour of members of their faith: a Muslim Iman cannot become a Catholic priest, for example, and nor (legally) can a woman. [↑](#endnote-ref-27)
28. See the US case of Fraternal Order of Police Newark Lodge No 12 v. City of Newark 170 F.3d 359 (3d Cir. 1999). [↑](#endnote-ref-28)
29. There is only the uninformative sense of discrimination in which Christians are picked out from others. But that is the case in all non-comparative wrongs. [↑](#endnote-ref-29)
30. Wintemute (2014) argues that religious accommodation cases (including all those in Eweida and others) can best be evaluated through the lens of indirect discrimination.

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Wintemute, R., 2014. Accommodating Religious Beliefs: Harm, Clothing and Refusals to Serve Others. *Modern Law Review* 77/2, 223-53. [↑](#endnote-ref-30)