Manifesting Religious Belief: A Matter of Religious Freedom, Religious Discrimination, or Freedom of Expression?

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Abstract

This thesis asks how manifestation of religious belief by religious individuals can best be protected in English law. It is particularly concerned with the protection available to religious individuals in the public sphere. This thesis assesses the current state of protection under religious freedom and religious discrimination models, before considering the potential for increasing protection by reconceptualising the right to manifest religious belief as an aspect of freedom of expression. This thesis asks whether the practical and conceptual limitations of a religious freedom model, and Article 9 of the European Convention on Human Rights (ECHR) in particular, can be overcome by reliance on alternative modes of protection, namely religious discrimination protections in domestic, Convention, and EU law, or through litigating religious manifestation claims as freedom of expression cases under Article 10 of the ECHR. The difficulty of communicating the harm in being denied the ability to manifest religious beliefs publicly is a key limitation of both religious freedom and religious discrimination models. Similarly, this thesis highlights the difficulty in assessing what weight should be attributed to such religious harm within a proportionality exercise balancing the rights of religious individuals with the rights and interests of other parties. The analysis in this thesis draws primarily upon the sources of law which shape domestic English law in this area, namely the ECHR and European Union law. However, this thesis also considers foreign precedent and case law from the United States in particular. This thesis contends that no one model can address the range of cases where manifestation of religious beliefs arise, and that litigants should be able to draw from religious freedom, religious discrimination, and freedom of expression protections depending on the nature of their case.

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Chapter 1 Introduction

Section I: Introduction

This thesis focuses on the religious individual, and specifically the protection available to the individual religious adherent wishing to act in accordance with their religious beliefs in the public sphere.[1] This thesis compares the protection of religiously manifested conduct under religious freedom, discrimination law, and freedom of expression models. An overriding question in this thesis is how to allow religious individuals to participate fully in public life while ensuring that their particular manifestations of religious belief do not burden others to an unacceptable extent. Legal conflicts often centre on attempts by believers to live their lives in accordance with particular religious norms in contexts such as employment, education, or the provision of services. These contexts involve different types of claims being made by religious individuals. Some religious individuals will make claims for accommodation of their religious manifestation; a religious employee may, for example, seek amendment of working hours in order to attend religious services on particular days. Other religious individuals will seek exemption from general rules; a religious school pupil, for example, may seek exemption from a no head-coverings rule in a school uniform policy.

The majority of this thesis does not dwell on theoretical debates about the interaction of religion and law, but instead focuses on the concrete issues of what legal protection is currently available to religious individuals wishing to act in accordance with their beliefs. That being said, at times this thesis delves into some of the deeper questions raised by the

[1] The law pertaining to religious communities is rarely alluded to in this thesis both for reasons of space and also because in practice such law has little influence upon the circumstances with which this thesis is concerned. The ECtHR has arguably been more active in relation to religious communities. See *Manoussakis v Greece* (1996) 23 EHRR 387 regarding regulation of places of worship; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 regarding autonomy of religious organisations in selection of their leaders; *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 regarding registration of churches. See Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55 International & Comparative Law Quarterly 929, 938-944.

particular character of religious acts, particularly when addressing the difficulties associated with communicating religious motivation. Chapter 4, which proposes freedom of expression as a model for understanding certain types of case, is of necessity substantially theoretical. However, the approach adopted in this thesis is generally intended to be both practical and litigant-focused. To this end, each of the substantive chapters in this thesis concludes with an overview of the different degrees of protection that a religious freedom, non-discrimination, or freedom of expression approach currently affords to different categories of religious litigants. These categories are introduced below and are reflective of some of the primary types of case that may arise in this area.

The interaction of the various sources of human rights law and discrimination law in the English legal system informs the context of this thesis.[2] When discussing discrimination law, for example, it is necessary to take account of the influence of European Union law,[3] the European Convention on Human Rights (ECHR),[4] and national statutory schemes of protection, namely the Equality Act 2010. The twin duties on English courts under the Human Rights Act 1998 (HRA) to interpret domestic legislation so that it is compatible with the ECHR and to take account of relevant jurisprudence of the European Court of Human Rights (ECtHR) mean that the Convention and ECtHR jurisprudence are directly relevant to determining the current state of applicable law in England.[5] For example, one key recent case in English law involved the question of whether the Convention obliges the UK government

[2] This thesis focuses on the law in England and Wales, one of three distinct legal jurisdictions in the UK and which is presided over by the UK Supreme Court. For ease, I refer to the legal jurisdiction of England and Wales in shorthand as England. Similarly, I refer to the UK legislature without specifically identifying occasions where additional legislation may be enacted by the devolved domestic legislatures in Northern Ireland, Scotland, and Wales.

[3] Article 6 of the 2008 Treaty on European Union commits the EU to acceding to the ECHR and declares the fundamental rights as guaranteed by the Convention to be part of the general principles of EU law, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 6. The relationship between EU law and ECHR law is discussed in greater detail in Chapter 3.

[4] This will at times be referred to simply as 'the Convention'.

[5] The Human Rights Act 1998 (HRA).

to grant an exemption from domestic anti-discrimination legislation[6] to religious individuals working for non-religious employers.[7]

The religious individuals most likely to end up before the courts are those whose religious beliefs are in some way counter-cultural, whether in terms of opposition to mainstream liberal values or in relation to more practical concerns such as issues of diet or dress. This thesis questions how such conflicts may be best resolved, examining the weaknesses and blind spots of legal protection deriving from religious freedom and non-discrimination approaches, before proposing that the issues which can arise in respect of some of the most controversial types of Article 9 or non-discrimination cases might warrant consideration from the standpoint of freedom of expression.

A. Why Focus on Religion?

Religion poses a problem to the modern liberal democratic state. The nature of religious requirements makes them distinct from the usual array of choices that the State governs and adds particular force to religious claims for accommodation and exemption from general requirements. The claim of religious citizens that they should not be forced to choose between spiritual and civil obedience poses a particular problem where this takes the form of requests for special accommodation or exemption from requirements and rules that are generally binding on all.[8] The nature of such claims is distinct from those of citizens who for innumerable other reasons would prefer not to be bound by certain general rules because the reasons for accommodation or exemption are essentially 'incommunicable'.[9] In essence, this

[6] The Equality Act 2010 (EA 2010), which largely implements EU law on non-discrimination in employment and the provision of services.
[7] *Eweida and others v UK* (2013) 57 EHRR 8.
[8] Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) xiii.
[9] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880, [2010] IRLR 872, [21].

thesis' subject matter is the question of the correct means through which these incommunicable claims may be evaluated. Since the religious grounds for these claims cannot be evaluated, courts must give weight to the concerns of religious individuals for other reasons, whether respect for religious freedom, protection from discrimination, or the safeguarding of freedom of expression. This thesis compares how these various models fare as methods of adjudicating the distinct issues raised in claims involving religiously motivated acts.

The nature of religious individuals' needs can be difficult to predict. Individualistic or lesser known minority beliefs would inevitably fail to fit within the sort of practical and limited exceptions which governments might be persuaded to grant. Liberal democracies' commitment to the principle of equality would deem the resulting differential treatment illegitimate. However, liberal ideals of autonomy, rights, and choice rely on a conception of rational citizens whose needs can be predicted and accommodated in an organised society. The problem of religion in a rational rights discourse is pinpointed by Jeremy Waldron when he notes how 'The liberal commitment to allowing individuals to pursue their aims is complemented by an insistence that individuals be reasonable in choosing what aims to pursue'.[10] In the liberal state certain freedoms are guaranteed in national and international documents and, generally, the State can know in advance the parameters of what it has agreed to protect and accommodate into its system of organisation and governance. Whilst followers of majority religions may succeed in ensuring that legislators are sensitive to their needs, minority and individualistic believers cannot do the same and will most often turn to the

[10] Jeremy Waldron, 'Toleration and Reasonableness' in Catriona McKinnon and Dario Castiglione (eds), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (Manchester University Press 2003) 21.

courts when seeking accommodation or exemption.[11] The unpredictability of how government policy will interact with the diversity of religious obligations within a given population makes legislators and courts unwilling to adopt general requirements for accommodation or exemption on grounds of religious belief. Where religious individuals are placed in the unenviable position of being subject to conflicting civil and spiritual obligations they must make either a political case for legislative action or a legal claim for judicial intervention.

Not only are religious needs unpredictable, but the actions required to support and accommodate religious individuals may also be financially burdensome or restrictive on the freedoms of other individuals. This poses a problem in two respects. First, where, in other contexts, ideas of proportionality, dialogue, and compromise would be crucial to fashioning resolutions of such conflicts, the absolute nature of religious obligations, in contrast with more flexible ideas of choice, makes such judicial tools less effective. Second, arguments premised on religious tenets fit awkwardly within traditional democratic frameworks of rational discourse and evidence-based reasoning. Where the central premises of one group's claims for special treatment rest upon claims which are not open to proof or general agreement, explaining why others should suffer detriment so as to accommodate their beliefs is an uncomfortable judicial role. In addition, the emotive nature of conflicts stemming from differing religious beliefs is reflective of religion's unique position as a source of conflict across societies. Religion is not like other forms of belief; it 'excites opposition of a kind that other beliefs do not and at the same time makes its adherents think themselves entitled to

[11] Scalia J's judgment in the US Supreme Court case of *Employment Division v Smith* 494 US 872 (1990) is reflective of the view that democratic processes alone should be the primary means for obtaining religious exemptions from general rules.

protections that other belief holders would not usually dream of demanding'.[12] It places a particular burden of respecting difference, even in relation to views and actions which some would view as purely irrational.

It is the extreme importance of religion to many of its citizens that exponentially increases the modern State's problems in this regard. For many religion is a fundamental part of everyday life. Indeed, for some it is the primary force in their lives, guiding their everyday actions as much as larger issues of morality. Religious beliefs may limit the choices available to an individual and the State accepts these self-imposed restrictions because it can interpret them as freely chosen, and protects the individual's right to make these choices as part of its guarantee of religious freedom. Even where religion does not play such a primary role for the individual, it is still often an inherent part of a person's identity. Our beliefs form part of who we are and whether they be atheistic or theistic they make up a substantial part of our view of the world, and of relationships within families and wider society. Religious belief and manifestation may not hold the same public or instrumental value as, for example, political belief and expression, but their value to the individual provides a reason for governments to pay heed to requirements and rituals which the majority of their citizens may neither value nor comprehend.

(i) Religion and non-discrimination

Non-discrimination is in many ways related to religious freedom. While the State has a basic duty of neutrality between different religions and beliefs, it is frequently argued that to give in to every claim of religious motivation would lead to anarchy and would certainly

[12] David Robertson, 'Neutrality between Religions or Neutrality between Religion and Non-Religion' in Peter W Edge and Graham Harvey (eds), *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Ashgate 2000) 32.

undermine several basic goals of the modern state such as public order, equality and certainty of the law.[13] Thus, questions of accommodation, exemptions, and public religious expression pose particular problems to leaders of multicultural liberal democracies. On the other hand, protecting only belief without protecting manifestation of religious belief fundamentally erodes the essence of the right. As Carolyn Evans has noted, 'if the right to freedom of thought, conscience, and religion is sufficiently protected as long as a person is able to continue to hold those beliefs, no matter how difficult the State makes it for them to do so, the content of the right is minimal'.[14]

It is abundantly clear that religion is an area ripe for discrimination. While our histories may have taught us to forego desires for universalism or conquering of contradictory belief systems, we still find difficulty in relating to the 'other'. The idea of toleration has been used as a means of moving forward from our violent history to a more accommodating present, but tolerance is distinct from equality and certainly dominant cultures of religion still exist. A country may have strong historical and cultural links with a particular religion, or indeed may have a formally established religion, whilst maintaining practical separation between church and state. For example, the surviving dominance of the Catholic church in places such as Ireland, Italy, or the Bavarian regions of Germany may create problems for members of minority religions.[15] Thus, equality of treatment is a central issue in considering the place of religious expression in the modern state. The various models of equality informing discussion of religious discrimination and difference are considered below.

[13] See Scalia J's reference to 'courting anarchy' in *Employment Division v Smith* (n 11) 888.
[14] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 68.
[15] See, for example, *Johnston v Ireland* (1986) 9 EHRR 203, where a Protestant citizen of the Republic of Ireland complained that Irish laws prohibiting divorce were an improper imposition on his freedom of religion.

(ii) Religion and human rights

Even though states contracting to the ECHR have agreed to the general principle that freedom of religion or belief should be protected, this is no indication that they share a common conception or definition of what this protection should entail.[16] There is a clear contrast between the general consensus amongst Western European states in support of the right to believe, and the distinct and conflicting approaches adopted by states in defining the limits of the right to manifest religious belief. The significant diversity in church-state models amongst the European states that have chosen to be bound by the ECHR adds to the difficulty of defining the contours of protection of religious manifestation.[17] In addition, the religious traditions and current demographics of each state colour dominant conceptions of religion and protected religious practices. Christianity has occupied a significant role in the culture and history of many European states.[18]

Under the Human Rights Act 1998 English courts must consider Strasbourg jurisprudence, though they are not bound by it.[19] However, it is clear that at times they have felt themselves constrained to follow Strasbourg's lead. The English courts are not required to adopt the ECtHR's standard of protection if it is lower than that which they would otherwise apply.[20] The case for stronger protection in the domestic context is greater in relation to areas of the ECtHR's jurisprudence where the margin of appreciation doctrine is

[16] Evans, *Freedom of Religion under the European Convention on Human Rights* (n 14) 18, 19.
[17] Carolyn Evans and Christopher Thomas, 'Church-State Relations in the European Court of Human Rights' [2006] Brigham Young University Law Review 699.
[18] Fourteen EU member states are predominantly Catholic (Austria, Belgium, France, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, and Spain), five are predominantly Protestant (Denmark, Estonia, Finland, Sweden, and the UK) and three are mainly Christian with no denomination predominating (Germany, the Netherlands, Latvia). Gwyneth Pitt, 'Religion or Belief: Aiming at the Right Target' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press 2007) 203.
[19] HRA, s 2.
[20] See *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2006] ICR 55, where Neuberger LJ focused entirely on domestic unfair dismissal law rather than the ECHR's protection because reliance on the effect of domestic law would better protect the claimant, [77], [81], [90]-[91].

influential.[21] English courts feel themselves to be less constrained by interpretations of the Strasbourg court which they judge to be flawed.[22] At the same time, though, with respect to Article 9 English courts have tended to adopt many of the criticized approaches of the Strasbourg institutions[23] and these restrictive interpretations of Article 9 have in turn influenced English courts' interpretation of domestic non-discrimination protections.[24] This tendency reflects Malcolm Evans' warning of the potentially debilitating effects of 'Importing what is essentially an impoverished, or negative, vision of religious liberty into what is often a more vibrant domestic debate'.[25]

Section II: Why are these Questions Relevant Now?

Some of the most controversial English and ECtHR judgements in recent years have related to the place of religious practices in society, involving questions such as the wearing of religious symbols by public and private employees[26] and the right of religious employees to abstain from acting in accordance with their employer's equality policies.[27]

There is a growing acceptance that predictions of modernization inevitably involving a reduction in religious belief have proven false. As Peter Berger acknowledges, the world 'is as furiously religious as it ever was, and in some places more so than ever'.[28] The rise of Pentecostalism and Islam are particularly reflected in recent cases involving claims for

[21] In relation to declarations of incompatibility see *R (Nicklinson) v Minister for Justice* [2014] UKSC 38, [2014] 3 WLR 200.
[22] *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.
[23] *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.
[24] *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955, [22].
[25] Malcolm Evans, 'Human Rights, Law and Religion: Locating the Debate' in Peter W Edge and Graham Harvey (eds), *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Ashgate 2000) 191.
[26] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] UKET 1702886/09; *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890.
[27] *Ladele* (n 24); *McFarlane* (n 9).
[28] Peter Berger, 'Secularism in retreat' [1996] National Interest 3, 3.

accommodation and exemption. However, the trend of religious growth is not necessarily reflected to the same extent in Britain. According to the 30th British Social Attitudes Survey, in 2012 only 52% described themselves as belonging to a religion, compared to 68% in 1983.[29] In 2012 only 20% described themselves as Anglican.[30] This suggests the 'mainstream' status for Christianity is no longer reflected in statistics. The process of renegotiating the position of Christianity and questioning previous institutional compromises is ongoing. The sensitivity of some believers towards the perceived threat of rejection of Christian values and practices is reflected in various Christian lobby groups' common warnings about the 'persecution' of British Christians[31] and concerns about marginalisation of religion are a recurring theme in much academic debate.[32] In England some Christian religious leaders have become increasingly vocal in their criticism of how Anglicanism and religion in general are treated by those in authority.[33] The role of the courts in negotiating the stream of controversial cases involving religion in recent years has proven a particular bone of contention. The former Archbishop of Canterbury, Lord Carey of Clifton, notably intervened in *McFarlane v Relate Avon*, complaining that English courts displayed ignorance and 'clear animus' towards Christian beliefs.[34]

Increasingly, privileges benefitting Christians and previously taken for granted by many are being questioned. Challenges to prayers at the start of council meetings in

[29] National Centre for Social Research, *British Social Attitudes Survey 31* (National Centre for Social Research 2014) 30.
[30] ibid.
[31] Some UK Christian campaigning groups have been criticised by a group of Christian legislators for providing 'a distorted presentation of facts for manipulation of the media', Christians in Parliament, 'Clearing the Ground Inquiry: Preliminary Report into the Freedom of Christians in the UK' (2012) Report of the Christians in Parliament All-Party Parliamentary Group <http://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf> accessed 13 September 2014, 24.
[32] See Lord Carey's concerns referred to in *McFarlane* (n 9) [17]; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press 2013) 4-8, 9.
[33] John Bingham, 'Britain's Christians are Being Villified, Warns Lord Carey' *The Daily Telegraph* (London, 13 April 2012).
[34] *McFarlane* (n 9) [17].

England[35] and the presence of crucifixes on the walls of Italian schools[36] are reflective of the growing confidence of those who view such privileges as inappropriate in modern society. Such challenges have been described as 'ultimately only one front of a larger cultural war … about the relationship between religion and liberal democracy'.[37]

As well as negotiating the appropriate place of and provision for Christian belief in society, there is also the question of how the European liberal state should treat its increasingly religiously plural citizenry. Recent English cases involving members of the Jewish,[38] Sikh,[39] Hindu,[40] and Muslim[41] faiths have required courts to adjudicate on the extent to which the consequence of individuals' adherence to the tenets of such faiths should require exemption or accommodation from various rules and policies. The ECtHR's case law is also reflective of the growing diversity within the citizenry of contracting states.[42] Traditional understandings of religion are being challenged by what Charles Taylor calls 'fragilization', whereby 'the issue of religious change is kept alive' and there are 'more "conversions" in both directions in the lives of individuals, and between generations'.[43] Some see friction as an 'inevitable consequence of a "marketplace" of faith'.[44]

The increasing domain of the State, in terms of welfare provision and promulgation of discrimination laws, means that more and more aspects of individual action have moved from

[35] *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175 (Admin), [2012] 2 All ER 1175.
[36] *Lautsi v Italy* (2012) 54 EHRR 3 (Grand Chamber).
[37] Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford University Press 2011) xvi.
[38] *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.
[39] *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] WLR (D) 151.
[40] *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893.
[41] *Begum* (n 23).
[42] See, for example, the numerous cases involving Muslims and Sikhs in France and Switzerland: *Dogru v France* (2009) 49 EHRR 8; *Fatima El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008); *Aktas v France* App no 43563/08 (ECtHR, 23 February 2010); *SAS v France* App no 43835/11 (ECtHR, 1 July 2014); *Mann Singh v France* App no 4479/07 (ECtHR, 13 November 2008); *Dahlab v Switzerland* ECHR 2001-V 449; and *Ouardiri v Switzerland* App no 65840/09 (ECtHR, 8 July 2011).
[43] Charles Taylor, *A Secular Age* (Harvard University Press 2007) 808, n 4.
[44] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 32) 14.

the private sphere and into the public sphere. This is reflected in the recent flurry of cases involving public authorities seeking to act in accordance with discrimination law and private individuals claiming that their religious freedom is being disproportionately limited.[45] Moreover, the range of actions with which the State is concerned has also expanded, with discrimination and hate speech regulation leading to new types of conduct coming under state scrutiny. Such laws are representative of a 'thick' type of substantive liberalism being promoted by the State. Authors such as Ahdar and Leigh have argued that this form of liberal state is not neutral and favours those religious individuals who treat religion as a 'mere subjective, individual preference or taste among many'.[46]

A key question is what space should be allowed for religious life in the public sphere. This issue will inevitably involve the question of what weight should be attached to the religious commitments of individuals. This issue frequently arises in exemption or accommodation cases where an individual's commitment to manifest their religious belief comes into conflict with other goals. A related concern is how modern legal adjudication can attribute weight to the content and tradition of beliefs. Some have argued that the fundamentally 'incommunicable' nature of religious belief put it in danger of being trivialised.[47] Julian Rivers has powerfully argued that recent cases on law and religion in England represent a 'fundamental shift' whereby religious action has 'no publicly cognisable weight' when placed against the pursuit of communal secular goods.[48]

Such larger theoretical questions about the place of religion in society, the evolving role of the State, and the appropriate response to pluralism inform the practical conflicts

[45] See text to n 323ff in ch 2.
[46] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 32) 17.
[47] *McFarlane* (n 9) [21] (Laws LJ).
[48] Julian Rivers, 'Promoting Religious Equality' (2012) 1 Oxford Journal of Law and Religion 1, 396.

which have been at the centre of much of the case law involving manifestation of religious belief. There is an endless range of contexts in which legal questions may arise about the extent to which persons may legitimately act in accordance with their religious beliefs. This thesis focuses predominantly on three contexts which have produced the majority of case law in this area: religious pupils at schools; religious individuals in employment; and the position of religious individuals who wish to act in accordance with beliefs about the wrongfulness of same-sex relationships. Unfortunately, for reasons of space, there are many types of claim involving religious individuals manifesting their beliefs are not addressed or are dealt with only briefly.[49]

A. Religious School Pupils

Some reasons for banning certain forms of religious dress explicitly concern religion, for instance objections relating to maintaining the denominational neutrality of schools or of only permitting a particular level of religiosity to be communicated, as in the *Begum* case.[50] The former view is dominant in the French debate where Muslim dress, Jewish *kippas*, and Sikh turbans are restricted in public schools. However, when discussing the limitation of religious manifestation in schools, it is important to acknowledge that concern about immigration, ethnicity, and changing cultural spaces are at times significant factors in such debates. Banning religious symbols in French public schools has much to do with the French public's perception of and reaction to France's increasingly diverse culture and the growing presence of non-Western immigrant groups. It is important to acknowledge at the outset that such issues inform the context of the ECtHR's case law in this area.

[49] Two notable categories of cases not addressed in this thesis are those involving conscientious objection to military service and the position of employees of religious organisations.
[50] *Begum* (n 23).

B. Religious Employees

The instances where the practice of religion may arise at work are varied.[51] In some cases the issue is the manifestation of belief through the wearing of specific clothing or symbols or through the act of praying. To a certain extent, when an employee agrees to any working arrangement they consent to the subordination of their needs to those of their employer during working hours. However, there is a growing recognition that where possible employees should be accommodated.[52] The question of whether an employer can legitimately prohibit such activities will likely depend on the practical reasons for refusing accommodation or exemption.[53] In some cases there may need to be alteration of the employee's work conditions so as to enable them to practice their religion within or outside of the workplace. This may involve adjustments to work rotas, dietary options in work canteens, or the allocation of particular tasks at work, such as handling pork products or serving alcohol. Where a pre-existing rule, roster or policy conflicts with an employee's religious practice the question is whether the employer should adapt their practices to avoid such conflict. Sometimes the refusal to permit a particular manifestation at work may be justified by reference to some general aim claimed to be impeded by such permission. For example, in *Eweida*, an employee's request to be permitted to wear a visible cross was rejected by her employer on the grounds that it was in conflict with the image the company wished to promote to the public.[54] This type of response moves the conflict to one of accommodation rather than permissiveness.

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[51] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008); Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink, *A Test of Faith: Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012); Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v United Kingdom' (2013) 15 Ecclesiastical Law Journal 191; Aileen McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1; Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecclesiastical Law Journal 280.
[52] *Eweida and others* (n 7).
[53] *Eweida v BA (CA)* (n 26).
[54] ibid.

C. Religious Objections to Same-Sex Marriages

The role of religious employees or service providers in the provision of services to same-sex couples has become a key area of conflict and has given rise to a number of ECtHR and Supreme Court challenges.[55] The Equality Act 2010 contains certain exemptions for religious organisations,[56] but otherwise requires that services be provided on a non-discriminatory basis. Religiously motivated refusals to serve same-sex persons may overlap with cases involving religious employees, in as much as the issue relates to the freedom to manifest religious belief in the workplace. However, this category of case is distinct in terms of the discriminatory nature of the reasons underlying the refusal of workplace duties. In such cases it may be argued that the individual's religious manifestation causes direct harm to customers who are denied service. Accommodation of such employees, for example by the rearranging of work duties, is controversial. Some argue that, provided service provision is not impaired, this is an appropriate and conciliatory response.[57] Others contend, however, that such accommodation is unjustifiable because it involves denying service for a prohibited reason.[58]

Section III: Some Preliminary Issues

Before examining the current state of the law in relation to Article 9 and religious discrimination, it is important to outline some key concepts and to address some preliminary objections to the protection of religious practices. This section will seek to respond to objections which reject the necessity of protecting religious beliefs, particularly illiberal ones such as those which clash with equality and non-discrimination norms. This section will

[55] *Eweida and others* (n 7); *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741.
[56] EA 2010, sch 9, [2]-[3], sch 11, [5], sch 23, [2]. See, however, *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch), [2010] PTSR 1074 (Catholic adoption agencies not included in exemptions).
[57] Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3 Oxford Journal of Law and Religion 2, 18-21.
[58] Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77 The Modern Law Review 223, 240.

lastly clarify the different meanings and models of secularism and equality that operate within the Convention system, as a means of contextualising the discussion of case law in Chapters 2 and 3.

A. What Do We Mean By Religion?

International human rights treaties reflect the level of ambiguity evident in this area by including belief alongside protection of religion without attempting to extensively define either.[59] Such broad definitions arguably facilitate broad agreement by acting as a 'placeholder'[60] for the multiple conceptions and definitions in operation across state parties. The difficulty of defining religion or belief has been identified as a key factor in domestic UK debates on the protection of religious individuals. In a wide-ranging consultation on prohibition of religious discrimination in the UK Bob Hepple found that the issue of definition was a key concern.[61] The definition adopted may be informed by the context of the inquiry; formal structure and authoritative statements of doctrine may have a greater role to play in some contexts, such as applications for charity status, whilst a focus on the sincerity of belief and the coherence and consistency of one's actions in light of the claimed belief might be more illuminating where issues of conscientious objection are in play. Similarly, the distinction between negative prohibition and positive enabling of religion might equally inform the definitional question.[62]

[59] Like the ECHR, the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the Declaration on the Elimination of all Forms of Intolerance and Discrimination 1981 all include belief within their definitions of protected characteristics.
[60] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.
[61] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000) 47.
[62] Pitt (n 18) 211.

The ECtHR appears to have faced the problematic question of definition by adopting a liberal approach to the question and largely resisting use of definitions as a filtering device.[63] On a practical level, the need to tackle the definition of religion is generally precluded by the text of Article 9 itself, which includes 'freedom of thought, conscience and religion'. Whilst the Strasbourg institutions have established some criteria about the types of belief that are protected by Article 9,[64] the test is clearly not imagined as a significant barrier by Strasbourg and a wide range of illiberal beliefs might potentially be open to protection.[65] Religions as diverse as Scientology,[66] the Moon Sect,[67] the Divine Light Zentrum,[68] and Druidism[69] have been recognised as protected by the Convention. Indeed the Court has more recently expressly counselled against domestic courts' use of a definitional filter in adjudicating Convention rights.[70]

In recent times English courts have moved away from use of the definition of religion as a filter of religious manifestation claims,[71] and in the recent Supreme Court case of *R (Hodkin) v Registrar General of Births, Deaths and Marriages*,[72] Lord Toulson provided a formulation of 'religion' appropriate to a multi-faith and multi-cultural society. He defines 'religion' as:

[63] A notable exception is *X v UK* (1977) 11 DR 55, where the Commission rejected a prisoner's claims on the ground that, inter alia, he had failed to establish the existence of the Wicca religion.
[64] It must attain a certain level of 'cogency, seriousness, cohesion and importance' and be 'worthy of respect in a democratic society' and 'not incompatible with human dignity'. See *Campbell and Cosans v UK* (1982) 4 EHRR 293, para 36 and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [76].
[65] Convention case law has recognised fascism (*X v Italy* (1976) 5 DR 83), Nazism (*X v Austria* (1963) 3 CD 42), and Communism (*Hazar, Hazar and Açik v Turkey* (1991) 72 DR 200) as amongst the beliefs which Article 9 may protect.
[66] *X and Church of Scientology v Sweden* (1978) 16 DR 68.
[67] *X v Austria* (1981) 26 DR 89.
[68] *Omkarananda and the Divine Light Zentrum v Switzerland* (1981) 25 DR 105.
[69] *Chappell v UK* (1990) 12 EHRR 1.
[70] *Eweida and others* (n 7).
[71] *Mba v Mayor and Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562, [2014] 1 WLR 1501.
[72] *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] AC 610.

> [A] spiritual or non-secular belief system, held by a group of adherents, which claim to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science … Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the sense or from science.[73]

The question of which beliefs should be protected is undoubtedly both controversial and difficult. However, this thesis' particular focus on religion and the specific difficulties in defending religiously motivated actions to a large extent precludes any examination of non-religious conscientious claims, such as those at issue in *Grainger v Nicholson PLC*.[74] While the claims of non-religious conscientious objectors may be highly analogous, the scope of this thesis' inquiry is limited to considering the interactions of religious individuals with non-religious authorities and actors. The particular difficulty in explaining and balancing religious motivation is a central concern in this thesis and one that is not experienced by those with non-religious conscientious views. That being said, the discussion of equality arguments in support of accommodating religious individuals in Chapter 2 includes some consideration of the potential that distinctions between religious and non-religious claims for exemption and accommodation on equality grounds may be hard to defend. However, for the present purposes protection of belief is considered in a solely theological sense. The definition of religion offered by Lord Toulson suitably captures the range of spiritual beliefs and motivations that fall within the subject matter of this thesis.

[73] ibid [57]. Norman Doe's definition of religion as 'transcendental belief in divinity and action based upon that belief in the visible world' is also helpful, Norman Doe, *Law and Religion in Europe* (Oxford University Press 2011) 23, 44

[74] Brian Leiter, 'Why Tolerate Religion' (2008) 25 Constitutional Commentary 1; *Grainger plc v Nicholson* [2009] UKEAT 0219/09, [2010] IRLR 4.

B. Why Accommodate Religion?

The question of what degree of protection ought to be provided to individuals' manifestation of their religious beliefs cannot be answered without referring to more general rationales in support of religious freedom. Equally, the question of why illiberal religious beliefs or practices should be accommodated, or exempted from otherwise general rules, raises the need for a more wide-ranging explanation of what is protected when we protect people's freedom to act in accordance with their religious beliefs.

(i) Rationales for protection

The confines of this thesis preclude detailed examination of religion's status as an objective good. However, in order to contextualise current legal protection of religious freedom, it is useful to introduce some of the most common rationales offered in support of religious liberty. Judicial remarks on this subject reflect both principled and instrumental rationales. In *R (Williamson) v Secretary of State for Education and Employment* Lord Nicholls reasoned that 'religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality'.[75] Strasbourg case law frequently refers to the value of protecting religious beliefs and practices in terms of reflecting respect for pluralism[76] and democracy.[77]

On a purely empirical level, even in an increasingly secular Britain there are good reasons to accommodate religious practices. In pragmatic terms the fact that there are still a great many citizens who place significant value upon religious practices should cause the State to think seriously about protection of religious freedom. For some citizens religion is

[75] *Williamson (HL)* (n 64) [15] (Lord Nicholls).
[76] *Hasan and Chaush* (n 1) para 62.
[77] *Kokkinakis v Greece* (1994) 17 EHRR 397, para 31.

the primary force in their lives, guiding everyday actions as much as larger moral issues.[78] Even where religion does not play such a role it is still often an important element of identity.[79]

Early arguments in favour of religious liberty, most prominently the writings of John Locke, relied on the desirability of minimising religious conflict as a rationale for religious toleration.[80] However, the failure of this rationale to place any independent value on religious freedom in itself can result in a very thin layer of protection easily overridden by competing goals; indeed, concerns for preserving religious harmony can mean the minority believer is more readily silenced.[81] A number of cases discussed in this thesis reflect how concerns about conflict avoidance can in fact support suppression of minority practices.

Ronald Dworkin highlighted this very point, identifying plentiful evidence that in modern times religions are frequently not tolerated 'without any apparent danger to stability'. In light of this fact he argued that 'dignity provides the only available justification for freedom of religious thought and practice'.[82] These considerations about dignity relate more generally to the principles and values to which liberal democracies claim to adhere. The concern that citizens should feel that the State treats them with equal respect is common across much of modern jurisprudential and political commentary.[83] This viewpoint holds that the utilitarianism of democracy should thus be tempered by concerns that the external

[78] Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 Harvard Human Rights Journal 189, 204-5.
[79] Sandel, *Liberalism and the Limits of Justice* (n 8) xiii. However, see criticism of the idea of religious identity in Raymond Plant, 'Religion, Identity and Freedom of Expression' (2011) 17 Res Publica 7.
[80] John Locke, *A Letter Concerning Toleration* (Mark Goldie ed, first published 1689, Liberty Fund 2010).
[81] Lucy Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 Oxford Journal of Legal Studies 197, 202.
[82] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 376.
[83] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 227.

preferences of citizens, relating to the respect they have for a person or their way of life, should not be counted in determining the State's policies.[84]

Equally, autonomy principles dictate that individuals should be free to pursue their own goals and to follow their own comprehensive views. As John Rawls observes, 'In a well-ordered society … the plans of life of individuals are different in the sense that these plans give prominence to different aims and persons are left free to determine their good'.[85] From an autonomy perspective, individuals' ideas of what would be a worthwhile and valuable life should not be coerced by the State, unless this is necessary to prevent harm to others. John Stuart Mill's harm principle is generally accepted as defining the limits of such autonomy, whilst reinforcing the general liberal thesis that government has no right to enforce popular morality by law.[86] As such, concern for religious freedom mirrors a strong tradition of liberal thought on how the State should maximise the autonomy of the individual whilst protecting social harmony and personal safety.[87]

Some may wonder why the courts should be concerned with protecting religious practices, particularly those reflecting illiberal beliefs. It might be argued that there is no reason for equality norms and human rights law to intervene to aid individuals whose illiberal beliefs would undermine those very concerns. Article 17, sometimes referred to as the 'militant democracy' provision in the Convention, reflects this concern that the Convention

[84] ibid 234.
[85] John Rawls, *A Theory of Justice* (rev edn, Oxford University Press 1999) 393.
[86] 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others', John Stuart Mill, *On Liberty* (originally published 1859, JM Dent 1993) 78.
[87] See also Plant, 'Religion, Identity and Freedom of Expression' (n 79) 16, where Plant builds on Bernard Williams' notion of 'ground projects', that is, beliefs that give meaning and significance to lives, as a reason for granting religious exemptions, Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981).

not be used as a shield by those who would seek to destroy the freedoms it guarantees.[88] However, the Strasbourg court has on numerous occasions demonstrated that illiberal religious are not outside the scope of Convention protections.[89]

In addition, it is arguable that illiberal religious expressions should not be judged independently of the historical and cultural contexts underlying the development of religious norms. Moreover, judging according to current human rights standards religious doctrines enshrined in ancient texts or religious practices developed over centuries misses a crucial aspect of why these beliefs, and practices inspired by them, should be protected. It is the importance of these religious practices and beliefs to the individual that makes them worthy of protection, and to a minimum level they should be respected regardless of their liberal or illiberal secular meanings. The illiberal nature of a belief should of course be relevant to considerations about accommodating its manifestation, but, in all but the most extreme cases,[90] to rule out such beliefs from the outset because of their content flies in the face of the autonomy and dignity rationales for religious freedom.

C. Models and Terminology

(i) Secularism

There are various approaches that one may take to the issues discussed in this thesis. One possible analysis is a church-state perspective. On one hand there is a certain degree of unanimity across Europe in as far as it is broadly understood that the State and religion are

[88] See *Refah Partisi v Turkey* (2002) 35 EHRR 3, para 99.
[89] *Gündüz v Turkey* (2005) 41 EHRR 5; *Eweida and others* (n 7).
[90] See application of Article 17 in *Norwood v UK* (2005) 40 EHRR 11, in contrast with the treatment of the beliefs in *Refah Partisi* (n 88) and *Gündüz* (n 89).

understood as separate spheres.[91] A common core of Western European church-state models is a basic division between church and state: the State should not interfere with the religious freedom of the individual, and religious denominations should not expect the aid of the State in enforcing orthodoxy. In return, the State should be free from interference by religious groups seeking to use their influence upon the citizenry to shape political policy.[92] Even though there is a large variation across such states in terms of legal and institutional identification with religion, this minimum degree of separation is generally accepted. At the same time, different states have developed diverse models of managing the relationship between church and state and in theory this to some extent explains different approaches to religious manifestation apparent across the Convention system. Gerhard Robbers has identified three basic types of categories: states with a state church or with 'close links between state power and the existence of the church' such as England, Greece, Malta and Finland; states with systems predicated on the principle of the strict separation of religion and state, such as France and the Netherlands; and, finally, states with basic church-state separation and simultaneous state-church cooperation in an array of common tasks, a category to which Robbers assigns Belgium, Poland, Spain and Italy amongst others.[93] Robbers, however, is quick to acknowledge that any attempt at categorisation according to legal and theoretical characteristics is beset by the realities of social conditions suggesting different groupings.[94] The constitutional conventions of UK law and the well-established tradition of religious neutrality in the courts means that the reality of establishment gives little cause for worry, as far as religious freedom or religious discrimination are concerned.

[91] Evans and Thomas, 'Church-State Relations in the European Court of Human Rights' (n 17).
[92] 'Secularism unadorned is the relegation of the eschatological ideology of religions to the private sphere, divorced from political power ... It is a system which allows individuals and groups to express themselves freely, not coerced by a prevailing creed', Frances Raday, 'Secular Constitutionalism Vindicated' (2009) 30 Cardozo Law Review 2769, 2770.
[93] Gerhard Robbers, *State and Church in the European Union* (2nd edn, Nomos 2005) 578-579.
[94] ibid 579.

Moreover, the various models in Europe are united by a common minimum standard under Article 9 of the ECHR.

The differentiation between strict and basic separation of church and state has also been referred to as a distinction between 'fundamental'[95] and 'liberal' secularism.[96] The ECtHR has judged various government measures enforcing fundamental secularism, including bans on the presence of religious symbols in such public institutions as universities and schools, to be legitimate.[97] Whilst such measures reduce individuals' freedom to engage in certain religious practices, primarily the wearing of religious dress, fundamental secular states such as Turkey and France view this as necessary to maintain freedom of individual belief. In contrast, liberal secular models adopt an approach which is broadly permissive of individuals' manifestations, including religious dress, and view neutrality between religions as a matter primarily related to the State's treatment of individuals. The ECtHR has equally permitted varying levels of state support for religion across liberal models, allowing states to reflect majority religious affiliation through contexts such as the displays of religious symbols.[98]

The general endorsement across Europe of separation of church and state does not necessarily mean that religion is absent from public life. However, it can mean that traditionally there is little sympathy for religious claims to accommodation or exemption,

[95] The term *laïque* is also used throughout this thesis when discussing French secularism.
[96] Nicholas Gibson, Sylvie Langlaude, and Ingvill Plesner have all adopted the terms 'fundamental' and 'liberal' to describe these two distinct types of secularism; Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66 The Cambridge Law Journal 657, 681; Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (n 1) 937; Ingvill Plesner, 'The European Court on Human Rights between Fundamentalist and Liberal Secularism' (Islamic Head Scarf Controversy and the Future of Freedom of Religion or Belief seminar, Strasbourg, 28-30 July 2005) <http://www.jus.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf> accessed 12 September 2014.
[97] *Sahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber); *Dahlab* (n 42); *Dogru* (n 42).
[98] *Lautsi (Grand Chamber)* (n 36).

particularly where public sector workers are concerned.[99] The dominance of the free-contract doctrine for much of Article 9's history, whereby religious freedom is ultimately protected by the freedom to resign from employment, is indicative of the prevalence of the view that the place of religion is predominantly the private sphere.

(ii) Equality

Equality is undoubtedly a contested term; as Ronald Dworkin notes, often those 'who praise it or disparage it disagree about what they are praising or disparaging'.[100] Indeed, equality has been understood as having a variety of meanings and has been understood and categorised in a diversity of forms. These include the individual justice model, the group justice model, equality as recognition of individual dignity, and equality as a means of tackling social exclusion.[101] Without entering into a larger debate on the categorisations and definitions of equality, this section seeks to outline some basic concepts of equality as a context to the more practically focused discussions of ensuing chapters. It briefly outlines the concepts of formal equality, substantive equality, and equality of outcomes.

Formal equality is most commonly understood as underpinning the common conception of non-discrimination. It can be traced back to Aristotle's dictum that 'things that are alike should be treated alike'. He went on to add that 'things that are unalike should be treated unalike in proportion to their unalikeness', an element which is often forgotten by critics of equality.[102] Formal equality involves a moral claim that all persons should be

[99] Lucy Vickers, 'Religious Interests in the European Workplace: Different Perspectives' in Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds), *A Test of Faith: Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 19-20.
[100] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 2.
[101] Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 The Cambridge Law Journal 562; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 The Modern Law Review 16; Christopher McCrudden, 'The New Concept of Equality' (2003) 4 ERA Forum 9.
[102] Aristotle, *Nicomachean Ethics* (William David Ross tr, Clarendon Press 1925) V3 1131a-1131b.

treated equally because they are of equal moral worth.[103] When we think of non-discrimination generally, and the concept of direct discrimination in particular, we are concerned with the discrimination that is 'morally unacceptable' because it takes the form of treating persons less favourably than others because of grounds which are 'morally irrelevant'.[104] Legal systems typically classify what grounds are considered to be illegitimate reasons for differentiating between persons.

However, a formal equality approach has been criticised as negating the value of difference, since in practice 'the apparently abstract individual is clothed with the attributes of the dominant culture, religion, or ethnicity'.[105] Moreover, non-discrimination does not create an equal playing field, and has been critiqued as ignoring systematic stereotyping and institutionalised prejudice. Fredman has highlighted how formal equality ignores how cumulative disadvantage prevents members of disadvantaged groups ever attaining the threshold of equal merit with the dominant group.[106] The structural dimensions of religious discrimination have long been recognised[107] and such realisations have led to growing acknowledgement of the limits of the concept of direct discrimination alone. The failure of the formal concept of equality, as represented in, for example, direct discrimination regulation, to redress any existing inequalities or increase the equality of persons more generally has led to growing support for a substantive view of equality.[108]

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[103] See for example, the requirement that governments treat their citizens with equal concern and respect, Dworkin, *Taking Rights Seriously* (n 83) 272. See also 'Liberalism' in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 180ff.
[104] David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press 2002) 135-9.
[105] Sandra Fredman, 'Equality: A New Generation?' (2001) 30 Industrial Law Journal 145, 154.
[106] ibid (n 105) 156.
[107] Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (United Nations 1960).
[108] Katherine O'Donovan and Erika Szyszczak, *Equality and Sex Discrimination Law* (Basil Blackwell Oxford 1988) 4.

Substantive equality is based upon the recognition that where there is an unequal starting point equal treatment is not enough. This idea of substantive equality is especially active in the context of redressing patterns of racial inequality and in doing so providing group-based remedies.[109] Generally a commitment to substantive equality imposes positive duties on state actors to amend patterns of disadvantage.[110] It is arguable that substantive equality is reflected to a certain extent in the concept of indirect discrimination. Some judicial commentary links the two concepts. In the *Thibault* case, concerning the denial of an annual salary increase to a female employee as a result of her absence due to sickness and maternity leave, the European Court of Justice (CJEU) observed that the aim pursued by the 1976 Directive on Equal Treatment was substantive and not formal equality.[111] However, some have highlighted how the concept of indirect discrimination in EU and Convention law falls short of endorsing a conception of substantive equality entailing equality of outcomes or results. As Fredman has highlighted, legislative protections from indirect discrimination cannot be viewed as attempting to achieve equality of results since indirect discrimination can be justified in a number of circumstances and only some differences in treatment are prohibited.[112]

However, indirect discrimination laws may in some cases further a transformative goal of accommodating diversity.[113] In examining the impact of apparently neutral criteria, indirect discrimination reveals the extent to which a dominant group is favoured. In *Mandla v Dowell Lee* the House of Lords recognized that an apparently neutral rule of requiring boys to

[109] See, for example, *Regents of University of California v Bakke* 438 US 265 (1978).
[110] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 178.
[111] Case C-136/95 *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011, para 31. See also C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549.
[112] Sandra Fredman, *Discrimination Law* (Oxford University Press 2011) 180.
[113] See ibid (n 112) 180.

come to school bareheaded was in practice requiring conformity to a Christian way of dressing.[114] The House of Lords recognised that the requirement created unacceptable barriers to persons from different cultures or religions.[115] However, the transformational potential of the concept of indirect discrimination is limited by the acceptance of justification for indirect discrimination. Job-related criteria remain legitimate despite the fact that some disadvantaged groups will inevitably fail to meet them.[116] However, mainstreaming of equality concerns in EU law with the ultimate goal of addressing structural inequalities reflects an aim of transformative equality.[117]

The classification of equality as formal, substantive, and transformative is by no means definitive. Fredman has argued, for example, that equality can be understood as a principle informed by sets of values such as individual dignity, restitution, redistribution, and democracy.[118] Dignity as an underlying value of equality is important in undermining the potential for equality to result in a levelling down approach. These various concepts of equality shape the legal protections discussed in Chapter 3.[119] To some extent a 'fourth generation' of equality has also become part of the legislative equality framework in the UK through the introduction of the public sector equality duty in the Equality Act 2010.[120] These brief outlines serve to illustrate not only the different understandings of what equality means, but also the different ends pursued by those who seek more 'equal' treatment.

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[114] *Mandla v Dowell Lee* [1982] UKHL 7, [1983] 2 AC 548.
[115] Fredman, *Discrimination Law* (n 112) 180.
[116] ibid.
[117] For discussion see Jo Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' (2005) 58 Current Legal Problems 255; Teresa Rees, *Mainstreaming Equality in the European Union* (Routledge 2002).
[118] Fredman, 'Equality: A New Generation?' (n 105) 155.
[119] Space precludes detailed examination of the application of these concepts across domestic, EU, and Convention law. For a detailed analysis of how, for example, the concepts of formal and substantive equality are reflected in the EU Constitution see Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002).
[120] EA 2010, ss 1, 149.

Section IV: The Current Context

This thesis argues that though the gaps in protection of religiously-motivated acts are narrower than they once were, a number of problematic aspects of Article 9 case law remain.[121] It is difficult to reason that there is any general right to accommodation of religious acts in contexts such as workplaces or schools in English law. The extent to which Article 9 guarantees accommodation or exemption where it is costly or significantly impacts upon business or administration efficiency is also unclear. As far as conflicts involving religious beliefs about homosexuality and non-discrimination protections are concerned, it is clear that little protection is presently provided by Article 9, since acting on such a belief is not viewed by the ECtHR as a manifestation of religious belief requiring of accommodation or exemption.[122] More generally, it is increasingly difficult to reconcile the ECtHR's approach to different contracting states because of the degree to which the margin of appreciation doctrine plays a role. In its recent finding that the French ban on the 'full-face veil' did not breach Article 9 the ECtHR accepted a new basis upon which Convention rights may be limited, interpreting 'the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others"'.[123] This ruling raises the question of the extent to which the Convention protects unpopular minorities.

The case law on religious freedom and religious non-discrimination discussed in this thesis is also reflective of larger problems of communication of religious motivation in the courtroom context. A key issue is the difficulty in communicating religious meaning. Judges

[121] *Eweida and others* (n 7).
[122] ibid.
[123] *SAS* (n 42) para 157.

simply do not have the ability to appraise fully the actions of religious individuals.[124] The requirement that state actions be based only on non-comprehensive grounds upon which all can agree has mainly been considered in the context of political discourse.[125] This thesis builds on existing works on the limiting effects of the requirement of 'public reason' by exploring how such principles impact upon religious individuals who come before English and Strasbourg courts.[126]

Another difficulty, particularly affecting members of minority faiths, is the influence of dominant assumptions about religion and the core of religious freedom in English and Strasbourg case law. It may be argued that restrictive judicial approaches merely give effect to an overarching normative assumptions about the role of religion in society. Academics such as Wendy Brown have argued that current approaches to religious freedom and religious discrimination law are representative of a larger problem of inequality at the heart of the secular division of religion and state.[127] This inequality is an end product of a secular system that imagines religion as private and the public space as neutral between religions. Brown has best articulated how such assumptions contribute to the disregarding of minority disadvantage that stems from ostensibly general and neutral rules.

These difficulties of communication play into the question of what weight can be attached to religious convictions in the proportionality analysis undertaken by courts in religious freedom and religious discrimination cases. At present, courts adopt a position of

[124] This question is dealt with to a limited extent in Peter Cumper and Tom Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (2011) 22 King's Law Journal 131.
[125] See discussion of the nature of the public reason principle and criticism of its effects at text to n 294 in ch 2.
[126] Cumper and Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (n 124).
[127] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2006).

neutrality and 'benevolent tolerance' of cultural and religious beliefs,[128] but this creates a gap in meaning between the basis upon which the religious litigant is making their case and the basis upon which the legitimacy of their claim is being adjudicated.[129] This issue of what weight to attach to religious beliefs is amplified in cases where the beliefs in question are illiberal or contrary to discrimination norms.

The current law on religious discrimination has been shaped in part by the developments in relation to Article 9.[130] The fact that most cases are considered in the context of indirect discrimination means that the difficulty of communicating how and why courts should value religious manifestations equally plays a role in considering the proportionality of justifications for differential treatment. In terms of both Article 14 and the Equality Act 2010 the full potential of discrimination law to alleviate disadvantage faced by religious individuals does not appear to have been fully realised to date. The impact of the *Eweida and others* judgement in terms of accommodation of religious individuals in contexts such as workplaces and schools is not yet fully clear, but it appears that there will be a greater requirement to provide substantial reasons for the failure to accommodate. However, the analysis in this thesis suggests that English courts are unlikely to go as far as reading a duty of reasonable accommodation into the ECtHR's findings. Apprehension concerning any substantial expansion of protection against indirect religious discrimination is apparent in both academic and judicial commentary, and the continuing debate surrounding the desirability of a hierarchy of discrimination is indicative of a larger view that the absolutism of religious non-discrimination principles needs to be kept in check. This may relate to the difficulty of cases involving persons with religiously-motivated opposition to same-sex

[128] *R (Johns) v Derby CC* [2011] EWHC 375 (Admin), [2011] HRLR 20, [41].
[129] Cumper and Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (n 124).
[130] *Ladele* (n 24) [22].

relationships. Current case law on religious discrimination provides little protection for such persons, since disadvantaging persons expressing such beliefs is viewed as justified and proportionate.[131]

In response to the limitations of religious freedom and religious discrimination approaches, this thesis argues that thinking about religiously-motivated acts as expressive acts may get at something that we might otherwise fail to capture fully, that is the value of manifesting a religious belief and the harm that occurs when such expression is forbidden or penalised. Defining religious harm and balancing such harm against other interests and the rights of other parties will be key elements in future cases involving religious manifestations. The problem of attributing weight to public expression of belief can potentially be overcome if courts are willing to look to freedom of expression rationales as a form of secularly accessible 'placeholder' for the varying reasons why a contestable religious expression might be valued.[132]

The structure of this thesis is as follows: Chapter 2 analyses the current state of Convention law post-*Eweida and others* and *SAS v France*, before addressing some of the larger issues which arise when relying on Article 9 as a means of protecting religiously motivated actions and considering how such conflicts often reflect certain culturally contingent understandings of religion which are 'unspoken, invisible and assumed'.[133] In

[131] *Bull v Hall (SC)* (n 55).
[132] See McCrudden's use of the term 'placeholder' in reference to a concept that can hold different content for different people simultaneously, McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 60) 678.
[133] Paul Weller, '"Human Rights", "Religion", and the "Secular"' in Nazila Ghanea, Alan Stephens and Rachel Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff 2007). See Wendy Brown's focus on the unacknowledged role of secularism in defining interactions between religion and society, Brown, *Regulating Aversion* (n 127).

addition, the chapter highlights the difficulty of judges adopting an external rather than an internal approach to interpreting religious practices.[134]

Chapter 3 considers the practical potential of the equality principle as a means to improve upon the standard and scope of protection of religious manifestation under Article 9, tracing how equality currently functions as an alternative route for protection. It analyses the non-discrimination protections under domestic, European, and Convention law, focusing on the question of whether equality protections in practice provide better protection of religiously motivated actions than that available under Article 9. The chapter goes on to question the appropriate limits of the equality principle in cases involving religious manifestation and considers some of the reasons why English courts may be wary of the relative absoluteness of equality principles as applied to religious claims. The final section of Chapter 3 considers the potential for a reasonable accommodation concept in English law as an answer to the gaps in protection identified under Article 9 without the pitfalls of a strengthened version of religious discrimination.

Chapter 4 explores how a freedom of expression approach may allow religious individuals to make their case to courts in a manner that focuses on the value of public manifestation rather than private belief. This has the potential to crucially reconfigure the proportionality analysis in claims involving religiously-motivated conduct. Both domestic and Convention freedom of expression case law demonstrates that courts are willing to define the reasonable limits under which controversial views might be tolerated in the context of freedom of expression. This type of analysis may strengthen cases taken by individuals whose religious beliefs are in conflict with dominant liberal norms.

[134] Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecclesiastical Law Journal 26.

Chapter 2 Religious Freedom

This chapter looks in turn at a number of key issues within Article 9 jurisprudence, discussing the ECtHR's evolving case law and its application in the UK. As well as setting out the current applicable law on freedom of religion in England, it discusses the developments in the ECtHR's approach towards Article 9. This chapter highlights some of the remaining difficulties in the case law of the Strasbourg court, before turning to consider deeper conceptual and systemic difficulties with the religious freedom model reflected in Article 9. There have been significant adjustments in Article 9 case law regarding the manner in which violations may be found to have occurred, and the manner in which potentially justifiable limitations are adjudicated. In the recent case of *Eweida and others v UK* the ECtHR made clear that the Article 9(2) proportionality exercise should be the primary filter on claims and that previous doctrines such as the specific-situation rule, the free-contract doctrine, and the act-belief distinction were inappropriate to filter claims at the interference stage. Section I details these major developments, setting out how the Strasbourg court's case law has influenced the current state of English law on religious freedom.[1] Much now hinges on the somewhat amorphous balancing exercise within Article 9(2). Section II focuses on the ECtHR's approach to Article 9, mapping the evolution of its reasoning in relation to how restrictions on Article 9 may be justified. A key contention in this thesis is that Article 9's protection is to some extent incomplete. One factor is that the minimum degree of protection for religious manifestation that the Convention guarantees varies across contracting states, because it is largely contingent on the State's attitude towards religion. In this sense the minimum standards of Article 9 appear to vary depending on the country in which those rights are invoked; what may clearly be claimed as an infringement in the English context might not amount to a violation in the French context. This may be justified by, amongst

[1] *Eweida and others v UK* (2013) 57 EHRR 8.

other factors, the differing State party interests that are invoked in such distinctive contexts. However, the Court's approach to Article 9 leaves little clarity about the minimum standards of Article 9 across contracting states and this can leaves significant gaps in the protection of minorities. As well as these practical problems, there are larger conceptual difficulties with the religious freedom model. Section III explores some complicating factors within the religious freedom model, focusing on the difficulties of communicating the motivation of religious acts in the courtroom context, the difficulty for judges of fully appreciating religious standpoints, and the difficulty of balancing religious concerns against non-religious aims. It concludes by considering occasions when religious manifestation comes into conflict with discrimination law and analysing the sufficiency of the approach of English courts and the ECtHR to date. Section IV concludes with a brief consideration of how Article 9 currently protects different types of religious individuals.

Section I: The Current Context of Article 9

A. The Legal Framework

Article 9 of the EHCR, incorporated into UK domestic law under the Human Rights Act 1998 (HRA), is the primary form of legal regulation in relation to religious freedom. Article 14 of the ECHR, concerning non-discrimination in the enjoyment of Convention rights, buttresses this protection from a non-discrimination perspective.

(i) Article 9: Religious freedom

Article 9 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.

Article 9 makes a distinction between the absolute freedom to believe and the qualified freedom to practice or otherwise manifest belief. This distinction is most often typified as the distinction between the absolute *forum internum* and the qualified *forum externum*. The freedom to manifest belief is subject 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'.[2]

The base level of protection that the Convention provides to the individual religious believer under Article 9(1) is relatively clear. The protection of the *forum internum* safeguards the individual's freedom to choose their own beliefs, creating a clear layer of protection from state coercion of belief, including non-religious forms of thought, conscience, and belief. Further protections are available under Article 2 of the First Protocol to the Convention, which covers the right of parents to educate their children in accordance with their religious views.[3] The State is prohibited from engaging through its education system in moral or religious indoctrination contrary to parents' wishes.[4] Equally, the State is prohibited from limiting the freedom of individuals to practice or not practice religion, for instance by requiring individuals to act in accordance with the practices of a religion to which they do not adhere.[5] Direct evidence of coercion to change religion emanating from private actors will

[2] Article 9(2).
[3] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711; *Folgerø v Norway* (2008) 46 EHRR 47.
[4] However, it seems such coercion much reach a relatively high level for it to be deemed an interference, see *Angelini v Sweden* (1988) 10 EHRR 123.
[5] *Buscarini v San Marino* (2000) 30 EHRR 208.

likewise amount to unjustified interference with the rights enshrined in Article 9.[6] Whilst the *forum internum*'s protection is absolute, its scope is narrow, being primarily concerned with freedom to believe and freedom from coercion to change belief. The freedom to manifest religion may be confined in numerous ways without infringing upon the absolute protections of Article 9(1).[7] This chapter primarily focuses on Article 9's qualified protection of religious manifestations and the judicial interpretations that have shaped the meaning and strength of the text's protection of them. In particular, this chapter is concerned with the balances struck by courts when the desire of individuals to manifest their religious beliefs comes into conflict with other objectives.

(ii) Article 14: Prohibition of discrimination

The issues that arise when a religious practice is restricted can be understood as relating to two separate strands of legal protection. The traditional view of such conflicts characterized them as relating to questions of religious freedom but more recently the religious discrimination aspect of such restrictions has also come to the fore. Article 14 of the Convention lays down the principle of non-discrimination in the following terms:

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

[6] For instance, where an employee is dismissed from their job solely because of their religious beliefs.
[7] Some would argue, and at times the ECtHR has seemed to imply, in cases such as *Buscarini*, that forcing a religious individual to act contrary to their beliefs is in breach of the *forum internum*. For a detailed exposition see Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) ch 3.

Article 14 is crucially not a freestanding right and may only be invoked in conjunction with another substantive Convention right[8]. That right need not itself have been breached for a successful Article 14 claim to be founded. Thus far, Article 14 has only been infrequently used as a basis for a finding of religious discrimination.[9] This is partially explained by the Court's practice of avoiding consideration of Article 14 complaints where the claimant has already established a breach of another Convention right.[10] Article 1 of Protocol 12 provides a general and freestanding anti-discrimination provision. However, it has limited legal effect, given that the UK and the vast majority of Council of Europe member states have yet to ratify it.

The UK's statutory scheme on discrimination is contained in the Equality Act 2010 (EA 2010), an amalgamation of numerous previously separate strands of equality protection. Under this scheme indirect discrimination occurs where A applies or would apply a provision, criterion, or practice equally (i) which puts persons of B's religion or belief at a particular disadvantage compared with others; (ii) which puts B at that disadvantage; and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.[11] Whilst discrimination is covered in detail in the following chapters, Article 14 and the domestic statutory non-discrimination regime have both played a role in the manner and context in which Article 9 case law has developed.

[8] This includes rights contained in Protocols which have been signed and ratified by the contracting states in question.
[9] In the context of religious discrimination, though found to be an interference with Article 14 in conjunction with Article 8 (right to private life), see *Hoffmann v Austria* (1994) 17 EHRR 293, involving the denial of custody to a Jehovah's Witness mother. In relation to conscientious objection to military service see *Thlimmenos v Greece* (2001) 31 EHRR 15.
[10] Where discriminatory treatment is a fundamental aspect of the case the Court will be more likely to address Article 14 arguments. See, for instance, *Dudgeon v UK* (1982) 4 EHRR 149.
[11] Equality Act 2010 (EA 2010) s 19.

To bring a case to Strasbourg an applicant must show that they have exhausted domestic remedies by raising the substance of their complaints before domestic courts, and appealing initial domestic findings where necessary.[12] For the requirement to apply the available domestic remedies must be both accessible and effective in practice in the sense of being available and sufficient, as well as being capable of directly remedying the impugned state of affairs with a reasonable chance of success.[13] In the UK context, section 4 of the HRA provides for the making of a declaration of incompatibility where primary legislation is considered incompatible with the Convention. Such a declaration gives rise only to a power, rather than a duty, of the relevant minister to amend the offending legislation, though in practice it is highly likely a declaration will lead to an amendment. Nonetheless, the ECtHR has found that UK applicants are not required to first raise their complaints under section 4 before applying to Strasbourg.[14]

B. The Current English Legal Context

This section tracks some key recent developments in Article 9 case law which have come about through the interaction of domestic courts and the ECtHR. This section considers three Article 9 doctrines, the distinction between religious acts and beliefs, the 'free-contract' doctrine, and the 'specific-situation' rule, each of which significantly limited the protection of Article 9 for religious claimants. The traditional operation of these doctrines was substantially rejected in *Eweida and others v UK*.[15] Judgment in the joined cases of Lillian Ladele, Gary McFarlane, Nadia Eweida, and Shirley Chaplin was handed down on 15 January 2013. The applicants were challenging the English courts' findings in a series of

[12] They must also make their application within six months of the final domestic determination.
[13] *Vučković v Serbia* App no 17153/11 (ECtHR, 25 March 2014) paras 69-77.
[14] *Burden v UK* (2007) 44 EHRR 51, para 43. Given the high rate of implementation, which has only solidified since the ruling in *Burden*, the ECtHR's approach to s 4 of the Human Rights Act 1998 (HRA) may be revised: see Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLR 487.
[15] *Eweida and others* (n 1).

judgments relating to the rights of religious employees under Article 9 of the Convention and under the religious discrimination provisions of the English statutory discrimination scheme[16] The *Eweida and others*[17] judgment provided a clear break with the Strasbourg institutions' traditional approach towards Article 9 of the EHCR, emphasising the need to resolve claims at the justification rather than interference stage.

(i) Factual background of the *Eweida and others* challenge

Ms Eweida was sent home from work without pay following repeated infringement of her employer's uniform policy by attending work wearing a visible Christian cross.[18] Her employer, British Airways (BA), subsequently altered their policy and she returned to work, though BA refused to compensate her for earnings lost during the period in which she had been away from work.[19] Her claim that Christian symbols were being treated less favourably than those of other religions such as Sikhism and Islam, which were allowed under BA's policy,[20] was rejected by the Court of Appeal. In *Eweida v British Airways* the Court of Appeal interpreted the 2003 non-discrimination regulations,[21] now incorporated into section 19 of the EA 2010, as necessitating that for indirect discrimination to be established the claimant must identify other persons sharing their protected characteristic who are also disadvantaged by the provision, criterion, or practice applied to them.[22] The Court of Appeal endorsed the EAT's statement that 'it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be

[16] *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890; *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] UKET 1702886/09; *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880, [2010] IRLR 872.
[17] Throughout this chapter the Strasbourg judgment will be referred to as *Eweida and others* (n 1), while the domestic judgments involving Ms Eweida will be referred to as *Eweida v BA*.
[18] *Eweida and others* (n 1) para 12.
[19] ibid para 13.
[20] ibid para 11.
[21] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.
[22] *Eweida v BA (CA)* (n 16) [18]-[19].

able to appreciate that any particular provision may have a disparate adverse impact on the group'.[23] The absence of any requests from other Christian employees was evidence that supported the conclusion that the cross was not a manifestation but merely a 'personal choice'.[24] Article 9 was judged to lend little assistance to the applicant's claim, given the Court of Appeal's interpretation of the ECtHR's restrictive jurisprudence on what qualifies as a religious manifestation.[25] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* involved a nurse, Shirley Chaplin, challenging her dismissal from her employment, which resulted from her refusal to cease wearing a cross around her neck whilst at work.[26] The hospital justified its uniform policy with reference to fears about risk of injury to patients and hygiene concerns. Ms Chaplin lost her claim in an employment tribunal and the *Eweida* judgment made any appeal to higher domestic courts unlikely to succeed.[27]

Ladele v Islington LBC involved the disciplining and dismissal of a registrar who refused on grounds of conscience to officiate at civil partnership ceremonies because she believed she could not 'facilitate the formation of a union which [she] sincerely believe[d] was contrary to God's law'.[28] Ms Ladele had been employed for a number of years previous to the introduction of civil partnerships and was not contractually obliged to undertake civil partnership duties. However, her employers were legitimately able to alter those terms and designate her a civil partnership registrar.[29] The Court of Appeal found any indirect discrimination she suffered was justified as her employers had acted proportionately in pursuit of their legitimate aim of promoting equality on grounds of sexual orientation. The

[23] *Eweida v British Airways plc* [2008] UKEAT 0123/08, [2009] IRLR 78, [60], endorsed by the Court of Appeal in *Eweida v BA (CA)* (n 16) [24].
[24] *Eweida v BA (CA)* (n 16) [9].
[25] ibid [22].
[26] *Chaplin* (n 16). Ms Chaplin was initially moved to a non-nursing, temporary position for 8 months before the position concluded, *Eweida and others* (n 1) para 20.
[27] *Eweida and others* (n 1) paras 21-22.
[28] *Ladele* (n 16) [10].
[29] The introduction of the Statistics and Registration Act 2007 altered Ms Ladele's employment status, making her an employee of the local authority rather than the Registrar General, *Eweida and others* (n 1) para 27.

Court of Appeal cited the offence caused to her colleagues and the fact that she was being 'required to perform a purely secular task' in their proportionality analysis.[30] *McFarlane v Relate Avon Ltd* involved a psycho-sexual counsellor who regarded same-sex sexual relationships as contrary to God's law because of his conservative Christian beliefs. Mr McFarlane had been providing general, not specifically sexual, counselling to same-sex partners. However, a conflict with his employers arose when he undertook a training course in psycho-sexual therapy.[31] He was dismissed for gross misconduct after it became clear he did not intend to comply with his employer's policies by providing sexual counselling to same-sex couples.[32] His case was largely determined by the application of the earlier Court of Appeal judgment in *Ladele*.[33]

A common feature of the domestic decisions challenged in *Eweida and others* was that the domestic outcome of each claim had been determined by the English courts' interpretation of statutory discrimination provisions rather than Article 9. This reflected the effects of the House of Lords' findings in *R (on the application of Begum) v Denbigh High School* upon litigation strategies and judicial approaches in these types of case.[34] The applicants' reliance on domestic discrimination legislation in the domestic courts was reflective of past expectations that statutory protection against religious discrimination could bridge the gap left by English courts' adoption of a non-interference approach to Article 9.[35] These cases primarily relied on Employment Equality (Religion or Belief) Regulations 2003, a precursor to the EA 2010. *R (Watkins-Singh) v Governing Body of Aberdare Girls' High*

[30] *Ladele* (n 16) [52].
[31] *McFarlane* (n 16) [4].
[32] *Eweida and others* (n 1) para 37.
[33] ibid para 40.
[34] *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.
[35] Early successful statutory discrimination cases included *Williams-Drabble v Pathway Care Solutions* [2004] UKET 2601718/04; *Khan v G & S Spencer Group* [2005] UKET 1803250/04; *Fugler v MacMillan - London Hairstudios Limited* [2005] UKET 2205090/04; *Noah v Sarah Desrosiers (t/a Wedge)* [2008] UKET 2201867/07.

School, a case successfully argued on equality alone without reference to religious freedom, appeared to indicate the way forward for other litigants.[36] However, the cases challenged in *Eweida and others* stemmed from the English higher courts interpreting the statutory anti-discrimination scheme as not only subject to the restrictive precedents established in *Begum*, but as also limited in a number of additional respects.[37] Having failed to convince national courts that this interpretation was contrary to national law, including the HRA, the applicants in *Eweida and others* turned to Strasbourg, contending that the approach of the domestic courts was contrary to the Convention.

(ii) The English courts' approach to Article 9

Prior to the incorporation of the Convention in the HRA an individual could not directly rely on the Convention in English courts, but courts could have regard to the Convention in interpreting legislation. However, there are few English decisions dealing with Article 9 prior to 1998. *Ahmad v Inner London Educational Authority* is one such case. The Court of Appeal had regard to Article 9 in a claim of constructive dismissal by a Muslim teacher who wished to attend a Mosque on Fridays.[38] In rejecting the claim Lord Denning commented that he saw 'nothing in the European Convention to give Mr Ahmad any right to manifest his religion on Friday afternoons in derogation of his contract of employment'.[39] In some cases more generous protection was available in domestic law than under Article 9. The exemption of Sikhs from the requirement to wear motorcycle crash helmets is one such example. The Motorcycle Crash Helmets (Religious Exemption) Act 1976 recognised the need to safeguard the religious freedom of practising male Sikhs whose religion required that they wear a

[36] *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] ELR 561.
[37] On the solitary believer's practice not qualifying as a ground of disadvantage, see *Eweida v BA (CA)* (n 16) [15].
[38] *Ahmad v Inner London Education Authority* [1978] QB 36 (CA).
[39] Mr Ahmad's claim was also dismissed by the Commission, *Ahmad v UK* (1981) 4 EHRR 126.

turban in public. The European Commission on Human Rights had previously ruled inadmissible a claim by a Sikh male convicted for failing to wear a motorcycle helmet because any interference with Article 9 was justified by the protection of health.[40]

Since the enactment of the HRA the Convention can be directly relied upon in English Courts.[41] A number of early cases such as *Copsey v WWB Devon Clays*[42] and *R (Williamson) v Secretary of State for Education and Employment* [43] were unsuccessful because the limitations on Article 9 were found to be justified in line with Article 9(2). However, in recent years English courts have faced recurring criticism over the manner in which Article 9 disputes have been adjudicated, with many cases decided upon the question of whether a prima facie interference with Article 9 actually arose. Undoubtedly some of the Article 9 cases which have come before the English courts have been weak and have failed because non-religious concerns are rightly judged to outweigh the religious interest invoked.[44] In many cases, however, while the ultimate results were rarely seriously disputed, many felt that English courts were too willing to rely on the question of interference as a filter to discharge claims, when the questions in issue would have been better determined under the justification limb of Article 9.[45] This line of criticism maintained that since the judgment of the House of Lords in *Begum* the limits of Article 9's protection of religious individuals under the HRA had been interpreted in an overly restrictive fashion. In *Begum* the Lords applied Strasbourg precedents, including some that had previously been regarded as controversial and

[40] *X v UK* (1978) 14 DR 234.
[41] The HRA received the Royal Assent on 9 November 1998, and the main provisions were brought into effect on 2 October 2000.
[42] *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2006] ICR 55.
[43] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.
[44] See *Adewole v Barking, Havering and Redbridge University Hospitals NHS Trust* [2011] UKET (unreported).
[45] See Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] Public Law 488; Nicholas Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66 The Cambridge Law Journal 657; Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008); Peter Cumper and Tom Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (2011) 22 King's Law Journal 131.

inconsistent by English courts,[46] to find that no prima facie interference with Article 9 occurred where a school refused to accommodate a pupil's desire to dress in accordance with her religious beliefs.[47] Denying that interference arose under Article 9 blocked any consideration of the merits of specific claims and this approach garnered much criticism. Whilst the *Begum* judgment related to 'a particular pupil and a particular school in a particular place at a particular time',[48] the majority's findings shaped English courts' approaches to religious claimants across a wide variety of cases. The following approaches are identifiable in the pre-*Eweida and others* English cases, with each acting as a filter on the types of claims where a prima facie breach of Article 9 would be accepted to have occurred.

(a) Limitation on actions judged to be religious manifestations

In English jurisprudence the question of what qualifies as a religious manifestation has become a central issue, not only for the purposes of Article 9's protection of freedom of religion, but also under the UK's statutory non-discrimination scheme. The test for determining this question is, however, by no means clear.[49] The *status quo* was generally assumed to be that English judges would avoid any role as assessors of the moral or doctrinal content of religious beliefs. Whilst the principle of non-justiciability applies to the internal doctrinal disputes of religious collectives,[50] this position appears to be somewhat more debatable in relation to the individual believer. Mummery LJ's remarks in a recent case on collective religious dispute reflect some of the rationales underlying the traditional stance of judicial restraint in this area:

[46] For example, the House of Lords' reliance on *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 EHRR 27, a case which was criticised in *Copsey* (n 42).
[47] *Begum* (n 34) [23]-[25].
[48] ibid [2].
[49] Gwyneth Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 Industrial Law Journal 384.
[50] *HH Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group & Another* [2010] EWHC 1294 (QB) [35]; Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 74-77.

> [T]he court in this case is being asked to pronounce on matters of religious doctrine and practice … How can the court possibly decide that kind of question with any degree of confidence or credibility?[51]

Despite the apparent intractability of this objection, in cases involving individual believers the courts appear to be willing to take on exactly this role, with an apparent shift away from the House of Lords' approach in *Williamson*. In that case, the Lords had clearly contended that courts should not attempt to assess the doctrinal or moral legitimacy of individuals' religious beliefs. Under the approach in *Williamson* the genuine belief of the applicant provided the only evaluative filter for Article 9's protection and questions of doctrinal coherency were relevant only to the question of sincerity.[52] However, in recent years this 'strong principle of abstention' in English law has been challenged.[53] In a number of cases courts have received evidence on the contents of religious beliefs and practice,[54] whilst other judgments clearly assess the consistency of applicants' particular beliefs with the doctrines of their religious communities. In *Playfoot* a pupil's genuine belief in celibacy before marriage was found not to be 'intimately linked' to her wearing of a 'purity ring' in contravention of her school's uniform policy, since she was 'under no obligation, by reason of her belief, to wear the ring'.[55] In *Ladele* the Court of Appeal felt able to determine that the applicant's beliefs about marriage were 'not a core part of her religion'.[56] In *Eweida* the Court of Appeal

[51] *Shergill v Khaira* [2012] EWCA Civ 983, [2012] WLR(D) 214, [71]. This decision was ultimately overturned by the Supreme Court who ruled the legal dispute should still be determined, despite the need to decide a religious issue, *Shergill v Khaira* [2014] UKSC 33, [2014] 3 WLR 1.
[52] *Williamson (HL)* (n 43) [22] (Lord Nicholls), [57] (Lord Walker).
[53] Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9 International Journal of Constitutional Law 200, 2 citing *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036 (QB) 1042-3 (Brown J) as an embodiment of that principle. See also *R (Johns) v Derby CC* [2011] EWHC 375 (Admin), [2011] HRLR 20, [41]-[42] for a more recent restatement of the principle.
[54] *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.
[55] *R (Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin), [2007] HRLR 34, [23].
[56] *Ladele* (n 16) [52].

required evidence of the obligatory nature of the practice of wearing a crucifix, as distinct from a merely personal desire to wear the cross as a sign of belief.[57]

In determining what counted as a religious manifestation English courts relied on a distinction in ECtHR case law between acts motivated by religious belief and religious manifestations.[58] The Commission in *Arrowsmith v UK* stated that 'when actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9(1), even when they are motivated by it'.[59] This distinction was relied upon in a number of admissibility decisions such as *C v UK,* involving a challenge to income tax procedures which made no provision for the pacifist beliefs,[60] and *Pichon and Sajous v France*, where two pharmacists challenged their prosecutions for refusing to supply contraceptive medication on grounds of conscience.[61]. Both cases make clear that acts are only protected in as much as they are 'intimately related' or 'closely linked' to religious belief, with the Commission in each case noting that 'acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form' would meet that test.[62] Later Strasbourg decisions, such as *Valsamis v Greece*, also reflect a willingness to determine the content of a religion's requirements.[63]

However, the ECtHR showed less willingness to deny interference on this basis in more recent cases. The Grand Chamber in *Sahin v Turkey* did not refer to there being any question open to consideration in relation to whether the wearing Muslim headscarf was

[57] *Eweida v BA (CA)* (n 16) [34], [37].
[58] Javier Martinez-Torron, 'Religious Liberty in European Jurisprudence' in Mark Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press 2002) 119.
[59] *Arrowsmith v UK* (1981) 3 EHRR 218.
[60] *C v UK* (1983) 37 DR 142, 147. The UK Government also referred to *Van den Dungen v Netherlands* (1995) 80 DR 147, 150 in support.
[61] *Pichon and Sajous v France* ECHR 2001-X 898, para 4.
[62] *C v UK* (n 60) 47; *Pichon and Sajous* (n 61) para 4.
[63] *Valsamis v Greece* (1997) 24 EHRR 294.

required according to Muslim beliefs.[64] In a number of cases involving challenges to restrictions on the wearing of Muslim dress the Court did not attempt to use the definition of 'manifestation' to exclude the applicants' claims.[65] A line of cases involving the claims of religious prisoners, more explicitly cast doubt on the English courts' requirement of doctrinal obligation. In *Jakobski v Poland* the refusal of a Buddhist prisoner's request for vegetarian food, not generally considered a mandatory requirement of Buddhism, resulted in a finding of interference with Article 9. The Court stated that the request could be 'regarded as motivated or inspired by a religion and was not unreasonable'.[66] Similarly, in *Bayatyan v Armenia* opposition to military service where motivated by sincere religious beliefs engaged Article 9.[67] There were further indications of a shift in approach in *Skugar v Russia*[68] where the Court noted that:

> It is ill-conceived to delve into discussion about the nature and importance of individual beliefs, for what one person holds as sacred may be absurd or anathema to another and no legal or logical argument can be invoked to challenge a believer's assertion that a particular belief or practice is an important element of his religious duty.[69]

The *Eweida and others* judgment marked a clear and decisive break with earlier Strasbourg case law on this issue.[70] The Court clearly indicated to national courts that the question of whether an act qualifies as a manifestation cannot be interpreted as a requirement that the applicant establish that they were fulfilling a duty mandated by their religion. The Court stated that, though acts of worship forming part of the practice of religion or belief in a generally recognized form were an example of the type of acts which may be considered

[64] *Sahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber) para 78.
[65] *Dahlab v Switzerland* ECHR 2001-V 449; *Dogru v France* (2009) 49 EHRR 8.
[66] *Jakobski v Poland* (2012) 55 EHRR 8, para 45.
[67] *Bayatyan v Armenia* (2012) 54 EHRR 15.
[68] *Skugar v Russia* App no 40010/04 (ECtHR, 3 December 2009).
[69] ibid 'The Law'.
[70] *Eweida and others* (n 1) para 82.

manifestations of religion, 'the manifestation of religion is not limited to such acts'.[71] Instead, the key question is whether 'a sufficiently close and direct nexus between the act and the underlying belief [can] be determined on the facts of each case'.[72] The ECtHR's reference to a 'nexus' invokes the terminology of the Canadian case of *Syndicat Northcrest v Amselem*, which was cited as a comparative authority.[73] The Court judged that such a nexus had been established in each of the applicants' cases. An insistence on visibly wearing a cross in order to 'bear witness' to Christian faith met the test,[74] as did Mr McFarlane's objection to counseling same-sex partners and Ms Ladele's objection to participating in the creation of same-sex civil partnerships.[75]

From a principled perspective, the Court's response on this issue is welcome. Applying a filter on Article 9 claims at this level was always inherently controversial, not least because questions concerning the 'centrality' of a particular practice or belief are almost impossibly subjective,[76] but also because such inquiries break with English judges' traditional abstention from assessing questions of religious doctrine.[77] The Court's explicit rejection of the English authorities' interpretation of the 'intimately linked' test is for this reason highly positive. Whilst previous cases had indicated that English courts might be out of step with the ECtHR's more permissive approach towards this issue, *Eweida and others* provides a clear rejection of any interference test based on an applicants' conformity with religious doctrines.

[71] ibid.
[72] ibid.
[73] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, cited by the ECtHR in *Eweida and others* (n 1) para 49.
[74] *Eweida and others* (n 1) paras 89, 97.
[75] ibid para 103.
[76] See Scalia J's comments in *Employment Division v Smith* 494 US 872 (1990) 886-887.
[77] Discussed below Section III A.

The interpretation of the 'intimately linked' test of Article 9[78] and the 'group disadvantage' test of the UK's statutory discrimination scheme[79] in such a manner was problematic for reasons beyond institutional competency. Not only were judges receiving evidence on and assessing the content of individuals' beliefs, but the test they adopted required them to assess what practices were mandated by religious doctrine, a question as inherently irresolvable as it is contentious. The submissions of the UK Equality and Human Rights Commission in the *Eweida and others* case questioned what evidence must be adduced to prove a religious requirement's existence and the cogency of a religion's beliefs.[80] Judge Nicholas Bratza displayed similar concerns at the oral hearing, asking the UK Government how judges in Strasbourg are to determine what qualifies as an obligatory practice under the test in cases where the applicant asserts that the impugned act is a manifestation and the respondent denies this.[81]

(b) The free-contract doctrine as an Article 9 filter

The free-contract doctrine operates so that no interference with Article 9 occurs where a religious employee voluntarily accepts to abide by rules which restrict the manifestation of their religion. The doctrine represented a major barrier to religious employees successfully establishing interference with their Article 9 rights, with employees consistently coming up against the argument that freedom of religion is guaranteed by the 'right to resign'. In addition, it might also be added that the Convention does not guarantee the right to employment. Given that the options available to the employee are those of resigning or

[78] See *Playfoot* (n 55), where the English High Court rejected a student's challenge to her school's refusal to allow her to wear a purity ring because it was not 'intimately linked' to her Christian beliefs.
[79] *Eweida v BA (CA)* (n 16) [24].
[80] UK Equality and Human Rights Commission, 'Submission in Eweida and Chaplin v UK App nos 48420/10 and 59842/1' <www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf> accessed 11 September 2014, para 27.
[81] European Court of Human Rights, 'Webcast of oral hearing in Eweida and others v UK' <www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20120904-1&lang=en&flow=high> accessed 14 September 2014.

contravening their understanding of their religious duties, the rule necessarily accepts that the employee may have to 'pay a price' for adherence to their beliefs.[82] This reasoning has been followed in several cases involving freedom of religion, resulting in findings of no prima facie interference with Convention rights.[83]

A typical instance of the free-contract doctrine can be seen in the remarks of the Commission in *Ahmad v UK*, where the Commission noted that the applicant, a teacher who wished to attend religious worship on a Friday, 'remained free to resign if and when he found that his teaching obligations conflicted with his religious duties'.[84] His claim was dismissed as 'manifestly ill-founded'. As the application of the doctrine prevents a consideration of the merits of an applicant's claim, the reasonableness of the employer's refusal is never questioned. In *Konttinen v Finland*, for example, the employee had offered to work other shifts to make up for the hours that he missed after sundown on Fridays and his duties were normal administrative ones that were not of urgent importance.[85]

The English Court of Appeal's position was that the law on this point was quite clearly settled: no interference with Article 9 arises where an employee is dismissed or faces work-related detriment because of their desire to act in accordance with their religion during working hours.[86] Unlike the other grounds argued by the applicants in *Eweida and others* there was little occasion to claim that English courts had adopted an overly strict interpretation or failed to match the ECtHR's evolving interpretation of the Convention, with

82 Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 300-3.
83 *Stedman v UK* (1997) 23 EHRR 168 (Commission Decision) para 28; *Konttinen v Finland* (1996) 87 DR 68, para 75; *Kalaç v Turkey* (1997) 27 EHRR 552.
84 *Ahmad v UK* (n 39) para 11.
85 *Konttinen* (n 83) paras 74-75.
86 In *Eweida v BA (CA)* (n 16) the UK Court of Appeal noted that opposition to religious manifestation in the workplace might conceivably justify a 'blanket ban' on such practices, [40]. In relation to detriment suffered because of an employee's out-of-work activities the English courts have been more protective, finding a breach of contract in *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] IRLR 86.

the doctrine being affirmed as recently as 2006 in *Kosteski v Macedonia*.[87] In order to establish an interference with Article 9 counsel for Ms Eweida, Mr McFarlane and Ms Chaplin needed to convince the ECtHR to fundamentally alter their interpretation of Article 9's application in the workplace.

In *Eweida and others* the Court acknowledged the numerous Commission cases where the freedom to resign was held to bar a finding of interference with an employee's religious freedom.[88] Addressing the Commission case law on the free-contract doctrine,[89] the Court noted that it had 'not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention'.[90] Crucially the Court stated that, given the importance of religion in a democratic society, the possibility of changing job should not be seen to negate any interference with the right. Instead, 'the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'.[91]

The Court's explicit statement that the freedom of the employee to resign is not an appropriate filter to apply at the interference stage is perhaps not so surprising a development as might be thought. The application of fundamental rights in the workplace generally had once been similar to the approach reflected in the free-contract doctrine.[92] However, over the years the Court established that work-based detriment could amount to an interference with a number of Convention rights. In relation to Article 10, *Van der Heijden v Netherlands*

[87] See *Kosteski v Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 31, affirming *Stedman* (n 83) and *Ahmad v UK* (n 39).
[88] *Eweida and others* (n 1) para 83.
[89] *Konttinen* (n 83); *Stedman* (n 83).
[90] *Eweida and others* (n 1) para 83.
[91] ibid.
[92] *Kosiek v Germany* (1986) 9 EHRR 328; *Glasenapp v Germany* (1987) 9 EHRR 25 (refusal of permanent employment because of membership of extreme political parties did not interfere with Article 10). See Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 45) 87-91.

established that dismissal can restrict free speech and can penalize the exercise of a right. The Commission found dismissal for exercising free speech to have as strong a deterrent effect as total prohibition.[93] In *Vogt v Germany*, another freedom of speech case, the ECtHR mirrored the Commission's approach, establishing that a teacher's dismissal created an interference with her Article 10 rights. In relation to Article 8, *Smith and Grady v UK* found that interference arose from a ban on gay personnel in the armed forces.[94] The fact that the applicants chose to join the army was no bar to there being an interference.[95]

Crucially, the free-contract doctrine failed to distinguish between situations where an employee was aware of the restrictions upon religious manifestation prior to agreeing to undertake a particular job role and situations where this was not the case. As such the free-contract doctrine in practice went beyond merely ensuring that employees should not be allowed to subsequently challenge job conditions to which they had voluntarily contracted. This flaw had long been a source of criticism.[96] Indeed, prior to the House of Lord's judgment in *Begum*, Rix LJ had noted this point, interpreting Commission case law as drawing a distinction between cases where the contract signed by the employee included the disputed terms and cases where the employer had varied the terms and as such caused the dispute.[97] Now that this issue forms a part of the broader proportionality analysis such important distinctions can play a more central role.

It is no overstatement to say that paragraph 83 of the *Eweida and others* judgment fundamentally rewrites the protection of Article 9 in the workplace. The recasting of the free-contract doctrine as relevant to the question of a restriction's proportionality rather than the

[93] *Van der Heijden v Netherlands* (1985) 41 DR 264.
[94] *Smith and Grady v UK* (1999) 29 EHRR 493.
[95] Cf *Kalaç* (n 83).
[96] Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (n 45).
[97] *Copsey* (n 42) [65]-[66].

issue of interference might be seen as mere window-dressing were it not for one point. The Court has now established a factual scenario where the rights of the religious employee in a secular work environment trump the desires of her employer. At a minimum, the substantive finding in *Eweida and others* signals that an employer is unlikely to succeed in future cases if 'maintaining corporate image' is the sole justification for an unqualified uniform policy. The meaning of 'fair balance' is still largely unclear, but at the very least it may be hoped that the shift away from a non-interference approach heralds the Court's adoption of a more nuanced and context-specific approach towards the claims of religious employees.

(c) The availability of alternative options as an Article 9 filter

In numerous cases the ECtHR has held that the individual must take their 'specific situation' into account.[98] Thus, where a student is refused enrolment because of her headscarf, as was the case in *Sahin*,[99] the specific-situation rule applies, as the applicant is viewed to have voluntarily submitted themselves to a system of norms limiting their freedom to manifest their religion.[100] The level of inconvenience one might be expected to bear in order to avoid restriction varies. The strongest interpretation of the applicant's obligation to take their situation into account sees no interference arising where there is an alternative option open to the applicant, however unpleasant or onerous that alternative may be. *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* has often been cited in support of this interpretation of Article 9.[101] In that case the Commission determined that the denial of permission to slaughter animals in accordance with the applicants' religious precepts did not constitute an interference with their freedom of religion or belief, since it was possible to

[98] *Sahin (Grand Chamber)* (n 64); *Dahlab* (n 65). It is often used in conjunction with the free-contract doctrine discussed in the next section.
[99] *Sahin (Grand Chamber)* (n 64). See also *Karaduman v Turkey* (1993) 74 DR 93.
[100] In the military context see *Kalaç* (n 83).
[101] *Jewish Liturgical Association* (n 46) para 48.

source the relevant meat products from another country.[102] This reasoning relied on the alternative options open to the applicants not being 'impossible', although they were undoubtedly less attractive.[103]

This 'impossibility test', largely viewed as an outlier in the ECtHR's jurisprudence, and which it had declined to follow in later decisions,[104] had, however, become a central feature of the jurisprudence of English courts relating to Article 9[105] and was key to the UK Government's argument in *Eweida and others*.[106] This had not always been the case. In the pre-*Begum* case of *Williamson* it was held that the alternative option open to the religious individual must be practical and not merely theoretical. In that case the House of Lords rejected as impractical the suggested alternative options of the plaintiff's educating their children at home or waiting until their children returned from school to discipline them.[107] However, the House of Lords had relied on the *Jewish Liturgical* interpretation of interference in *Begum*, with the majority holding that the fact that the applicant could go to other schools which would permit her to wear her religious dress meant that no interference with her Article 9 rights arose.[108] The simple fact of alternative options, even though these were not particularly attractive from the applicant's perspective, was key to the rebuttal of her claim that her rights under Article 9 had been subject to interference. Subsequent English cases had viewed the availability of alternative options as a strong ground for rejecting claims of an interference with Article 9, even where the applicant had no prior awareness of the

[102] ibid para 81.
[103] ibid para 84.
[104] See Lord Nicholls' analysis of the Strasbourg jurisprudence in *Williamson (HL)* (n 43) [38].
[105] Not all claims were excluded at the interference stage by the specific-situation rule. In *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175 (Admin), [2012] 2 All ER 1175 the court declined to apply the rule to a councillor who had stood for election knowing that Christian prayers were said at the beginning of council meetings.
[106] *Eweida and others* (n 1) para 59.
[107] *Williamson (HL)* (n 43).
[108] *Begum* (n 34).

restrictions they would face and as such had not 'voluntarily accepted' a restrictive regime.[109] The UK Government therefore argued in *Eweida* that ECtHR case law reflected a consistent position that interference was only assumed or established 'where, even by resigning and seeking alternative employment or attending a different educational establishment, individuals had been unable to avoid a requirement which was incompatible with their religious beliefs'.[110] As the applicants were free to work elsewhere, and in addition Ms Eweida and Ms Chaplin had been offered alternative roles within their employment, the Government argued that the restrictions placed upon their religious manifestation did not amount to an interference.

Addressing the UK Government's reliance on the *Jewish Liturgical* case, the ECtHR suggested that the case's applicability is limited to its specific facts. The Court seems to have viewed the claimed interference in that case to have been essentially indirect, stressing that the facts did not relate to 'any personal involvement in the ritual slaughter and certification process itself'.[111] This aspect of the judgment may limit the continuance of the 'other available options' limitation in English law. However, the Court did not explicitly disassociate itself from its previous ruling in the *Jewish Liturgical* case, a point highlighted by Harris, O'Boyle and Warbrick.[112] In any event, it firmly restricts the relevance of such considerations to the justification rather than interference stage. This view is in line with the minority opinions of Lord Nicholls and Lady Hale in *Begum*[113] and answers a frequent criticism of English case law on Article 9.[114]

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[109] *R (X) v The Headteachers of Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249.
[110] *Eweida and others* (n 1) para 59, citing *Kokkinakis v Greece* (1994) 17 EHRR 397, *Ahmet Arslan v Turkey* App No 41135/98 (ECtHR, 23 February 2010), and *Sahin (Grand Chamber)* (n 64).
[111] *Eweida and others* (n 1) para 83.
[112] David Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 605.
[113] *Begum* (n 34) [41], [93]-[94].
[114] Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (n 45); Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' (2007) Public Law 488 (n 45).

(d) The end of interference as a filter?

Some definitional filtering is doubtlessly appropriate and the requirement of an intimate connection between the manifestation and the belief appears to be a successful compromise. Some religiously-motivated actions are too remote to receive Article 9 protection. For example, an employee refusing to take a drug test because they did not wish to affirm their employer's drug policy which contained a statement at odds with their religious beliefs is undoubtedly too removed.[115] Similarly, Quakers' objections to use of tax revenues to support military activities might also be viewed as too remote.[116] Considering what counts as a religious manifestation will thus remain necessary, but the ECtHR's judgment in *Eweida and others* makes clear that a test of doctrinal obligation should not form any part of this stage of analysis.

(e) Factors relevant to justification under Article 9(2)

The pre-*Eweida and others* case law is indicative of the factors which will likely be considered in determining whether future refusals to accommodate are justified under Article 9(2). In *Begum*, though the House of Lords ultimately determined there was not interference with Article 9, the factors the judges drew on to determine this issue may now give guidance to the issues which will be taken into account when deciding on justification. Subsequent English case law is also revealing of the considerations that will be relevant to resolving future disputes.

[115] *Rushton v Nebraska Public Power District* 653 F Supp 1510 (D Neb 1987).
[116] *C v UK* (n 60); Megan Pearson, 'Article 9 at a Crossroads: Interference before and after Eweida' (2013) 13 HRLR 580, 587.

In *Begum* the House of Lords placed emphasis on the manner in which school uniform policies and decisions on possible exceptions to those policies were made.[117] In other school dress cases the quality of the decision-making procedures of the school were also highlighted.[118] Evidence of efforts to accommodate religious manifestations and consultation with religious bodies prior to such decisions will weigh in favour of the policy being found to be justifiable. As was made clear in *Watkins-Singh*, the duty to carefully consider a uniform policy and possible accommodation is part of a school's race equality policy under section 71 of the RRA 1976.[119] A similar requirement exists under the EA 2010 public sector equality duty, which has been in force since 6 April 2011. Erica Howard has argued that *Watkins-Singh* suggests that a breach of this duty is actionable if a school can be shown to have failed to consider carefully its uniform policies.[120]

In *Begum* the House of Lords also listed the question of whether there is an alternative option open for the religious individual to manifest their belief as important to the question of justification. In *Begum* there were other schools nearby that permitted the articles of Muslim dress concerned and this featured in the court's reasoning in support of the school's refusal to accommodate the pupils.[121] This was key to the finding of no interference with Article 9. As Lord Hofmann stated, Ms Begum's 'right was not in my opinion infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one'.[122] In *X v Y Headteacher*, a case where a *niqab* wearing school pupil was told to remove her veil or be excluded, Silber J found the simple fact of the availability of alternative schools was of itself sufficient for a finding of no interference with

[117] *Begum* (n 34) [83], [98].
[118] *Playfoot* (n 55)
[119] *Watkins-Singh* (n 36).
[120] Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2011) 96.
[121] *Begum* (n 34) [52], [57], [69]; *Playfoot* (n 55) [30]-[32].
[122] *Begum* (n 34) [50].

Article 9.[123] The question of what counts as an acceptable alternative is key. How would the availability of a school that performed significantly less well or that was a good deal further away from the pupil's home figure in relation to the question of justification? The ECtHR has set a high barrier in terms of the alternative means which it will view as unacceptable. In cases involving religious dress in schools the ECtHR stressed that the pupils concerned could instead complete their education via correspondence courses.[124] This seems to imply that even the availability of highly unattractive alternative options should be considered as relevant in the discussion of justification.

Certainly, this case law suggests that many of the factors which played a role in the denial of interference will now be considered under the justification limb of Article 9. Whether this will lead to substantive results is unclear, but it is at least appears certain that the obligatory or widespread nature of a practice or belief will not figure in future determinations about the appropriateness of restrictions of Article 9. If there is no evidence of careful and considered decision making and no available alternatives then this will likely lead to a finding of a violation of Article 9. Beyond these extremes, it is unclear how high a standard English courts will apply in respect of each of these criteria.

The current English legal context in relation to Article 9 is substantially defined by the impact of *Eweida and others*. Much of the pre-existing English jurisprudence focused on the limiting doctrines discussed above, rejecting claims as not establishing a prima facie interference with Article 9. The position where a judge might conclude that 'Article 9 added little' to the domestic protections, namely discrimination protections, available to applicants has now been reversed. In the post-*Eweida and others* case of *Mba v Mayor and Burgesses of*

[123] *X v Y Headteachers* (n 109) [29]-[35].
[124] *Dogru* (n 65); *Aktas v France* App no 43563/08 (ECtHR, 23 February 2010).

the London Borough of Merton the majority held that the concept of justification in the domestic indirect discrimination provisions at issue should be read so as to be compliant with Article 9.[125] Elias LJ reasoned that Article 9 made it irrelevant for the purposes of the proportionality assessment whether or not the applicant's belief in the wrongfulness of working on a Sunday constituted a 'core' belief of any particular religion.[126] This is reflective of the profound shift in the manner in which Article 9 cases are dealt with. Moreover, the *Eweida and others* decision may mark a turning point for the ECtHR in adopting a far more careful approach to the manner in which it explains its reasoning, as the following section illustrates with reference to the troubled area of religious dress.

Section II: The Evolving Approach of the ECtHR

A. Reasoning in Controversial Cases: the ECtHR, *Laïcité,* and religious dress

The area of religious symbols and religious dress has proved to be one of the most controversial aspects of the ECtHR's Article 9 case law. Harris, O'Boyle and Warbrick have noted that 'it is hard to think of an area, in recent years, where the Court's jurisprudence has provoked as much unfavourable comment as that of religious dress'.[127] This section charts how in more recent cases the ECtHR has become increasingly careful to express its reasoning in a detailed and nuanced manner and to avoid simplistic or terse rejections of claims, a tendency that once characterised much of the early Strasbourg jurisprudence on the wearing of religious symbols. This section contends that recent case law in this area reflects a move away from the contention that such restrictions are justified by a common European value of secularism. The ECtHR has also increasingly recognised the harm caused by restrictions on

[125] *Mba v Mayor and Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562, [2014] 1 WLR 1501.
[126] ibid [34]. Vos LJ concurred, [39].
[127] David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995) 438.

Article 9 freedoms, whilst seeking to avoid inflammatory or negative characterisation of the nature of Muslim religious symbols, an approach which had previously garnered much criticism. Instead the Strasbourg Court has continued to rely on the margin of appreciation doctrine, an approach which offers a pathway through its conflicting decisions on how religious symbols may feature in the public space, such as *Lautsi v Italy*, *Eweida and others,* and *Sahin*. The most recent addition to the Court's case law in this area, *SAS v France*, indicates that it will seek to do so by invoking a fluid and far-reaching interpretation of 'living together' (*vivre ensemble*) as an aspect of what the 'rights and freedoms of others' may entail.

(i) Explaining the relationship between the Court and *laïcité*

Strasbourg's jurisprudence on religious symbols is littered with examples of failed challenges to the restrictions imposed on Muslim dress by *laïque* states.[128] The Court has at times endorsed State party's claims of concern for the need to preserve freedom of choice between religions when supporting of restrictions on the wearing of religious symbols by individuals. At other times the Court has accepted arguments that restrictions on religious dress are necessitated by the State's role in ensuring the neutrality of public spaces. Some key questions in determining the limits of Article 9 are whether and to what extent restrictions on public religious manifestation in pursuit of such aims are legitimate and justifiable.

First, it is important to distinguish between religious neutrality as commonly understood and neutrality in the context of *laïcité*. Generally, religious neutrality is concerned with official treatment of religion by the State. The concept is most often invoked in the context of State recognition and regulation of religions. For example, restrictions being

[128] *Karaduman* (n 99); *Dogru* (n 65); *Aktas* (n 124).

placed upon particular religions by using registration schemes to sanction followers of unregistered minority beliefs would conflict with religious neutrality.[129] Alternatively, neutrality can be seen as a wider duty encompassing the actions of state agents, such as civil servants, and ensuring the absence of manifestations of religion within public institutions more generally.[130] This second form of neutrality is associated commonly with the French concept of *laïcité*, though similar ideas of neutrality are apparent in countries such as Switzerland and Turkey, as reflected in cases such as *Dahlab*[131] and *Sahin*,[132] discussed in this section. This concept of neutrality features in much of Strasbourg's jurisprudence on religious symbols. The limits of Article 9's protection have for the most part been determined in the context of conflicts between states ascribing to this second, stricter form of neutrality and religious individuals, primarily veiled or headscarf-wearing Muslim women, who have challenged the restrictions that this version of neutrality imposes upon them.

The margin of appreciation doctrine has frequently featured prominently in the ECtHR's reasoning in cases involving restrictions on religious dress by *laïque* states. The manner in which the doctrine has considerably lessened the Court's scrutiny of state parties' claims of necessity has caused some commentators to question whether the Court's reduction in scrutiny arises from a tacit favouring of *laïcité*. In cases such as *Sahin* the Court's statements in relation to the value of secularism in general, without particularising its remarks in the context of the Turkish state, could be taken to imply its general support for secularism as *laïcité*. Academics such as Ingvill Plesner, Joseph Weiler, and Ian Leigh have at different times suggested that the Court's case law could be interpreted as actively promoting

[129] *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13, para 26.
[130] Malcolm Evans and Peter Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 Religion, State and Society 205, 214.
[131] *Dahlab* (n 65).
[132] *Sahin (Grand Chamber)* (n 64).

laïcité.[133] This type of criticism has particularly been targeted at the Chamber's decision in *Lautsi v Italy*, where the Court appeared to apply a strict idea of religious neutrality, in line with a *laïque* church-state model, to the vastly different Italian model.134 As Weiler noted, the 2009 Chamber judgment in *Lautsi* represented a view of the *laïque* position as 'a primordial condition *sine-qua-non* for a good liberal democracy'.[135] Ian Leigh has also critiqued the Court's jurisprudence as displaying 'tendencies towards a strong duty of neutrality bordering on favouring secularism', citing recent cases such as *Folgerø v Norway* and the Chamber judgment in *Lautsi*.[136] In the context of the Court's case law on religious dress, Ingvill Plesner contended that the 'lack of emphasis on individual behaviour or characteristics making the prohibitions reasonable' in some of the Court's case law on religious dress implies that the Court 'accepts a general ban on certain expressions of religious self-identification'.[137]

However, this interpretation is no longer tenable in light of the Grand Chamber's overturning of the Chamber judgment in *Lautsi* explicitly rejecting arguments relying on the application of a fundamental conception of secularism to Italy.[138] The Grand Chamber went to some lengths to distinguish its case law on religious dress in *laique* states from the

[133] Joseph Weiler's submissions to the Grand Chamber in *Lautsi (Chamber)*, published in Joseph HH Weiler, 'State and Nation; Church, Mosque and Synagogue - The Trailer' (2010) 8 International Journal of Constitutional Law 157; Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 Ecclesiastical Law Journal 266; Ingvill Plesner, 'The European Court on Human Rights between Fundamentalist and Liberal Secularism' (Islamic Head Scarf Controversy and the Future of Freedom of Religion or Belief seminar, Strasbourg, 28-30 July 2005) <http://www.jus.uio.no/smr/om/aktuelt/arrangementer/historikk/forum/plesnerpaper.pdf> accessed 12 September 2014.
134 *Lautsi v Italy* (2010) 50 EHRR 42 (Chamber).
[135] Weiler (n 133) 162-5, 159-60.
[136] Leigh (n 133) 274
[137] Plesner (n 133) 7. Plesner has also contended that *Refah Partisi v Turkey* (2002) 35 EHRR 3 was 'a signal to other state parties that the Turkish approach to secularism gives good guidance also for their legal systems', and that the Court 'might use this fundamentalist understanding of secularism in its own rulings in cases involving other state parties', Plesner, 6.
[138] *Lautsi v Italy* (2012) 54 EHRR 3 (Grand Chamber) paras 73-74.

question of whether non-*laique* states may display crucifixes in schools.[139] The assumption that such restraint is necessary to guarantee state neutrality between religions was denied, at least in the context of countries such as Italy with historical and cultural links to particular religions.140 The decision made it abundantly clear that deference towards Convention states rather than support for fundamental secularism has always been, and remains, a determinative influence on the Court's approach.141

Moreover, the Court has at times been equally deferential towards liberal secular models. The Court will find violations in extreme cases, such as where a Convention state is clearly promoting a particular religion at the cost of the freedoms of followers of other religions. Attempts to interfere with religious organisations,[142] criminalise all proselytism,[143] or restrict the registration of religious groups[144] have generally been met with a high standard of scrutiny. Where the State's support for a particular religion amounts to indoctrination, the Court will similarly intervene.[145] However, where less obvious intrusions upon religious freedom are involved, the Strasbourg institutions have proved unwilling to look behind claims of neutrality and generality made non-*laïque* regimes. *Valsamis* and *Efsratiou v Greece* showed the Court's unwillingness to acknowledge interference with Article 9 where a restriction did not explicitly target religious beliefs.[146] Both cases involved the children of Jehovah's Witnesses who had been suspended from school for refusing to participate in a

[139] Albeit by employing the unconvincing distinction between active and passive symbols, discussed below at text to n 169.
140 See particularly the concurring opinions in *Lautsi (Grand Chamber)* (n 138) of Bonello J, paras 39-41, and Power J, paras 44-45.
141 ibid.
[142] *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, concerning a dispute within the Bulgarian Muslim community as to who should be the Chief Mufti.
[143] *Kokkinakis* (n 110).
[144] *Manoussakis v Greece* (1996) 23 EHRR 387.
[145] *Folgerø* (n 3). Whilst recognising a wide margin of appreciation, the Court rejected Norwegian educational regulations under which 'not only quantitative but qualitative differences had applied to the teaching of Christianity as compared to that of other religions and philosophies', paras 89-95. A violation of Article 2 of Protocol 1 occurred where the applicants were refused full exemption from such classes, para 102.
[146] *Valsamis* (n 63), particularly paras 36-37.

military parade. The Court was 'surprised that pupils can be required on pain of suspension from school - even if only for a day - to parade outside the school precincts on a holiday', but could discern nothing, 'either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist conviction'.[147] Equally, in *CJ, JJ & EJ v Poland* claims of discriminatory treatment of an agnostic child in relation to religious instruction were similarly dismissed.[148] Even where state restrictions are particularly suspect, such as Greek laws banning proselytism and restricting registration of religions, the ECtHR has been unwilling to look beyond the individual case and recognise a more general restriction of religious freedom.[149] Paul Taylor has particularly criticised the Court's unwillingness to recognise that the restriction's underlying aim was 'to ensure denominational allegiance'.[150]

Just as the outcomes in *Sahin* and *Dahlab* do not reflect support for fundamental secularism *per se*, the Grand Chamber judgment in *Lautsi* should not be perceived as an attack on fundamental secularism. Instead, each of these judgments serves to illustrate that deference is a significant factor in Article 9 case law, an interpretation supported not only by judicial statements but also by the text and historical context of the Convention itself.[151] The powerful role played by the margin of appreciation doctrine is thus a key aspect of Strasbourg's religious symbols case law. The Court has at various times stressed the particular need for sensitivity towards national arrangements where Article 9 is concerned. In *Sahin* the Court emphasised the doctrine's application where challenges to a state's particular

[147] ibid para 31.
[148] *CJ, JJ and EJ v Poland* (1996) 84 DR 46. See also *Angelini* (n 4) para 3, where the Commission held that 'The fact that the instruction in religious knowledge focuses on Christianity at junior level at school does not mean that the second applicant has been under religious indoctrination in breach of Art. 9'.
[149] Carolyn Evans and Christopher Thomas point to the approach of Martens J in *Manoussakis* (n 144) as a rare example of a member of the Court eschewing such an approach, with Martens J noting that 'the very essence of the applicants complaints is not one of individual, but one of general injustice', Carolyn Evans and Christopher Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) Brigham Young University Law Review 699, 724. *Manoussakis* involved the role of the Greek Orthodox Church in granting permits to other religions for the building of places of worship in Greece.
[150] Taylor, *Freedom of Religion* (n 7) 50.
[151] Evans and Thomas, 'Church-State Relations in the European Court of Human Rights' (n 149).

church-state arrangements were in question. Pointing to the diversity of approaches across Europe to the issue of religious symbols, the Grand Chamber emphasised the need to apply a wide margin of appreciation in assessing national actors.[152] More recently, in *SAS v France* the Grand Chamber highlighted the 'fundamentally subsidiary role of the Convention mechanism'.[153]

(ii) Recognising the impact of restrictions on religious manifestation

Where the religious manifestation of individuals are at issue the key question in situating proportionality at the heart of resolving Article 9 disputes is what weight ought to be attributed to the applicant's wish to manifest their religious belief. Some of the Court's early judgments on religious symbols failed to reflect an understanding of the seriousness of restrictions on religious manifestation for the individuals concerned. Judgments on restrictions on religious dress in public institutions tended to focus on the fact an applicant had breached a rule, without considering the impact on the individual. In *Dogru v France* the Court noted that the applicant was able to continue her schooling by correspondence classes whilst concluding that 'the penalty imposed is merely the consequence of the applicant's refusal to comply with the rules applicable on the school premises – of which she had been properly informed – and not of her religious convictions'.[154] Indeed, the decision appeared to exclude actions contrary to the principle of secularism from the protection of Article 9, noting that 'an attitude which fails to respect [French secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion'.[155] A similar approach was adopted

[152] *Sahin (Grand Chamber)* (n 64) para 109.
[153] *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) para 129.
[154] *Dogru* (n 65) para 73.
[155] ibid para 72.

in *Aktas v France* when upholding the expulsion of school pupils who wore headscarves and other religious symbols in violation of the 2004 French ban on 'ostentatious' symbols.[156]

Julian Rivers has powerfully argued that cases on law and religion in England in recent years represent a 'fundamental shift' whereby religious action has 'no publicly cognisable weight' when placed against the pursuit of communal secular goods.[157] As such, he concludes that the current law in England 'is coming to treat religions as merely recreational and trivial'.[158] This point appeared to be evidenced in the Court of Appeal's judgment in *Eweida*, a major criticism of which was the undervaluing of the importance of individual religious convictions.[159] However, the reasoning and language adopted by the ECtHR in more recent cases, particularly *Eweida and others* and *SAS v France*, suggests that it is increasingly cognisant of the need to acknowledge the impact of restrictions on Article 9 on individuals. Finding a violation of Article 9 in *Eweida and others* the Court expressed the view that the domestic courts, in allowing it to outweigh to the applicant's fundamental right to manifest her religious beliefs, had given too much weight to the wishes of an employer to project a certain corporate image. The Court specifically referred to the weight that should be attributed to the individual's right and went beyond mere reference to the importance of the right to democratic society, highlighting its 'value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others'.[160] In addition,

[156] Loi No 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, Journal Officiel 17 mars 2004; *Aktas* (n 124).
[157] Julian Rivers, 'Promoting Religious Equality' (2012) 1 Oxford Journal of Law and Religion 1, 396.
[158] ibid 371.
[159] The case has been compared with the more protective stance in the US case of *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981) 716. See Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How not to Define Indirect Discrimination' (2011) 74 The Modern Law Review 287, 292.
[160] *Eweida and others* (n 1) para 94.

on a number of occasions the Court noted the grave impact of losing one's job.[161] In *SAS v France* the Grand Chamber acknowledged the dilemma faced by the applicant as a result of the *burqa* ban.[162] In reasoning that the aim of public safety could be achieved by less restrictive means than a blanket ban, the Court acknowledged that the women affected by the law are 'obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs'.[163] Though the Court ultimately found the ban to be justified by the more amorphous aim of 'living together', it is still worth emphasising this recognition of the harm presented by such restrictions.

(iii) A more nuanced understanding of religious symbols

The Strasbourg Court has faced criticism for assertions about the meaning of the Muslim headscarf. A number of judgments on restrictions of Muslim religious dress have been critiqued as representing a tendency to 'secularize the meaning of religious symbols', interpreting them in line with the 'sensibilities, prejudices and identitarian claims of the majority'.[164] Previous judgments in cases such as *Dahlab* and *Sahin* had highlighted gender equality as a legitimate aim that could justify restrictions on Muslim dress. In *Dahlab* a prohibition of a teacher from wearing her headscarf while teaching a class of young children was found not to violate Article 9. The Court referred to the wearing of a Muslim headscarf as a 'powerful external symbol', before contending that it 'appeared to be imposed on women by a religious precept' which 'was hard to square with the principle of gender equality'. In

[161] For example, the Court refers to Mr McFarlane's loss of his job as a 'severe sanction with grave consequences for the applicant', ibid para 108. See also para 106 (in relation to Ms Ladele).
[162] *SAS* (n 153) paras 57, 110.
[163] ibid para 139.
[164] Susanna Mancini and Michel Rosenfeld, 'Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 164.

Sahin the Grand Chamber endorsed these aspects of *Dahlab*'s reasoning,[165] an approach which was sternly criticised in Judge Tulkens' dissent. She questioned whether the Court had gone beyond its legitimate institutional role in imposing their external judgment of the meaning and significance of the applicant's act of wearing the headscarf and challenged the majority's negative classification of the act.[166] In contrast, national courts in England and Germany have explicitly avoided such negative labelling of Muslim dress. In *Begum* Lady Hale specifically endorsed the right of the applicant to wear the *jilbab* as an exercise of her autonomy,[167] while in the 2004 case of *Ludin* the German Federal Constitutional Court similarly refused to classify the headscarf as contrary to gender equality.[168]

The Court's ruling in *Lautsi*, which rejected the coercive potential of the positioning of Christian symbols within educational establishments, increased the basis for making of such criticism of the Court, with some understandably contending that it viewed some symbols to be somehow intrinsically more coercive than others. This interpretation is supported by the Grand Chamber's employment of an active/passive distinction to distinguish much of its previous case law relating to the Muslim headscarf from the issue of the legitimacy of crucifix displays in state schools. In the absence of any evidence proving some coercive or otherwise negative effect upon the pupils of Italy's state schools, the crucifix was held to be an essentially 'passive' symbol,[169] with the correlation being that the headscarf was an 'active' symbol, somehow more deserving of caution. A more nuanced understanding of religious symbols was offered in the concurring opinion of Judge Power in *Lautsi*. Instead of adopting the majority's view of the cross as 'passive', she contends that 'symbols … are

[165] *Sahin (Grand Chamber)* (n 64) para 111.
[166] ibid 'Dissenting Opinion of Judge Tulkens', para 12.
[167] *Begum* (n 34) [96].
[168] *Ludin (Federal Constitutional Court)* BVerfGE 108 282, NJW 56 (2003), 2 BvR 1436/02, paras 50-52.
[169] *Lautsi (Grand Chamber)* (n 138) para 72.

carriers of meaning. They may be silent but they may, nevertheless, speak volumes without, however, doing so in a coercive or in an indoctrinating manner'.[170]

The Court has been careful in its most recent judgment in *SAS v France* to recognise the variety of meanings attributable to Muslim dress and to reject the more far-reaching assertions about the meaning of the *burqa* as contrary to gender equality or human dignity. Rejecting the invocation of gender equality as an aim justifying restrictions on the full-face veil, it stated that:

> [A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.[171]

The French government had also contended that human dignity justified the 2010 ban. They argued that, whether women wore the *burqa* voluntarily or not, the consequence was their 'effacement' from the public space solely on the ground that they were women. The Government contended that such a consequence was necessarily dehumanising and contrary to human dignity.[172] It was further argued that a visible denial of values such as gender equality in public spaces impacted upon the dignity of others who share the same space. These kinds of argument reject a subjective view of dignity in favour of an externalised judgment of dignity. This was not an entirely surprising approach, given that domestic French case law has recognised that dignity may act as a constraint on liberty, most famously in the 'dwarf-throwing' case.[173] In a forthright defence of pluralism, however, the Grand Chamber rejected the view that respect for human dignity could constrain freedoms to the extent that it

[170] ibid 'Concurring opinion of Judge Power'.
[171] *SAS* (n 153) para 119.
[172] ibid para 82.
[173] Cons. d'Etat, 27 October 1995, Ville d'Aix-en-Provence, D. 1996.177.

justified such a blanket ban. The Court noted that it is 'aware that the clothing in question is perceived as strange by many of those who observe it', but stressed that wearing the burqa is 'the expression of a cultural identity' and that this in turn contributes to pluralism.[174] The Court went on to refer to the absence of evidence that wearers of the veil aim to express a form of contempt against those they encounter or otherwise offend against the dignity of others.

Much now centres on the proportionality reasoning at the centre of the consideration of justification of interferences with Article 9. However, whilst *Eweida and others* clarified and improved many areas of ECtHR case law, *SAS* demonstrates that some significant difficulties remain. This is most clearly so regarding the operation of the margin of appreciation doctrine in relation to justification of *laïque* states' restrictions on public displays of religious belief.

B. The Shifting Grounds For Restrictions On The Wearing Of Religious Symbols: Muslim Dress

Despite these clarifications and improvements in its case law, significant difficulties in this area of the Court's jurisprudence remain. The Court may now be more careful not to appear to endorse secularism as *laïcité*, or simply to dismiss the impact of restrictions on religious manifestation, but it is still reluctant to challenge the creeping restrictions on religious dress and public displays of religious affiliation introduced by numerous *laïque* states. Such restrictions have largely targeted the public expression of the religions of immigrant communities, particularly impacting adherents to the Muslim faith. Over the years numerous

[174] *SAS* (n 153) para 120.

aims have been cited as motivating the introduction of various restrictions on religious dress in the many ECtHR cases that have dealt with this issue. Much of these cases have centred on Muslim dress, such as the headscarf, *niqab* and *burqa*. However, laws passed in recent years have targeted Muslim worship places, and also affected other religion's religious dress, notably the head coverings of Sikh men. It is worthwhile to briefly track how the bases upon which these restrictions have been justified by Strasbourg institutions have shifted and developed in recent years. The Grand Chamber's judgment in *SAS* adds an additional line to the Court's evolving repertoire of reasons why restrictions on religious symbols, particularly Muslim dress, should not violate Article 9. The new ground of 'living together', accepted as an aspect of 'the rights and freedom of others', has the potential to significantly undermine the Article 9 rights of minorities.

(i) The evolution of the Court's justifications for restrictions on religious dress

As the forms of restriction placed upon religious dress have expanded, the grounds upon which restrictions of Article 9 are justified have also varied and developed. The ECtHR has been willing to accept restrictions on the right to manifest religion by wearing religious attire under Article 9(2) on the grounds of public order and public safety, as well as under 'rights and freedoms of others'. The Court has at different times accepted various cited aims such as protection of secular education, gender equality, and protection from coercion as falling within the 'rights and freedoms of others'. In *SAS* the ECtHR again expanded the types of state aims which can be furthered under this ground, including preservation of the conditions of 'living together'.

The grounds of public order and public safety have been accepted as legitimate justifications for restricting acts otherwise protected by Article 9 on a number of occasions.[175] In some cases where this type of justification has been invoked the reasons for the restriction on Article 9 are relatively straightforward and readily defensible. Cases contesting security checks at airports[176] and consulates[177] have been found to be manifestly ill-founded on the grounds of the necessity of safeguarding public safety and order. Equally, the obligation to appear bareheaded in identity photos for use on official documents was found not to be a violation of Article 9.[178] This ground has also been successfully argued in more controversial cases such as *Karaduman v Turkey*.[179] In that case measures taken in universities to prevent 'fundamentalist religious movements' from exerting pressure on students who did not practise their religion were not considered to constitute interference with Article 9, given concerns for public order and public safety. Public order was also accepted as a legitimate aim for restriction on university students wearing headscarves in *Sahin*.[180] In relation to the ban on the 'full-face veil' at issue in *SAS*, the Grand Chamber accepted that the concern for public safety was a legitimate aim, but found that the law of 11 October 2010 was not necessary in a democratic society for public safety. The Court declared that the aim could be fulfilled merely by imposing an obligation on veiled women to show their face and to identify themselves where there was some risk to the safety of persons and property or where there was a suspicion of identity fraud.[181] In the Grand Chamber's view a blanket ban could only be justified where some general threat to public safety existed.[182] This reasoning indicates a move away from the extension of the public safety ground for restriction beyond cases where

[175] *Sahin (Grand Chamber)* (n 64) para 111; *Refah Partisi* (n 137) para 92.
[176] *Phull v France* App no 35753/03 (ECtHR, 11 January 2005).
[177] *Fatima El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008).
[178] *Mann Singh v France* App no 4479/07 (ECtHR, 13 November 2008).
[179] *Karaduman* (n 99).
[180] *Sahin (Grand Chamber)* (n 64) para 99.
[181] *SAS* (n 153) para 139.
[182] ibid.

restrictions on religious dress are genuinely concerned with issues of security, such as ascertaining identity.

The protection of the rights and freedoms of others ground has included a myriad of different state party aims where religious dress has been concerned. These aims have necessarily varied according to the types of restriction and interests in play within a given factual matrix. The church-state model at issue is also significant in deciphering and reconciling the Article 9 case law in this area. The protection of state party values, particularly secularism, has played a significant role in the Court's case law in this area. A number of the religious symbols cases have concerned the wearing of Muslim veils and headscarves within educational institutions. In these cases the interest of preserving the secular nature of the education system has been expressly cited as an element of the rights and freedoms of others. In *Sahin* and *Köse*[183] in particular, the Court examined complaints arising from restrictions on the wearing of the Muslim headscarf in educational institutions and concluded that, having regard to the principle of secularism, there had been no violation of Article 9. The ECtHR has found the expulsion of the pupils from state schools not to be disproportionate to the aim of pursing secularist policies in state schools.[184] Without considering whether the individual actions of applicants posed a threat to 'the rights and freedoms of others', the tendency of the Court in such cases was to view measures taken in pursuit of the constitutional principle of *laïcité* as falling within the State's margin of appreciation.

Disquiet about the effect of religious symbols on others has been a central characteristic of Strasbourg's case law religious symbols in educational establishments, with

[183] *Köse v Turkey* ECHR 2006-II 1175.
[184] See *Dogru* (n 65). The joined cases in *Aktas* (n 124) involved challenges to the 2004 French ban on ostentatious religious symbols in schools (n 156).

state parties successfully drawing on the idea of religious coercion in justifying their restrictions on the wearing of religious symbols. In *Dahlab v Switzerland* the Court declared inadmissible a teacher's challenge to a ban on her wearing a headscarf whilst teaching small children.[185] The Court acknowledged that Ms Dahlab never engaged in any form of direct proselytism during the three years she worked at the school,[186] nor were there any disturbances or complaints during this time. However, the Court accepted the Swiss government's concerns about the proselytising effect of the sight of a teacher wearing such a 'powerful religious symbol' upon impressionable children.[187] The negative connotations of the symbol in terms of gender equality and tolerance[188] and the students' vulnerability within the context of the student-teacher relationship were sufficient to justify the restriction of the applicant's religious manifestation, despite the absence of active verbal proselytism present in *Larissis v Greece*.[189] Whilst the justification in *Dahlab* rested largely on the applicant's role as a teacher of young children, *Sahin v Turkey*,[190] involved a university's restriction on the wearing of Muslim headscarves by students at enrolment, lectures and examinations. The Grand Chamber expressed the view that in addition to being justified by concerns for secularism and gender equality, the ban responded to a 'pressing social need' arising from the potentially coercive effect of the Muslim headscarf. Despite the absence of any suspect or asymmetrical relationship amongst university students, the Court referred to the effect the headscarf, which was 'often presented or perceived as a compulsory religious duty', might

[185] *Dahlab* (n 65).
[186] ibid para 463. Ms Dahlab was careful to ensure she was not indirectly proselytising her students by wearing her headscarf; when asked why she covered her head she said it was to keep her ears warm, para 456
[187] ibid para 457.
[188] The Court referred to the practice as both 'difficult to reconcile' with tolerance and contrary to gender equality, ibid para 463.
[189] See criticism of the decision: Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52; Javier Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1 Oxford Journal of Law and Religion 363; Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (n 45).
[190] *Sahin (Grand Chamber)* (n 64).

have on those who chose not to wear it, particularly within the context of a country where Islam was the majority religion.[191]

(ii) A new ground for restriction: 'living together'

In *SAS v France* a new limiting value was recognised as contained within the 'rights and freedoms of others' ground of limitation, that of ensuring respect for the 'minimum set of values of an open and democratic society'.[192]

The context of SAS v France

In recent years a number of national legislatures have implemented regulations in relation to certain forms of religious dress. Such matters, like other elements of the relationship between church and state, are generally under the jurisdiction of individual states,[193] with the Strasbourg Court only playing a role where government actions are challenged as violating Convention rights. France's law of October 11 2010 is a particularly prominent and far-reaching example of such regulations,[194] though similar bans have come into effect in countries such as Belgium,[195] and been drafted in the Netherlands.[196] Following on from the 2004 restriction on the wearing of religious symbols in public schools,[197] the latest French

[191] *Sahin v Turkey* (2005) 41 EHRR 8 (Chamber) para 108.
[192] *SAS* (n 153) para 122.
[193] Gerhard Robbers, *State and Church in the European Union* (2nd edn, Nomos 2005).
[194] Loi No 2010-1192 du 11 oct 2010 interdisant la dissimulation du visage dans l'espace public, Journal Officiel 12 oct 2010.
[195] The Belgian ban, which came into effect on the 13 July 2011, makes it an offence to publicly 'cover or conceal one's face in whole or in part, so that one is unrecognisable'. The Belgian Constitutional Court recently confirmed the constitutionality of the Act, Saïla Ouald Chaib, 'Belgian Constitutional Court says Ban on Face Coverings does not Violate Human Rights' (*Strasbourg Observers*, 14 December 2011) <http://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/#_ftn1> accessed 13 September 2014.
[196] For discussion of such *burqa* bans see Siobhán Mullally, 'Civic Integration, Migrant Women and the Veil: At the Limits of Rights?' (2011) 74 The Modern Law Review 27; Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13 HRLR 57; Cécile Laborde, 'State Paternalism and Religious Dress Code' (2012) 10 International Journal of Constitutional Law 398.
[197] 2004 French ban on ostentatious religious symbols in schools (n 156).

law prohibits the covering of one's face in public places.[198] Section 2(I) of the October 2010 law defines 'the public space' as 'composed of the public highway and all premises open to the public or used for the provision of a public service'. Section 3 sets out the sanctions for failing to adhere to the ban including fines, currently set at 150 euro, and compulsory attendance at a citizenship course. Section 4 provides for fines of 30,000 euro and imprisonment for up to a year for anyone found to have coerced or forced another to cover their face. The wide definition of 'public space'[199] and the long list of specific exemptions reveals the law as 'quite clearly motivated by a desire to restrict the wearing of the full-face veil by Muslim women'.[200]

The analysis of the French Council of State (Conseil d'Etat) supports this view. Prior to the introduction of the October 2010 law, the Council warned that introducing a general ban would threaten rights guaranteed under the Convention and 'could not legally apply to the whole of the public space under prevailing constitutional and conventional case law'.[201] The Council particularly criticized any ban worded so as to specifically target the *burqa*. The Council report warned that the proposed ban, compared to the more neutrally worded 2004 ban on 'ostentatious' religious symbols, would violate rights to personal liberty, privacy, freedom of expression, and equality.[202] The provisions of the October 2010 law are framed in a neutral fashion by regulating facial coverings in general. However, the Council was not convinced that public safety or public order concerns could justify even a generally-worded ban. To interpret public order requirements as a means of enforcing the 'minimum

[198] The law makes exceptions for face coverings worn in religious buildings, during cultural or religious festivals or processions, and coverings necessary for medical or health and safety reasons.
[199] Laborde views the ban as covering 'any space outside the home', Laborde, 'State Paternalism and Religious Dress Code' (n 196) 406.
[200] McCrea, 'The Ban on the Veil and European Law' (n 196) 58.
[201] Conseil d'Etat de France, 'Study of Possible Legal Grounds for Banning the Full Veil' <www.conseil-etat.fr/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf> accessed 15 April 2012, 8.
[202] ibid 17.

requirement for the reciprocal demands and essential guarantees of life in society' and 'fraternity'[203] would be an unprecedented extension of the meaning of public order and should be considered 'legally fragile'.[204] Importantly, the Council warned that such a general ban would likely be in conflict with ECtHR case law.[205] However, the French National Assembly was not receptive to this advice; the bill maintained its broad and general ban on face coverings, and was later approved by the Constitutional Court in this form.[206] The resulting law was challenged before the ECtHR in the case of *SAS*.

Evaluating the 'living together' limitation on Article 9

The Grand Chamber accepted that 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'. The Court took the view that 'the observance of the minimum requirements of life in society' is a facet of the 'rights and freedoms of others' limitation within the meaning of Article 9(2).[207] The Court referred to the explanatory memorandum of the 2010 law which emphasised the view that 'the systematic concealment of the face in public places, contrary to the ideal of fraternity ... falls short of the minimum requirement of civility that is necessary for social interaction'.[208] In *SAS* the Grand Chamber acknowledged the risk of abuse resulting from the flexibility of the aim of 'living together' and conceded that such risk necessitates 'careful examination of the necessity of the impugned limitation'.[209] However, this statement of intent was contradicted by the Court's subsequent acceptance that a wide margin of appreciation should apply.[210] The dissenting

[203] ibid 27.
[204] ibid 29.
[205] ibid 34-35.
[206] Decision No 2010 – 613 DC of 7 October 2010, para 5.
[207] *SAS* (n 153) paras 140-142.
[208] ibid paras 25, 141.
[209] ibid para 122.
[210] ibid para 155

judgment of Judges Nussberger and Jäderblom highlighted a number of concerns about this new ground for justifying restrictions on Article 9. They note that the concept of 'living together' does not fall directly under any of the Convention rights and freedoms and that even if it touches on some rights it remains a 'far-fetched and vague' concept.[211] They highlighted how national debates on legislation restricting full-face veils often involved objections based on assumptions about the symbolic meaning of the veil as an expression of identity in contradiction with French and European culture.[212] The dissenting judges stressed that even if such assumptions about the veil's meaning are correct, 'there is no right not to be shocked or provoked by different models of cultural or religious identity', highlighting the Court's protection of divisive expression under Article 10.[213] Despite the many strong points in the *SAS* judgment, particularly the majority's rejection of the state party's and interveners' typification of the veil as contrary to dignity and gender equality, the acceptance of the 'living together' aim appears to be a substantial set-bank in the Court's evolving and maturing Article 9 jurisprudence. The majority's judgment allows for a requirement that different modes of cultural identity be hidden away in order to allow a common space for living together on the cultural majority's terms. There is a very real danger that 'living together' may simply be a requirement of assimilation. It is possible that this new ground of justification within the 'rights and freedoms of others' limb may yet give rise to further incursions on the rights of minorities to express their faith.

C. The Margin of Appreciation and Proportionality

Deference to state party church-state models and cultural contexts, whether entailing respect for secularism or reflection of Christian influence, has played a significant role in

[211] ibid 'Partly Dissenting Judgment of Judges Nussberger and Jäderblom', para 5.
[212] ibid para 6.
[213] ibid para 7.

determining the limits of Article 9. However, because of this it is unclear where the outer limits of the margin of appreciation doctrine lie and what minimum level of protection of Article 9 exists across contracting states where religious manifestation is concerned. The diversity in the Court's findings on what amounts to proportionate restrictions on the wearing of religious symbols demonstrates the difficulty in determining any universal standard of Article 9 protection. This diversity is justified by reference to the influence of the margin of appreciation doctrine. This section focuses on the manner in which that doctrine impacts upon the Court's reasoning on whether restrictions are 'necessary in a democratic society' and proportionate to the legitimate aim pursued.

It is worthwhile comparing the ECtHR's approach towards restrictions on religious dress with that of another international judicial body. The United Nations Human Rights Committee (UNHRC) has taken a markedly different approach towards French restrictions on religious symbols and dress. Article 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR) protects religious manifestation in a manner similar to Article 9, allowing limitation in broadly equivalent circumstances.[214] In *Bikramjit Singh v France* a Sikh pupil challenged his French school's restriction on his attendance while wearing the *keski*, a 'small light piece of material of a dark colour, often used as a mini-turban'.[215] The case involved the 2004 French prohibition on religious dress in schools, which had been previously challenged before the ECtHR,[216] with the Strasbourg Court concluding that the challenges to the 2004 law were manifestly ill-founded and that the restrictions on Article 9 were within the margin

[214] The ICCPR, art 18(3) states: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.
[215] *Bikramjit Singh v France* (1852/2008), CCPR/C/106/D/1852/2008 (2012) para 2.3.
[216] *Aktas* (n 124).

of appreciation afforded to contracting states.[217] The Court has particularly stressed the value of secularism in its reasoning in past challenges to French restrictions on religious dress.[218]

In *Bikramjit Singh* the complainant had been separated from his classmates and ultimately expelled for refusing to comply with the school's request that he remove the *keski* while on school premises. The UNHRC adopted a starkly different stance than the ECtHR towards the reasons offered by the French government. The Committee accepted that the government was pursuing aims of protecting public order, safety, and the rights of others and further acknowledged the importance of secularism as a means to protect the rights of others.[219] However, in contrast with the ECtHR's approach the Committee scrutinised the necessity of the measures adopted in pursuit of that aim. It particularly highlighted the absence of 'compelling evidence that by wearing his *keski* the author would have posed a threat to the rights and freedoms of other pupils or to order at school'.[220] The Committee also questioned whether the school actually considered the complainant individually, noting that his expulsion was imposed 'because of his inclusion in a broad category of persons defined by their religious conduct'.[221] This absence of any evidence that 'the sacrifice of [Singh's] rights is either necessary or proportionate to the benefits achieved' resulted in the Committee's finding a violation of Article 18.[222] The Committee's judgment in *Bikramjit* followed the approach it had adopted in previous cases addressing French prohibitions on the wearing of religious symbols,[223] whereby the rights of the applicant are given significant

[217] Citing, inter alia, the reasoning of its earlier decision in *Dogru*, ibid para 71.
[218] ibid para 72.
[219] *Bikramjit Singh v France* (n 215) para 8.6.
[220] ibid para 8.7.
[221] ibid.
[222] ibid.
[223] *Ranjit Singh v France* (1876/2009), CCPR/C/102/D/1876/2009 (2011) (involving a requirement that a Sikh remove his turban for an ID photograph).

weight and the state party is required to demonstrate the necessity of the specific course of action it has pursued, rather than merely citing the pursuit of certain aims in general terms.

It is uncontroversial that the margin of appreciation doctrine influences the ECtHR's approach in determining the proportionality of contracting states' actions. Generally speaking, proportionality requires an adequate balance between the means employed and the aims pursued. The relationship between the margin of appreciation doctrine and the principle of proportionality generally operates so that the narrower the margin of appreciation allowed to national authorities the more intense the standard of proportionality becomes. There are a number of specific principles relating to the proportionality principle that are at times relied upon by the ECtHR. The Court's less restrictive alternative means doctrine reflects one of the more stringent forms of proportionality scrutiny whereby national authorities have an obligation to opt for a less restrictive means of achieving their stated aim. The ECtHR has at other times applied a procedural version of this doctrine, requiring only evidence of consideration of less-restrictive means by national authorities.[224] However, there have been numerous cases where the Court has not applied a less restrictive means test, despite the arguments of applicants or dissenting judges relying on the criterion. Even where the Court accepts less restrictive alternatives were available, a finding of a violation may not necessarily follow.[225] As such, the criterion has been described as 'only an optional interpretations of the proportionality requirement'.[226] This approach is indicative of the more general analysis of Professors van Dijk and van Hoof that the 'proportionality test has not

[224] *Hatton v UK* (2002) 34 EHRR 1, para 97. The Court highlighted the failure of national courts to 'give due consideration' to less restrictive alternatives in *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013) paras 42-43.
[225] See discussion in Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 HRLR 349, 362-364, referring to *Chappell v UK* (1990) 12 EHRR 1.
[226] Brems, 'Human Rights: Minimum and Maximum Perspectives' (n 225) 365.

been applied in a uniform manner … [and] the Court uses different variants for different contexts'.[227]

The role of the margin of appreciation doctrine is unquestionably controversial. Some see the doctrine as a necessary element of a transnational court's supervision, whilst others feel the references to the doctrine in the ECtHR's judgments are both wrong in principle, because the boundary of human rights must be as clear and precise as possible, and pointless in practice because the doctrine merely indicates state discretion to act in a manner which the Court does not consider incompatible with human rights.[228] Others have contended that the margin of appreciation should only be used in limited types of cases. In *Egeland and Hanseid v Norway* Judge Rozakis criticised the majority's application of the doctrine on the grounds that its relevance was limited to cases where it is clear that national authorities are better placed to assess the 'local' and specific conditions. He contended that it was only in those types of case that the Court should limit itself to simple supervision of reasonableness and an absence of arbitrariness, surrendering its power of assessment.

The breadth of the margin of appreciation applied will not always be determinative of whether an interference is found. Despite the wide margin of appreciation attributable to relations between church and state, where the State's support for a particular religion amounts to indoctrination, the Court has found a violation of the Convention. Similarly in *Folgerø v Norway*, despite recognising that a wide margin of appreciation applied, the Court nonetheless found that a violation arose from Norwegian educational regulations under which 'not only quantitative but qualitative differences had applied to the teaching of Christianity as

[227] Peter van Dijk and Godefridus JH van Hoof, *Theory and Practice of the European Convention on Human Rights* (AW Heringa ed, 3 edn, Martinus Nijhoff Publishers 1998) 81.
[228] *Z v Finland* (1998) 25 EHRR 371, 'Partly Dissenting Opinion of Judge De Meyer'.

compared to that of other religions and philosophies'.[229] The Court took the view that a violation of Article 2 of Protocol 1 occurred where students were refused full exemption from such classes.[230] Generally, however, it is uncontroversial that the breadth of the margin of appreciation applied in a case plays a significant role in the Court's ultimate determination. In cases where the Court judges that a state has gone too far, such as *Ahmet Arslan v Turkey*, the Court has relied on the margin of appreciation doctrine to distinguish previous factually similar judgments. In *Ahmet Arslan* the Court determined that prohibiting the wearing of religious symbols on public streets was not equivalent to restricting the dress of persons working in public offices or attending public educational establishments, and that therefore the wide margin of appreciation, applied in cases such as *Sahin*, *Dogru*, and *Dahlab,* was not applicable.[231]

(i) The nature of the margin of appreciation doctrine

A number of factors have been highlighted as determining the appropriate margin of appreciation to be applied: the provision invoked, the interests at stake,[232] the aim pursued by the impugned interference, the context of the interference, the impact of a possible consensus in such matters, the degree of proportionality of the interference and the comprehensive analysis by superior national courts. The relative weight given to each factor varies across cases,[233] but the existence of a European consensus will often prove important, [234] with the absence of such a consensus weighing in favour of a broader margin of appreciation being

[229] *Folgerø* (n 3) paras 89-95.
[230] ibid para 102.
[231] *Ahmet Arslan* (n 110) para 49.
[232] *Manoussakis* (n 144) para 44.
[233] See van Dijk and van Hoof's conclusion that no factor is decisive to the scope of the margin of appreciation, noting that 'each variable has relative value', van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 227) 90.
[234] *Bayatyan* (n 67) para 122.

afforded to the respondent state.[235] At a general level, in cases such as *Sahin* and *Lautsi* the Court has highlighted the wide variety of church-state models within the Convention and the absence of consensus amongst contracting states about the correct model as reasons to apply a wide margin of appreciation.[236] The Court may also seek to highlight the absence of consensus at a specific level in relation to the particular restriction in question.[237] It is at this level that the issue of whether a consensus exists amongst member states has been most frequently contested. In *Sahin* Judge Tulkens' dissent questioned the majority's finding of an absence of consensus in relation to regulation of religious manifestations in the public sphere, given the unique application of Turkey's prohibitions on religious dress to the university context. Similarly in *SAS* the dissenting judgment of Judges Nussberger and Jäderblom highlighted that the three factors the Court's jurisprudence identifies as relevant to the determination of the consensus, international treaty law, comparative law and international soft law,[238] all weighed in favour of a finding that a consensus existed against the banning of the full-face veil.[239] They particularly highlighted the fact that an 'overwhelming majority', 45 out of the 47 member states of the Council of Europe, had not legislated in the area was a very strong indicator of a European consensus.[240]

Two Aspects of the Margin of Appreciation Doctrine

Before considering how the margin of appreciation doctrine operates in Article 9 cases, it is worth considering the ways in which the ECtHR uses the doctrine. The work of George Letsas is helpful in explaining the multiple uses of the 'margin of appreciation' term in

[235] *SAS* (n 153) para 157.
[236] *Lautsi (Grand Chamber)* (n 138) paras 67-70; *Sahin (Grand Chamber)* (n 64) paras 109-110.
[237] See *Bayatyan* (n 67) para 122.
[238] *Marckx v Belgium* (1979) 2 EHRR 330.
[239] *SAS* (n 153) 'Partly Dissenting Judgment of Judges Nussberger and Jäderblom'.
[240] ibid, citing *Bayatyan* (n 67) paras 103, 108.

ECtHR case law.[241] Letsas has suggested that the phrase margin of appreciation has two distinct meanings, a substantive concept relating to the relationship between individual rights and common goals and a structural concept dealing with the position of the Court as an international institution. The first is a moral claim about the rights that individuals are entitled to by virtue of being human. The Court refers to it in the context of whether the State has struck an acceptable balance between the right and the competing public goal. This aspect of the margin of appreciation concept has been described as akin to democratic deference.[242] Letsas has suggested that the second way in which the ECtHR uses the margin of appreciation is in awarding member states a margin of appreciation on the grounds that they are in a better position than an international court to assess policies. This concept 'has to do with the relationship between the European Court of Human Rights and national authorities, rather than with the relationship between human rights and public interest'.[243]

This second understanding of the margin of appreciation doctrine reflects a general preference for the national legislature to deal with the complaints of citizens. This view is reinforced by the text of the Convention. Article 13 makes clear it is primarily for national authorities to give effect to the Convention, whilst under Article 34 complaints are inadmissible where there is evidence that applicants have not exhausted all national remedies available to them. This respect for national legislative processes is reflected in *Hirst v UK (No 2)*[244] where the ECtHR appeared more willing to question domestic legislation where it had not been substantively considered or approved by domestic political institutions for some time.[245] The Court noted that the weight to be attached to the legislature's support for

[241] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705.
[242] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 201.
[243] Letsas (n 241) 721.
[244] *Hirst v UK (No 2)* (2006) 42 EHRR 41.
[245] ibid para 82.

disenfranchisement of prisoners was reduced due to the absence of 'any substantive debate by members of the legislature' on the occasions where it had been re-enacted.[246] Similarly, in *SAS v France* the Grand Chamber emphasized the 'direct democratic legitimation' of national authorities.[247]

(ii) The margin of appreciation doctrine in practice

Eweida and others v UK

The rejection of definitional filters in the *Eweida and others* judgment clearly indicates that balancing will be at the centre of future Article 9 cases. The key question thus seems to be what kind of supervisory role the Court will adopt. The Court's statements outlining the rationales behind the outcomes in each of the applicants' cases reveal its understanding of its role in overseeing the reconciliation of individuals' Article 9 rights with other competing concerns. The role of the margin of appreciation within the proportionality analysis undoubtedly remains strong, as the findings in the cases of Ms Eweida's co-applicants demonstrate.

The Court found a violation arose from a failure to accommodate Ms Eweida's religious beliefs, in breach of the positive obligation under Article 1 of the Convention that a state secure the Convention rights and freedoms for everyone with its jurisdiction.[248] This framing of the issue as a failure to accommodate is not surprising, given that the violation arose from the actions of Ms Eweida's employer in refusing to accommodate her wearing of a religious symbol at work and the domestic authorities' refusal of her claim for relief. As in various prison cases, competing concerns were judged by domestic authorities to outweigh

[246] ibid para 78.
[247] *SAS* (n 153) para 129.
[248] *Eweida and others* (n 1) para 95.

the applicant's claim for freedom to manifest their religion in a particular context.[249] This contrasts with other religious symbol cases where the State has actively prohibited the manifestation of religious belief.[250]

With regard to the reasons offered for a failure to accommodate, on one hand it seems clear that the Court is not going to investigate the justifications offered by domestic authorities in any great detail. In Ms Chaplin's case her managers feared that a disturbed patient might grab the chain on which her cross was worn or that the cross might swing forward and come into contact with an open wound.[251] The Chamber was unwilling to dismiss these fears as unlikely. Deferring to the hospital authorities' judgment, they distinguished her claim from that of Ms Eweida, noting that concerns about health and safety on a hospital ward were 'inherently of a greater magnitude' than the reasons cited by Ms Eweida's employers. '[E]vidence of … encroachment on the interests of others' will thus weigh against an individual's Article 9 interests. Though in Ms Chaplin's case the specific fears cited by her employer appeared relatively weak and speculative, the Court nonetheless took these fears seriously and, in line with the margin of appreciation doctrine, treated the seriousness of the health and safety implications as a matter best decided by her employer.[252]

It is also clear that the encroachment on the rights of others need not be concrete or tangible for the Court to give credence to the State's concerns. In Mr McFarlane's case the Court found that the balance to be struck between his rights and those of gay couples again fell within the UK Government's margin of appreciation. The facts of Mr McFarlane's case were never particularly strong, given his awareness of the conflict between his beliefs and his

[249] See *Jakobski* (n 66) and *Bayatyan* (n 67).
[250] *Kokkinakis* (n 110); *Buscarini* (n 5).
[251] *Eweida and others* (n 1) para 91.
[252] ibid para 99.

employer's non-discrimination policy when he first entered his employment.[253] In addition, he had specifically sought out a role as a psycho-sexual counsellor and in so doing significantly increased the likelihood of a conflict with his religious beliefs arising.[254] The Court rightly took account of these factors in its proportionality analysis.[255] In this sense it might be argued that his case would be distinguishable from that of Ms Ladele. However, the Court explicitly stated that in their view 'the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination'.[256] This suggests that even where there is a stronger fact pattern, the refusal of an employee in a secular job role to condone homosexuality would be unlikely to be protected.

The Court's findings in relation to Ms Eweida do, however, demonstrate that the ECtHR views itself as still having an important supervisory role in monitoring domestic authorities' balancing of the competing concerns of religious individuals and their employers. The Court made clear that they felt the domestic courts had accorded too much weight to British Airways' interest in projecting a certain corporate image, particularly given the discreet nature of her cross and the absence of evidence that permitting other religious symbols had detrimentally impacted on the company's corporate brand or image.[257] The Court's dismissal of the justifications offered by Ms Eweida's employers was also informed by the fact that the subsequent change in their policy was implicitly an acceptance that the former restrictions could not be justified.[258] Given the absence of evidence of 'any real encroachment' on her employer's interests, the Court judged that the domestic authorities had

[253] This point is referred to by the Court, *Eweida and others* (n 1) para 109, and by Judges Vučinić and de Gaetano at para 5 of their partly dissenting opinion (separately numbered).
[254] ibid paras 32-34.
[255] ibid para 109.
[256] ibid.
[257] ibid para 94.
[258] ibid.

failed to protect sufficiently Ms Eweida's right to manifest her religion, breaching their positive obligation under Article 9.[259]

The partially dissenting opinion of Judges Bratza and Björgvinsson contested the majority's conclusion with regard to Ms Eweida. They argued that the specific factual context of the case dissuaded them from finding that either British Airways or the domestic courts had failed to reach a 'fair balance' in her case. They particularly stressed the conciliatory nature of BA's actions in offering the applicant an equally-paid temporary administrative job, allowing her to continue wearing her cross in accordance with her beliefs.[260] They noted the Court of Appeal's finding that Ms Eweida had accepted the requirement of concealing her cross without complaint before breaching the company's policy by reporting for work with her cross clearly visible and without waiting for the formal grievance complaint she had lodged to be addressed.[261] The dissenting judges argued that BA was right to suspend amendment of their uniform policy until the issue had been thoroughly examined. Whilst her employer's subsequent alteration of the policy might suggest the earlier prohibition 'was not of crucial importance', the dissenting judges contended that the majority should not rely on this fact as evidence that BA's failure to immediately accede to Ms Eweida's requests was disproportionate.[262] In Judges Bratza and Björgvinsson's view, the fact that the applicant was not dismissed, but merely offered a different position whilst the uniform policy was swiftly reviewed, before being reinstated, should have 'tipped the balance' in favour of her employer.[263]

[259] ibid para 95.
[260] ibid 'Partly Dissenting Opinion of Judges Bratza and David Thor Björgvinsson', para 4.
[261] ibid.
[262] ibid para 5.
[263] ibid.

SAS v France

The results of a wide margin of appreciation being applied are most starkly demonstrated in the Grand Chamber's reasoning in *SAS v France*. Given the ECtHR's previous ruling in *Ahmet Arslan v Turkey*, it might well have been supposed that the Court would view the October 2010 law as violating the Convention.[264] In *Arslan* a violation of Article 9 was found where 127 members of a religious group were convicted for wearing religious dress in the streets. In its judgment the Court had emphasised the distinction between such restrictions operating in public areas open to all and restrictions in schools or other public establishments where religious neutrality was key. This suggested that a blanket ban in all public spaces would likely violate Article 9. Moreover, as the ECtHR itself acknowledged in *SAS*, 'a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate'.[265] However, in *SAS* the Grand Chamber nonetheless found the 2010 law to be proportionate and went to some lengths to distinguish *Arslan*. It stressed that, though both cases involve a ban on wearing religious dress in public places, *SAS* 'differs significantly … [as] the full-face Islamic veil has the particularity of entirely concealing the face, with the possible exception of the eyes' (para 136). This appears a relatively thin basis on which to reconcile its findings with the earlier case.

The Grand Chamber particularly highlighted that the October 2010 law did not expressly target religious dress.[266] Such emphasis on ostensible neutrality is unconvincing given the legislative history of the ban and its impact on a highly specific class of persons. The Court acknowledges that only a small number were the subject of the law – approximately 1,900 women out of a total population of 65 million – and that the ban might impact upon not only those women's religious freedom, but also upon their autonomy and

[264] *Ahmet Arslan* (n 110).
[265] *SAS* (n 153) para 147.
[266] ibid para 151.

private life.[267] Similarly, the Court noted its concern at Islamophobic comments in debates on the law.[268] Nonetheless, the Court attributed significant weight to the fact that the law was 'not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face'.[269] This, in the Grand Chamber's view, was sufficient to distinguish the 2010 law from the restrictions at issue in *Arslan*. This approach is questionable. It is highly unconvincing to stress the general wording of a ban when there is no evidence of an intention to create a law of general application. The US case of *Church of Lukumi Babalu v City of Hialeah* 508 US 520 (1993) comes to mind. In that case the US Supreme Court looked to legislative intent in determining that an ordinance forbidding ritual animal slaughter was neither neutral nor generally applicable, but in fact targeted a minority religious community. In the context of the French *burqa* ban, it is not only evident that the law in practice only affects religious persons, but it is obvious that it is aimed at targeting religious persons and one religious group in particular. To stress the neutral wording of a law in such circumstances is beside the point. The margin of appreciation doctrine operated so that, despite clear indications that the October 2010 law targeted an unpopular minority, it was still deemed to be proportionate to the aim pursued, namely 'the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others"'.[270]

Analysing the role of the margin of appreciation

The religious symbols jurisprudence emanating from Strasbourg illustrates the impact of church-state models on the strength of Article 9 protection and the role of the margin of

[267] ibid para 146.
[268] ibid paras 148-149.
[269] ibid para 151.
[270] ibid para 157.

appreciation doctrine in this respect.[271] As identified above, the deference to differing national models apparent in the application of the margin of appreciation doctrine, particularly in the contrast between the Court's approaches in *Eweida and others* and *SAS*, is largely unsurprising. The diversity of church-state models reflecting identification with and respect for secularism within the Convention system alone has been well documented.[272]

The difference in the Court's approach depending on the church-state model at issue is stark. It appears difficult to reconcile the Court's acceptance of far-reaching regulation of the wearing of Muslim symbols in *SAS* and its support in *Lautsi* for crucifix displays in state schools. However, the Court's case law in this area may be more reflective of the general stance of the ECtHR that states are entitled to limit rights in order to uphold cultural norms or particular conceptions of public morality.[273] One may thus view the case law of the Court as a consistent reflection of the principle that any challenge to the State's choice of church-state model must be grounded in strong evidence of harm to the individual. *Lautsi* therefore seems wholly in line with the principles articulated in the Court's previous case law.

However, if this is taken to be the overarching approach of the Court then it is difficult to understand its finding in *Eweida and others*. Endorsing the legitimacy of the French *burqa* ban in *SAS* appears at odds with the Court's finding in *Eweida and others* that a far narrower rule, prohibiting the wearing of religious symbols by British Airways employees, was in violation of Article 9. Unlike the other claimants in the case, Ms Eweida was not dismissed, but merely offered a different position whilst her employer's uniform

[271] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 19-21; Martinez-Torron (n 58); Evans and Thomas, 'Church-State Relations in the European Court of Human Rights' (n 149) 104-107.
272 Evans and Thomas, 'Church-State Relations in the European Court of Human Rights' (n 149).
[273] McCrea, 'The Ban on the Veil and European Law' (n 196) 89.

policy was swiftly reviewed, before being reinstated, a fact highlighted by the partially dissenting opinion of Judges Bratza and Björgvinsson.[274]

However, this difference in approach demonstrates that a number of other factors may also be at play. The Court may have been more persuaded of the existence of an imbalance in the domestic authorities' handling of Ms Eweida's case because of the perfunctory nature of the English Court of Appeal's proportionality analysis when dismissing her initial appeal. Having found no evidence of group disadvantage and deeming the act in question 'an entirely personal objection',[275] the Court of Appeal never seriously addressed the proportionality of her employer's refusal of her request. The Court of Appeal treated the proportionality of her employer's actions as largely self-evident, given BA's reconsideration of their policy, the offer of an alternative job role to Ms Eweida, and the fact that Ms Eweida was the only employee disadvantaged by the policy in the 7 years since its adoption.[276] Sedley LJ's view that Article 9 was of little use to the plaintiff resulted in scant analysis of the necessity of the restrictions on Article 9.[277] If the ECtHR was indeed influenced by this factor, the question of 'fair balance' might require evidence of the domestic authorities fully considering the conflicting interests before them and affording each due consideration.

Moreover, it is to a certain extent unsurprising that analysis of the margin of appreciation doctrine highlights how the Court in effect requires different standards from different contracting states. Under Article 9(2) the reason for a restriction is necessarily key. The aim of respecting a certain ideal of 'living together' in *laïque* states is certainly distinct from the 'corporate image' aim put forth in justification in *Eweida*. In *Lautsi* the aim of

[274] *Eweida and others* (n 1) 'Partly Dissenting Opinion of Judges Bratza and David Thor Björgvinsson', para 4.
[275] *Eweida v BA (CA)* (n 16) [34].
[276] ibid [33]-[38].
[277] ibid [22].

pursuing symbolic neutrality in schools put forth by the applicant had little resonance, in contrast with cases involving *laïque* states, since it was not an aim supported by the majority of the population or one which had a constitutional or cultural basis in Italy.

How a case is framed may also be influential. In some cases, such as in Ms Eweida's and Mr McFarlane's, the applicant will be claiming a breach of the State's positive obligation under Article 9.[278] The question will be whether in all the circumstances the domestic legal order complied with the State's positive obligation to secure the applicant's freedom of manifestation and whether a fair balance was struck between the applicant's rights and the competing interests at stake.[279] This is a different test than the question of whether the State's prima facie interference with the applicant's Article 9 rights was necessary in a democratic society. However, the largely similar analysis of Mr McFarlane's claim of a breach of a state's positive obligation and Ms Ladele's claim of a breach of a substantive right, Article 14, makes it difficult to discern what practical implications arise from the different tests.

This question of democratic process is related to how a case is framed and is similarly important. Where a measure involves action by a State, rather than a private party, there will be additional reason to give a wider margin of appreciation out of respect for the legislative processes behind that action. The Court's explicit expression of its subsidiary role when referencing the margin of appreciation is correspondingly reflected in its greater deference to decisions which have been subjected to democratic processes and debate. In *Hirst v UK* the Court highlighted the low quality of parliamentary and judicial review of the challenged measures when supporting a challenge to the UK ban on prisoners voting.[280] In *Animal Defenders International v UK*, in contrast, the Court stressed the 'extensive pre-legislative

[278] See also *Bayatyan* (n 67).
[279] *Eweida and others* (n 1) para 91.
[280] *Hirst (No. 2)* (n 244) paras 79-80.

consultation' and the UK courts' careful application of Convention jurisprudence[281] in holding that a ban on political advertising on television[282] did not violate Article 10. The private actions of the employer in *Eweida* were not endorsed by any democratic process or debate, but simply defended by the UK Government after the English Court of Appeal's judgment was challenged in Strasbourg. In contrast, in *SAS* the constitutional and legislative basis of the law was strong and it was clear there had been significant political debate, albeit at times intolerant and extreme.[283]

More generally, in many key cases there have often been other highly specific but significant factors in play. Much has hinged on the context of such challenges and, at times, significant external factors at play. In cases such as *Refah Partisi v Turkey* and *Sahin* it is clear that the Court has been acutely influenced by the potential that a strict form of secularism might, in the context of Turkey's sensitive political landscape, might be 'considered necessary to protect the democratic system in Turkey'.[284] Given all these factors it is not easy to predict how the Court will apply the margin of appreciation doctrine in any particular case. From an examination of the ECtHR's application of the margin of appreciation doctrine in some of its most recent and prominent cases, it is apparent that it is increasingly difficult to reconcile the Court's approach to different contracting states because of the degree to which the margin of appreciation doctrine plays a role. The Court's approach to potential violations of Article 9 is undoubtedly deeply influenced by deference to states' choices of church-state models, but numerous other significant factors also play a role.

[281] *Animal Defenders International v UK* (2013) 57 EHRR 21, para 115.
[282] The case involved the Communications Act 2003, s 321(2), which prohibits advertisements 'directed towards a political end' and advertisements inserted 'by or on behalf of a body whose objects are wholly or mainly of a political nature'.
[283] *SAS* (n 153) paras 147-149
[284] *Refah Partisi* (n 137) para 125; *Sahin (Grand Chamber)* (n 64) para 114.

D. Gaps in Protection: What Protection for Unpopular Minorities?

As the Court's case law currently stands it is difficult to discern any base line of protection which holds true across Convention states. There may be good reasons for this flexibility in approach, but the elasticity of what amounts to protection for religious manifestation creates certain problems. The Court's recent case law reveals a danger that the protection of religious manifestation may become so limited in countries that pass legislation in support of a *laïque* version of secularism or in furtherance of 'vague'[285] values such as 'living together' that the *forum internum* is fundamentally affected. Less favourable treatment on the grounds of religious affiliation can directly and indirectly influence the potential of a religious person to sustain their religious beliefs. The banning of minority religious symbols in schools or public places, or the promotion of majority religious symbols in schools and public places can discourage the practice of minority religions and affect the capacity of a minority religious community to sustain itself. The religious freedom of individuals within one religious community is in some senses relative to the freedom granted to other religious communities, since such differentiation communicates negative expressive meaning towards members of the disfavoured religions.

Furthermore, the case law on the wearing of Muslim dress should be understood in light of the fact that in many contracting states, including France and Switzerland, the public space is far from secular. Many European public spaces reflect the majority's attachment to the religious symbols of Christianity despite relatively low rates of church attendance. At the same time, evidence of an attitude of disapproval of non-traditional religions is apparent in state actions such as the October 2010 law in France or the recent Swiss ban on the

[285] *SAS* (n 153) 'Partly Dissenting Judgment of Judges Nussberger and Jäderblom', para 5.

construction of minarets.[286] The latter prohibition was motivated by the majority's perception of minarets a threat to the national and religious identity of the country. Many laws restricting the wearing of the headscarf are couched in general terms but explicitly exempt majority religious symbols on the grounds that these are of cultural rather than religious importance. For example, one such restriction in the German province of Baden-Württemberg ostensibly prohibits public school teachers from manifesting their religion in a manner that can endanger the neutrality of the country and the peace of the school. However, the law is explicit in its aim of safeguarding 'Christian and occidental educational and cultural values or traditions'.[287] In considering whether this law treated different religions with strict equality the German Federal Administrative Court reasoned that such reference to Christian values was not preferential treatment of Christianity because such values are divorced from their religious meaning and now inform fundamental values of the German Basic Law such as human dignity, equality and religious freedom. The Federal Administrative Court viewed demonstration of Christian and occidental values as distinct from profession of religious faith and deemed such values to be ones which every public servant should be able to agree to, irrespective of their religion.[288] The ECtHR's treatment in *SAS* of the 2010 French *burqa* ban indicates that at present Article 9 provides little answer to such unequal treatment of religious minorities. Indeed, it might fairly be contended that the ECtHR's current approach only seems to protect the rights of minorities which are 'small, invisible and 'non-threatening'.[289]

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[286] See *Ouardiri v Switzerland* App no 65840/09 (ECtHR, 8 July 2011) and *Ligue des Musulmans de Suisse v Switzerland* App No 66274/09 (ECtHR, 8 July 2011), in which both complaints were held to be inadmissible on the grounds that the applicants were not 'victims' of any violation.

[287] Act Amending the School Code of Baden-Württemberg, April 1, 2004, Baden-Württemberg GB1. S. 178, Nr, 6 (FRG). Other German Länder (Bavaria, Hesse, North Rhine-Westphalia, and Saarland) have passed similar laws restricting public teachers' appearance to safeguard religious neutrality, whilst allowing exceptions for Christian and Western traditions. Human Rights Watch, *Discrimination in the Name of Neutrality* (Kintera 2009); Ruben Seth Fogel, 'Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, unless - God Forbid - They are Religious' (2006) 51 NYL Sch L Rev 619.

[288] *Ludin (Federal Administrative Court)* BVerwGE, June 24 2004, 2 C 4503, 14.

[289] Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77 The Modern Law Review 223, 237, pointing to protection of Buddhists (*Jakobski*, n 66) and Jehovah's Witnesses (*Thlimmenos*, n 9).

E. The Margin of Appreciation and Domestic Determinations of Proportionality

The significant role of the margin of appreciation doctrine in the ECtHR's Article 9 case law may in fact be reason for domestic courts to consider themselves free to increase the protection offered at a domestic level. As Lord Reed recently noted, the Strasbourg Court's determinations on proportionality are 'indissolubly linked to the margin of appreciation' and because of this national ideas of proportionality 'cannot simply mirror that of the Strasbourg court'.[290] In interpreting and applying Convention jurisprudence domestic courts may go beyond Convention jurisprudence on what constitutes a limited interference with Article 9, and the central role of the margin of appreciation in Article 9 cases weighs in favour of domestic courts viewing themselves as having a broad freedom in this regard.[291]

It is important to recall that domestic courts have developed their own test of proportionality in domestic case law under the Human Rights Act,[292] most recently and comprehensively articulated in *Bank Mellat v Her Majesty's Treasury (No 2)*.[293] Under the domestic test a court must ask itself whether: (i) the objective of the measure is sufficiently important to justify the limitation of a protected right; (ii) the measure is rationally connected to the objective; (iii) a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In respect of this last step Lord Reed noted, 'In essence, the question at

[290] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] 1 AC 700, [71].
[291] *R (Nicklinson) v Minister for Justice* [2014] UKSC 38, [2014] 3 WLR 200
[292] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30, [1999] 1 AC 69, 80.
[293] *Bank Mellat v Her Majesty's Treasury (No 2)* (n 290). This more recent articulation of the test explicitly adds the fourth criterion in the Canadian case *R v Oakes* [1986] 1 SCR 103 which was endorsed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 WLR 581, [19].

step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure'.[294]

However, religious litigants must be able to convince domestic courts that the restrictions they face are disproportionate. The focus in Article 9 on protection of freedom to believe[295] leads to courts relying on this context to assume that public manifestations are in some way unusual, making it easier to justify a restriction on public manifestation as proportionate.[296] More generally, the difficulties in communicating religious motivation in the courtroom setting can undermine the potential for litigants to convince courts that the infringement of their Article 9 rights is disproportionate to the more readily-understandable non-religious aims pursued by their opponents.

Section III: Conceptual Problems

The previous sections outlined the legal context of current debates about Article 9, as well as highlighting some of the problems associated with the ECtHR's current approach towards Article 9. This section discusses some of the conceptual difficulties that arise in religious freedom cases, considering them in light of the current case law's focus on balancing under the Article 9(2) justification limb. The first part of this section highlights some of the problems that may arise when communicating religious motivation in the context of disputes about the weight that should be given to religious freedom in proportionality analysis. The second part of this section examines the difficulty of receiving arguments centred on religious motivation on their own terms, without applying external viewpoints or assumptions. The

[294] *Bank Mellat v Her Majesty's Treasury (No 2)* (n 290) [74].
[295] *Sahin (Grand Chamber)* (n 64) para 105.
[296] *Konttinen* (n 83) para 75; *Ladele* (n 16) [51]-[52].

third part of this section addresses the difficulties in attempting to understand the value of an individual or group's religious freedom in a way that allows it to be weighed against competing non-religious factors. Finally. this section considers instances of competing rights, looking at conflicts between religious freedom and sexual orientation non-discrimination in particular.

(i) Law and religion as cross-cultural communication

Questions of culture and cross-cultural communication are relevant when considering the communication of religious motivation and religious meaning in courts. Culture has been defined by Parekh as:

> [a] historically created system of meaning and significance or … a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives. It is a way of both understanding and organizing human life.[297]

The interaction of religious individuals and courts has been characterised by some as 'an instance of cross-cultural encounter'. Benjamin Berger argues that the constitutional system of law is a cultural system 'composed of sets of symbols, categories of thought, and particular practices that lend meaning to experience'.[298] When judges write their judgments they do so according to the conventions and rules of legal culture, explaining the legal classification of the religious practices before them in a manner consistent with precedent.[299] In order to make their religious practices intelligible to courts, litigants are required to communicate the meaning of their religious practice. The meaning of a particular practice for a religious

[297] Bhikhu C Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press 2002) 143.
[298] Benjamin Berger, 'The Cultural Limits of Legal Tolerance' (2008) 21 Canadian Journal of Law and Jurisprudence 245, 246.
[299] Howard Kislowicz, 'Faithful Translations? Cross-Cultural Communications in Canadian Religious Freedom Litigation' [2013] Osgoode Legal Studies Research Paper, 10.

litigant will be determined by their religious and cultural background. Literature on cross-cultural communication delineates between norms that may be commonly held and background justifications which may not be the subject of agreement.[300] This idea is modelled on John Rawls' model of an 'overlapping consensus'.[301] For example, some who denounce the practice of slavery may do so because of religious values, whilst others will refer to liberal values of equality and dignity, but all can agree on the wrongfulness of slavery. Howard Kislowicz has highlighted how successful cross-cultural communication hinges on a respect for diverging perspectives which recognises their value whilst maintaining an awareness of the culturally contingent nature of one's own perspective.[302] These two issues are key to understanding the difficulties faced by religious litigants in courts. On the one hand judges may find it difficult to overcome the chasm of difference of meaning and to respect fully the religious motivation and practices of religious litigants. Equally, they may fail to be fully aware of the culturally contingent nature of common understandings of religion and what kinds of limitations interfere with religious freedom.

A. Barriers to Communicating Religious Motivation

One immediate hurdle for the religious litigant is the question of institutional propriety. English courts have repeatedly stated that it is not their role to determine and apply religious requirements.[303] This can impact religious individuals' capacity to communicate the motivation of their actions, since some aspects of a dispute involving religious questions will be simply outside the boundaries of what is considered justiciable. Christopher McCrudden has described 'a strong principle of abstention' where claims about religious normative

[300] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' in J Bauer and D Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 124.
[301] John Rawls, *Political Liberalism* (Columbia University Press 1993).
[302] Kislowicz, 'Faithful Translations?' (n 299) 14-16.
[303] *Rai v The Charity Commission for England and Wales* [2012] EWHC 1111 (Ch) [35] (finding that doctrinal issues in a case involving a dispute between two rival Sikh groups could not be settled by litigation).

systems were raised.[304] The Supreme Court has recently drawn back from this principle to a certain extent, taking the view that the determination of a religious dispute, involving the court ascertaining the essential tenets of a faith in order to determine entitlement, is justiciable if this was necessary in order to decide a disputed legal right. The Supreme Court explained non-justiciability as 'a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject-matter'.[305] However, there remains a strong principle that the courts will not discuss the truth or reasonableness of religious doctrines.[306]

Secondly, there are restrictions on the manner in which religious individuals may communicate in the courtroom. The confines of judicial culture in a secular state make it difficult for a court to rely on religious reasons in justifying a decision. When delivering its judgment a court must be rationally persuasive, giving reasons within the confines of 'public reason'. Robert Audi has defined a reason which adheres to the duty of public reason as 'roughly one whose normative force, that is, its status as a prima facie justificatory element, does not evidentially depend on the existence of God (or on denying it) or on theological considerations.'[307] Thomas Nagel defines the requirement of public reasons as necessitating that 'it must be possible to present to others the basis of your own beliefs, so that once you have done so, *they have what you have*, and can arrive at a judgment on the same basis'.[308]

The duty to use public reasons in courts may create difficulties for religious persons who attempt to communicate the motivation of their actions. A significant amount of

[304] Christopher McCrudden, 'Catholicism, Human Rights and the Public Sphere' (2011) 5 International Journal of Public Theology 331, 337.
[305] *Shergill (SC)* (n 51) [41].
[306] ibid [45].
[307] Robert Audi, 'Religious Values, Political Action, and Civic Discourse' (2000) 75 Industrial Law Journal 273.
[308] Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16 Philosophy & Public Affairs 215, 232.

academic debate amongst political and legal philosophers has focused on whether there should be a moral requirement to adhere to public reasons in debates amongst citizens and in the legislature. Criticism of the restrictions of the duty on communication have concentrated on these political contexts, rather than questioning how the duty to give public reasons affects the judicial process. However, it might be argued that the effects of such a restraint in judicial fora are also significant. This section considers possible challenges to this most widely accepted aspect of Rawls' theory,[309] highlighting some of the negative effects of this requirement on religious litigants.

There are a number of arguments relating to political discourse that may be equally relevant to challenges to judicial use of public reasons. Jürgen Habermas takes seriously the concerns of the religious person who must translate their perspective into secular terms despite being committed to institutional neutrality. He contends that religious arguments have unique potential for 'transporting possible truth contents, which can then be translated … into a generally accessible language'.[310] The key issues are what is lost in the translation of the meaning of religious commitments into non-religious terms and how judges react to this difficulty. Peter Cumper and Tom Lewis have argued that there is evidence that the English judiciary has been overly reliant on deference arguments in cases where religious issues are in question and that this problem stems from an awareness of issues of translation:

> In short, there is an absence of vocabulary – an ineffability – which prevents a court in a modern liberal democracy from taking account of manifestations of belief in a way that adequately conveys the profundity with which claimants hold these very beliefs.[311]

[309] This principle has been described as 'sufficiently well established to be regarded as a virtual axiom', Cumper and Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (n 45) 133.
[310] Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14 European Journal of Philosophy 1, 10.
[311] Cumper and Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (n 45) 133.

Potential difficulties for the religious litigant are manifold. In relation to political debate, Nicholas Wolterstorff has highlighted the crisis of sincerity that can result from the individual being required to detach a belief from its religious source and to argue as though their convictions had secular grounds is to invite him to misrepresent publicly his own position.[312] This criticism seems especially relevant to the case of the religious litigant, when we consider that participation in a religious accommodation case may be a matter of strong principle and undoubtedly an event of wide-ranging importance in the life of the litigant. Requiring religious litigants to misrepresent or only partially represent arguments that relate to an ultimate concern in their life is undoubtedly both onerous and disadvantageous.[313]

Furthermore, in the context of restrictions on legislative debate theorists such as Michael McConnell have argued that it may be difficult for religious litigants to formulate convincing arguments in secular terms.[314] McConnell essentially contends that we cannot exclude comprehensive reasons because once we have done so there are simply no freestanding reasons remaining.[315] Detaching a secular reason from a religious source may render the religious individual's arguments simply unpersuasive. Paul Weithman has also highlighted how some religious persons may simply not view the world in a way in which secular reasons have any hold on the issue in question; they are simply incapable of discerning 'any "pull" from any secular reasons'.[316]

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[312] Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman & Littlefield 1997) 69.
[313] Stephen L Carter, 'The Religiously Devout Judge' (1989) 64 Notre Dame Law Review 932, 940; Thomas L Shaffer, 'On Checking the Artifacts of Canaan: A Comment on Levinson's Confrontation Symposium on Politics, Religion, and the Relationship between Church and State' (1989) 39 De Paul Law Review 1133.
[314] Michael McConnell, 'Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation' 1 JL Phil & Culture 159; Jeremy Waldron, 'Public Reason and "Justification" in the Courtroom' (2007) 1 JL Phil & Culture 107.
[315] McConnell, 'Secular Reason' (n 314), 170-171.
[316] Paul J Weithman, *Religion and the Obligations of Citizenship* (Cambridge University Press 2002) 157.

In addition to the difficulties of finding a way to represent religious arguments sincerely and forming convincing non-religious arguments, the potential for mistranslation or partial translation is also at play. Lovisa Bergdahl has developed this point in the context of political debate. If religious arguments must be translated for them to be taken into account, then the question of how to convey such meaning is paramount.[317] Bergdahl highlights how those aspects of a religious reason which do not lend themselves to translation may be ignored or simplified and the more complex message may fail to be communicated. Thus, those arguments that cannot be translated will in the end remain excluded from the debate. These concerns again appear to apply equally in the context of the religious litigant.

Jeremy Waldron has argued that the exclusionary nature of public reason 'might seriously distort the justificatory character of the processes to which they apply'. If certain arguments are excluded, the balance in favour or against certain proposition may be severely altered. He points to the effects of Rawls' constraints on the political debate over abortion. The pro-life lobby are excluded from invoking a particular religious reason, even though they believe it to be a weightier reason than any put forward by the other side: 'They are required to suppress their views of what the relevant reasons are and to distort their view of the decisional weight of the reasons they *are* permitted to mention.' Waldron questions how we can 'be sure of getting it right if we restrict the range of reasons we are interested in'.[318]

Waldron explicitly avoids the application of these arguments to the legitimacy of judicial reasoning, arguing that judges' decisions are not instances of 'genuine undistorted reason-giving', in the sense of being comparable to debates of citizens or legislators. He contends that judges are still constrained, albeit by the requirement to 'consider only those

[317] Lovisa Bergdahl, 'Lost in Translation: On the Untranslatable and its Ethical Implications for Religious Pluralism' (2009) 43 Journal of Philosophy of Education 31.
[318] Waldron, 'Public Reason and "Justification" in the Courtroom' (n 314) 118, 123-4.

reasons that derive from established sources of law' rather than by liberal political doctrine. Waldron's arguments would suggest that there is little connection between the deliberation in political chambers and the deliberation in courtrooms. For Waldron the considerations relevant to legal judgments are not like reasons, but rather like warrants upon which to authorize certain outcomes. Thus, exclusion of certain reasons is not irrational: 'Excluding a reason while it is still a reason may seem irrational; excluding a reason in circumstances where we are not warranted or authorized to consider it is not irrational if our only question is what we are warranted to do'.[319] Undoubtedly Waldron's distinction is a useful one, allowing him to challenge the legitimacy of conclusions arising from legislative debates restricted by Rawls' duty, without making a more radical attack on judicial use of public reasons. However, his distinction is open to contestation. Firstly, it is not clear that Rawls' duty of public reasons does not fit the peculiar form of reason-giving that Waldron describes; certainly rationales for public reason based on judges' lack of democratic legitimacy and their need for justifiable use of coercion are heavily analogous with, if not indistinguishable from, Waldron's account of authority-giving. Secondly, judges themselves feel restricted by the duty to use only public reasons both in terms of their deliberations and in terms of their written opinions.[320] In addition, theorists continue to view judicial reasoning as embodying a duty of public reason. Kent Greenawalt, though referring to judicial opinion writing as a 'kind of ceremony of justification', still takes the view that such a ceremony involves the acknowledgement of 'the aspiration to rely on public reasons'.[321]

[319] ibid 125, 128, 130.
[320] Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press 1995) 142-143.
[321] ibid 143.

B. External and Internal Perspectives

In addition to the problems of religious litigants expressing themselves intelligibly and persuasively, there may be difficulty with the capacity of the listener to truly accept arguments referring to religious motivation, even if made in non-religious terms. Any judicial attempt to calculate the importance of an individual's act of religious freedom is undoubtedly controversial, none less so because of the requirements of public reason in the judicial process. Building on HLA Hart's concept of the 'internal' viewpoint of law[322] and Neil MacCormick's concept of a 'cognitively internal' point of view, whereby conduct is assessed in accordance with the standards and norms that shaped that conduct,[323] Christopher McCrudden has highlighted how the 'cognitively internal' view point was missing in a number of recent British judgments.[324] To adjudicate questions of religious freedom or religious discrimination the law must adopt an external perspective; no court can adopt or prefer the precepts of any one religion.[325] However, some have called for greater empathy on the part of the judiciary.[326] In terms of what an internal perspective might look like, Nussbaum has offered a useful definition. Writing about what 'cultivated inner eyes' would require, she states:

> [It] requires seeing the other as a person pursuing human goals, and understanding in some loose way what those goals are, so that one can see what a burden to their conscience is, and whether the conduct really does contravene vital state interests.[327]

A number of cases demonstrate the difficulties in this judicial process and the potential negative consequences for little-understood or unpopular minority religious

[322] Herbert LA Hart, *The Concept of Law* (Oxford University Press 1961).
[323] Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978) 292.
[324] McCrudden, 'The JFS Case Considered' (n 53).
[325] *McFarlane* (n 16) [22]; *Johns* (n 53) [39]-[41].
[326] Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford University Press 2011) 153.
[327] Martha C Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Harvard University Press 2012) 143.

viewpoints. One possible source of such 'external perspectives' is the dominant conceptions of religion in English society; judges may make general assumptions about the nature of religion based on their own religious and cultural experiences of Christianity, and Protestantism in particular. Didi Herman has suggested that judges have handled engagement with non-Christian faiths in a problematic fashion, highlighting judicial tolerance of negative stereotypes[328] and reliance on assumptions about Jews and Jewishness in a number of trust and child custody cases.[329] Herman points to evidence of judges applying a Christian understanding of religious faith as 'predominantly belief evidenced by practice' to religions, in particular Judaism, that do not define religion in those terms. Such judgments are problematic regardless of which religions are under inspection, though some commentators have highlighted the potential that minority religions will be less likely to have their core doctrines recognized as religious manifestations because of judicial assumptions about the nature of religious convictions.[330] Others have warned that where Christianity is in question there is a danger that courts may see the content of an applicants' belief as 'self-evident'.[331] Certainly it seems that elements of the Court of Appeal's reasoning in both *Ladele* and *Eweida* involved assessments of more devout or orthodox minority beliefs in accordance with mainstream conceptions of Christianity, so that the claimant's beliefs were either deemed not to be 'core' beliefs or not to be 'religious' at all.[332] In the recent case of *Mba v London Borough of Merton* [2013] EWCA Civ 1562 the Court of Appeal, responding to *Eweida and others*, took care to distance itself from this approach. Acknowledging that all agreed that

[328] Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (Oxford University Press 2011) 46-48.
[329] ibid 68, 82-85.
[330] Jeremy Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights' in Johan David van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff 1996).
[331] Peter Edge, 'Determining Religion in English Courts' (2012) Oxford Journal of Law and Religion 402, 412.
[332] See references to Ms Ladele's belief in traditional marriage not being a 'core' Christian belief, *Ladele* (n 16) [52]. Similarly, see Sedley LJ's analysis of group versus individual disadvantage, *Eweida v BA (CA)* (n 16) [24]. See also *Playfoot* (n 55).

Mrs Mba had sincere Sabbatarian beliefs which many other Christians did not share,[333] Maurice Kay LJ highlighted the need for 'sensitivity to the diversity of beliefs between and *within* religions.[334]

Moreover, the pervasiveness of the Protestant conception of religion as a matter of choice may influence judicial determinations of whether a religious applicant's actions are reasonable.[335] The Supreme Court has explicitly adopted a wide description of religion.[336] However, there has been some evidence of judges applying to a 'common sense' understanding of what religion comprises which fails to take account of the diverse array of religious convictions. Whilst the judicial focus in cases such as *Ladele*[337] on what acts are at the 'core' of Christian religious freedom has now been largely rejected as inappropriate, a view of religion as choice remains supported by Article 9's focus on conscience as opposed to manifestation.[338] This approach becomes problematic when the religion at issue in a case does not focus on conscience as the core of religious affiliation. The application of a conscience-based understanding of religion is apparent in the Supreme Court judgment in *R (on the application of E) v Governing Body of JFS*, a case centring on conflicting definitions of Jewish identity adopted by the Reform and Orthodox members of the Jewish community.[339] The majority of the Supreme Court determined that a school admissions policy which applied the *halakhic* rule of Jewish identity, a definition in Orthodox Judaism

[333] *Mba* (n 125) [13].
[334] ibid [14].
[335] See Sedley LJ's observation that religion and belief are 'matters of choice', *Eweida v BA (CA)* (n 16) [40].
[336] See the description of Lord Toulson in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] AC 610, [57].
[337] *Ladele* (n 16) [52]. See also *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] WLR (D) 151, where the High Court held that whilst open air cremation was a manifestation of Hindu belief, since it was 'sufficiently close to the core of one strand of orthodox Hinduism', for Sikhs it was a mere matter of tradition and not belief.
[338] See Julie Ringelheim's criticism of the privatization thesis in the Court's case law on religious freedom, Julie Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Camil Ungureanu and Lorenzo Zucca (eds), *A European Dilemma: Religion and the Public Sphere* (Cambridge University Press 2012).
[339] *JFS* (n 54).

which defined Jewish status primarily according to a child's parentage, to be racially discriminatory. Though calling for legislation to remedy the school's predicament, the Supreme Court enforced an interim practice-based admissions test, clearly at odds with the explicit ethos of the school. Highlighting how courts may subconsciously generalise from their personal religious understandings, Christopher McCrudden points to Lord Philips' reference in the *JFS* judgment to 'normal' religions based on choice in the *JFS* judgment.[340] Didi Herman has also critiqued the *JFS* judgment,[341] echoing Lord Brown's criticism of the imposition of a Christian practice-based test as intrusively overriding of the school's expressed desire to admit non-observant Jews.[342] Sedley LJ's reference in *Eweida* to religion and belief as 'matters of choice',[343] rejecting the applicant's argument that the visible wearing of a crucifix was a requirement of the Christian religion, has also come in for criticism on this point.[344]

These few instances of judicial comment on this subject may be indicative of wider trends. Contributions by academics such as Wendy Brown have highlighted how dominant conceptions of religious freedom and religious discrimination are themselves representative of a larger problem of inequality, whereby the majority's definition of religion as private conscience and primarily a matter of worship is privileged and applied as a 'neutral' concept.[345] Dinah Rose QC, representing Ms Ladele before the ECtHR, contended that the current approach to religious freedom in England is representative of a larger problem of inequality at the heart of the secular system of governance.[346] Imagining religion as private

[340] ibid [44].
[341] Herman, *An Unfortunate Coincidence* (n 328) ch 7.
[342] *JFS* (n 54) [253] (Lord Brown).
[343] *Eweida v BA (CA)* (n 16) [40].
[344] See McCrudden, 'The JFS Case Considered' (n 53) 221.
[345] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2006). See also Rivers, 'Promoting Religious Equality' (n 157).
[346] ECtHR, 'Chamber Hearing: Ladele v United Kingdom (no. 51671/10), McFarlane v United Kingdom (no. 36516/10), Eweida v United Kingdom (no. 48420/10) & Chaplin v United Kingdom (no. 59842/10)' (4 April

and the public space as neutral between religions masks the disadvantage experienced by those who do not share that conception of religion.

Furthermore, there is a danger that any attempt at balancing, a process inherently focused on ideas of reasonableness and proportionality, may have an internal bias in favour of established religions. The beliefs of mainstream religions do not seem so outlandish as those of less established religions. Religions such as Catholicism and Protestantism have had centuries of institutionalisation within Europe. If religion is not simply a matter of exercising a choice, but of identity and 'even an alternative to reason which may not be comprehensible in liberal terms'[347] then the gap to understanding is greatest where the religion in question is little known or understood. Building on HLA Hart's concept of the 'internal' viewpoint of law[348] and Neil MacCormick's concept of a 'cognitively internal' point of view, whereby conduct is assessed in accordance with the standards and norms that shaped that conduct,[349] Christopher McCrudden has highlighted how the 'cognitively internal' view point was missing in a number of recent British judgments.[350] To adjudicate questions of religious freedom or religious discrimination the law must adopt an external perspective; no court can adopt or prefer the precepts of any one religion.[351] However, some have called for greater empathy on the part of the judiciary.[352]

2012)
<http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=5167110_04092012&language=en&c=&py=2012> accessed 27 September 2014.

[347] Carl F Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 Oxford Journal of Legal Studies 729, 753.

[348] Hart, *The Concept of Law* (n 322).

[349] MacCormick, *Legal Reasoning and Legal Theory* (n 323) 292.

[350] McCrudden, 'The JFS Case Considered' (n 53).

[351] *McFarlane* (n 16) [22]; *Johns* (n 53) [39]-[41].

[352] Horwitz, *The Agnostic Age* (n 326) 153.

(i) The judicial role in intra-community conflict

A particular difficulty arises where cases centre on conflicting interpretations of religious doctrine. A number of recent English cases have involved disputes related to larger tensions between liberal majorities and conservative minorities within religious communities. *Ladele*, *Begum*, and *JFS* each involved English conservative minorities' assertions of their right to practice their beliefs in ways conflicting not only with non-religious policies, but also with more liberal approaches adopted by a majority of their local or larger religious community. The applicant in *Ladele* and the respondent school in *JFS* each belonged to conservative factions of larger Protestant and Jewish communities and took comparatively stricter approaches to the respective issues of condoning homosexuality and defining religious membership. The applicant in *Begum* viewed her religion as requiring a more conservative approach to religious dress than that decided upon after consultation with the parents of other Muslim pupils in her school.

In each case English courts favoured the section of the religious community that adopted the more liberal approach. Such findings do not necessarily indicate a preference for liberal interpretations of religious doctrine. They may simply result from the nature of such disputes, where a singular person or small group of persons seek through the courts concessions or accommodation of religious beliefs or practices beyond what the larger religious community has already negotiated for itself. Moreover, these cases may also be indicative of judges' pragmatic desire to respect carefully negotiated compromises between secular authorities and the mainstream leadership of religious communities. Where a litigant's views are at odds with religious leaders and the majority of their religious

community, judges may be unwilling to require compromises on the part of the majority.[353] This approach is most apparent in cases relating to wearing of religious symbols. In *Begum*, the House of Lords explicitly stated that the applicant's belief was 'not the less a religious belief … because it was a belief shared by a small minority of people'.[354] However, the House of Lords at times implied that the rejection of Ms Begum's request was legitimate because her beliefs were not reasonable given the school policy's existing concessions to Muslim concerns about modesty.[355] The majority opinion of what was necessary in the end held sway and the court supported this determination not to accommodate the minority opinion of Ms Begum.[356] The *Begum* decision clearly expresses the message that minority opposition will not be sufficient reason to overturn compromises reached between secular authorities and the majority of a given religious community.

Though pragmatic concerns likely play a role in many cases, the potential that the repeated failure of arguments defending illiberal religious beliefs may be caused by judges internalising liberal norms cannot be fully discounted. Ultimately, the more liberal version of a religion may appear more legitimate and reasonable under a proportionality assessment. Under the Convention system balancing of support for religious freedom against Convention values of equality and dignity is explicit.[357] As Malcolm Evans remarks, 'religious manifestation is seen as permissible only to the extent that this is compatible with the

[353] See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010). On intra-faith conflicts and freedom of internal religious dissent more generally see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 35-38.
[354] *Begum* (n 34) [21] (Lord Bingham). See also Lord Hoffmann's statement that 'The fact that most other Muslims might not have thought it necessary is irrelevant', ibid [50].
[355] Lieve Gies, 'What Not To Wear: Islamic Dress And School Uniforms' (2006) 14 Feminist Legal Studies 377.
[356] Gies argues that 'Despite its multicultural credentials, Denbigh High School appears rather mono-cultural as it is only willing to accommodate particular religious convictions, namely those of "moderate" Muslim, Sikh and Hindu pupils', ibid 387.
[357] *Refah Partisi* (n 137) para 93; *Sahin (Grand Chamber)* (n 64) para 114.

underpinnings of the ECHR system, these being democracy and human rights'.[358] However, some have argued that support for 'liberal' strands of religious belief is an implicit factor in English decisions such as *Begum*, questioning whether the outcome of the case would have been different if the facts had been reversed and a liberal Muslim student wanted to contest a conservative Muslim school uniform policy.[359] According to such critiques, English courts have failed to heed Lord Nicholls' warning in *Williamson* that courts must be careful to avoid a situation where they only show tolerance to tolerant liberals.[360] More generally, Rex Ahdar and Ian Leigh have warned that a commitment to politically liberal values may inevitably breach separationist principles by favouring non-religious citizens over religious citizens.[361]

C. What Weight to Attach to Religious Arguments?

A particular difficulty arises when courts are called upon to determine disputes between parties where one party invokes non-controversial goods as motivating their actions and the other invokes inherently subjective goods such as compliance with religious belief. Julian Rivers has powerfully argued that recent cases on law and religion in England represent a 'fundamental shift' whereby religious action has 'no publicly cognisable weight' when placed against the pursuit of communal secular goods.[362] As such, he concludes that the current law in England 'is coming to treat religions as merely recreational and trivial'.[363] While Rivers may overstate his case somewhat, one central problem with the religious freedom model is the disparity between the reasons of judges and the reasons of claimants for valuing protected religious acts; the need to be neutral between different religions leads to

[358] Malcom Evans, 'Human Rights and the Freedom of Religion' in Michael Ipgrave (ed), *Justice and Rights: Christian and Muslim Perspectives* (Georgetown University Press 2009) 113.
[359] Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press 2007) 112-113.
[360] *Williamson (HL)* (n 43) [24].
[361] Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005).
[362] Rivers, 'Promoting Religious Equality' (n 157) 396.
[363] ibid 371.

judges being unable to assess religious practices' legitimacy,[364] valuing them instead from reasons of respect for autonomy or pluralism.[365] Certainly in some cases there is a clear gap in meaning relating to the weight attached to particular religious understandings. For example, in *R (Swami Suryananda) v Welsh Ministers* the Court of Appeal contended that a Welsh Government Minister who had ordered the culling of a religious community's sacred bullock understood the importance of the community's religious beliefs relating to the treatment of the animal.[366] However, it is clear that the Minister could not possibly have appreciated the matter in the manner in which the religious community did; if he had shared their belief that the killing of the bullock was equivalent to the killing of a human being, it is unlikely that the importance of preventing the spreading of bovine tuberculosis would have outweighed the former consideration.[367]

In contrast, it is arguable that judges may be more attuned to the 'pull' of arguments that rely on non-religious premises, including moral arguments relating to the importance of human rights or equality norms. Whilst the Court may respect the reasons presented in cases such as *Ladele* or *Surayanda*, they are still being outweighed by reasons that were deemed to be of greater weight. In *Suryananda* the religious community relied on Article 9 to argue that because of its importance to them their sacred bullock should not be treated in an identical manner to other animals that tested positive for bovine tuberculosis. They asked that they instead be allowed to quarantine the animal and restore it to health using medication. The Court of Appeal considered a range of factors that weighed in favour of slaughter including the difficulty of effectively quarantining the animal, the need for post mortem tests to validate

[364] *Manoussakis* (n 144) para 47. This restraint does not extend to clearly harmful practices such as female genital mutilation.
[365] *Kokkinakis* (n 110) para 31; Timothy Macklem, 'Faith as a Secular Value' (2000) 45 McGill Law Journal 1; Cumper and Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (n 45).
[366] *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893, [53] (Pill LJ).
[367] McCrudden, 'The JFS Case Considered' (n 53) 221.

the presence of bovine tuberculosis, and the success of the Welsh Government's surveillance and slaughter policy. In the final assessment of proportionality of effect, these factors in favour of slaughter were seen to be more important than the considerations offered by the religious community.[368] Such a decision may be perfectly justifiable, but it nonetheless evidences the potential gaps in meaning between the religious applicant and the court that may leave some religious individuals feeling that under a proportionality test their deepest and most strongly felt concerns will inevitably be secondary to non-religious concerns.

(i) The difficulty of respecting competing normative systems

A judge will have little difficulty drawing on their knowledge of certain normative systems, such as human rights law, and attributing weight to particular norms from such systems when making their judgments. These systems have been distilled into legal texts and precedents over the years and judicial reference to such norms is uncontroversial. In contrast, there is considerable difficulty in seeking to attribute weight, in essence respect, to a competing normative system, such as that contained in a given religious doctrine. This problem is brought into sharpest relief in cases involving conflicting claims of religious freedom and non-discrimination.[369] Both forms of legal protection reflect society's respect for sometimes conflicting normative systems, but do so in different ways. Most would agree that religious freedom is a good thing at a general level, but would do so to differing extents and for profoundly different reasons.[370]

The difficulty of attributing weight to arguments that rely wholly on the premises of a separate normative system, one that the judge might not only view as uncertain, but may even

[368] *Suryananda* (n 366).
[369] Such cases may be litigated as conflicts of different grounds of non-discrimination law or as conflicts between different Convention rights, see *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741.
[370] See text to n 316.

find repugnant, is compounded by the accessibility and comparative attractiveness of the ideological and moral commitments that discrimination law provisions reflect. Discrimination law is in essence a moral system. Though more recent legal students may take discrimination norms to be uncontroversial, the core premises of discrimination norms were once revolutionary in nature, originating in a desire to challenge traditional culture and to reveal elements in dominant cultures which functioned as tools of minority oppression and historically faced much opposition.[371] The moral nature of a belief in the necessity of this project is arguably now somewhat obscured by liberal societies' wide-scale acceptance of the moral imperative of equality. At present judges enforcing equality norms would hardly feel they were straying too deeply into the 'comprehensive',[372] while the broad reach of discrimination legislation makes such thoughts yet more unlikely.

A key problem is that judges, who control and understand the world of rights and law, are being asked to adjudicate disputes involving a clash between laws reflecting liberal morality and the competing normative world of religious duty. Assessing particular religions' normative worlds is not a role judges feel themselves competent to undertake.[373] Robert Cover presents the pernicious nature of the problems involved in asking judges to adjudicate disputes involving a competing and separate normative system in his seminal article '*Nomos* and Narrative'.[374] In Cover's terms, it might be said that the devout citizens, like all other citizens and communities, each reside in separate normative universes, with each universe, or *nomos*, providing its own 'world of right and wrong, of lawful and unlawful, of valid and

[371] In the US context, for example, as late as 1964 gender equality aims were considered so outlandish that protection against gender discrimination under Title VII of the Civil Rights Act 1964 only arose from a Virginian congressman adding the provision as an attempt to derail the legislation's primary purpose of outlawing discrimination on the grounds of race, Catharine A MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 The Yale Law Journal 1281, 1283-1284.
[372] Rawls admitted his 'justice as fairness' principle to be comprehensive, John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 University of Chicago Law Review 765, 806.
[373] *Williamson (HL)* (n 43) [60] (Lord Walker).
[374] Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4.

void'.[375] Judges, in Cover's view, use their interpretative power to support the State's *nomos* and to suppress other competing normative universes.[376] Applied to the clash of religion and law, Cover's view of judges sees them repressing the world of the religiously devout citizen in favour of the normative universe of the State and of liberal norms, leaving the religious individual with the choice of resistance or withdrawal. As every *nomos* concretes its existence through the denial of competing *nomoi*, it is hard to see how such competing systems can co-exist. Cover's hope for a minimal liberalism that could maintain and manage such competing *nomoi* appears not to have come to fruition.[377] As Robert Post has noted, 'It is clear enough that liberalism inhabits its own world, asserts its own pieties and values, [and] advances its own narratives of individual self-fashioning'.[378] The problem with judges determining what weight ought to be given to each party's concerns, and whether their actions are proportionate, is that those priorities and actions are invariably rational from the perspective of each normative system. However, in the end, the law will reinforce its own normative universe, rather than deferring to another and accepting it as reason for disobeying otherwise general requirements.

Seen in this light, it is understandable that the division of church and state in terms of a public–private division remains persuasive. As Christopher McCrudden has contended, current case law reflects a consensus that 'the way to discipline these alternative normative systems is to be sceptical of religions that depart from an already accepted (and unthreatening) model'.[379] Secularism intervenes to determine which system should win out,

[375] ibid.
[376] ibid 53.
[377] ibid 16, 19.
[378] Robert C Post, 'Who's Afraid of Jurispathic Courts: Violence and Public Reason in Nomos and Narrative' (2005) 17 Yale Law Journal 9, 13.
[379] McCrudden, 'The JFS Case Considered' (n 53) 26.

with the public-private divide weighing heavily in favour of enforcing public and democratically endorsed values in the public place whilst limiting religions' sectarian and logically unreasonable views to the private sphere. The dominance of the view that religion ought primarily to be confined to the private sphere is reflected in the prevalence of the various filtering doctrines in Strasbourg's Article 9 case law[380] and the English courts' generalisation of the free-contract approach in pre-*Eweida and others* case law.[381]

The division of public practice and private belief is explicitly at the core of how Article 9 protects religious freedom and has long featured in the ECtHR's case law. The protection of the *forum internum* as absolute, in contrast with the limited nature of the *forum externum,* represents the compromise at the heart of religious freedom. Even if judges specifically seek to address the difficulties in translation and the need to be conscious of their own cultural or religious values, the nature of religious freedom as primarily protecting belief rather than practice still unavoidably influences the balancing process.

(ii) Balancing of clashing rights in practice

In cases where there is a clash between religious freedom and non-discrimination norms both the ECtHR and English courts may endorse support for sexual orientation equality as applied in the particular facts before them, but can only endorse religious freedom in a more general and qualified sense, since courts cannot endorse the particular substantive beliefs involved in any given case.

It is difficult to know how this influences cases in practice. In *Eweida and others* it seemed clear that the ECtHR viewed the favouring of one set of values, those of non-

[380] See text to n 49.
[381] Sandberg, *Law and Religion* (n 50) 99; *Playfoot* (n 55); *X v Y Headteachers* (n 109).

discrimination, over the value of protecting individuals from limitations on religious freedom as within the State's margin of appreciation. The Court noted that its Article 14 jurisprudence had established that 'differences in treatment based on sexual orientation require particularly serious reasons by way of justification',[382] and for this reason the wider aim of the local authority could be said to be legitimate. This statement is indicative of the Court's rejection of Ms Ladele's contention that difference on the basis of religious belief should similarly require weighty justification.[383] Though acknowledging that Ms Ladele had not put herself in a position in conflict with her beliefs, the Court nonetheless found that her employer's policy was proportionate and not in violation of Article 14 or Article 9, citing the fact that it 'aimed to secure the rights of others' and the wide margin of appreciation attributable to both the local authority and the domestic authorities.[384] The Court's reasoning has been criticised as lacking clarity and failing to apply the test of whether there are reasonable and objective grounds.[385]

On one hand, the ECtHR's response to the question of whether the Convention should require contracting states to exempt certain persons from a neutral and general law on grounds of conscience is in some ways obvious. The UK legislature had considered the possibility of allowing a conscientious objection opt-out for persons in Ms Ladele's position and rejected such a concession.[386] The Court is loath to overturn legislative choices that have been both thoroughly and recently debated.[387] Moreover, the fact that the non-discrimination right invoked was 'abstract' in the sense highlighted by the dissenting judgment of Judges

[382] *Eweida and others* (n 1) para 105.
[383] ibid para 105. However, the subsequent case of *Vojnity v Hungary* (n 224) found that religion was a suspect ground requiring very weighty reasons, citing *Hoffmann v Austria* (1994) 17 EHRR 293 in support. This case law is discussed in Chapter 2.
[384] *Eweida and others* (n 1) para 106.
[385] Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3 Oxford Journal of Law and Religion 2, 13.
[386] See the unsuccessful amendment of Lady O'Cathain to the Equality Bill 2005, HL Deb 13 July 2005, vol 684, col 1147.
[387] See text to n 280.

Vučinić and De Gaetano was unlikely to be persuasive.[388] The Court has previously refused the right of a Protestant Christian political party to refuse to select women as candidates.[389] Despite the conflicting right being 'abstract', since no woman had been rejected as a candidate for the party, the Court ruled that the party's stance violated Article 14 in conjunction with Article 3 of Protocol 1, 'regardless of the deeply–held religious conviction' on which the measure was based.[390]

On the other hand, the ECtHR's approach to Ms Ladele is difficult to reconcile with its treatment of Ms Eweida. It is arguable that, on the facts, the treatment of Ms Ladele was more unfair than that of Ms Eweida, given the recent nature of the changes to the former's employment and her lengthy previous employment as a registrar prior to the introduction of civil partnership.[391] As counsel for Ms Ladele contended in oral hearing before the ECtHR, when she joined Islington Council in 1992 and became a registrar of marriages in 2002 she could not have predicted that her circumstances would change in such a short period of time. Indeed, even if she had anticipated a legislative change, she could not have foreseen the exact manner in which this would be enacted or that there would be no exemptions available to those who objected on religious grounds. The fact that the applicant was already in her job ought to have made some difference to the extent to which the public authority were under an obligation to accommodate her and to the question of the proportionality of her treatment. Moreover, unlike Ms Eweida, the ultimate consequence for Ms Ladele was the loss of her employment, which the Court acknowledged had grave consequences for the applicant.[392]

[388] *Eweida and others* (n 1) 'Partly Dissenting Opinion of Judges Vučinić and De Gaetano', para 6.
[389] *Staatkundig Gereformeerde Partij v the Netherlands* App no 58369/10 (ECtHR, 10 July 2012).
[390] ibid para 75.
[391] Mark Hill, 'Lillian Ladele is the Real Loser in Christian Discrimination Rulings' Guardian Online, Comment Is Free, 17 January 2013 <http://www.theguardian.com/commentisfree/belief/2013/jan/17/lillian-ladele-loser-christian-discrimination-rulings> accessed 4 August 2014.
[392] *Eweida and others* (n 1) para 106.

Despite the findings the ECtHR made in relation to the treatment of Ms Eweida, the Court found the treatment of Ms Ladele to be proportionate.

The English Court of Appeal's prior judgment in *Ladele* reflected a similar reluctance to criticise the approach taken by Ms Ladele's employers. Potentially discriminatory comments by her managers were found to be 'directed not to Ms Ladele's belief with regard to civil partnerships, but to the manifestation of that belief, namely her refusal to conduct such partnership duties'.[393] In contrast with the Court of Appeal's view, many commentators have criticised the approach of Ms Ladele's employers, noting that numerous opportunities to avoid conflict were missed.[394] Patrick Parkinson argues that conflicts such as those in *Ladele* and *McFarlane* could have been avoided by viewing the employees' beliefs as relating to matters of aptitude and suitability, rather than as misconduct.[395] As Parkinson highlights, from a client-based perspective this might in fact have been a more favourable outcome than receiving the services of a half-hearted or unwilling participant.[396] In contrast, Ms Ladele's early steps to inform her employer of the problems posed by the change in English law appear to have been given little weight by the Court of Appeal. The fact that civil partnership duties were not part of her job description could have justified greater flexibility in her employer's approach. The Court of Appeal, however, rejected this factor, highlighting that the applicant was willing to do other duties outside of her contract.[397] The fact that Ms Ladele was a flexible employee in respect of other duties not impacting her conscience should not, though, have led the Court to view her employer's approach as somehow more proportionate.

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[393] *Ladele* (n 16) [35]-[36].
[394] Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17 Res Publica 21, 32.
[395] Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace Forum: Religion and Australian Law' (2011) 34 University of New South Wales Law Journal 281, 294.
[396] ibid.
[397] *Ladele* (n 16) [52].

In the Supreme Court's recent decision in *Bull v Hall* much of the analysis centred on discrimination law, but Article 9 was also considered. In that case the Christian owners of a hotel refused to allow a same-sex couple a double-bedded room, though they claimed that they were motivated not by a specific opposition to homosexual activity but rather by a general opposition to sex outside of marriage.[398] Having found that this constituted unlawful discrimination within the meaning of Regulations 3(1) and 4 of the Equality Act (Sexual Orientation) Regulations 2007,[399] Lady Hale considered the Bulls' Article 9 rights. Citing the need for 'very weighty reasons' to justify discrimination on grounds of sexual orientation and the continuing legacy of years of discrimination against homosexuals, Lady Hale reasoned that prohibiting hotel keepers from discriminating against homosexuals was not a disproportionate limitation on the former's right to manifest their religion.[400] Although split 3-2 on the question of whether the discrimination at issue was direct or indirect, the Court unanimously agreed on the findings in relation to Article 9 and that, should it be indirect discrimination, it could not be justified.[401]

Some have argued that balancing in cases such as Ms Ladele's is in any event inappropriate, since the right at issue is actually the absolute right of conscience of Article 9(1), rather than the limited freedom of manifestation in Article 9(2). The partially dissenting judgment of Judges Vučinić and De Gaetano in *Eweida and others* recast the dispute as one involving moral conscience, rather than religion and belief.[402] They also highlighted how there had been no actual complaint of discrimination by a person seeking a same-sex civil

[398] *Bull v Hall (SC)* (n 369).
[399] ibid [29], [36]; Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.
[400] *Bull v Hall (SC)* (n 369) [53].
[401] ibid [55].
[402] *Eweida and others* (n 1) 'Partially Dissenting Opinion of Judges Vučinić and De Gaetano', para 2.

partnership.[403] Forcing the applicant to act against her conscience on fear of dismissal could not be 'deemed necessary in a democratic society'.[404] In such circumstances failing to treat Ms Ladele differently to other registrars in the judges' view violated Article 14 in conjunction with Article 9. This approach has been endorsed by some authors, who highlight how Ms Ladele was concerned with her own personal culpability and not acting contrary to her beliefs, rather than preventing civil partnerships taking place.[405] Judges Vučinić and De Gaetano excluded Mr McFarlane's case from this form of protection because he was likened to having volunteered himself into a situation in conflict with his beliefs. Limiting the reach of absolute Article 9 protection to circumstances where a requirement is unexpectedly imposed has practical advantages, though this would have implications for persons whose religious views altered during the course of their employment.[406] However, if a right of conscience was viewed to confer an absolute right to refuse participation in certain acts, this could lead to potentially wide-ranging exemptions and recurrent litigation, particularly given the uncertainty over what amounts to participating in or condoning acts contrary to religious belief. In the context of the conscientious objection to participation in treatment under section 4 of the Abortion Act 1967 the question of what amounts to participation has proved controversial.[407] The Inner House of the Court of Session, the Scottish civil court of appeal, recently ruled that the right of conscientious objection to participation in such treatment included any delegation, supervision or support.[408]

[403] The language of their dissent has been criticized as inappropriate by some: Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v United Kingdom' (2013) 15 Ecclesiastical Law Journal 191.
[404] *Eweida and others* (n 1) para 7.
[405] Leigh and Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (n 385) 8.
[406] On the freedom to develop one's priorities see Sheldon Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of Religion' (2007) 70 The Modern Law Review 713.
[407] The Abortion Act 1967, s 4(1) states that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'.
[408] *Doogan and Wood v NHS Greater Glasgow & Clyde Health Board* [2013] CSIH 36, (2013) 132 BMLR 39, [32], [36]-[37].

On the other hand, it might be argued that balancing is inappropriate because the Convention does not protect discriminatory beliefs. In *Ladele* the UK Employment Appeals Tribunal held that had Ms Ladele been given an exemption and allowed to refuse to conduct civil partnerships this might have breached Article 17 of the ECHR.[409] Article 17 prohibits reliance on the Convention's provisions to weaken or destroy the rights and freedoms of the Convention, a point echoed by the UK National Secular Society in its submissions to the ECtHR in *Eweida and other*s.[410] It is arguable that Article 17 should be reserved for more extreme circumstances, where the action for which protection is sought undermines democracy[411] or denies the dignity of others in the way that Holocaust denial[412] or anti-Semitism does.[413] Further, not all discriminatory views are outside the Convention's protections. In *Redfearn v UK*, an electoral candidate for the British National Party, a party opposed to any form of racial integration between British and non-European peoples, was able to benefit from the protection of Article 11.[414] The Court refused 'to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP'.[415] In *Eweida and others* the Court did not address the issue of Article 17, but appeared to reject it implicitly by accepting that a prima facie interference with Ms Ladele's and Mr McFarlane's Article 9 rights had occurred.

Assuming that balancing of clashing rights will remain the primary manner by which such conflicts will be resolved, Hambler and Leigh have offered a reversibility test as a means to distinguish between strong and weak clashes of rights. Their formula would involve asking whether, if the State were to give priority to religious freedom, the disappointed party

[409] *Islington LBC v Ladele* [2008] UKEAT 0453/08, [2009] ICR 387. The Court of Appeal did not address this issue.
[410] UK National Secular Society, 'Submission on behalf of the National Secular Society' <www.secularism.org.uk/uploads/nss-intervention-to-european-court-of-human-rights.pdf> accessed 30 July 2014, para 22.
[411] *Refah Partisi* (n 137).
[412] *Garaudy v France* ECHR 2003-IX 369.
[413] Pearson, 'Article 9 at a Crossroads' (n 116) 600.
[414] *Redfearn v UK* (2013) 57 EHRR 2.
[415] ibid para 47.

would have an admissible Convention claim.[416] Essentially, their test highlights the need to identify an 'other' whose rights and freedoms might actually need protecting if Article 9 were to be limited on those grounds. They highlight the discretionary nature of the recognition of same-sex partnerships in Convention law,[417] in contrast with, for example, the access to contraception at issue in *Pichon and Sajous*,[418] and typify the conflict in Ms Ladele's case as an example of a weak clashing right. Given this factor, they argue that the right to access civil partnerships ought to be given less weight in the balancing process when proportionality of limitations are considered.[419] They contend that the right actually at issue in Ladele is closer to a 'right not to be offended'[420] or a 'bare knowledge' offence,[421] neither of which are rights in the Convention sense.[422] Hambler and Leigh argue that the Court's previous rulings that religious offence is no reason to block Gay Pride marches should be conversely applied to allow religious dissenters such as Ms Ladele to be heard.[423] However, others have contended that mere knowledge that a law or policy authorises religious individuals to discriminate against same-sex couples is an affront to the dignity of homosexuals.[424]

Hambler and Leigh argue that the approach the Court has adopted to date opens the door to a hierarchy of Convention rights.[425] This is the primary criticism of the current approach, whereby it seems there will be little remit for accommodation of claims of conscience that arise from a belief in the wrongness of homosexuality. The residual discretion

[416] Leigh and Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (n 385) 16.
[417] *Schalk and Kopf v Austria* (2011) 53 EHRR 20.
[418] *Pichon and Sajous* (n 61).
[419] *Eweida and others* (n 1) para 17.
[420] ibid.
[421] Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others*, vol 2 (Oxford University Press 1985).
[422] *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34.
[423] Leigh and Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (n 385) 20.
[424] Wintemute, 'Accommodating Religious Beliefs' (n 289) 242; Ronan McCrea, 'Religion in the Workplace: Eweida and Others v United Kingdom' (2014) 77 MLR 277.
[425] Leigh and Hambler, 'Religious Symbols, Conscience, and the Rights of Others'. The debate about whether there *should* be a hierarchy of rights is discussed in the next chapter.

to decide not to designate marriage registrars as civil partnership registrars came to an end with the entry into force of the Marriage (Same-Sex Couples) Act 2013.[426] There is now no means by which public authorities can accommodate marriage registrars with views such as those of Ms Ladele.[427] Equally, businesses that refuse custom in line with their religious ethos risk litigation.[428]

D. Systematic Difficulties Remain

Recognition by judges of the potential for difficulties in translation of religious meaning and the need for extra care to ensure any assumptions about religious meaning are questioned and discounted should go some way to addressing some of the conceptual difficulties highlighted in this section. However, some of the limitations on the nature of religious freedom are not mere assumptions about religious meaning, but are ingrained in both the text of Article 9 and case law relating to it such that ultimately it may be difficult ever to fully remove the influence of such difficulties from the balancing process. Similarly, the context of religious freedom as a limited right within a system which is deferential to the variety of church-state models within the Convention system means that Article 9 jurisprudence tolerates significant differentiation of treatment between religions. Even if litigants could optimally communicate their motivation to judges sensitive to their own preconceptions, there may be little willpower to find a violation of Article 9 from a failure to afford accommodation of religious manifestations that would come at a cost or that would require alteration of majority practices. The potential of differential treatment to impact religious freedom and the *forum internum* has to date not been substantially recognised. Moreover, the ultimate weight that can be given to religious motivation in the balancing process, given its inherently contestable

[426] The statute came into force on 13 March 2013.
[427] A point highlighted in Wintemute, 'Accommodating Religious Beliefs' (n 289) 244.
[428] *Bull v Hall (SC)* (n 369). See also 'Ashers Baking Company: "Gay Cake" Row could End Up in Court' BBC News, 8 July 2014 <www.bbc.com/news/uk-northern-ireland-28206581> accessed 30 July 2014.

nature, appears to almost inevitably fall below the weight that can be attributed to communal goals such as sexual orientation equality.

Section IV: Conclusion

The Strasbourg Court's position has altered significantly in recent years, with its unadulterated support for secularism as a fundamental value now replaced with an increasing insistence that secularism is only one of a number of values in play and that a fair balance be struck between the aims of the state and religious individuals. The various filtering doctrines which in many cases prevented the reasonableness of states' restrictions being considered have also been discarded. The Court's approach to analysing restrictions of Article 9 and its reasoning in relation to religious manifestations, particularly the display of religious symbols, has improved markedly. The impact via the HRA of the ECtHR's case law in England has meant that the level of protection provided by Article 9 in English jurisprudence has increased substantially, though the full consequences of this development are not as yet fully clear. However, as regards the wider context of Article 9, it is difficult to determine what constitutes the minimum protection of religious manifestation across contracting states.

It is the Court's 'invidious task' to ensure that the Convention affords proper respect for a variety of faiths and beliefs in an increasingly diverse continent.[429] In doing so, the Court must set standards which govern a wide variety of states, ranging from those that privilege one particular church, such as the UK, to those that accord constitutional protection to secularism, such as Turkey and France. It is for this reason that the Court frequently cites deference to the particular church-state context of a contracting state in explaining its

[429] Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (n 112) 612.

decisions. The common standards set by the Court inevitably have to be both sufficiently minimal and also flexible to be adaptable to the diverse range of states in the Convention system. Whilst some may criticise the Court as 'overly deferential',[430] the Court was certainly not afraid to criticise the UK in Ms Eweida's case.

A degree of deference to national norms is unavoidable and undoubtedly appropriate, given the wide cultural and historical diversity amongst contracting states. However, adopting a hands-off approach because the boundaries of religious freedom vary across Convention states or out of deference to the democratic process to some extent contradicts the necessarily counter-majoritarian nature of human rights, particularly where protection of minorities is concerned. Moreover, the ECtHR fundamentally undermines its own purpose if its judgments cannot be said to pursue a common European standard of human rights. As Judges Nussberger and Jäderblom argue in their dissent in *SAS*, 'it still remains the task of the Court to protect small minorities against disproportionate interferences'.[431] It remains unclear how judgments such as those in *Eweida and others, Lautsi,* and *SAS* can be reconciled so as to identify the minimum content of Article 9's protection. This chapter highlights how the increasingly unequal treatment of different religious communities in countries claiming to apply a *laïque* church-state model impacts upon religious freedom. In highlighting how a key issue could be inequality of treatment rather than the simple question of whether the restriction of religious manifestation ostensibly or actually pursues a legitimate aim, this chapter contextualises the analysis of the potential of an equality model to plug the gaps in protection of unpopular minorities which will be considered in Chapter 3.

[430] Ivana Radacic, 'Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 133.
[431] *SAS* (n 153) 'Partly Dissenting Opinion of Judges Nussberger and Jäderblom', para 20.

With the downfall of the free-contract doctrine, the scope of Article 9 protection in the employment sphere has certainly increased. However, it is difficult to reason that any general right to accommodation of religious acts, such as the wearing of symbols or avoidance of tasks like handling alcohol or meat, follows from the finding of a violation in *Eweida and others*. The finding of a violation in Ms Eweida's case is in contrast with the findings in respect of her co-applicants. In Ms Chaplin's case the Court afforded significant weight to the health and safety concerns raised by Ms Chaplin's employer, without scrutinising the reality of the purported risks.[432] Some have warned that this risks giving a '*carte blanche* to employers to invoke "health and safety" in order to choke off religious manifestation'.[433] The question of choice will also still have a role at the justification stage in employment situations. If a person accepts a job knowing that the nature of the role would inevitably conflict with their religious beliefs then it is difficult to see why they ought to be accommodated.[434] Moreover, the Court's case law on religious clothing in France and Turkey means that there is little certainty of the approach in *Eweida and others* being broadly applicable beyond circumstances where an employer cites projection of corporate image as their aim. Equally, the more protective stance adopted in *Eweida and others* may be limited to circumstances where, as in *Eweida*, some but not other forms of religious manifestation are accommodated in a workplace without sufficient justification for this distinction.[435] On a more positive note, in the domestic interpretation of Article 9 it is apparent that the question of whether a religious practice is obliged by religious doctrine is no longer considered relevant to the determination of Article 9 claims.[436]

[432] *Eweida and others* (n 1) para 99.
[433] Leigh and Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (n 385) 4. The authors contrast this approach with that of the Canadian Supreme Court in *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, [59]-[67].
[434] Pearson, 'Article 9 at a Crossroads' (n 116) 597.
[435] This might be argued in the context of a claim under Articles 9 and 14. Wintemute views such a limited approach as 'likely', Wintemute, 'Accommodating Religious Beliefs' (n 289) 231-232.
[436] *Mba* (n 125) [34]-[37] (Elias J), [41] (Vos J).

Now that barriers such as the question of whether a religious practice is obligated by religious doctrine have been removed as filters of Article 9 claims, future disputes will focus on a variety of factors in determining whether a school's actions are justified. Harris, O'Boyle, and Warbrick have highlighted that it remains to be seen how rejection of the free-contract approach will extend to other arenas, since the Court did not disassociate itself from its previous ruling in the *Jewish Liturgical Association* case.[437] That case featured prominently in the reasoning of the majority of the House of Lords in *Begum*, which still stands as the leading authority on religious dress in English schools. The fact that in *Eweida and others* projection of a particular corporate image was viewed as being of insufficient importance to justify interference with the State's positive duty under Article 9 does not mean that the various aims of school uniform policies would be viewed similarly. The success of future claims rests on showing that a uniform policy was not well thought-out and did not consider religious implications, as it is required to do under section 149 of the EA 2010. It is clear that the nature of the decision-making process and the consideration given to requests for exemption from school policies will be key. The justifications considered in relation to indirect discrimination in *Begum* are revealing of the kinds of considerations which courts will focus upon in future. Widespread consultation with local religious communities will weigh in favour of a school's decision. The particular reasons for a refusal will matter. If the refusal is based on neatness or a general idea of conformity adding to school spirit then this will be given a certain amount of weight,[438] but is not certain to be defensible. If there is a more particular concern, as there was in *Begum* about the impact of exemptions on other pupils in a context where management were concerned about pressures to conform to

[437] Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (n 112) 605.
[438] *X v Y Headteachers* (n 109) [73]-[76]; *Playfoot* (n 55) [36]-[37].

conservative religious standards, then this will likely be given particularly strong weight.[439] The availability of alternative options for the student to manifest their belief will also be a key issue.

As far as conflicts between religious beliefs about homosexuality and non-discrimination protections are concerned, it is clear that little protection is presently provided by Article 9. The current approach apparent in both *Eweida and others* and recent English cases such as *Bull v Hall* is that refusing to provide goods or services to persons based on their sexual orientation is discriminatory and is not a manifestation of religious belief requiring of accommodation or exemption in Convention law.[440]

As well as these practical challenges and uncertainties, there are numerous conceptual uncertainties that particularly arise in the context of religious freedom and Article 9. A central issue in the current, post-*Eweida and others* context is the question of what weight should be attributed to the individual's religious manifestation in the Article 9(2) balancing process. Problems of communication of religious motivation are difficult to overcome, even where the judiciary is particularly sensitive to such issues and their own potential preconceptions. The difficulty of law as a system recognising the competing systems of rules and reasons provided by religious belief appears equally difficult to overcome. Any balancing process focused on ideas of reasonableness may founder when confronted with incommunicable and seemingly irrational motivations which conflict with reasoned arguments in favour of non-religious goals. Where the religious reason appears to conflict with the theoretical bases of accepted moral systems, particularly non-discrimination law, then the challenge is to ensure that the outcomes in such cases are not simply pre-determined

[439] *Begum* (n 34) [98].
[440] *Eweida and others* (n 1); *Bull v Hall (SC)* (n 369).

by the nature of the value which society places on these competing rights. For these reasons it may be necessary to address the defects in Article 9 case law under other models which focus on issues of differential treatment or freedom of expression of belief, rather than through the prism of religious freedom.

Chapter 3 Equality and Non-Discrimination

Section I: Introduction

This chapter considers the equality and non-discrimination protections under domestic, European, and Convention law, focusing on the question of whether framing one's case in terms of non-discrimination can in practice result in stronger protection than that available under Article 9. At a conceptual level, equality seems to require a strong level of protection; the proposition that differences in situation should be reflected in differences in treatment appears to capture the essence of the claims of religious individuals seeking accommodation of their beliefs. Indeed, a discrimination approach seems to go farther than a human rights approach in requiring accommodation where the system can be shown to differentiate between religions without legitimate justification. The focus on differential impact renders ineffective any attempt at justification by reference to the seemingly neutral nature of a measure.

As regards terminology, the use of the terms equality and non-discrimination in this chapter will model the approach in Convention law,[575] whereby the two terms are used as positive and negative enunciations of the same principle.[576] Whilst a substantive equality approach promises to go beyond the paradigm of 'equal treatment' and examine the role of institutional prejudice and systematic stereotyping

[575] The explanatory report to Protocol 12 refers to Article 14 as providing protection 'with regard to equality and non-discrimination' and notes that, though the term 'equality' does not feature in the text of either art 1 or art 14 of Protocol 12, the principle is 'closely intertwined' with non-discrimination, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 177, 2000) para 15.
[576] Anne F Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 Human Rghts Law Journal 1, 1-2.

in continuing patterns of religious inequality,[577] much of discrimination law is reflective of the negative enunciation of the equality principle, in the form of prohibitions from direct and indirect discrimination. This chapter's focus will largely remain upon these aspects of equality. The Public Sector Equality Duty is the exception to this approach,[578] but thus far there has been little indication of what impact the duty has had upon the area of religious discrimination.

For many years, a clear gap in Article 9's protection of religious manifestation related to the prospect of accommodation for religiously-motivated acts that are contrary to rules of general application, such as uniform policies or rules relating to working hours.[579] Prior to the ECtHR decision in *Eweida and others*[580] the difference between a discrimination and an Article 9 one was starker: under discrimination law differences in treatment must be justified, whilst Article 9 jurisprudence provided for a whole host of situations where no justification for interference with Article 9 was in fact required. Though *Eweida and others* may have rejected this filtering of claims at an interference stage, the judgment and subsequent ECtHR decisions such as *SAS v France*[581] indicate that the Court does not intend to scrutinise strictly the strength of ostensibly general and neutral justifications for interference with Article 9 rights. In such circumstances, one might still contend that a discrimination approach may promise a stronger form of review.

[577] Nazila Ghanea, 'Religion, Equality and Non-Discrimination' in J. Witte and C. Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2011).
[578] The duty is set out in the Equality Act 2010 (EA 2010) s 149 and came into force on 5 April 2011. See text to n 40. *Thlimmenos v Greece* (2001) 31 EHRR 15 has been viewed as 'planting the seeds of a more substantive approach to equality under the Convention', Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2003) 40. However, *Thlimmenos* has had little impact on religious discrimination claims.
[579] Stephanos Stavros, 'Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?' [1997] EHRLR 607.
[580] *Eweida and others v UK* (2013) 57 EHRR 8.
[581] *SAS v France* App no 43835/11 (ECtHR, 1 July 2014).

Application of discrimination law principles may uncover the discriminatory nature of some ostensibly 'neutral' rules and policies, such as rules prohibiting certain forms of religious dress justified with reference to protection of secularism. Similarly, discrimination law principles require that the differential impact of ostensibly neutral rules be justified.

A discrimination approach can address how societies are organised in a manner that facilitates the practices of the religious majority. Apparently neutral laws may take account of the majority's religious practices whilst failing to accommodate those of minorities. At best, an Article 9 approach considers whether there should be accommodation on a case-by-case basis because of the need to respect religious freedom. In contrast, a discrimination approach allows religious minorities to claim the same amount of respect that majorities are granted or indirectly benefit from.[582] Rather than needing to prove that their religious freedom is interfered with to a disproportionate extent, a religious minority may simply point to the lack of objective justification for their differential treatment. For example, in *O'Donoghue v UK* a requirement that Roman Catholics obtain an immigration certificate before marrying, a condition from which those marrying in the Church of England were exempted, did not breach Article 9, but did violate Article 14 combined with Article 9.[583]

From a litigant's perspective, adopting a discrimination approach to one's claim promises to avoid the pitfalls of Article 9 doctrines such as the conduct-belief doctrine and the specific-situation rule, which still play a role in analysis of the

[582] Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77 The Modern Law Review 223, 227.
[583] *O'Donoghue v UK* (2011) 53 EHRR 1, para 110.

proportionality of restrictions on Article 9 rights. Many of the English cases testing the boundaries of religious discrimination in recent years came before domestic courts post-*Begum*, with numerous litigants formulating their claims in terms of the 2003 religious discrimination employment regulations rather than Article 9.[584] Section II of this chapter details these cases and the impact of restrictive Article 9 doctrines upon English judges' interpretations of religious discrimination concepts.

A key advantage of an equality approach is the avoidance of a focus on the public-private distinction. Instead, religion is simply one of many protected characteristics in a general non-discrimination model. As with other protected grounds, direct discrimination is prohibited and indirect discrimination must be justified. The UK legislature's application of this general model of discrimination to religion implies that judicial interpretation of the scope and standard of protection under religious discrimination legislation should follow the principles established in relation to other protected grounds. However, this approach to religious accommodation, reflected in the terms of statutes such as the Equality Act 2010 (EA 2010),[585] is contested. The question of whether religion is sufficiently like other protected grounds to be protected within a standardised non-discrimination model is undoubtedly important; the conceptual strength of equality varies considerably according to whether or not religion is viewed as an exception to this 'standard model'. The substance of such debates are dealt with in section III of this chapter.

[584] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, now incorporated into the EA 2010 sch 27.
[585] Lucy Vickers, 'Promoting Equality or Fostering Resentment - The Public Sector Equality Duty and Religion and Belief' (2011) 31 Legal Stud 135.

Section II: Religious Discrimination in English law

A. Sources of Discrimination Principles in English Law

(i) European Union law

There are a number of discrete forms of protection of religious believers in EU law. Article 10 of the Charter of Fundamental Rights of the European Union[586] contains the right to religious freedom. Article 21 prohibits discrimination on a number of grounds, including discrimination based on religion or belief. Article 10 of the Treaty on the Functioning of the European Union (TFEU) provides that 'the Union, in defining and implementing its policies and activities, shall aim to combat discrimination based on, among other things, religion or belief'. Article 19 of the Treaty provides a direct legal basis for taking action in order to combat discrimination also on the ground of religion or belief.

Secondary legislation implementing the principle of equal treatment between persons irrespective of religious belief includes Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive), which prohibits discrimination on grounds of religion and belief in the field of employment.[587] Discrimination on religious grounds outside of the field of employment is not yet covered by secondary legislation.[588] The Framework Directive provides for justification of differential

[586] The text's protection of freedom of thought, conscience, and religion closely mirrors the text of Article 9 of the Convention.
[587] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/00 (The Framework Directive).
[588] The European Commission adopted a proposal for a Directive implementing the principle of equal treatment outside of the labour market on 2 July 2008, but this proposal is still under discussion amongst the EU institutions.

treatment based on a genuine occupational requirement in limited circumstances.[589] The Framework Directive was implemented into UK law by the Employment Equality (Religion or Belief) Regulations 2003,[590] now incorporated into the EA 2010. The status of equality as a general principle of EU law also theoretically provides a basis of protection for religious believers.[591] The CJEU has also held that the right to non-discrimination on religious grounds is a fundamental right protected by Community law.[592]

(ii) Article 14 and the HRA 1998

Article 14 is sometimes described as a 'parasitic' right, since it can only be engaged where the facts of a complaint come within the ambit of a substantive Convention right. However, there is no requirement that a violation of that substantive right be established.[593] Protocol 12 attempts to expand Article 14's remit by extending the prohibition of discrimination in respect of any legal right, not just those covered by the Convention. However, although it entered into force on 1 April 2005 it has only been signed by 17 member states and not as yet by the UK. In contrast, Article 14 is part of English law as a result of the HRA and domestic legislation is to be interpreted, so far as is possible, in a manner compatible with Article 14.

[589] The Framework Directive (n 587) para 23: 'In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate'.
[590] Employment Equality (Religion or Belief) Regulations (n 584).
[591] Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, [75]. See text to n 68.
[592] Case 130/75 *Prais v Council of Ministers of the European Communities* [1976] ECR 1589.
[593] See text to n 9.

English courts are required by section 3 of the HRA 1998 to interpret discrimination law in a manner that is compatible with the ECtHR's rulings.[594] Where necessary judges may read extra wording into statutes, even if this changes the meaning of a UK statute.[595] The requirement under section 2(1) of the HRA to 'take account' of Strasbourg precedents when determining a question that has arisen in relation to a Convention right is not uncontroversial, but in most cases English courts will ensure that their judgments take account of the Convention and ECtHR jurisprudence.[596] Debates surrounding the intricacies of the relationship between English courts and the ECtHR are outside the scope of this thesis, but it is sufficient to say that English courts have in the past tended to use the judgments of the ECtHR as a ceiling as opposed to a floor, only rarely going further than the ECtHR decisions.[597] If the ECtHR has found that a wide margin of appreciation applies to a given issue, then English courts will view themselves as having unfettered discretion to interpret Convention rights beyond current interpretations of the ECtHR.[598] Thus, there is a clear basis by which the ECtHR's Article 14 jurisprudence might impact English court's interpretation of religious discrimination law.

[594] The Human Rights Act 1998 (HRA) s 3(1) states: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.
[595] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[596] The domestic courts may depart for a variety of reasons, including: where there are 'special circumstances' to justify a departure or it would compel a conclusion 'fundamentally at odds' with the UK's separation of powers (*Alconbury* [2001] UKHL 23, [2001] 2 All ER 929, [26], [76]); where the courts attach great weight to a legislative decision (*Animal Defenders International v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] 3 All ER 193, [33]); or where the courts wish to enter into 'dialogue' with the ECtHR (*R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, [11]).
[597] See the interpretation in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [20] as 'no more, but certainly no less', and as 'no less, but certainly no more' in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26, [2007] 3 All ER 685, [106] (Lord Brown).
[598] *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2008] 3 WLR 76; *R (Nicklinson) v Minister for Justice* [2014] UKSC 38, [2014] 3 WLR 200.

Unlike other provisions in the Convention, Article 14 does not contain a clause expressly setting out the grounds of justification. A violation of the Convention will be found if no objective and reasonable justification exists for a difference in treatment. Such a justification exists if the treatment pursues a legitimate aim and there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[599] The Court stated in *Belgian Linguistics Case (No 2)* that the 'existence of such justification must be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic society'.[600] Failing to treat differently, without objective and reasonable justification, 'persons whose situations are significantly different' also violates the Convention.[601] However, a difference in otherwise similar situations may function as justification for differential treatment and contracting states enjoy a margin of appreciation in assessing this issue.[602]

(iii) Domestic statutory schemes of protection

The UK's statutory scheme on discrimination is contained in the EA 2010, an amalgamation of numerous previously separate strands of equality protection. Under this scheme direct discrimination occurs where a person treats another person less favourably than they treat or would treat others.[603] The less favourable treatment must be 'because of a protected characteristic'. Indirect religious discrimination occurs where A applies or would apply a provision, criterion or practice equally (i) which puts persons of B's religion or belief at a particular disadvantage compared

[599] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10.
[600] ibid para 34.
[601] *Thlimmenos* (n 578) para 44.
[602] *Rasmussen v Denmark* (2008) 46 EHRR 29.
[603] EA 2010 s 13.

with others; (ii) which puts B at that disadvantage; and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.[604]

The EA 2010 unifies and extends the existing strands of equality protection which had previously been enacted in legislation such as the Employment Equality (Religion or Belief) Regulations 2003,[605] implementing the Framework Directive, and the Equality Act 2006 (EA 2006), extending protection to cover provision of goods and services.[606] The EA 2010 now brings these pieces of legislation together, alongside protections on a number of other non-discrimination grounds. As the 2010 Act's explanatory note states, the purpose of the legislation was to harmonise discrimination legislation and 'strengthen the law to support progress on equality'.[607] Section 10(1) defines religion as any religion, including lack of religion, with belief being similarly defined in section 10(2) as any religious or philosophical belief, including lack of belief. The explanatory notes further specify that denominations or sects within a religion may be considered a religion or belief.[608]

The Equality Act 2010 is drafted so that the terms of religious discrimination match those of other grounds such as race and sexual orientation. Similarly, the Equality Act protects religion and belief as part of a single public-sector equality duty covering seven different grounds, including the traditional grounds of race, disability and gender.[609] Arguably, the Act reflects a clear legislative signal rejecting

[604] ibid s 19.
[605] Employment Equality (Religion or Belief) Regulations (n 584).
[606] The 2006 statute covered discrimination in the provision of goods, facilities and services; in the disposal and management of premises; in education; and by public authorities.
[607] EA 2010 Explanatory Notes, [10]. The explanatory notes hold no legal meaning and tribunals are at liberty to take a different interpretation than that indicated by the notes.
[608] ibid Explanatory Notes, [51].
[609] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecclesiastical Law Journal 280.

any hierarchy between religious grounds and those of race or gender. The extension of non-discrimination grounds to include religion in the 2003 regulations was seen as a means to address the discrepancies between protection of religious manifestations which also had ethnic aspects, such as those of Sikhs and Jews,[610] and those which did not meet the *Mandla v Dowell Lee* test, most notably those of Muslims.[611]

Direct discrimination occurs where a person receives less favourable treatment because they have a protected characteristic or because of their association with a person who has a protected characteristic.[612] Direct discrimination cannot be justified; there is no defence that the discriminatory treatment was reasonable. If the claimant makes a prima facie case that unlawful discrimination has occurred then the burden of proof passes to the respondent, who can argue that the discrimination did not in fact occur.

A person indirectly discriminates against another where they apply a provision, criterion, or practice (PCP) which is discriminatory in relation to a relevant protected characteristic.[613] A PCP is discriminatory where it applies to persons other than those sharing the protected characteristic, but places persons who share that protected characteristic at a particular disadvantage when compared to others and does or would put a particular person of that characteristic at a disadvantage. If such a PCP is not a proportionate means of achieving a legitimate aim then it is in breach of the

[610] *Mandla v Dowell Lee* [1982] UKHL 7, [1983] 2 AC 548, discussed below at n 825.
[611] See *JH Walker v Hussain* [1996] ICR 291, [1996] IRLR 11; *Crown Suppliers (PSA) v Dawkins* [1993] IRLR 284 (CA).
[612] EA 2010 Explanatory Notes, [59].
[613] ibid s 19(1).

2010 Act.[614] Religious harassment and victimisation are also covered by the 2010 Act.[615]

The EA 2010 introduced a Public Sector Equality Duty including the ground of protection of religion or belief, which came into effect in April 2011.[616] Equality law in Britain had previously been critiqued as failing to secure equality because of a focus on imposing negative duties alone.[617] The duty under the 2010 Act requires a public authority in the exercise of its function to have due regard to the following: the need to eliminate discrimination, harassment, and victimisation; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between persons who share a protected characteristic and persons who do not share it.[618] In *Watkins-Singh* it was held that a school governing body that had refused to allow a Sikh girl to wear a *kara* bangle in school had breached its race equality duty under section 71 of the Race Relations Act 1976 (RRA).[619] The duty in the RRA was comparable to the current Public Sector Equality Duty under the EA 2010, requiring public authorities to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations. Whilst the procedural equality duty contained in the EA 2010 may prove to be a force for accommodation in the long-term, with academics such as Bob Hepple championing the duty as justifying the reinvention of

[614] ibid s 19(2).
[615] ibid s 27(1) and ss 26(1)(a)-(b).
[616] Such a positive duty already existed in relation to the grounds of race and sex, see the Race Relations Act 1976 (RRA) s 71 and the Sex Discrimination Act 1975, s 76(a) respectively.
[617] Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' 6 EHRLR 598.
[618] EA 2010 s 149(1).
[619] *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] ELR 561.

discrimination law towards a wider field of equality law,[620] it is still unclear how effective the duty will prove in relation to religious discrimination, with some fearing that it may be diluted into a procedural box-ticking exercise.[621] However, in relation to other grounds of the duty English courts have been clear in rejecting this presumption.[622]

It is worth noting that numerous exceptions to non-discrimination law have been granted to protect collective practice with respect to employment for the purpose of organised religion[623] or where an employer has an ethos based on religion or belief.[624] However, these exceptions are outside the scope of this thesis, since they primarily further associational rights rather than the rights of the individual religious believer.

B. Discrimination Law in Practice

(i) European Union law

On the face of it, the religious believer should be able to overcome the gaps in protection under Article 9 by reference to their right under EU law to equal treatment irrespective of religious belief. In particular, the Framework Directive appears to require that difference in treatment be justified by necessary and proportionate reasons. The Court of Justice's case law in respect of other grounds, such as gender and sexual orientation, indicates that there is strict review of the justification offered.

[620] Bob Hepple, *Equality: The New Legal Framework* (Hart 2011) 1.
[621] Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40 Industrial Law Journal 405; Vickers, 'Promoting Equality or Fostering Resentment - The Public Sector Equality Duty and Religion and Belief' (n 585).
[622] *Domb v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941, [2009] BLGR 843.
[623] EA 2010 sch 9, para 2.
[624] ibid para 3.

Such case law appears to indicate that a refusal to grant exceptions to a workplace or school policy may require strong justification before it will be allowed by the Court of Justice.

Making a referral of the application of the Framework Directive to Luxembourg in theory appears to be a fruitful basis upon which to argue a case of religious discrimination. The Framework Directive defines indirect discrimination in a broad and general way. Article 2(2)(b) states that:

> Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief … at a particular disadvantage compared to other persons unless:
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[625]

The UK Equality and Human Rights Commission submitted arguments to the ECtHR in *Eweida and others* that the restrictive interpretation of the test for manifestation of belief under the EA 2010 by domestic courts might mean that the UK's protections failed to meet the standards required by the Framework Directive.[626] The Commission noted that the Directive does not require claimants to prove that other people who share the religion have actually been put at a disadvantage by their employers' actions.[627] Equally, the application of the free-contract doctrine in relation to Article 9 by domestic courts meant that in some cases employers were not required to justify objectively the refusal of their religious employees' requests for accommodation. It was thus arguable that pre-*Eweida and*

[625] The Framework Directive (n 587).
[626] See submission in relation to Ms Eweida's and Ms Chaplin's cases: UK Equality and Human Rights Commission, 'Submission in Eweida and Chaplin v UK App nos 48420/10 and 59842/1' <www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf> accessed 11 September 2014.
[627] ibid.

others English case law failed to apply fully the Framework Directive, despite the presence of national implementing legislation. Post-*Eweida and others*, both these aspects of English case law are likely to be substantially altered and therefore the application of the Framework Directive in such circumstances would only provide supplementary rather than alternative protection to religious employees.

a. Practical barriers: making a referral to the CJEU

One initial barrier is the difficulty of securing a reference to the CJEU. Article 267 of the Treaty provides that when a question of interpretation of the Treaties or of the validity or interpretation of any acts of institutions, bodies, offices or agencies of the EU is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling. Where such questions of validity or interpretation arise before a court of final appeal Article 267 states that the domestic court or tribunal 'shall' make a preliminary reference, unless the matter is *acte clair* or *act éclairé*.[628] With regard to an issue of validity, a reference must be made to strike down a matter of EU law.[629] Most references are on interpretation as opposed to validity.

However, the domestic court will decide whether such a question is in fact raised. Convincing a court or tribunal that a preliminary reference should be made is no small hurdle. The *Azmi* case is an example of the difficulty of obtaining a preliminary reference. In *Azmi* the EAT rejected a *niqab*-wearing school support-

[628] Case 77/83 *Srl CILFIT and Lanificio di Gavardo SpA v Ministero della sanita* [1984] ECR II-1257.
[629] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR I-4199.

worker's claim of direct discrimination.[630] The tribunal was reluctant to brand the discrimination as direct, because the employee's religious manifestation impacted their capacity to perform their duties in a serious manner. Ms Azmi's employer gave evidence that when communicating with pupils it was imperative that all school staff reinforced spoken words with facial expressions. The veil would significantly reduce communication signals and in the EAT's view wearing it was simply incompatible with Ms Azmi's job requirements.[631] The school had unsuccessfully offered numerous compromises to Ms Azmi, including the use of a screen, allowing her to sit with her back to male colleagues, or the removal of students Ms Azmi was teaching to a separate classroom.[632]

In *Azmi* counsel requested before the EAT that a reference be made to the Court of Justice for a preliminary ruling on two points.[633] The first point related to the question of direct discrimination and whether the refusal to allow Ms Azmi to wear a *niqab* amounted to direct discrimination.[634] The second point on which a reference was requested related to the meaning of the phrase 'an apparently neutral PCP', specifically whether it the intention of the employer in imposing the PCP was relevant to the establishment of a PCP as 'apparently neutral'.[635] On both issues the EAT declined to make a reference. In relation to the first point it held that it was not necessary for it or the lower tribunal to make any decision on the point, nor had they done so. In relation to the second point, the EAT held that the appellant's policy was apparently neutral as a matter of fact and that this was established from the document

[630] ibid [56]-[57] (Wilkie J).
[631] ibid [64].
[632] ibid [73].
[633] *Azmi v Kirklees MBC* [2007] UKEAT 009/07, [2007] ICR 1154.
[634] ibid [78]
[635] ibid [79].

produced by the respondents.[636] The refusal appeared to relate to the fact that the tribunal did not accept that in not being allowed to wear the veil Ms Azmi had suffered disadvantage compared to other Muslims.[637] The case demonstrates the difficulties of convincing a domestic court that a question necessitating a preliminary reference is actually at issue.

b. Substantial barriers: religious freedom in EU law

There is almost no EU case law on religious discrimination. It might be argued that the CJEU case law that deals with religion reflects concern about the need to accommodate religious duties. Cases such as *Prais*, involving a candidate for an examination involved in recruiting officials to the Council of Europe, who had been unable to attend her exam due to it falling on a religious holiday, indicate a possible line of argument for religious individuals seeking concessions from their employers. Though the claim in *Prais* was unsuccessful, the CJEU indicated that, had the Council been made aware of her situation before the date of the exam had been set, then would be an expectation that the Council 'take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious faith to undergo the test'.[638] From the perspective of religious employees, this is far more permissive than the strict approach of the Strasbourg Court to enforcing the free-contract and specific-situation doctrines in its pre-*Eweida and others* case law, and comes closer to a 'reasonable accommodation' approach.[639]

[636] ibid.
[637] See Section III C.
[638] *Prais v Council of Ministers of the European Communities* (n 592) para 19.
[639] Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2010) 149. See discussion in Section III D.

However, despite the apparently stronger version of protection available in EU law, no religious individual has taken a case to the Court of Justice. Beyond the difficulties of the referral process, this is also reflective of the fact that the Framework Directive does not have direct effect, only indirect effect,[640] and the Charter can only apply when member states are acting within the sphere of EU law.[641] In addition, potential litigants may consider it unlikely that the CJEU would choose to intervene in their favour. Despite what the text of the Framework Directive may suggest,[642] the EU has on numerous occasions shown its willingness to defer to member states' competence in this complicated area. As Article 17 TFEU states, 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'.[643] Furthermore, as McCrea has argued, the jurisprudence of the ECtHR will significantly impact any decisions by the Court of Justice in this field.[644] The Court of Justice has afforded a substantial role to the jurisprudence of the Strasbourg Court in interpreting the requirements of the Union's commitment to fundamental rights.[645] McCrea contends that the ECHR provides the framework within which the Union can construct its relationship to religion because politically and legally the EU institutions and the Court of Justice have made it clear that the Convention is a key source of fundamental rights obligations within EU law and that measures in violation of such

[640] Where a directive has indirect effect individuals may rely on the directive against under individuals because national courts have a duty to interpret domestic law in line with EU law, whether or not the directive has direct effect: Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.
[641] Case C-617/10 *Aklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46, paras 19-20.
[642] ibid para 114.
[643] Introduced by 16 C of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1.
[644] McCrea, *Religion and the Public Order of the European Union* (n 639) 119-120.
[645] For example, see Article 52(2) of the Charter; Case C-109/01 *Akrich v Secretary of State for the Home Department* [2003] ECR I-9607; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 35, noting the special significance of ECtHR jurisprudence.

rights will be struck down.[646] Accordingly, McCrea predicts the privatised version of belief that the ECtHR has developed will influence the Court of Justice's interpretation of the principle of religious discrimination in EU law.[647]

Certainly, McCrea's point is borne out by the fact that the CJEU has not addressed religion before now. Since the Charter has supremacy over national constitutional law,[648] it may be that the Court of Justice is picking its battles and does not wish to wade into a politically sensitive area where it has no margin of appreciation tool to soften the application of discrimination norms.

c. Equality as a general principle

The CJEU's *Mangold* ruling implies that even where parties do not rely on the provisions of EU Directives before national courts, these courts are still obligated to respect the primacy of the general principle of equality in Community law. As Christopher McCrudden notes, this creates 'the possibility of the evolution of a body of EU non-discrimination law through direct application of the general principle'.[649] The *Mangold* decision has since been supported in a number of subsequent CJEU cases, including the Grand Chamber of the Court of Justice decision in *Kücükdeveci v Swedex GmbH*.[650] However, it is important to note that the decision only applies where a member state is acting in the sphere of EU law, such as in its

[646] McCrea, *Religion and the Public Order of the European Union* (n 639) 120.
[647] 'The constraints imposed on state choice in this area are, with a few exceptions, limited to a duty to respect religion in the private sphere', ibid 121.
[648] The Framework Directive (n 587) does not have supremacy over UK law since it is not mentioned in the European Communities Act 1972, s 3.
[649] Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (2nd edn, Oxford University Press 2009) 512.
[650] Case C-555/07 *Kücükdeveci v Swedex GmbH* [2010] ECR I-365; See also *Prais v Council of Ministers of the European Communities* (n 592).

implementation.[651] Relying on such general principles is thus a somewhat circuitous procedure. To rely on such a general principle one would first need to assert successfully before a national court that religious non-discrimination was a general principle of EU law. One would then need to demonstrate that the UK had failed to implement the Framework Directive in a manner in line with that general principle. Moreover, there is no certainty that the CJEU will choose to rely on general principles in any given case. For example, in *Bartsch*, a case involving an allegation of age discrimination during a period of time before the implementation period of the Framework Directive had expired, the CJEU considered the Directive alone and made no reference to a general principle of non-discrimination on grounds of age.[652]

In conclusion, EU law does not appear to create a clear–cut remedy in either English courts or before the CJEU, largely due to the absence of any substantive case law on this issue and the related procedural difficulties caused by this. It cannot be said with any certainty how the CJEU would react to a case coming before it by way of preliminary ruling.

(ii) Article 14

At first glance, Article 14 appears to provide a strong basis for English courts to broaden the protection afforded to religious manifestations. In addition to the prohibition of discrimination in relation to rights enshrined in the Convention, Article 14 applies to additional rights which the State has voluntarily decided to

[651] See discussion of enforcement of EU law at Section III B below.
[652] Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245.

provide, so long as they fall within the wider ambit of a Convention article.[653] Cases such as *O'Donoghue v UK*, described above,[654] *Grzelak v Poland*,[655] and *Thlimmenos v Greece*[656] demonstrate the positive potential of bringing a case under Article 14 in conjunction with Article 9. In *Grzelak v Poland* the ECtHR found a violation of Article 9 in conjunction with Article 14 in relation to the Polish system of religious education. In distinguishing the case from previous failed challenges to the Polish religious education system the Court stressed the effect of considering the claim in light of Article 14 rather than solely in terms of Article 9.[657] Though allowing for a non-religious ethics classes, pupils' grade reports revealed whether they have chosen to avoid religious education classes. Despite the facts that such education was not compulsory and that the applicant had not proven that he had suffered any prejudice because of his grade report, issues that had derailed previous cases, the Court still found a violation.[658] In the context of wider Polish culture, where the majority of citizens share the Catholic religion, being forced to reveal such information created, in the Court's view, a form of 'unwarranted stigmatisation'.[659] *Thlimmenos* involved an individual whose registration as a chartered accountant was refused because of a criminal conviction that had resulted from his religiously-motivated conscientious objection to military service. Though the claimant was successful under Article 14 read in conjunction with Article 9, the Court stressed that

[653] *EB v France* App No 43546/02 (ECtHR, 22 January 2008) para 49; *Savez Crkava v Croatia* (2012) 54 EHRR 36, para 58.
[654] See text to n 583.
[655] *Grzelak v Poland* App no 7710/02 (ECtHR, 15 June 2010)). In distinguishing the case from previous failed challenges to the Polish religious education system the Court stressed the effect of considering the claim in light of Article 14 rather than solely in terms of Article 9, para 98.
[656] *Thlimmenos* (n 578). The Court stressed that the Convention does not protect the right to choose a particular profession, implying that had the case been taken under Art 9 alone it would have been unsuccessful.
[657] *Grzelak* (n 655) para 98.
[658] ibid. The outcome of the case is markedly different from similar cases such as *CJ, JJ and EJ v Poland* (1996) 84 DR 46 and *Saniewski v Poland* [2010] ECHR 904.
[659] *Grzelak* (n 655) [99].

the Convention does not protect the right to choose a particular profession, implying that had the case been taken under Art 9 alone it would have been unsuccessful. The case also provides an example of the manner in which Article 14 can be used to establish a claim despite the absence of a substantive interference.[660]

However, in practice Article 14 has an extremely limited impact upon the interpretation of religious discrimination in English law, primarily because of the absence of any Strasbourg case law on this issue which might increase protection beyond that afforded by Article 9 or domestic discrimination law. Beyond the more extreme cases,[661] Article 14 in conjunction with Article 9 has only rarely been relied upon by the Court as a basis for a finding of religious discrimination.[662] There have been some cases where violations have been found where states have granted privileges to some religious organisations but not others and have done so without objective and reasonable justification.[663]

In some Article 14 cases identifying a relevantly similar comparator has proved a stumbling block. In *Ahmad v UK* the Court reasoned that the position of members of minority religious groups was not relevantly similar to the position of members of majority religions.[664] In that case a Muslim teacher was refused time off work to attend his mosque. The Court reasoned that the appropriate comparator was other minority religions rather than the majority religion and that accordingly there

[660] Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 182-3.
[661] See, for example, *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13.
[662] *Thlimmenos* (n 578). This case is generally viewed as criticism of a failure to treat different cases distinctly rather than as recognition of indirect discrimination in Convention case law.
[663] *Savez Crkava v Croatia* (n 653).
[664] *Ahmad v UK* (1981) 4 EHRR 126.

was equal treatment and no violation of Article 14. This approach appears to allow the favoured position of the majority to go unquestioned.

Given this context, the finding in *O'Donoghue* appears anomalous and may be somewhat misrepresentative of the general trend in ECtHR case law towards the position of religious majorities and Article 14.[665] The context of that case goes some way towards explaining the Court's approach. The House of Lords had already found, *inter alia*, that the exemption for marriages conducted in the Church of England made the requirement to obtain an immigration certificate a breach of Article 14 read together with Article 12 (the right to marry).[666] The UK government had thus conceded this point in its submissions to the Court.[667] In general, few claims under Article 14 in conjunction with Article 9 by individuals have been successful. In particular, many claims of indirect discrimination based on the Court's approach in *Thlimmenos* have failed because the Court was not satisfied that the differential treatment established lacked objective and reasonable justification.[668]

There are numerous reasons for the dearth of successful claims under Article 14 in conjunction with Article 9. Cases clearly involving discrimination on grounds of religious belief have been considered under the auspices of Article 14 in conjunction with other Convention articles, such as Article 8. In *Hoffmann v Austria*[669] the applicant was denied custody of her children on the basis that her religious beliefs as a Jehovah's Witness placed her children on the fringes of society

[665] See text to n 583.
[666] *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 287.
[667] *O'Donoghue* (n 583) para 70.
[668] *Coster v UK* (2001) 33 EHRR 20; *Chapman v UK* (2001) 33 EHRR 18; *Beard v UK* (2001) 33 EHRR 19.
[669] *Hoffmann v Austria* (1994) 17 EHRR 293.

and that the religion's beliefs about blood transfusion could endanger a child's life. The domestic court's ruling was held to be a violation of Article 8 combined with Article 14. Even if the protection of the child was a legitimate aim, the means used were not proportionate because 'a distinction based essentially on a difference in religion alone is not acceptable'.[670] Despite accepting the difference in treatment was on grounds of religion the Court did not deem it necessary to consider the claim under Article 9 in conjunction with Article 14.[671] In the absence of such consideration, the central element of the case, that is disadvantage suffered by Jehovah's Witnesses, is left unaddressed.

Another reason for the absence of successful Article 14 claims is that where claimants pursue both Article 14 and Article 9 claims the ECtHR will normally decide the issue on the basis of Article 9 alone. In several cases challenging restrictions on religious dress and religious symbols applicants have claimed breaches of Article 14 coupled with Article 9, but with little success. Many of these claims were simply ruled inadmissible as 'manifestly ill-founded', with few reasons given.[672] In one of the few substantive ruling on religious dress prior to *Eweida and others*, the Grand Chamber in *Sahin v Turkey* dismissed the applicant's Article 14 arguments in just one paragraph.[673] The applicant had claimed that she was discriminated against on the basis of her religion. The Court complained of an absence of detailed pleadings in respect of Article 14, before highlighting that 'the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation' and consequently the reasons justifying interference under

[670] ibid para 36.
[671] ibid para 38.
[672] See, for example, *Mann Singh v France* App no 4479/07 (ECtHR, 13 November 2008); *Fatima El Morsli v France* App no 15585/06 (ECtHR, 4 March 2008); *Karaduman v Turkey* (1993) 74 DR 93.
[673] *Sahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber).

Article 9 'incontestably also apply to the complaint under Art.14, taken individually or together with the aforementioned provisions'.[674] The Court's approach in these cases has been criticised as representing an 'underdeveloped, 'formal equality' type of discrimination analysis'[675] and as ignoring its own case law on indirect discrimination.[676] It was therefore no surprise when in *Eweida and other*s the Court focused on the Article 9 arguments of Ms Eweida, Ms Chaplin, and Mr McFarlane.[677] The Court followed its typical approach in concluding that the analysis of the balance struck in relation to Article 9 applied equally to any alleged violation of Article 14,[678] and in the case of Ms Eweida that, having found a violation of Article 9, there was no reason to examine her complaint under Article 14 separately.[679] However, Robert Wintemute has highlighted that there was a clear case for making a direct discrimination claim on the facts of Ms Eweida's case, since accommodation of her religious manifestation was denied whilst the symbols and dress of other faiths were permitted. This aspect of the case was never fully addressed despite the Court finding a violation.

Some religious claims coming within the ambit of Article 14 have been argued in terms of other Article 14 grounds, such as sex discrimination. The ECtHR's admissibility decision in *Dahlab v Switzerland* involved a public-school teacher who had worn a headscarf for 5 years before being asked to remove it.[680] In addition to a breach of Article 9, the applicant claimed sex discrimination, since a

[674] ibid para 165.
[675] Anastasia Vakulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 Social & Legal Studies 183, 191.
[676] Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2008) 30 Cardozo L Rev 2669, 2695.
[677] *Eweida and others* (n 580).
[678] ibid paras 101 (Ms Chaplin), 110 (Mr McFarlane).
[679] ibid para 95.
[680] *Dahlab v Switzerland* ECHR 2001-V 449.

Muslim man would not have been disadvantaged by the rule. Her complaint was dismissed because the ECtHR considered that the measure was 'not directed against her as a member of the female sex' and that the law would apply to any man who wore clothing clearly identifying him as a member of a different faith.[681] This approach has been criticised for failing to explain why the appropriate comparator should be a male of a different faith when the claim made was one of sex discrimination.[682]

The strong influence of the margin of appreciation in religious cases provides another reason for the Court to frequently decline to consider the Article 14 claims of religious applicants in any great detail. In order for an issue to arise under Article 14 there must be different treatment of persons in analogous or comparatively similar situations.[683] The Court has acknowledged that contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment.[684] Once an interference with Article 14 has been found, the margin of appreciation doctrine is again highly relevant to the question of justification, particularly to the scrutiny of an aim's proportionality. It is arguable that the role of the margin of appreciation may make Article 14 equally prone to impotency in respect of religious rights, particularly where no consensus exists upon whether a restriction amounts to a breach of Article 9. [685] In Article 14 claims the margin of appreciation is linked to whether a ground of differentiation is considered to be 'suspect' or not. A markedly different approach to justification of

[681] ibid 14.
[682] Vakulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (n 675) 189.
[683] *DH v Czech Republic* (2008) 47 EHRR 3, para 175; *Burden v UK* (2007) 44 EHRR 51, para 60.
[684] *Burden* (n 683) para 60.
[685] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008) 117.

differential treatment exists where the discrimination involves certain suspect grounds. In such cases, Strasbourg is willing to apply Article 14 to scrutinise state actions strictly.[686] These grounds include differences of treatment on grounds of race,[687] sex,[688] and nationality and ethnicity.[689] Where differential treatment relates to these grounds, the Court has required very weighty reasons to be provided by state parties in justification. For some time it was unclear whether religion was considered a suspect ground.[690] In *Eweida and others* the Court appeared unconvinced by Ms Ladele's argument that religious discrimination requires very weighty justificatory reasons.[691] Implicitly rejecting this point, the Court emphasised the special status of sexual orientation as requiring particularly serious justification.[692]

However, the subsequent case of *Vojnity v Hungary* established that differential treatment based on religion can only be justified by very weighty reasons.[693] The Court highlighted the absence of evidence that the applicant's religious convictions presented a risk or physical or psychological harm.[694] The case involved a claim of differential treatment on account of religious beliefs in the context of the removal of the applicant's access rights to his son. No reference was made to *Eweida and others* and the Court went on to find a violation of Article 14 in conjunction with Article 8, determining that no separate issues arose under Article 9

[686] Carmelo Danisi, 'How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in its Nondiscrimination Jurisprudence' (2012) 9 International Journal of Constitutional Law 793.
[687] *DH v Czech Republic* (n 683).
[688] *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471.
[689] *Timishev v Russia* (2007) 44 EHRR 37.
[690] Some viewed the ECtHR's statement in *Hoffmann v Austria* (n 669) that 'a distinction based on difference of religion alone is not acceptable' as evidence that the Court viewed religion as a suspect ground, see discussion in Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2011) 115-116. See also the joint dissent of Judges Bratza, Hirvelä, and Nicolaou in *Redfearn v UK* (2013) 57 EHRR 2, 17.
[691] *Eweida and others* (n 580) paras 71, 105.
[692] ibid para 105.
[693] *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013) para 36.
[694] ibid para 38.

taken alone or in conjunction with Article 14. However, even though religion now appears to be within the category of suspect grounds, whereby the Court should strictly scrutinise the state party's reasons offered in justification, there are already indications that the Court will not consistently follow this approach. In *SAS v France* the Grand Chamber reasoned that the 'specific negative effects' on Muslim women who wished to wear the full-face veil were objectively and reasonably justified for the same reasons that the 2010 French law's prima facie interference with Article 9 was justified.[695] No special or additional considerations were considered under the Article 14 aspect of the application and the Grand Chamber did not mention the 'weighty reasons' criterion. Despite evidence to the contrary,[696] the Court in *SAS* appeared to treat the 2010 French law banning the full-face veil as only indirectly discriminatory.[697] The Court highlighted that the ban was 'not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face'.[698] This is a rather formalistic assessment of the nature of the ban, given that the parliamentary debates preceding it give a clear picture that the reason behind the ban is to counter the various perceived threats of Islam to French society.[699]

Even where a claimant purposefully formulates their claim in terms of Article 14 alone, using Article 9 solely as a platform for engaging the Article 14 right, the

[695] *SAS* (n 581) para 161.
[696] The Islamophobic context of the debate preceding the 2010 French law was highlighted in the submissions of the interveners (ibid paras 98, 100, 104) and acknowledged by the Court (ibid para 149).
[697] Some hoped that *SAS* (n 581) would prompt the Court to apply a stronger scrutiny to religious discrimination claims: Sally Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 Yale LJ 1089; Wintemute, 'Accommodating Religious Beliefs' (n 582).
[698] *SAS* (n 581) para 151.
[699] The 2010 Gérin Report addressed veiling as an indication of the threat of political Islam and highlighted the need to dissuade the wearing of the *niqab* and *burqa* in particular: Jennifer Selby, 'Islam in France Reconfigured: Republican Islam in the 2010 Gerin Report' (2011) 31 Journal of Muslim Minority Affairs 383.

Court uses substantially similar proportionality analysis to that used under Article 9. As will be recalled, the claimants in *Eweida and others*, having failed to convince national courts of the mistakenness of such interpretations, claimed violations of Article 9 and Article 14 before the ECtHR. The details and outcome of that case will not be repeated here. However, it is important to note that the Court appeared to view the situating of Ms Ladele's claim in a religious discrimination rather than religious freedom context as having little impact on their analysis and applied broadly similar considerations to Mr McFarlane and Ms Ladele. In relation to Ms Ladele's claim the Court focused on the role of the margin of appreciation[700] and the progressive nature of the aim pursued by her employers[701] in much the same manner as when it considered Mr McFarlane's claim, though the former was explicitly formulated as a claim under Article 14 alone rather than Article 9 in conjunction with Article 14. The attempts of counsel for Ms Ladele to exclude Article 9 analysis appeared to have little impact on the Court's reasoning or the ultimate view it took of the merits of her claim.

The tendency of courts to focus upon Article 9 rather than Article 14 where religious discrimination is argued appears difficult to circumvent. Article 14 claims must be formulated within the ambit of a substantive Convention right and Article 9 is often the most relevant right with respect to claims involving religious manifestation.[702] Where Article 14 in conjunction with Article 9 is considered, the impact of doctrines governing interpretation of Article 9, alongside the wide margin

[700] ibid para 106, citing *Evans v UK* (2008) 46 EHRR 34.
[701] ibid paras 106 (*Ladele*), 109 (*McFarlane*).
[702] Some cases have been successfully brought under Article 8 taken in conjunction with Article 14 in the context on restrictions on family arising from religious discrimination: *Hoffmann v Austria* (n 669); *Vojnity v Hungary* (n 693). However, in general, most cases involving discrimination arising from religious manifestation will most appropriately be brought in conjunction with Article 9.

of appreciation the Court tends to allow in Article 9 cases, have acted so as to exclude the potential of arguments formulated under Article 14.

(iii) Domestic discrimination legislation

If the limited nature of the ECtHR's religious discrimination jurisprudence has meant that Article 14 has had little impact upon English religious discrimination case law, then the opposite is true in relation to Article 9. A major practical limitation on religious discrimination law has come from the influence of Article 9 on English courts' interpretations of religious discrimination protections. The religious discrimination route should in theory free claimants from assumptions about the limited place of religion in public life. However, in English case law these two areas have become intertwined to a significant extent.[703] For example, as Christopher McCrudden has highlighted, the Court of Appeal's judgment in *Ladele* considered issues in the indirect discrimination context that were in fact only relevant to a religious freedom context.[704] The specific-situation rule has been cited in numerous cases where religious discrimination was claimed.[705] Initial religious discrimination case law from lower tribunals was encouraging of a greater level of protection for religious claimants. However, the challenges which eventually came before the ECtHR in *Eweida and others* each stemmed from the English higher courts adopting an interpretative stance towards anti-discrimination statutory protections that not only incorporated elements of Strasbourg's early restrictive Article 9 jurisprudence,

[703] Russell Sandberg, 'The Adventures of Religious Freedom: Do Judges Understand Religion?' (2012) Cardiff University Centre for Law and Religion Working Paper 11 <http://ssrn.com/abstract=2032643> accessed 12 September 2014.
[704] Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9 International Journal of Constitutional Law 200, 20 citing *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955, [52].
[705] See discussion in Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] Public Law 488, 503-504.

but also created additional limitations, such as requiring the claimant to prove group disadvantage.[706] These developments are outlined in this section.

a) Direct discrimination

In some cases direct religious discrimination is clear-cut. In *Thompson v Luke Delaney George Stobbart Ltd* the applicant, a Jehovah's Witness, complained of her employer's refusal to allow her work at a time on Sundays that would have allowed her to attend worship.[707] The Tribunal found that she had been unfairly dismissed and discriminated against on grounds of her religious belief.[708] There were other employees available to work without any difficulty on Sundays between 12 and 4pm and therefore the Tribunal did not consider the employer's actions to be a proportionate means of achieving a legitimate aim. Accordingly, her employer's insistence that she work during those hours was an attempt to apply a PCP that would put persons of her religious belief at a particular disadvantage.[709] However, many religious discrimination cases fail to establish direct discrimination, and as Sandberg remarks 'it might be more accurate to say the plaintiff has to make a convincing case rather than merely a prima facie one'.[710] Claimants often fail to convince the tribunal that the reason for the less favourable treatment in question is their religion. For example, in *Mohamed v Virgin Trains*, an employee who wore his beard for religious reasons was repeatedly asked to trim his beard and later dismissed for lack of enthusiasm and poor performance. The employee's claim of direct

[706] On the solitary believer's practice not qualifying as a ground of disadvantage, see *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890, [15].
[707] *Thompson v Luke Delaney George Stobbart Ltd* [2011] NIFET 00007 11 FET (15 Dec 2011).
[708] Her employer was found to have discriminated on grounds of her race and gender also, ibid [24], [26].
[709] ibid [25].
[710] Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 108.

religious discrimination failed because neither the employment tribunal nor the EAT were convinced that his beard was the reason for dismissal.[711]

In *Ladele* the claimant failed to establish direct discrimination. As will be recalled, the case involved a Christian registrar who refused on grounds of conscience to officiate at civil partnership ceremonies.[712] Since she was not contractually obliged to undertake civil partnership duties, Ms Ladele argued that Islington Council's insistence that she do so, in light of their knowledge of the conflict this would cause her, and the subsequent disciplining and threats of dismissal she received constituted direct discrimination. Her claim failed. The Court of Appeal found that the Council would have treated any registrar who refused to perform civil partnerships in the same way. The focus of a direct discrimination inquiry was why the less favourable treatment occurred,[713] and for the claim to succeed the 'explanation given by the employer for the less favourable treatment must be Ms Ladele's religious beliefs'.[714] The Court of Appeal upheld the EAT's reasoning, which had stressed that it was important not to confuse the claimant's reasons for acting as she did with the employer's reasons for treating the claimant as it did.[715] Though the claimant's actions were motivated by religion or belief, the respondent's were not.

One important recent development is that cases can no longer be filtered out on the grounds that a religious belief is not widespread or obligatory, and so differences in treatment between different religious adherents will likely result in a

[711] *Mohamed v Virgin Trains* [2005] ET 220181/04; EAT (2006) WL 25224803.
[712] *Ladele* (n 704) [10].
[713] ibid [30].
[714] ibid [30], [33]
[715] *Islington LBC v Ladele* [2008] UKEAT 0453/08, [2009] ICR 387.

finding of direct discrimination. In *Eweida v BA* the applicant was denied accommodation of her Christian religious symbol, despite Jewish, Muslim and Sikh employees having previously been accommodated.[716] Ms Eweida's direct discrimination claim was denied by the Employment Tribunal, which rejected the comparison of her cross with a Sikh bangle on the grounds that the latter was 'worn as a result of a mandatory religious requirement' whilst the former was not.[717] This distinction has subsequently been rejected as contrary to Article 9,[718] and a reading of discrimination legislation in light of *Eweida and others*[719] would now recognise that such issues of mandatory obligation are irrelevant.[720]

In direct discrimination claims the question of the correct comparator is key. In *Azmi* it was argued that the correct comparator should be another Muslim woman who covered her head but not her face.[721] The Employment Tribunal rejected Ms Azmi's argument and concluded that the correct comparator should be a non-Muslim person who covered their face for whatever reason. This approach was endorsed by the EAT on appeal.[722] Because such a comparator would also have been suspended Ms Azmi's claim of direct discrimination was rejected. In contrast, in *Watkins-Singh* the High Court determined the correct comparator group to be 'pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery, which is required to show

[716] *Eweida and others* (n 580) paras 11-12.
[717] *Eweida v British Airways plc* [2008] UKET 2702689/06, [31.7]-[31.10]. The direct discrimination argument was not pursued in the EAT or Court of Appeal: *Eweida v British Airways plc* [2008] UKEAT 0123/08, [2009] IRLR 78, [6]; *Eweida v BA (CA)* (n 706) [2].
[718] *Eweida and others* (n 580).
[719] The HRA, s 3(1) provides that 'so far as it is possible to do so … subordinate legislation must be read and given effect in a way which is compatible with Convention rights'.
[720] *Mba v Mayor and Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562, [2014] 1 WLR 1501; Wintemute (n 582) 233.
[721] *Azmi v Kirklees MBC* (n 633) [52]-[55].
[722] ibid [55].

the pupil's intimate association with his or her religion or race'.[723] If this type of comparator had been accepted in *Azmi* then the application would have been compared with people whose religious beliefs were not compromised by the uniform policy. Ms Azmi was clearly disadvantaged compared with persons unaffected by the uniform policy and as such her claim of direct discrimination would have been difficult to rebut. These issues are discussed in greater detail in later sections of this chapter.[724]

b) Indirect discrimination

Indirect religious discrimination claims centre on whether there has been a relevant 'disadvantage' and whether that disadvantage is justified. The first limb of the test is not met in all cases. In *Harris v NKL Automotive*[725] the applicant, a Rastafarian, failed to show that a rule requiring employees have tidy hairstyles was a relevant PCP which had caused him disadvantage.[726] A requirement of tidy hair was not a rule against dreadlocks.[727] In *Eweida* the EAT and the Court of Appeal each interpreted the 2003 non-discrimination regulations as necessitating that, for indirect discrimination to be established, the claimant must identify other persons sharing their protected characteristic who are also disadvantaged by the PCP applied to them.[728] The Court of Appeal endorsed the EAT's statement that 'it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular

[723] *Watkins-Singh* (n 619) [46].
[724] See text to n 283.
[725] *Harris v NKL Automotive* [2007] UKEAT 0134/07/0310.
[726] ibid [25] (Elias J).
[727] ibid [19].
[728] *Eweida v BA (CA)* (n 706) [18]-[19].

provision may have a disparate adverse impact on the group'.[729] The absence of any requests from other Christian employees was evidence that supported the conclusion that the cross was not a manifestation but merely a 'personal choice'.[730] This approach is no longer reflective of the current law, given the need to read discrimination legislation in light of the ECtHR's ruling in *Eweida and others*.[731]

Indirect discrimination claims centre on the strength of the justifications offered. In *Bushra Noah v Sarah Desrosiers trading as Wedge* the claimant, whose application for a hairstylist job was rejected because she covered her hair with a headscarf, established indirect discrimination.[732] The requirement that hairstylists display their hair while working could not be justified. However, this case is a notable exception.[733] In *Azmi v Kirklees MBC* the defendants successfully argued that a Muslim teaching assistant was less able to teach language skills when her mouth was covered by her veil.[734] There was clearly a 'performance-related' reason for restricting her wearing of religious dress and her employer's provided evidence that her ability to communicate was impeded.[735] Similarly, in *Panesar v Nestle Co Ltd* a claim of discrimination was rejected where a Sikh was refused a job in a chocolate factory because he refused to shave off his beard. The necessity of requiring employees be clean-shaven was supported by expert evidence regarding hygiene.[736] In *Adewole* a Christian midwife who objected on religious grounds to wearing scrub trousers, as opposed to scrub dresses, while working in an operating

[729] *Eweida v BA (EAT)* ibid [60], endorsed by Court of Appeal in *Eweida v BA (CA)* (n 706) [24].
[730] ibid [9].
[731] *Mba* (n 720) [34] (Elias J), [39] (Vos LJ).
[732] *Bushra Noah v Sarah Desrosiers t/a Wedge* [2007] UKET 2201867/07.
[733] Sandberg (n 703).
[734] *Azmi v Kirklees MBC* (n 633).
[735] Mark Freedland and Lucy Vickers, 'Religious Expression in the Workplace in the United Kingdom Religion in the Workplace: Country Studies: United Kingdom' (2008) 30 Comp Lab L & Pol'y J 597, 614.
[736] *Panesar v Nestle Co Ltd* [1980] IRLR 60.

theatre had her claim rejected. The Tribunal found that the policy was justifiable as a proportionate means of achieving a legitimate aim, namely preventing infection in operation theatres. In *Cherfi v G4S Security Services Ltd* the tribunal found that an employer's refusal to permit a security guard to leave his place of work on Fridays to attend a mosque was justified In addition to immediate financial considerations, the continuation of an important contract was in danger if the employer was not able to provide a full team of security staff on the site at all times.[737]

A number of early discrimination cases from lower-tier tribunals reflect the potential strength of a discrimination approach. For example, asking employees to attend work on holy days was found to amount to indirect religious discrimination.[738] Similarly in *Fugler v MacMillan-London Hairstudios Ltd* a 'no Saturdays off work' rule was found to put Jews at a disadvantage and to put a Jewish claimant at a disadvantage on a particular Saturday.[739] Though the tribunal recognised as legitimate the employer's aim to make the most of Saturday trade, it ruled that the employer should have considered how or if it could rearrange Fugler's duties and customers for that Saturday.

However, the trend of such lower tribunal cases was not replicated when higher courts were given the opportunity to consider the proper interpretation of religious discrimination protections. Commenting in the context of employment claims, Matthew Gibson has noted how 'A rapidly expanding corpus of UK equality jurisprudence has seemingly diluted the protection of religion or belief interests at

[737] *Cherfi v G4S Security Services Ltd* [2011] UKEAT 0379/10.
[738] *Williams-Drabble v Pathway Care Solutions* [2004] UKET 2601718/04.
[739] *Fugler v MacMillan - London Hairstudios Limited* [2005] UKET 2205090/04.

work where individual divergence from a norm is required'.[740] The higher courts' approach tended to focus on a number of Article 9 doctrines subsequently rejected by the ECtHR in *Eweida and others* as reasons to deny prima facie interference with Article 9. In *Ladele* and *Eweida v BA* the Court of Appeal focused upon the distinction between disadvantage following from conduct motivated by religious beliefs and religious manifestations.[741] The Court of Appeal reasoned in both cases that the disadvantage followed from 'merely personal' beliefs rather than from religious belief. Lord Dyson MR reasoned that 'Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion'.[742] Sedley LJ similarly reasoned that Ms Eweida's claim was 'an entirely personal objection, neither arising from any doctrine of her faith nor interfering with her observance of it, and never raised by any other employee'.[743] However, these approaches to Article 9 have been rejected in *Eweida and others*.

In *Eweida v BA* the claimant failed in her indirect discrimination claim because she was not deemed to have been subject to a provision which disadvantaged an identifiable group. As she was the only employee who had complained, there was no evidence of other persons placed at a disadvantage.[744] Lower courts went on to apply this reasoning in other claims of indirect discrimination such that individual believers in any given workplace appeared to be prevented from claiming indirect religious discrimination.[745] The exclusion of hypothetical comparators has been criticised as an unnecessarily narrow reading of

[740] Matthew Gibson, 'The God "Dilution"? Religion, Discrimination And The Case For Reasonable Accommodation' (2013) 72 The Cambridge Law Journal 578, 587.
[741] *Arrowsmith v UK* (1981) 3 EHRR 218.
[742] *Ladele* (n 704) [52].
[743] *Eweida v BA* (n 706) [34].
[744] ibid [28].
[745] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] UKET 1702886/09, [28].

the statute.[746] More generally, such decisions have been criticised for undervaluing the importance of individual religious convictions.[747] The ECtHR's insistence in *Eweida and others* that the nexus between practice and belief not be limited to those acts mandated by religious doctrine now appears to require that justification be provided for indirect religious discrimination in cases involving solitary believers. Commenting on the impact of *Eweida and others* Elias LJ recently noted that a Convention-compliant reading of discrimination protections means that 'it does not matter whether the claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion'.[748]

Such restrictive approaches had meant that, generally, an employer was rarely required to show other means of accommodation had been considered. As Vickers has noted, where it was possible to identify alternative accommodations, the courts often took the view that 'the employer is under no obligation to offer the employee the least disadvantageous accommodation available'.[749] Since *Eweida and others* establishes that some reasons are too weak to justify interference with an employee's rights, there is now a greater likelihood that discrimination claims will succeed where non-accommodation lacks a legitimate explanation. However, where accommodation would impede the service provided, such refusals will likely be found to be justified.[750]

[746] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 609) 288-289.
[747] Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How not to Define Indirect Discrimination' (2011) 74 The Modern Law Review 287, 292.
[748] *Mba* (n 720) [35].
[749] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 609) 288.
[750] *Cherfi v G4S Security Services Ltd* (n 737); *Azmi v Kirklees MBC* (n 633).

The impact of *Eweida and others* on domestic discrimination legislation is reflected in the majority's reasoning in *Mba v London Borough of Merton*, a case involving a challenge to an employer's requirement that all employees work on Sundays.[751] Despite Ms Mba's contract including a requirement to work on Sundays, her employer had initially accommodated her Sabbatarian beliefs. However, after 2 years her employer changed its position, in part because of the effect on other workers required to work on Sundays more frequently. As noted above, the Court of Appeal found that it was necessary to read the concept of indirect discrimination in accordance with Article 9 so that the need to establish group disadvantage was excluded.[752] Similarly, the fact that the applicant's beliefs were not widely shared or did not constitute core beliefs of any particular religion could not then weaken her case.[753] However, the Court of Appeal found no grounds for criticism of the Employment Tribunal's ultimate finding that no viable and practicable alternatives to the Sunday work rule were available, given issues of costs, quality, and efficiency of service delivery.[754]

The interpretation of religious discrimination in England has undoubtedly been significantly impacted by the ECtHR's judgment in *Eweida and others*. The need to be Convention-compliant has certainly strengthened the protection available from statutory protection from religious discrimination. However, English courts may still be hesitant to abandon tests centred on free-contract and the availability of alternative options. Though, post-*Eweida and others* such factors no longer exclude a prima facie finding of direct or indirect discrimination, they will likely continue to

[751] *Mba* (n 720).
[752] ibid [35] (Elias LJ), [41] (Vos LJ).
[753] ibid.
[754] ibid [7], [37] (Elias J), [38] (Vos LJ).

play a role in considering indirect discrimination claims by religious persons. The free-contract doctrine was explicitly mentioned in *Eweida and others* as a factor that could be appropriately considered at the justification stage of analysis.[755] Restrictive interpretations of comparators will likely continue to feature as a means for courts to reclassify difficult claims, such as that of Ms Azmi, the *niqab* wearing language-support teacher, as indirect rather than direct discrimination. Otherwise courts might find themselves cornered into accepting unpalatable practical results – whereby a finding of direct discrimination excludes otherwise acceptable justifications from consideration[756] – or into admitting to a hierarchy within discrimination grounds. This would all threaten to qualify the otherwise absolute principle that direct discrimination cannot be justified.[757] With most cases being classified as indirect discrimination, the religious litigant will still need to explain the harm and reasonableness of their request for accommodation or exemption in terms that adhere to the confines of 'public reason'. The larger question is the reasons underlying the restrictive approach taken by courts towards the 'equalising upwards' approach of the drafters of domestic equality legislation. The 'dilution'[758] of statutory protection may reflect underlying concerns about some of the potential consequences of a 'strong' concept of religious discrimination. These issues form part of the discussion in the ensuing section, the focus of which will be to consider whether the religious discrimination ought to in fact provide more expansive protection to religious persons.

[755] *Eweida and others* (n 580) para 83.
[756] *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.
[757] This would have particular ramifications in terms of pregnancy discrimination.
[758] Gibson, 'The God "Dilution"? Religion, Discrimination And The Case For Reasonable Accommodation' (n 740).

In conclusion, the jurisprudence on religious discrimination law before the CJEU, the ECtHR, and English courts is discouraging of any aspiration that religious discrimination law can plug the gaps in protection identified in Chapter 1.

Section III: Analysing Religious Discrimination

A. The Problematic Boundaries of Equality-Centred Models

One repercussion of a focus on equality is the need to address the special status granted to religious as opposed to non-religious claims of conscience. If we adopt an equality rationale for the differential treatment of religious individuals then this rationale seems to lead inexorably to the recognition that equality requires differential treatment of individuals or groups according to their ethical or cultural outlooks. In turn, it then becomes necessary to justify the delineation between religious and non-religious claims of conscience in a way that goes beyond simply citing the fact of the former category's established legal protection. Numerous authors have contended that the inequality between religious and non-religious views in constitutional and human rights law is morally indefensible.[759] Some have sought to defend the traditional position towards non-religious exemptions by arguing that the demands of religious conscience might be 'ontologically superior' to 'personal conclusions about right and wrong'.[760] This type of justification has in turn been

[759] Ronald Dworkin, *Religion without God* (Harvard University Press 2013); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011); Brian Leiter, *Why Tolerate Religion?* (Princeton University Press 2013); Christopher L Eisgruber and Lawrence G Sager, *Religious Freedom and the Constitution* (Harvard University Press 2010).
[760] Michael McConnell, 'Why Protect Religious Freedom?' (2013) 123 Yale LJ 770.

subject to robust criticism and prompted calls for the law to provide similar treatment for comparable secular ethical, moral, and philosophical views.[761]

The detail of debates about whether such differential treatment can be justified on moral or legal grounds is beyond the scope of this chapter. However, this section highlights how English courts strengthening their approach to non-discrimination on grounds of religion or belief could raise a host of particularly difficult issues. The absolute nature of discrimination law, allowing no justification for direct discrimination, again raises difficulties, especially where the philosophical beliefs in question are intolerant or potentially harmful. In terms of indirect discrimination, where religion is concerned it is generally accepted that judges' determination about the legitimacy and proportionality of refusing particular exemptions or accommodations should not include judging the content of belief. However where philosophical beliefs are concerned, there are growing questions about the appropriateness of this agnostic approach in the context of political viewpoints that are discriminatory or intolerant. The first part of this section discusses some of the general conceptual difficulties in determining which claims of conscience are deserving of special protection. The second part outlines the current protection of philosophical belief in English law, before considering some of the particular difficulties apparent in English case law on protection from non-discrimination on grounds of religion or belief.

[761] Micah Schwartzman, 'What if Religion Isn't Special?' (2013) 79 University of Chicago Law Review 2012.

(i) The potential for 'equalizing upwards'

There are obvious examples of how accommodating claims for religious exemption can be non-egalitarian: An employer must give credence to a religious reason for refusing to work on Saturdays when no such requirement exists in respect of employees who wish to pursue political causes or to spend time with their families then. The key issue is how a more egalitarian stance can be adopted that is both practically and conceptually feasible; there must be limits and clear distinctions about who may claim exemptions or a right of accommodation on the basis of their conscientious views and in what circumstances these claims should be supported.

Lawrence Sager and Christopher Eisgruber have argued that exemptions can be demanded by the ideal of equality.[762] Whilst they believe that 'common sense, compassion and political accountability'[763] guarantee accommodation of mainstream groups, they advocate that government treat minority faiths with the same generosity demonstrated towards secular concerns. Thus, they contend that if police officers may be permitted to wear beards on medical grounds then Muslim police officers must equally be given such permission on religious grounds.[764] This form of approach might be criticised as somewhat missing the point. Religious individuals are accommodated or exempted because the State is concerned about their freedom of conscience; the fact that a rule already has exemptions for non-secular reasons is indicative that absolute conformity is not strictly required, but the absence of pre-existing non-religious exemptions should not automatically justify refusal as a corollary. Equally, the same argument applies to making the accommodation of

[762] Eisgruber and Sager, *Religious Freedom and the Constitution* (n 759).
[763] ibid 280.
[764] ibid 90. They also refer to pacifist's conscientious objection to military service as an example of where accommodation should be required on equality grounds, 115.

particular characteristics, such as facial hair or religious dress, contingent on their being pre-existing accommodation for non-religious reasons. Sager and Eisgruber considers the example of a mother whose deep commitment to her children prevents her from accepting Saturday work.[765] They conclude that in refusing such a mother unemployment benefit the State is merely making a judgment about childcare needs and not showing 'hostility or neglect towards religion or irreligion'.[766] Sager and Eisgruber's model requires that analogous secular commitments must be categorical, akin to inflexible religious obligations, and somehow comprehensive. At times they refer to a need for the secular commitment to bear 'a relation to religion'.[767] However, as Laborde has argued, this fails to address the core issue of whether a mother's commitment to her children is sufficiently similar to religion to ground a claim for religion.[768]

Some approaches try to justify the need for states to exempt religious citizens from otherwise general and neutral laws by generalising the potential for exemptions from such rules and including the kinds of exemptions necessitated by comparable claims of conscience. Charles Taylor and Jocelyn Maclure widen the definition of the sorts of experiences a freedom of conscience model should protect to include all 'meaning-giving commitments', protecting them on the same basis as religious commitment.[769] This wider understanding is supported by their contention that the aims of secularism are equal respect for citizens and the protection of freedom of

[765] ibid 115.
[766] ibid 116.
[767] Eisgruber and Sager, *Religious Freedom and the Constitution* (n 759) 118.
[768] Cécile Laborde, 'Equal Liberty, Non-Establishment and Religious Freedom' (2014) 20 Legal Theory 52, 18.
[769] Maclure and Taylor, *Secularism and Freedom of Conscience* (n 759) 11-13.

conscience.[770] They claim that freedom of religion relies on a moralized distinction between valuable and non-valuable activities, so that only some activities are protected whilst others are ignored. Similarly, Ronald Dworkin contended that traditional theistic beliefs are just one sub-set of morally respectable beliefs.[771] Dworkin argued that, for example, atheistic views on what is and is not of value in human life are as equally comprehensive as theistic religions' ideas on such subjects.[772] In his view 'religion is deeper than God' and the essence of religion is constituted by two elements: faith in the full independence and objectivity of values, and faith in the objective beauty of nature. Accordingly, he argued that, in respect of ethical views of how to live life with dignity and self-respect, liberals have as strong a claim to freedom of religion as conservatives. Thus, the right to have an abortion, or for homosexuals to marry, can be defended in terms of freedom of religion. Cecile Laborde characterises these approaches as 'egalitarian theories of religious freedom', viewing them as characterised by three claims: that religion is a sub-set of morally respectable beliefs and practices; that traditional believers have no *a priori* right to exemption from general laws; and that the State must guarantee equal status for all citizens.[773]

The problem with this wide conceptualisation of conscience is that it leaves open the question of how to identify the actions that should be protected. Since the limits of protection cannot be defined by any concept of 'religion' or 'comprehensive' value structures, to provide some limit on their model Taylor and Maclure must engage in the kind of perfectionist evaluations that liberal thinkers

[770] ibid 20.
[771] Dworkin, *Religion without God* (n 759). See also Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 376.
[772] ibid ch 1.
[773] Laborde, 'Equal Liberty, Non-Establishment and Religious Freedom' (n 768).

generally avoid, most often by valuing religious freedom as an aspect of valuing an individual's autonomous life choices. Taylor and Maclure's distinction between 'trivial' and 'core' commitments is precisely the type of judgment that courts have traditionally avoided, facing substantial criticism on the rare occasions where they have broached such inquiries, such as in *Ghai*.[774] However, whilst some agree that it is not possible to avoid such distinctions in evaluating acts inspired by different conceptions of the good,[775] questions about the competence or willingness of judges to engage in these kinds of adjudication remain. Maclure and Taylor respond to these concerns by arguing that only the individual can make these distinctions, not the court;[776] as such they adopt a subjective conception, emphasizing sincerity of belief.[777] However, adopting a subjective definition on this issue again broadens the category of protected acts to an impossibly wide level.

The workability of such a wide conception is doubtful. Religious accommodation cases must also do justice to the non-religious party; simply allowing the religious applicant to determine the significance of their preferred practice creates a one-sided equation which courts would be unwilling to enforce. This model has also been criticized from the other end of the spectrum as being insufficently inclusive. Cécile Laborde argues that it fails to protect rituals which, though 'connected to believers' sense of their moral integrity', cannot be perceived as duties. Taylor and Maclure's model could leave unprotected practices such as the

[774] *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] WLR (D) 151; Peter Cumper and Tom Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (2011) 22 King's Law Journal 131.
[775] Cécile Laborde, 'Protecting freedom of religion in the secular age' The Immanent Frame. http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/ (accessed May 22, 2012).
[776] Maclure and Taylor (n 759) 82-84.
[777] See *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.

wearing of a crucifix or other religious symbol, which although not a mandatory requirement or part of Christian doctrine, still contribute to a believer's sense of connection with their God and inform their interactions with secular society. Laborde argues that Taylor and Maclure's interpretation encourages dogmatic and fundamental ideas of religion, or at least those who present their religion as such, whilst failing to protect 'the cultural, habitual, embodied, and collective dimensions of religion'.[778] Such criticisms are difficult to rebut and the 'equality between all claims of conscience' model, though conceptually appealing, appears largely unworkable in practice.

(ii) Protection of philosophical beliefs

To a certain extent Convention and domestic non-discrimination protections already include philosophical beliefs within their scope. In Convention case law the category of philosophical belief has been held to include such beliefs as pacifism[779] and vegetarianism.[780] However, courts tend to attribute a basic value to religious claims that is not consistently available to non-religious claims of conscience. Non-religious claims of conscience are required to be shown to be sincere and the failure of philosophical beliefs to adhere to a principle of dignity can act to disqualify that belief from protection at a prima facie level.[781] The English Employment Equality (Religion or Belief) Regulations 2003 were amended in 2007 so that 'belief' was no longer defined as a 'similar philosophical belief' to religious belief, but instead included 'any religious or philosophical belief'.[782] Prior to the amendment claims

[778] Laborde (n 775).
[779] *Arrowsmith* (n 741).
[780] *H v UK* (1992) 16 EHRR CD 44; *Jakobski v Poland* (2012) 55 EHRR 8.
[781] *Campbell and Cosans v UK* (1982) 4 EHRR 293.
[782] Equality Act 2006, s 44(b).

involving beliefs such as support for the British National Party had been rejected.[783] *Grainger plc v Nicholson*[784] sets out the criteria required for a philosophical belief to be protected and these criteria are now reflected in the explanatory notes to section 10 of the EA 2010.[785] A belief must: be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available;[786] relate to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society;[787] and not be incompatible with human dignity or in conflict with the fundamental rights of others.[788] The EAT accepted Mr Nicholson's claims that he had 'a strongly held philosophical belief about climate change and the environment', finding that this gave rise to the sort of moral order derived from most religions. They found his views were distinguishable from mere opinion because they affected the way he led his life.[789] A protected belief must be 'consistent with basic standards of human dignity or integrity',[790] which would seem to exclude racist or homophobic beliefs.[791] These requirements are not uncontroversial. In the House of Lord's judgment in *Williamson* Lord Walker questioned the capacity of courts to weigh the cogency, seriousness, and coherence of theological doctrines. He further criticised as begging too many questions the requirement that 'an opinion should "be worthy of

[783] *Baggs v Fudge* (2005) UKET/1400114/05; *Finnon v Asda Stores Ltd* (2005) UKET/2402144/05.
[784] *Grainger plc v Nicholson* [2009] UKEAT 0219/09, [2010] IRLR 4.
[785] EA 2010 Explanatory Notes [52]; *Grainger* ibid [24] (Burton J).
[786] Drawing on *McClintock v Department of Constitutional Affairs* [2007] UKEAT 0223/07, [2008] IRLR 29 [24].
[787] See test set out in ibid [41], drawing on *Campbell and Cosans* (n 781).
[788] See *Cosans* ibid para 36 and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [23].
[789] As had been found in *McClintock* in respect of a view relating to adoption by same-sex couples (n 786) [45].
[790] *Williamson (HL)* (n 788) [23] (Lord Nicholls)
[791] *Grainger* (n 784) [28]; *Vejdeland v Sweden* (2014) 58 EHRR 15, paras 53-59.

respect in a democratic society"', stating that 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'.[792]

The definition of philosophical belief has become especially problematic in the context of the beliefs of supporters of extremist political organisations. The recent ECtHR case of *Redfearn v UK*, involving a bus driver dismissed after being elected as a councillor for the British National Party, highlights this difficult.[793] The appellant worked mainly with disabled persons of Asian origin and following his election was summarily dismissed after 7 months employment. He was unable to avail of unfair dismissals legislation because he had been employed for less than 12 months and so instead issued proceedings under the RRA for race discrimination. Following unsuccessful domestic proceedings,[794] the appellant succeeded before the ECtHR on the grounds of freedom of association. The Court held that dismissal for exercising one's Article 11 rights 'struck at the "very substance" of that right'[795] and that the UK government had a positive obligation under Article 11 to enact legislation that would protect the right.[796] Crucially, it noted that this could be done through the alteration of unfair dismissals legislation or 'through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation'.[797]

The Government implemented the *Redfearn* judgment through alteration of the unfair dismissals procedure rather than adjusting English discrimination law.[798] The

[792] *Williamson (HL)* (n 788) [60].
[793] *Redfearn v UK* (n 690).
[794] *Serco Ltd v Redfearn* [2006] EWCA Civ 659; [2006] IRLR 623.
[795] *Redfearn v UK* (n 690) para 47.
[796] ibid para 57.
[797] ibid.
[798] Karen Monaghan, *Monaghan on Equality Law* (Oxford University Press 2013) 227.

former allows for a 'fairness' assessment,[799] whilst the direct discrimination provisions under the EA 2010 allow no opportunity for assessing the reasonableness of adverse treatment.[800] If the Government had failed to alter the unfair dismissals legislation to allow claims within the first 12 months of employment it was feared that this could lead to a situation where employers would not be able to respond to concerns about employees' extreme political views without coming within the terms of direct discrimination legislation.

The possibility of altering unfair dismissals law short-circuited a repeat of the arguments mooted at the time of the *JFS* judgment[801] regarding the possibility of legal justification of direct discrimination or some distinction between 'discrimination which is invidious and discrimination which is benign'.[802] Both Lord Phillips P[803] and Lady Hale[804] have spoken of how a general defence of justification in discrimination law would be preferable to looking for technical distinctions which would mean no direct discrimination arose. Lady Hale further argued that the approach of the Convention to discrimination under Article 14 was a preferable model than that adopted under EU mandated anti-discrimination laws because it allowed for competing rights to be balanced against each other. However, academics and practitioners alike warned of the devastating effect of eroding the strength of direct discrimination provisions in areas such as pregnancy discrimination, fearing that allowing justification for discrimination on grounds of pregnancy would open

[799] Employment Rights Act 1996, s 98.
[800] EA 2010, s 13.
[801] *JFS* (n 756).
[802] ibid [94] (Lord Hope DP), [69] (Lady Hale).
[803] ibid [9] (Lord Philips P).
[804] Lady Hale, 'The Conflict of Equalities' (Alison Weatherfield Memorial Lecture at the Employment Lawyers Association, 10 July 2013) <http://www.supremecourt.gov.uk/docs/speech-130710.pdf> accessed 20 January 2014.

the door to introduction of evidence of the range or extent of financial impact on employers. For the purposes of responding to the *Redfearn* judgment, altering unfair dismissal procedures has met the concerns of the ECtHR that 'domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail',[805] whilst allowing courts and tribunals to take into account where necessary the particular nature of the beliefs. However, the question of how to respond to a future direct discrimination case involving such beliefs remains unclear.

Moreover, it is unclear whether it is appropriate for courts to be taking the nature and contents of philosophical beliefs into account. In indirect discrimination claims justification of refusal to accommodate or grant exemptions may rely on the nature of a philosophical belief. The traditional approach where religion is concerned is to treat all religions with equal respect, providing they are genuinely held and meet a certain threshold of seriousness and coherence.[806] Courts will also not inquire into the correctness or otherwise of that belief.[807] Thus, the House of Lords did not ask whether a Christian sect was correct in believing that the Bible requires parent to beat their children.[808] Equally, it did not question the belief that the Islamic instruction to dress modestly required a girl to wear a *jilbab*.[809] Moreover, it is unclear whether the *Nicholson* criteria are in line with the protection required by

[805] *Redfearn v UK* (n) para 56.
[806] Mummery LJ described this principle in *Shergill v Khaira* [2012] EWCA Civ 983, [2012] WLR(D) 214, [19], as meaning that courts would 'abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief and on the correctness or accuracy of religious practice, custom or tradition'.
[807] The ECtHR has stated on numerous occasions that 'the freedom of religion … excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate', *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46, para 92.
[808] *Williamson (HL)* (n 788).
[809] *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

Article 9. Though the criteria originated in ECtHR case law, that case law related to the right of parents under Article 2 of Protocol No 1 to ensure that their children's education is in conformity with their religious and philosophical convictions.[810] Aileen McColgan has argued that that the criteria never applied to Article 9 and were misapplied by English courts.[811] In *Eweida and others* the ECtHR referred to some minimal level of 'cogency, seriousness, cohesion and importance',[812] but there was no mention of a requirement that a belief be 'worthy of respect in democratic society' or 'not incompatible with human dignity'. English courts may yet need to address whether these criteria inappropriately filter out beliefs which ought to benefit from Article 9's protection.[813]

B. Hierarchies and Religious Discrimination

Some academics and judges have highlighted a number of ways in which religious discrimination is distinct from and more problematic than other discrimination grounds in offering conceptual and practical reasons why a hierarchy of discrimination grounds should be instituted. The view that the conceptually distinct nature of religious discrimination requires that it be treated differently from other grounds has featured in both academic and judicial commentary. The identity-choice distinction is often a key element of these proposals. A unique factor in religious discrimination cases is that the concept covers both situations where adherence to religion is a mark of group identity and also those where it is a matter of personal

[810] *Campbell and Cosans* (n 781).
[811] Aileen McColgan, 'Religious Difference and Discrimination' (From Theory to Practice: Religion and Discrimination in a Changing World Conference, University College London, 8 November 2012).
[812] *Eweida and others* (n 580) para 81.
[813] Pearson has argued that no restriction greater than that applied under Article 17 should apply since this would put Article 9 under greater scrutiny than other rights, Megan Pearson, 'Article 9 at a Crossroads: Interference before and after Eweida' (2013) 13 HRLR 580, 602.

belief or conscience. The distinction is important because disadvantage as a consequence of an individual's immutable characteristics is generally seen as more serious than disadvantage because of an individual's choices. Characteristics that are incapable of being changed are often viewed as more fundamental to a person's identity and dignity.[814] It might be said that it is reasonable to hold people responsible for the consequences of the religious beliefs they hold because they are chosen, whereas it would be not be reasonable to hold people responsible for characteristics which are not chosen, such as race and gender. Such factors to some extent play a role in judicial decisions. The ECtHR has indicated that differences of treatment which are based on immutable characteristics will as a general rule require weightier reasons in justification than differences of treatment based on a characteristic or status which contains an element of choice.[815] In *Bah v UK* the Court held that the fact that refugee status could not be considered personal 'in the sense of being immutable or innate to the person'[816] weighed heavily in relation to the determination of the scope of the margin of appreciation.[817]

Numerous academics have justified introducing hierarchies of discrimination grounds by reference to such distinctions between choice and circumstance.[818] Many argue that protection of religious discrimination should differ from other grounds of discrimination because it relates to choice rather then identity.[819] However, where religious belief in general, or any particular religion, lies on the choice-identity scale

[814] *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31, [2011] 1 AC 596, [11] (Lord Hope).
[815] *Bah v UK* (2012) 54 EHRR 21.
[816] ibid para 45.
[817] ibid para 47.
[818] Dagmar Schiek, 'A new framework on equal treatment of persons in EC law?' (2002) 8 European Law Journal 290.
[819] Anthony Lester and Paola Uccellari, 'Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution' [2008] EHRLR 567.

is inherently contestable. At times, some commentators have emphasised the chosen nature of religious beliefs in order to emphasise their considered and deliberate nature, as opposed to being mere accidents of birth or history.[820] In contrast, others have highlighted the phenomenon of religion as identity in order to stress the need for accommodation of religious manifestations.[821] Tariq Modood has highlighted the role of community and family in shaping beliefs.[822] However, Peter Jones has argued that religious people do not present their beliefs as mere circumstance, but as convictions to which they are positively committed, and, accordingly, they should be take responsibility for what they believe.[823]

Where English courts stand on this matter is unclear. In the English Court of Appeal's decision in *Eweida v BA* Sedley LJ distinguished race and sexual orientation discrimination from religious discrimination based on the view that the former related to unchangeable personal characteristics unlike religion which he viewed to be a matter of choice.[824] However, in *Mandla v Dowell Lee* the House of Lords rejected an argument that a Sikh schoolboy could comply with a school requirement to cut his hair short and it was simply his choice not to do so.[825] The Lords reasoned that in practice the boy could not comply because it conflicted with an important cultural/religious requirement.[826] This reasoning reflects some of the problem of determining religious conviction as a question of choice. First, the concept of religious believers making an active, mature choice to believe is not

[820] Roger Trigg, *Equality, Freedom, and Religion* (Oxford University Press 2012) 41.
[821] Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law' (2003) 16 Harvard Human Rights Journal 189.
[822] Tariq Modood, *Multiculturalism: A Civic Idea* (Polity 2007) 70.
[823] Peter Jones, 'Accommodating Religion and Shifting Burdens' [2014] Criminal Law, Philosophy 1.
[824] *Eweida v BA (CA)* (n 706) [40].
[825] *Mandla* (n 610).
[826] ibid [6].

shared by all religious belief systems.[827] Religion as identity might be seen as having much in common with race discrimination. Second, though choice may still exist, such choice is exercised within a particularly limited sphere of autonomy;[828] the individual may technically have the freedom not to follow their religion, but the consequences of doing so may be severe, both practically, in terms of isolation from family and community, and psychologically, in terms of worry about the spiritual import of such a failure. It is clear the question of how various religious commitments relate to choice is not one which can be easily resolved, and each example likely turns on its own facts.

The argument may also be made that, regardless of how religion figures in the identity-choice distinction, it remains the case that many religious discrimination claims arise from facts quite different from that which discrimination law typically targets and for this reason religion should be distinguished from other discrimination grounds. Differentiation on the basis of religious manifestation may on some occasions act as a proxy for racial discrimination or stereotyping on the basis of ethnicity or nationality. In other instances, however, religion is at issue because that characteristic causes the individual in question to act in a manner different from other persons and it is that differential action rather than the characteristic itself that is the cause of disadvantage. In the workplace context, for example, it can be said that some protected grounds covered by non-discrimination legislation involve characteristics truly irrelevant to job performance. Manifestation of religious belief may, on the other hand, actually affect the manner in which a person acts. This may

[827] Apostasy remains part of some interpretations of Islam, Michael Kirby, 'Fundamental Human Rights and Religious Apostasy-The Malaysian Case of Lina Joy' (2008) 17 Griffith L Rev 151.
[828] See Michael Sandel on the 'encumbered' nature of the religious individual, Michael Sandel, 'Religious liberty - freedom of conscience or freedom of choice' [1989] Utah L Rev 597.

be because, for example, a worker's availability is limited during certain periods of time or because there are certain duties or job roles that they find themselves unable to perform.

A prominent objection to a strong religious discrimination model is that in a significant subset of cases what many religious individuals claim is not equal treatment, but *special* treatment. This special treatment can create a burden on employers or co-workers or other service providers, such as schools.[829] Brian Barry has argued that such legal exemptions are not required by equality or distributive justice.[830] He contends that any given law will prove more burdensome on some than others and exemptions should not be granted for religious reasons when no exemptions are granted for other sorts of reasons. Some have argued that religious belief is due special protection because religious believers are peculiarly vulnerable to discrimination.[831] This likely proves correct where direct discrimination claims are concerned. Where what is sought is exemption from a general rule, as in *Ladele* or *Mba* intent to discriminate is not at issue. In such cases other reasons for special protection must be provided. To a certain extent all grounds of discrimination suffer from this dilemma and in the end the simple answer is that society, in passing laws, has determined what forms of reasons for disadvantage are acceptable and unacceptable.

On a more principled level, it might be argued in response to Barry that the psychological harm, in the sense of harm to their autonomy, well-being, and

[829] See discussion of 'burden-shifting' in Leiter, *Why Tolerate Religion?* (n 759) 99.
[830] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001) 32-50.
[831] Eisgruber and Sager, *Religious Freedom and the Constitution* (n 759) 59.

identity,[832] caused by requiring a religious person to contravene their beliefs provides a reason for exemption. Special treatment in this sense is just the alleviation of a particular form of harm to a particular category of persons, and reasons of justice if not substantive equality would require that the State act to curb harm to its citizens where it can do so at little or at an acceptable cost. Many religious exemptions, such as allowing people to wear religious dress, can be granted at little burden to the State or others.[833] Refusing exemptions that alleviate disadvantage at little or no cost simply for reasons of favouring a strictly formal equality would thus seem irrational. Where there are contravening harms then the same questions of the proportionality of legitimate means to an end that arise in relation to other grounds of discrimination apply. On conceptual grounds at least, no inherent case for a hierarchy appears to then arise.

From a practical standpoint there is also the concern that protecting religious discrimination on an equal footing with other grounds might dilute the level of protection available for other protected characteristics by undermining common discrimination concepts. Aileen McColgan argues that it is 'a mistake to protect religion and/or belief in like manner to grounds such as sex, race, sexual orientation and disability' because of the risk of diluting the standard model of equality protection in order to balance the types of conflicts that uniquely arise in relation to

[832] Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005) 57-64 (referring to autonomy); Bhikhu Parekh, *A new politics of identity: political principles for an interdependent world* (Palgrave Macmillan 2008) 13 (highlighting impact upon self-worth); and Charles Taylor, 'The Politics of Recognition' in Charles Taylor and Amy Gutmann (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 28-30 (referring to damaging one's 'authenticity').

[833] Leiter identifies the right to wear certain religious dress as an example of an exemption that does not shift burdens, Leiter (n 759) 100.

religion.[834] She also warns how applying equality principles may lead to undesirable outcomes such as protecting religious practices that perpetuate discrimination, particularly against homosexuals and women. The judgment in *Azmi v Kirklees Metropolitan Council* illustrates the fear that difficult issues surrounding religious discrimination might end up further confusing the distinction between direct and indirect discrimination.[835] The key question in *Azmi* is not whether Kirklees Council's actions were justified, but rather whether the question of justification should be relevant at all – were the facts of the case actually direct rather than indirect discrimination? The court in *Azmi* chose to push the distinction between indirect and direct discrimination rather than openly address these problems, but such an approach is hardly sustainable in the long term.

It is unsurprising then that some academics see any broadening of religious discrimination protection as a negative development. The calls for a hierarchy of religious discrimination grounds are likely to re-emerge as litigants seek to rely on the EA 2010 read in light of *Eweida and others*.[836] There appears to be significant apprehension that, by not recognising a hierarchy of grounds, there is a danger that courts may end up both diluting the absolute nature of direct discrimination in cases where it is not possible to rebrand direct discrimination as indirect discrimination, or undermining pregnancy and gender discrimination principles by including economic impact as reason to justify indirect discrimination.

[834] Aileen McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1.
[835] *Azmi v Kirklees MBC* (n 633).
[836] See *Mba* (n 720).

However, establishing a system of hierarchies between grounds may create obstacles in cases of intersectional discrimination.[837] A system focused on single-ground non-discrimination can deprive persons of the possibility of seeking justice. Hierarchies may also cause claimants to reclassify claims of religion as falling within other grounds. As the discussion above details, the Convention system and EU system appear to consider some grounds of discrimination intrinsically more morally problematic than others. Under the Convention discrimination on such grounds faces a higher threshold of justification, whilst the EU provides for particular positive measures and less exceptions from the non-discrimination principle in relation to grounds such as race and sex. These hierarchies may impact upon how claimants formulate their claims. For example, a claim of discrimination by a Jewish or Sikh applicant might be formulated as religious discrimination or as racial discrimination. If race continues to receive greater protection than religion then this will arguably place considerable pressure on the distinction between race and religion as religious claimants struggle to fit their claims within the confines of the race provisions of the EA 2010 or as claims based on race within Article 14. A hierarchy of discrimination grounds might then create separate and distinct problems of its own, bringing applicants back to the situation they were in prior to the recognition of religious discrimination and the law back to the indefensible position whereby one form of religious group receives greater protection than another by reason of the former's racial heritage.

[837] See Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' [1989] U Chi Legal F 139, 139.

C. Exacerbation of General Problems with Equality Analysis

(i) Comparator analysis

Comparator analysis can be a powerful tool in revealing discrimination. In *DH v Czech Republic* the apparent neutrality of the use of psychological tests to determine whether children should attend educationally inferior 'special' schools was undermined by the statistical evidence of the overrepresentation of Roma children in those schools.[838] However, the role of comparator analysis in discrimination law has been critiqued on a number of fronts. A difference in treatment is only discriminatory if the circumstances are the same or not materially different. However, it can be easy to point to some difference in the circumstances of the claimant and the comparator so as to justify the relevant difference in treatment.[839] Where there is an open-ended non-discrimination claim, such as that of Article 14, the courts may rely on an absence of an analogous comparator to dismiss differences in treatment which they think are undeserving of a 'discriminatory' label. For instance, in *Shackell v United Kingdom* the ECtHR rejected a complaint that British social security legislation discriminated against unmarried surviving partners on the basis that married and unmarried couples were not in analogous situations.[840] Arguably such a use of comparator analysis tacitly reflects judicial determination that there is nothing wrong with the distinction involved.

More generally, it has been argued that a focus on comparators detracts from the question of how a person's traits are situated in society, such as the question of whether there has been a history of discrimination, a factor adopted by the ECtHR in

[838] *DH v Czech Republic* (n 683).
[839] Brenda Hale, 'Foreword' in Monaghan, *Monaghan on Equality Law* (n 798).
[840] *Shackell v UK* App no 45851/99 (ECtHR, 27 April 2000).

Kiyutin v Russia[841] and *Kiss v Hungary*.[842] A more fundamental criticism of a comparator-focused approach to equality is that it conditions access to equal treatment protections on the less privileged proving 'sameness' with the more privileged. Aileen McColgan has criticised how legislation such as the Equal Pay Act 1970 requires that women be treated like men to the extent that they are similar in the job roles they perform, the workplaces they work in and the employers they work for. However, much of the disadvantage suffered by women, and by part-time workers in particular, stems from the ways in which women are not like men. The statute is blind to disadvantage arising from uniquely female characteristics or behaviour.[843] Questions of the correct comparator and the relevant level of difference lie at the heart of much criticism of a comparator-focused equality approach. In indirect discrimination claims the question of the appropriate pool of comparison is key. For example, in proving that 'considerably fewer women than men' could comply with a requirement should the comparison be drawn with all women and men generally or only relevantly qualified women and men?[844] Moreover, what should be the appropriate margin of difference?[845]

Determining an appropriate comparator is thus both a crucial and contestable element in discrimination cases. The characteristics of a comparator for the purposes of direct discrimination and indirect discrimination, under the EA 2010 sections

[841] *Kiyutin v Russia* (2011) 53 EHRR 26.
[842] *Kiss v Hungary* App no 31754/04 (ECtHR, 29 January 2008) para 42. See also *Horvath and Kiss v Hungary* (2013) 57 EHRR 31, paras 104, 119.
[843] Aileen McColgan, 'Cracking the Comparator Problem: Discrimination," Equal" Treatment and the Role of Comparisons' (2006) 6 EHRLR 650, 656.
[844] Sandra Fredman, *Discrimination Law* (Oxford University Press 2011) 184.
[845] *R v SS, ex parte Seymour-Smith and Perez* [2000] UKHL 12, [2000] 1 All ER 857, particularly [57] (Lord Nicholls).

13(1)[846] and 19(2)(b) respectively, require that 'there must be no material difference between the circumstances relating to each case'.[847] The discriminatory characteristic will not be a relevant characteristic in this respect, and for the purpose of the comparative exercise the discriminatory characteristic is excluded from the comparative task[848] so as to ensure that the discrimination is not 'justified' at this stage, which is particularly important in direct discrimination claims where no justification defence is available.[849] For example, in *Smyth v Croft Inns Limited*,[850] involving the direct religious discrimination provisions of the Fair Employment (Northern Ireland) Act 1976,[851] the Northern Ireland Court of Appeal rejected an attempt to utilise a comparator including the discriminatory characteristic. The claimant was a Roman Catholic barman working in a pub in a 'loyalist' area of Belfast with Protestant customers. After being threatened on grounds of his religion and his employer taking no action, he left his employment. The court rejected as 'fallacious' the argument by his employers that they would not have treated a Protestant working in a Catholic area subject to such threats any differently.[852] However, as Elias J recognised in the EAT judgment in *Ladele*, the dividing line between exculpatory circumstances and material circumstances relevant to the comparative exercise is not easily drawn: 'in practice a tribunal is unlikely to be able

[846] Which requires that any treatment in a direct discrimination claim be less favourable than that which was or would have been afforded to others.
[847] EA 2010, s 23(1).
[848] *James v Eastleigh Borough Council* [1990] IRLR 288, [13]; *Showboat Entertainment Centre Ltd v Owens* [1984] 1 All ER 836; [1984] 1 WLR 384 [20] (Browne-Wilkinson J). However, see *R (Al Rawi) v Secretary of State for Foreign & Commonwealth Affairs & Anor* {2006] EWCA Civ 1279 and criticism of the Court of Appeal's stance in Monaghan (n 798) 267.
[849] Monaghan ibid 262. There is an exception to the absence of a defense for direct discrimination in relation to age discrimination, EA 2010 s 13(2).
[850] *Smyth v Croft Inns Limited* [1996] IRLR 84.
[851] Fair Employment (Northern Ireland) Act 1976, s 16 (4A).
[852] *Smyth* (n 850) para 28.

to identify a statutory or hypothetical comparator without first answering the question why the claimant was treated as he or she was'.[853]

It is arguable that the potential for manipulation of the choice of comparator is exacerbated in religious discrimination cases. One factor is an absence of consensus on the nature of religion as a characteristic, particularly whether it is a question of identity, strong conscientious views, or an entire way of life. In *Ladele* the Employment Tribunal originally chose Ms Ladele's homosexual co-workers as appropriate comparators, and the greater respect to the views and feelings of the latter workers established that there had been direct discrimination. The EAT and the Court of Appeal rejected this choice.[854] The Court of Appeal endorsed the EAT's judgment that the 'proper hypothetical or statutory comparator here is another registrar who refused to conduct civil partnership work because of antipathy to the concept of same sex relationships but which antipathy was not connected [to] or based upon his or her religious belief'.[855] This approach insists that all the material circumstances are considered in identifying the appropriate comparator, the proper comparator was not simply someone who refused to carry out civil partnerships, but someone who refused due to their non-religiously motivated opposition to same-sex marriages.[856]

However, it might be argued that this reasoning glosses over the religious context in which Ms Ladele's refusal was grounded. Anthony Bradney has observed that independent of their religious significance many acts of religious adherence

[853] *Islington LBC v Ladele* (n 715) [35].
[854] *Ladele* (n 704) [39].
[855] *Ladele* EAT (n 715) [64]; Ladele (n 704) 39.
[856] Highlighted by Monaghan, (n 798) 263.

might easily be dismissed as the acts of the peculiar or difficult. Minority religions would especially suffer under such an approach.[857] Religion is not a factor which like race, sexual orientation, or gender is best considered by being removed from the comparison of individuals.[858] Unlike these characteristics, religion may cause people to act differently and may be burdensome for employers or other individuals to accommodate.[859] In such circumstances it is arguable that comparing the actions of a religious person with those of a peculiarly idiosyncratic but non-religious individual merely serves to unbalance the comparative process and obscure its purpose of highlighting discriminatory intent.

Another factor is the diversity between belief systems. This may make a strict comparison of religions inappropriate. The fact that a religion may not be prescriptive about its religious practices should not make those practices any less protected. In *Eweida* both Ms Eweida's employers and the domestic courts failed to see the differential treatment of an individual who sought to wear a cross as a manifestation of her faith in comparison with those wearing Sikh and Muslim religious symbols as direct discrimination.[860] This reveals the problem with a strict comparator approach in religious cases. No two religions are identical, but the question is what differences between religions can justify differential treatment of adherents. A strict comparison approach failed to take account of the fact that the absence of a doctrinal basis for a religious practice does not necessarily mean that

[857] Anthony Bradney, 'Faced by Faith' in Peter Oliver, Sionadh Douglas-Scott and Victor Tadros (eds), *Faith in Law: Essays in Legal Theory* (Hart 2000)102-3.
[858] In the context of race see Browne-Wilkinson J's comments in *Showboat Entertainment Centre Ltd v Owens* (n 848) [73].
[859] See discussion of reasonable accommodation below at Section III D.
[860] *Eweida v BA (ET)* (n 717) [31.7]-[31.10]. Direct discrimination was not pursued before higher courts, *Eweida v BA (CA)* (n 717) [2]. Wintemute (n 582) suggests that this may have been due to a tendency to view the claims of ethnic minority religions, which raised potential claims of indirect discrimination, as more serious than the claims of mainly white Christians, 232.

the practice is any less important to a religious person. In indirect discrimination cases the need for a comparator in establishing a disadvantage can equally operate to make 'it easier to accommodate claims based on collective practice than those based on individual conscience'.[861]

Moreover, the questions of the correct comparator and whether the impugned conduct should be imputed to the actual or hypothetical comparator appear to differ according to which ground is in question and the relationship between the conduct and the characteristic.[862] In contrast to the use of the belief-conduct distinction in cases such as *Ladele*,[863] discriminating on the grounds of sexual orientation has been held to include discrimination arising from the manifestation of sexual orientation. In the *Amicus* case, it was established that the appropriate comparator for the purposes of identifying sexual orientation discrimination must be a person who does not manifest such conduct.[864] Such distinctive approaches to the identification of appropriate comparators across different grounds appear difficult to justify on principled grounds. However, distinguishing between belief and manifestation of belief may be explained by a pragmatic concern that restricting or punishing conduct or behaviour motivated by religious beliefs would otherwise be in breach of direct discrimination provisions and would not be open to justification. If it can instead be understood as indirect discrimination then it can be dealt with within the confines of discrimination law in circumstances where it interferes with the rights of others.[865]

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[861] Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecclesiastical Law Journal 371, 390.
[862] Monaghan (n 798) 267.
[863] *Ladele* (n 704).
[864] *Amicus MSF Section, R (on the application of) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2004] IRLR 430, [119] (Richards J); *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [78] (Lord Roger).
[865] Darren Newman, 'Direct Discrimination, Religion and Disability' [2011] Equal Opprtunities Review 17.

(ii) Expressive harm

A strong model of religious discrimination might be difficult to align with increasing use of the concept of expressive harm. It is beyond dispute that discrimination norms have greatly expanded in recent years and this has been the subject of much debate and controversy.[866] The link between dignity and non-discrimination norms is increasingly being recognised.[867] The question of how dignity operates in relation to discrimination and religion is somewhat complex. On the one hand, respect for individual human dignity provides a theoretical justification for individual protection of religion and belief. Vickers has argued that religion or belief is 'closely related to an individual's concept of identity and self-respect' and that it is 'protected because it is a key aspect of personality and autonomy, based on personal choices about conceptions of the good'. On the other hand, dignity also informs the debate on the limits of legal protection for religion and belief also. Acts which are prima facie protected as manifestations of religion and belief may potentially be limited because they infringe on the dignity of others.[868] In some jurisdictions, particularly those where discrimination laws have developed alongside the use of the notion of human dignity, such as South Africa[869] and Canada,[870] courts often invoke the expressive message that laws and government actions convey.[871]

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[866] See the *Amicus* case (n 864).
[867] Gay Moon and Robin Allen, 'Dignity discourse in discrimination law: a better route to equality?' (2006) 6 EHRLR 610, 625.
[868] This issue was key in the *Ladele* judgment (n 704).
[869] The South African Supreme Court has held that unfair discrimination is judged to occur if somebody is 'treating persons differently in a way which impairs their fundamental dignity as human beings', *Prinsloo v Van der Linde & another* 1997 (3) SA 102 (CC) [31]. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [41].
[870] In *Law v Canada* the Canadian Supreme Court held that discrimination under s 15(1) of the Canadian Charter involves differences in treatment on the basis of listed or analogous grounds that violate human dignity, *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497

The facts of *Ladele* provide a particularly good opportunity to discuss the role of expressive harm in discrimination law since the sole detriment following from Ms Ladele's actions was that of expressive harm. In *Ladele* the aim which accommodation would have impaired was that of fully implementing Islington Council's 'Dignity for All' policy.[872] This policy provided that 'there should be equality and freedom from discrimination and harassment (on the grounds, among others, of sexual orientation and religious belief) for all staff' and that staff should be treated with dignity and respect. Crucially, it also warned that 'All employees are expected to promote these values at all times and to work with the policy' and that failure to do so might lead to disciplinary action.[873] As Khaitan has reasoned, focusing on dignity opens up the question of discrimination to actions which are only harmful in this expressive sense.[874] Thus, the real harm to allowing Ms Ladele to avoid duties involving same-sex couples was the expressive harm of failing to show respect to homosexual members of the community and staff.

Some may be legitimately concerned about how religious discrimination protections might interact with potentially unwieldy concepts such as expressive harm. As authors such as Koppelman have highlighted, expressive harm 'cuts both ways'.[875] The 'Dignity for All' policy in question in *Ladele* was by its own terms equally concerned with Islington Council's potential to cause expressive harm to

(CSC) [88]. However, see the recent move away from dignity in *R v Kapp* [2008] 2 SCR 483 (CSC) [21]-[22].
[871] See *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) [54]; *Law v Canada* ibid.
[872] *Ladele* (n 704) [45].
[873] ibid [9].
[874] Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 Oxford Journal of Legal Studies 1, 11.
[875] Andrew Koppelman, 'You Can't Hurry Love - Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 Brook L Rev 125, 135.

religious individuals. It is arguable that the treatment of Ms Ladele by her employers reflects a lack of concern for the expressive harm caused to those who shared Ms Ladele's religious views. Maleiha Malik has argued that in the context of such a clash of harms it is important not to adopt a hierarchal approach which places concern for the dignity and respect of one group above concern for the other.[876] Instead, courts and decision makers should determine conflicts according to an 'analysis that seeks to balance and give importance to both sets of rights'.[877] At present, the treatment of expressive harm seems to replicate the apparent hierarchy of equality grounds. However, it is clear that this kind of expansion of the notion of harm greatly broadens in practical terms the range and type of action which can lead to instigation of legal proceeding. On a political level it adds fuel to the fire of accusations of a liberal culture war in which discrimination laws are used to force individuals into line with a dominant progressive liberal agenda. When discrimination laws become detached from clear ideas of harm and disadvantage then the sort of sanctions imposed on individuals such as Ms Ladele are harder to justify to wider society.

In conclusion, having considered the various conceptual and practical difficulties associated with a religious discrimination approach it is clear that these issues may go some way towards explaining English courts' reticent approach towards discrimination on the grounds of religion or belief. The lukewarm judicial response to the UK government's decision to protection religion on equal footing with other discrimination grounds appears to be to some extent warranted. Returning

[876] Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17 Res Publica 21, 38.
[877] ibid 34.

to the categories introduced at the start of this thesis it seems that, apart from where there is relatively uncontroversial case of direct discrimination, the religious discrimination model does not appear to add significantly to the protection available under Article 9. A number of the factors that operated as reasons for a finding of no interference with Article 9 will now likely figure in proportionality analysis in relation to the justification of indirect religious discrimination.

For religious school pupils, the type of case with the greatest chance of success will be one where there has been accommodation of some students and not of others. This may occur because schools do not view certain practices as obligatory or fail to take certain types of religious beliefs seriously.[878] There is still the issue of finding a correct comparator, which is by no means a straightforward or predictable assessment. The option will remain open for Sikh pupils to make their claims in terms of the RRA, an approach which has had a high success rate to date.[879] A school pupil's prospects for a successful religious discrimination claim are greater where the processes leading to the making of a school policy and for deciding on claims for accommodation do not take religious considerations into account. A school must show that it considered religious implications in crafting its policy and considered the effect on religious individuals when responding to requests for accommodation, as required under section 149 of the EA 2010.[880] As in cases made in terms of Article 9, consultation with religious groups will weigh in favour of the school's decision being upheld.

[878] *R (Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin), [2007] HRLR 34. In *Watkins-Singh* (n 619), a case where refusal to allow a school child to wear a Sikh bangle was deemed to be unjustified indirect racial discrimination, this appears to have been a factor, [80]-[86].
[879] *Mandla* (n 610); *Watkins-Singh* ibid.
[880] A school was found to have failed to comply with the analogous duty under the RRA (n) s 71 in *Watkins-Singh* ibid [121]-[123].

However, if neither of these factors arises, and the case is based on a general claim of indirect discrimination arising from a refusal of accommodation, then it appears that framing such a case in terms of religious discrimination will not significantly impact the potential for success. The interpretation of the EA 2010 provisions will be undertaken in conformity with section 3 of the HRA, requiring that English courts take account of Convention case law.[881] The question of justification will again be key and the same factors will likely be considered in determining the justifications offered for disadvantage on the grounds of religious belief. The possibility of changing schools will likely remain an important factor. Another related issue is the religious individual's awareness of the policy prior to enrolment. If there was a well-known policy of, for example, prohibiting the wearing of a certain article of dress, then this factor will weigh against the religious individual's claim.[882] A key issue is the availability of alternative means of manifesting belief open to the employee or student. In *X v Y Headteacher* the fact that there were alternative schools available to the pupil was sufficient to determine that there was no interference with an Article 9 right.[883] How much weight such a factor will now be given as part of a proportionality analysis is as yet unclear.

A number of similar factors are apparent in relation to religious discrimination claims arising in the employment context. A lack of any satisfactory reason for a refusal to accommodate a religious employee will likely be in breach of religious discrimination provisions when read in light of Convention jurisprudence.

[881] *Ladele* (n 704) [22]
[882] *Begum* (n 809) [54].
[883] *R (X) v The Headteachers of Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249, [29]-[35].

However, as Ms Chaplin's case in *Eweida and others* shows, the ECtHR's interrogation of reasons offered by employers is not overly onerous. Evidence of an absence of consideration of a public body's duty under s 149 EA will similarly weigh in favour of a claim by a religious employee. A restriction affecting a solitary believer is now sufficient to establish 'disadvantage' in the workplace context, and the fact that a small number of employees are affected may actually weigh in favour of accommodation.[884] In clear-cut cases, direct discrimination may be established where, as in *Eweida v BA*,[885] some religious employees are accommodated and others are not.[886] However, future cases will centre on justification and proportionality is key. A religious individual's awareness of a conflicting job role or employee policy prior to taking the job will doubtless be relevant.[887] The impact of accommodation or exemption on the employer's business,[888] other employees, and customers will also be considered.[889]

In refusal of service cases where an employees religious beliefs come in conflict with an employers equality duties or policies or where a religious businessperson is refusing to cater for certain types of client because of religious beliefs, it is unclear if religious discrimination law provides any protection. The ECtHR's proportionality assessment of Ms Ladele and Mr McFarlane's claims in *Eweida and others* suggests that the Court does not consider it reasonable to expect an employer to accommodate such employee's Article 9 or Article 14 rights.[890] The post-*Eweida and others* decision in *Bull v Hall* suggests that the UK Supreme Court

[884] *Mba* (n 720) [40] (Vos LJ).
[885] See text to n 860.
[886] Wintemute, 'Accommodating Religious Beliefs' (n 582) 232.
[887] *Eweida and others* (n 580) para 83.
[888] *Cherfi* (n 737).
[889] *Mba* (n 720) [24] (Maurice Kay LJ); [37] (Elias LJ).
[890] *Eweida and others* (n 580) paras 105-106, 109.

does not view that case as strengthening the position of such religious business owners either.[891] In that case the Christian owners of a hotel refused to allow a same-sex couple a double-bedded room, though they claimed that they were motivated not by a specific opposition to homosexual activity but rather by a general opposition to sex outside of marriage. The Supreme Court found that service providers were not justified in refusing to provide their services on a non-discriminatory basis.[892] Discrimination on the basis of marital status was viewed as direct discrimination on the grounds of sexual orientation.[893] The judgment in *Bull v Hall* was careful to emphasise that were the facts reversed Mr and Mrs Bull would equally be protected from being refused service on the grounds of their beliefs and that the decision should not be interpreted as meaning that sexual orientation discrimination is preferred to religious discrimination.[894] However, it is clear that discrimination law provides no protection to those who would refuse service to homosexuals on religious grounds and that such conduct will be considered direct discrimination.

D. Do the Pitfalls of a Religious Discrimination Model Necessitate An Alternative Approach?

The final part of this section considers whether religious manifestation claims that require exemption or special treatment might be better dealt with as cases of reasonable accommodation. Though both Article 9 and indirect religious discrimination provisions may require that legitimate justification be provided for a refusal to accommodate, neither comes close to the kinds of requirement to

[891] *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741, [47]-[51]
[892] Ibid (n 891).
[893] The Supreme Court was divided on this issue by 3:2, with the minority finding unjustified indirect discrimination ibid.
[894] ibid [54].

accommodate necessitated by a reasonable accommodation model. It appears that courts have to some extent avoided implementing religious discrimination protections to their fullest extent because of concerns about the consequences of a uniform application of discrimination concepts to religious discrimination. A duty of reasonable accommodation allows for an alternative means of addressing differential impact and considering issues of justification for non-accommodation without the difficulties religious discrimination poses to the 'standard model' of discrimination law.

In the United States the wearing of religious symbols by government employees and civil servants is protected under both the Constitution (the Free Exercise Clause and the Establishment Clause) and the Civil Rights Act 1964.[895] In constitutional claims the US government can impose restrictions on the wearing of religious symbols if the action is 'substantially related' to promoting an 'important' government interest.[896] The 1964 statute requires that an employer must either offer some 'reasonable accommodation' of the religious practice or prove that allowing the contested religious practice would impose 'undue hardship'.[897] Reasonable accommodation is also a feature of Canadian human rights legislation,[898] including national non-discrimination legislation and provincial human rights codes.[899] The duty operates as a two-way process since, as Vickers notes, the duty does not require

[895] This duty is explicitly provided for in the US (Title VII of the Civil Rights Act; *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009)) and in some provinces in Canada (*R v Big M Drug Mart Ltd* [1985] 1 SCR 295). See discussion in *Eweida and others* (n 580) paras 48-9 and Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 685) ch 6, 221.
[896] Tenafly Eruv Association v Borough of Tenafly 309 F.3d 144, 157 (3rd Cir. 2002).
[897] Ansonia Board of Education v Philbrook 479 US 60 (1986).
[898] Canadian Human Rights Act 1952, s 15(2).
[899] See the distinction emphasised in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 2009 SCC 37 [68].

that 'religious adherence be cost-free for the employee'.[900] In the case of *Multani* the process required by a duty of reasonable accommodation was described as one that 'takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs'.[901]

(i) The potential impact of reasonable accommodation

It might be argued that a fully developed conception of reasonable accommodation might significantly address some of the gaps in Article 9 protection without the conceptual problems caused by extending discrimination provisions. In some regards indirect discrimination reaches some of the difficulties faced by members of religious minorities. However, it allows for a wide range of differential treatment to be found to be not discriminatory, whether because of the absence of an identifiable disadvantaged group, the manipulation of the choice of comparator, or the view that the disadvantage is necessary and proportionate in light of the aim pursued. A right to reasonable accommodation addresses the issue in a more direct and positive manner by offering the opportunity to remedy potential injustices in individual cases, whilst avoiding the stigma of one party to a conflict being branded 'discriminatory'. The adoption of such a model certainly seems preferable to a wide relaxation of generally applicable rules for all those with conflicting religious beliefs. A reasonable accommodation model could also avoid the 'dilution' of discrimination norms feared by some because it removes the need for discrimination to solve

[900] Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 685) 199.
[901] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 2006 SCC 6, [131] (Deschamps and Abella JJ).

difficult cases involving the application of neutral rules without threatening the absolute nature of protection from direct discrimination.

The concept of a duty of reasonable accommodation is not without its critics. Lisa Waddington has argued that an explicit duty of reasonable accommodation for religious beliefs and practices would add little and cause confusion given the existing prohibition of direct and indirect discrimination under EU law.[902] The question of how a duty of accommodation would operate in cases involving conflicting claims of sexual orientation discrimination and religious freedom has proved controversial. In *Bull v Hall* the Supreme Court considered Canadian case law on reasonable accommodation in the context of such disputes, and two British Columbia Human Rights Tribunal cases in particular.[903] In these cases the Tribunal highlighted the manner in which a booking was cancelled, the failure to offer an apology or reimbursement of expenses, and the lack of any attempts to find alternative service providers for the customers as factors relevant to a finding that the duty of reasonable accommodation had been breached.[904] Those exercising their religious freedom could be judged by the same standard of reasonableness in their rejection of certain would-be customers, rather than having their actions ruled from the outset to be directly discriminatory and thus unjustifiable. However, some have proposed that such conflicts should be resolved by an accommodation test that also includes consideration of the prospect of indirect harm caused by accommodation.[905] As well as requiring that the proposed accommodation would cause no direct harm to others

[902] Lisa Waddington, 'Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?' (2011) 36 NTM| NJCM-Bulletin 186.
[903] *Bull v Hall (SC)* (n 891) [48]-[50].
[904] *Smith and Chymyshyn v Knights of Columbus* 2005 BCHRT 544; *Eadie and Thomas v Riverbend Bed and Breakfast* (No 2) 2012 BCHRT 247.
[905] Wintemute, 'Accommodating Religious Beliefs' (n 582) 228.

and only minimal cost, disruption, and inconvenience, such a test would include harm caused by the refusal of employees like Ms Ladele to provide services to homosexual couples.[906] Wintemute has argued that accommodation of such religious persons is wrong in principle because it denies customers access to 100 per cent of an employer's capacity to serve. In addition, he argues that in practice such accommodation would become known to lesbian and gay customers or staff and this knowledge would offend their dignity.[907]

In relation to conflicts between sexual orientation non-discrimination and religious manifestation, Lady Hale has recently discussed the benefits of a concept of reasonable accommodation in avoiding the 'all or nothing' approach of discrimination law towards individuals motivated by religiously-based opposition to homosexuality. Questioning whether the 'hard line EU law approach to direct discrimination can be sustainable in the long run', she has asked whether a duty of reasonable accommodation might be preferable.[908] In a July 2014 speech Lady Hale suggested that the Supreme Court could have adopted 'a more nuanced approach' in response to such conflicts of rights as arose in *Bull v Hall*.[909] The hotel owners had contended that the protection of the rights and freedoms of homosexual guests could be achieved at less cost to their own religious rights through allowing them to offer twin rather than double beds to customers.[910] This argument was rejected because on the facts the hotel owners had not raised this option at the relevant time. While in her

[906] ibid 240.
[907] ibid 242; Ronan McCrea, 'Religion in the Workplace: Eweida and Others v United Kingdom' (2014) 77 MLR 277.
[908] Lady Hale, 'Religion and Sexual Orientation: The clash of equality rights' (Comaparative and Administrative Law Conference, Yale, 7 March 2014) <http://supremecourt.uk/docs/speech-140307.pdf> accessed 20 September 2014, 17.
[909] Lady Hale, 'Freedom of Religion and Belief' (Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014) <www.supremecourt.uk/docs/speech-140613.pdf> accessed 20 July 2014, 17.
[910] Ibid (n 909) 17.

judgment Lady Hale declared that she found it 'very hard to accept' that such a compromise could be sufficient to achieve the aforementioned aim, her recent extra-judicial comments appear to indicate a possible reconsideration of that conclusion.

A strong discrimination approach might be too strong its impact on existing historically-negotiated compromises between liberal states and majority religions and communities, such as that at the heart of the *Lautsi* case. Favouring one particular religion over others clearly offends non-discrimination principles, but to require all religions to be represented equally or not at all ignores the history and character of particular communities. For the Convention to compel American-style religious neutrality would fundamentally alter communities across Europe. On the other hand, a strong conception of direct and indirect religious discrimination is undoubtedly the correct means to identify and tackle *bona fide* cases of religious discrimination. Not all cases of indirect discrimination ought to be characterised as reasonable accommodation, but at present judicial categorisation of cases as involving an absence of accommodation rather than discrimination often simply result in failed discrimination claims.[911]

One of the main issues with pre-*Eweida and others* case law was that the question of whether a refusal to accommodate was reasonable was rarely asked because of the operation of concepts such as the free-contract doctrine. In a case like *Konttinen v Finland*,[912] for example, the reasonableness of refusing an employee's request to work other shifts to make up for hours missed after sundown on occasional Fridays, where the employee's duties were normal administrative duties

[911] *Ladele* (n 704) [29].
[912] *Konttinen v Finland* (1996) 87 DR 68.

that were not of urgent importance, was not questioned.[913] This view also influenced domestic English case law. In *Eweida v BA* the Court of Appeal noted that opposition to religious manifestation in the workplace might justify a 'blanket ban' on such practices.[914] Incorporating the concept of a duty to accommodate reframes the questions asked in religious freedom or discrimination cases so that employers, schools, and service providers must make adjustments unless this causes disproportionate burden.

Section IV: Reasonable Accommodation

Neither Article 9 nor non-discrimination protections currently require reasonable accommodation. This section considers how a reasonable accommodation approach might become part of English law.

A. The Basis for Reasonable Accommodation in Current Law?

Though there has been a significant institutional enthusiasm for it in recent times,[915] a duty of reasonable accommodation of religious practice appears to go beyond any current understanding of Article 9 or discrimination law as reflected in English or ECtHR case law.

[913] ibid 74-75.
[914] *Eweida v BA (CA)* (n 706) [40].
[915] Thomas Hammerberg, *Opinion of the Commissioner for human rights on national structures for promoting equality* (CommDH(2011)2, Strasbourg, 21 March, 2011) 3.2.

(i) Article 9

Some have argued that Article 9 is broad enough to be interpreted as implying such a duty,[916] but the Court has thus far declined to go down such a route.[917] Some recent decisions of the ECtHR appear to open the possibility of a duty of reasonable accommodation being read into Article 9. In *Jakobski v Poland* the Court, in finding an interference with Article 9 arising from the refusal of a Buddhist prisoner's request for vegetarian food, considered matters that mirror the kind of 'undue hardship' defence considered in US and Canadian reasonable accommodation claims.[918] The Court stated that the request could be 'regarded as motivated or inspired by a religion and was not unreasonable', highlighting that the provision of a vegetarian diet would not be onerous because separate preparation or cooking was not required.[919]

In a number of recent speeches Lady Hale has called for consideration of whether a right of reasonable accommodation could be found within the Article 9 jurisprudence of the ECtHR.[920] Such a duty could cover both accommodation of employees and reasonable accommodation for the right of their would-be customers to use services run by religious persons. In this regard, she has highlighted the 'powerful' dissenting judgment in the recent ECtHR case of *Francesco Sessa v Italy*, which directly contended that Article 9 should encompass a duty of reasonable

[916] Katayoun Alidadi, 'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?' (2012) 37 European Law Review 693, 699.
[917] Kristen Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church-State Relations' under the Jurisprudence of the European Court of Human Rights' in K Alidadi, M-C Foblets and J Vrielink (eds), *A Test of Faith: Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 59.
[918] *Jakobski* (n 780).
[919] ibid para 45.
[920] Hale, 'Freedom of Religion and Belief' (n 909); Hale, 'Religion and Sexual Orientation: The clash of equality rights' (n 908).

accommodation.[921] In a 4-3 split decision the Court found that the refusal to adjourn a criminal case to facilitate the religious observance of a Jewish lawyer did not violate Article 9. The dissenting judgment highlighted how the accommodation of the applicant would not have disproportionately burdened the Italian judiciary. However, the majority failed to find any interference with Article 9(1), applying the now outmoded free-contract doctrine,[922] and as such the question of whether the refusal was proportionate was never considered. The dissenting judges, Tulkens, Popović and Keller, contended that for a measure to be proportionate the means chosen must be those least restrictive of rights of the claimant and that seeking a reasonable accommodation would be a less restrictive means of achieving the aim pursued. As the Italian court had ample notice of the problem and the reorganisation of the court lists to accommodate the complainant would have caused minimal disruption to the administration of justice, in the dissenting judges' view accommodating Mr Sessa would have been 'a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society'.[923]

However, at present, the development of a duty of reasonable accommodation via Article 9 appears unlikely. Where religious manifestation cases are concerned there is an absence of consistent principle on the necessity of proving that no alternative, less interfering means exists, as demonstrated in decisions on uniform policy involving relatively unobtrusive forms of religious manifestation, such as crosses or silver rings.[924] It is questionable whether the *Eweida and others*

[921] *Francesco Sessa v Italy* App no 28790/08, (ECtHR, 3 April 2012).
[922] The majority followed the approach in *Stedman v UK* (1997) 23 EHRR 168 (Commission Decision) and *Konttinen* (n 912). The free-contract filter of interference has since been rejected, *Eweida and others* (n 580).
[923] *Sessa v Italy* (n 921) Joint Dissenting Opinion of Judges Tulkens, Popović and Keller, para 13.
[924] *Eweida and others* (n 580); *Playfoot* (n 878).

decision provides any extension of Article 9 to include such a duty. Despite arguments for the adoption of the concept put forth by a large number of interveners[925] and the Court's receipt of submissions on the operation of the doctrine of reasonable accommodation in the US and Canada,[926] there was little evaluation of the concept in the Court's judgment. The majority's findings suggests only that the Convention neither requires nor precludes such a concept.[927] On the other hand, Lady Hale recently stated in the Supreme Court's judgment in *Bull v Hall* that in her view 'the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases' and that this was reinforced by the decision in *Eweida and others*.[928] The guidance released by the UK Equality and Human Rights Commission following the decision in *Eweida and others* supports such an interpretation.[929] Such comments certainly give strength to the proposition that domestic courts might be minded to interpret Article 9 in such a manner, but what approach the majority of the Supreme Court would take is still far from certain. Of course, it remains open to the Parliament to legislate for an explicit duty, such as that which exists in the context of disability.

(ii) Discrimination law

The Independent Review of the Enforcement of UK Anti-Discrimination Legislation has previously suggested the introduction of a specific duty of reasonable

[925] *Eweida and others* (n 580) para 78.
[926] ibid paras 48-49.
[927] David H McIlroy, 'A Marginal Victory for Freedom of Religion' (2013) 2 Oxford Journal of Law and Religion 210, 216.
[928] *Bull v Hall (SC)* (n 891) [47].
[929] Equality and Human Rights Commission, *Religion or belief in the workplace: an explanation of recent European Court of Human Rights judgments* (2013).

accommodation.[930] At present, courts in discrimination cases will consider the 'scope' for accommodation as part of the proportionality assessment. Consideration of reasonable alternative means of accommodation is already an element in discrimination law. The introduction of a general duty on public institutions to promote equality has to some extent mainstreamed institutional accommodation of minorities.[931] More generally, CJEU case law clearly requires that domestic courts take into account 'the possibility of achieving by other means the aims pursued by the provisions in question'.[932] Domestic indirect discrimination cases similarly highlight the need for the respondent to prove that no less discriminatory alternatives existed.[933] Moreover, domestic case law also includes a consideration of the overall balance between the reasonable needs of the respondent and the discriminatory impact of the measure in question.[934] Discussion of alternative means of accommodating employees' requests in relation to symbols or working hours are often a feature of discussion in justification analysis of indirect discrimination claims. In *Eweida and others* the Court referred to the religious accommodation of Ms Eweida's co-workers, comparing their treatment with that of Ms Eweida.[935]

Consideration during proportionality analysis of less intrusive or less discriminatory means is still some way from an actual duty of accommodation. According to the former approach, the potential to accommodate without undue

[930] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000).
[931] Vickers, 'Promoting Equality or Fostering Resentment - The Public Sector Equality Duty and Religion and Belief' (n 585).
[932] C-187/ 00 *Kutz-Bauer v Freie und Hansenstadt Hamburg* [2003] ECR I-02741 .
[933] *Steel v Union of Post Office Workers* [1978] 2 All ER 504, [1978] ICR 181
[934] *Hampson v Department of Education and Science* [1989] IRLR 69, [1989] ICR 179 (Balcombe LJ) approved by the House of Lords in *Webb v EMO Air Cargo* [1992] UKHL 15, [19992] 4 All ER 929, 936d.
[935] At para 94 the ECtHR refers to the absence of evidence that previously authorised items of religious clothing 'had any negative impact on British Airways' brand or image', *Eweida and others* (n 580).

difficulty is just one factor in the mix in determining the proportionality of a response to a claim for accommodation. In contrast, a distinct duty to reasonably accommodate would provide a starting point from which one would have to justify any deviation. The level of justification implied by a reasonable accommodation model seems to require convincing justification for a refusal to accommodate.

It might also be argued that reasonable accommodation is merely a remedy to structural discrimination and that as such it falls within the discrimination paradigm. Reasonable accommodation has been recognised in the context of disability law, where a duty of reasonable accommodation of disability was introduced into domestic law in line with the terms of the Framework Directive.[936] However, it might be contended that the concept is not necessarily limited to disability, and the paradigm of reasonable accommodation is also applicable to religion, and minority practices and beliefs in particular.[937] Some kind of reasonable accommodation idea is inherent in the idea of indirect discrimination. Recognizing that a general rule is inherently harsher on one group than another and seeking to ameliorate this situation clearly mirrors elements of what is understood by reasonable accommodation. This is apparent in some sex discrimination cases. In *London Underground Ltd v Edwards (No 2)* the House of Lords required that the employers of a single mother accommodate her needs by offering her a shift system which took account of her childcare responsibilities.[938] The failure of her employers to do this was deemed to be indirect discrimination. These cases could equally be seen as accommodation cases; because women are more likely to have childcare responsibilities, and

[936] The Framework Directive (n 587) arts 2(2)(b)(ii), 5.
[937] Lisa Waddington and Aart Hendriks, 'The expanding concept of employment discrimination in Europe: From direct and indirect discrimination to reasonable accommodation discrimination' (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403, 406.
[938] *London Underground Ltd v Susan Patricia Edwards* [1998] EWCA Civ 877.

therefore are more likely to need part-time working arrangements, the employer is required to change their policies to accommodate this. We can see this type of conception of discrimination law at work in relation to claims by religious individuals relating to uniform policies[939] or working hours.[940]

Heiner Bielefeldt has argued that reasonable accommodation should be seen as 'an attempt to rectify situations of indirect discrimination from which members of minorities typically suffer even in liberal democracies that are devoted to the principle of neutrality'.[941] Such an interpretation also seems to accord with the ECtHR's findings in *Thlimmenos v Greece* that a failure to accommodate difference amounted to unequal treatment.[942] A duty of reasonable accommodation could also be explicitly added to discrimination provisions. The Independent Review of the Enforcement of UK Anti-Discrimination Legislation suggested the introduction of a specific duty of reasonable accommodation.[943]

However, discrimination and reasonable accommodation are in many ways distinct models of protection. Importantly, the remedy for reasonable accommodation is a one-off accommodation of a specific case; in contrast, a finding of unjustified indirect discrimination invalidates the general rule. Given the specificity of some of the religious beliefs in question in religious discrimination cases, it might be argued that a group-based remedy is inappropriate for the diverse range of possible claims of individual believers. Many are opposed to any

[939] *Watkins-Singh* (n 619).
[940] *Mba* (n 720).
[941] Heiner Bielefeldt, 'Freedom of Religion or Belief—A Human Right under Pressure' (2012) 1 Oxford Journal of Law and Religion 15.
[942] *Thlimmenos* (n 578).
[943] Hepple, Coussey and Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (n 930).

incorporation of a reasonable accommodation duty into discrimination law,[944] contending that discrimination law and reasonable accommodation should be treated as wholly distinct issues.[945] Some authors have pointed to the distinct burdens in relation to indirect discrimination and duties of reasonable accommodation as practiced in Canada and the US.[946] Though acknowledging that it might be possible to interpret domestic equality protections to create a duty of accommodation, Vickers sees reason to eschew such an approach in the distinct burden on the respondent in reasonable accommodation cases to prove that the accommodation would create undue hardship.[947] This is in contrast with indirect discrimination where the initial burden is on the claimant to prove particular disadvantage because of their holding of a protected characteristic. Vickers also sees reason to avoid developing a duty of accommodation within indirect discrimination law in the potential that such a development might impede the possibility of developing a hierarchy of differing standards of protection amongst protected grounds.[948]

B. The Potential for the Development of a Reasonable Accommodation Duty

It is possible that judicial activism might supply a basis for a duty of reasonable accommodation. However, given the previous stance of the higher English courts towards both religious discrimination cases and Article 9 claims it is unlikely that

[944] See for example, reasonable adjustments as part of domestic disability non-discrimination provisions in the Disability Discrimination Act 1995, now replaced by the EA 2010, s 15.
[945] Waddington and Hendriks, 'The expanding concept of employment discrimination in Europe: From direct and indirect discrimination to reasonable accommodation discrimination' (n 937) 427. See also Dagmar Schiek, Lisa Waddington and Mark Bell, *Cases, materials and text on national, supranational and international non-discrimination law* (Hart Pub 2007) 745.
[946] Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 685) 224. See also Waddington and Hendriks ibid 427.
[947] The duty was inserted in the 1972 amendment to the Civil Rights Act 1964, 42 USCA sec 2000e j.
[948] ibid 225.

such an extension of remedies would be instigated by the English judiciary. Moreover, the level of judicial activism required to read such a remedy into English law without an explicit legal basis for reasonable accommodation as exists in disability legislation is hardly likely. It might be said that such authority might be read into the ECtHR's interpretation of Article 9 in *Eweida and others*,[949] but the impetus to interpret that case as necessitating a radical reinterpretation of discrimination law remedies would still be lacking in any event. Given the institutionally difficult position of the ECtHR, it is unlikely that it would rule that such an increase in Article 9's requirements was mandated by the Convention.

It is equally open to the English judiciary to interpret the EA 2010 in a more expansive manner. This has not been the tendency of the higher courts to date, but it is still possible that the English higher courts may respond to *Eweida and others* by strengthening and broadening their jurisprudence on religious discrimination and including such a duty. Enforcement of the Public Sector Equality Duty could also indirectly lead to a requirement that policies failing to exempt religious persons be determined in light of current non-discrimination case law. The main drawback of such an approach is that it would be limited to the policy-making of public bodies or public service-providers.

An express legislative footing for the concept of reasonable accommodation might be preferable as a means to minimise the degree of legal uncertainty for persons considering litigation in this area. Such a legislative basis, similar to that provided in respect of disability discrimination legislation, would cover both public

[949] *Eweida and others* (n 580). Reasonable accommodation is discussed in relation to the US and Canada at paras 48 and 49, and in relation to third party interventions at para 78. The relevance of the Court's references to reasonable accommodation is discussed in the final section of Chapter 1.

and private policy-makers and decision-makers. However, whether this duty is read into Article 9 or is provided for in legislation, some litigation in determining what is 'reasonable' accommodation would likely be unavoidable. As the recent decision in *Mba* demonstrates, a request for accommodation has to be within certain limits. A desire to avoid Sunday work has to be balanced against the needs of children in care with severe disabilities who need weekend support and the need to appropriately organise their care.[950] The impact upon workers with non-religious reasons for wanting free weekends should also be placed in the balancing process.

A duty of reasonable accommodation would be no panacea; difficulties with communication of religious motivation would likely still impact upon the determination of whether a refusal to accommodate was reasonable. However, the framing of the legal issue as a positive presumption that religious manifestations should generally be accommodated where possible is significant to overcoming many of the limiting assumptions undercutting the protection of Article 9, particularly the general view that religion is predominantly a private matter of belief. Moreover, the difficulties of communicating religious motivation play a far less dominant role when a litigant does not need to convince the court that a particular action or failure to act has unjustifiably interfered with their religious freedom. The existence of the duty means that interference with religious freedom cannot simply be accepted as legitimate independent of the questioning of less restrictive means.

[950] *Mba* (n 720).

Section V: Conclusion

Though sometimes the reasoning of English courts post-*Eweida and others* appears akin to the kind of considerations involved in a reasonable accommodation model, a free-standing duty would go considerably further. Firstly, the question of less-restrictive means is only sporadically considered in cases brought under domestic discrimination law or under Article 9, whether considered alone or in conjunction with Article 14. Secondly, the existing approach merely considers the prospect of accommodation as one factor amongst others in determining the proportionality or otherwise of a refusal to accommodate or grant an exemption within indirect discrimination analysis. At present there is no clear legal basis for an explicit duty of reasonable accommodation in English law. Neither legislative action nor judicial activism developing such a duty appear imminent, despite some positive suggestions of the latter in some extrajudicial commentary.[951]

There appears to be limited potential for substantially increased protection of religious individuals wishing to manifest their belief publicly based upon a discrimination law model without any duty of reasonable accommodation The restrictive nature of judicial approaches belies the ostensibly promising potential of the textual provisions prohibiting religious discrimination in EU, Convention, and domestic law. Persistent apprehension concerning any substantial expansion of protection against indirect religious discrimination, apparent in both academic and judicial commentary, and the continuing debate surrounding the desirability of a hierarchy of discrimination grounds are indicative of the poor prospects for a significant expansion of protection of religious manifestations via the religious

[951] See text to n 908.

discrimination route. Moreover, in light of the significant role of proportionality analysis in indirect religious discrimination cases the difficulties that religious persons face in communicating the value of their exercises of religious manifestation, discussed in Chapter 2, will equally apply in religious discrimination cases, whether taken under Article 14 or the EA 2010.

Given these factors, there may be good reason for religious individuals to consider other modes of protection. The difficulty of communicating how and why courts should value religious manifestations indicates that some other model may be needed. Chapter 4 explores how a freedom of expression approach may allow religious individuals to make their case to courts in a manner that focuses on the value of public manifestation rather than private belief and which has the potential to crucially reconfigure proportionality analysis of prima facie interferences. Moreover, a long line of freedom of expression case law demonstrates that courts are willing to define the reasonable limits under which controversial views might be tolerated, which may strengthen cases taken by individuals whose religious beliefs are in conflict with dominant liberal norms.

Chapter 4 Freedom of Expression

Section I: Introduction

In evaluating alternatives to the Article 9 approach a significant hurdle exists in finding a more protective model that can still be appropriately limited. It is axiomatic that the right to manifest religious beliefs must be limited to some extent. The key question is what restrictions on religious manifestations may be considered legitimate. This thesis argues throughout that the manner in which the right is conceived affects what are understood as proportionate restrictions. This chapter looks at the potential to invoke freedom of expression when considering the place of religious manifestation in the public sphere. In so doing it explores how conceiving of the actions of religious individuals as expressive acts alters our perception of the proportionality of restrictions on religious manifestations. This chapter looks at the potential to conceive of religious freedom as an expressive right, and the consequences ensuing from such an understanding when determining the legitimacy of restrictions on manifestation of religious belief. Though the relationship between religious freedom and freedom of expression is often presented as one of conflict, and on numerous occasions freedom of expression has been restricted because of claims of religious offence, this chapter argues that we need not restrict our understanding of the interrelatedness of these two concepts to such instances. Instead, this chapter points to the positive possibilities that arise from recognising the connections between the two rights, and considers whether thinking about religious manifestation through the lens of freedom of expression can cultivate judicial understanding of the significance of religiously-motivated acts.

The expressive elements of religious conduct are in one sense clear. Manifestation of religion through worship, teaching, practice, and observance is explicitly recognised in the text of Article 9 of the ECHR. There is no distinctive protection for religious speech as such in the Convention,[1] though in the early case of *Kokkinakis v Greece* the ECtHR recognised proselytism as included within Article 9's protection.[2] In laying out the rationales underlying the Convention's protection of belief and manifestation, the Court in *Kokkinakis* specifically highlighted the expressive dimension of Article 9, stating that, 'Bearing witness in words and deeds is bound up with the existence of religious convictions'.[3]

This chapter contends that some religious accommodation and exemption claims might be more successfully argued as freedom of expression claims and are potentially stronger when considered in terms of Article 10 rather than Article 9 or religious discrimination. It argues that the concepts behind and the rationales informing freedom of expression closely map onto the religiously-motivated expression at the heart of many Article 9 and religious discrimination claims. In essence, this chapter questions the distinction between religious belief manifested in words and religious belief manifested in actions. Symbolic expression has been recognised by the ECtHR, in line with the approach taken in other speech-protective

[1] In contrast, the relationship between free speech and freedom of religion is reflected in UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981, art 6. The Declaration states that freedom of religion includes the freedom 'To write, issue and disseminate relevant publications in theses areas' and 'To teach a religion or belief in places suitable for these purposes' Ahdar and Leigh have pointed to this failure as causing the ECtHR to permit states to deny any right of access to broadcast media for religious purposes, pointing to cases such as *Murphy v Ireland*, Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005) 393.
[2] *Kokkinakis v Greece* (1994) 17 EHRR 397.
[3] ibid para 31.

jurisdictions.[4] A refusal to act in a certain manner has also been recognised as protected by the Convention.[5] In such circumstances, a case may be made for treating the issues in cases involving religious symbols or religious-motivated refusal of service as questions of freedom of expression. Moreover, a freedom of expression approach might illuminate aspects of cases that are currently overlooked when framed in terms of religious freedom or religious discrimination. This is particularly true in relation to the value of *publicly* manifesting religious belief, a factor often undervalued in religious freedom cases where religion is understood as 'primarily a matter of individual thought and conscience'.[6]

The search for a reconceptualization of religious freedom is not a new one,[7] and freedom of expression often forms part of the alternative theoretical frameworks that have been offered. James W Nickel has argued that religious freedom should be viewed as an amalgamation of other established rights. Under this view, religion is merely a specific application of more general basic liberties such as freedom of thought, expression, association, assembly, movement, privacy, political participation, and economic activity.[8] Once those 'basic liberties' are guaranteed 'religious belief and activity are an application area whose content is adequately

[4] *Vajnai v Hungary* (2010) 50 EHRR 44; *Donaldson v UK* (2011) 53 EHRR 14. See text to n 278.
[5] *Buscarini v San Marino* (2000) 30 EHRR 208. However, see *Valsamis v Greece* (1997) 24 EHRR 294. Such recognition may be limited to the context of religious oaths.
[6] *Eweida and others v UK* (2013) 57 EHRR 8, para 80.
[7] For example, Brian Leiter has argued that there is no reason why legal or constitutional regimes should single out religion for protection, Brian Leiter, 'Why Tolerate Religion' (2008) 25 Const Comment 1, 26. Christopher Eisgruber and Lawrence Sager have also proposed a shift away from focusing on religious freedom, replacing the concept of 'separation of church and state' with a concept of 'Equal Liberty', Christopher L Eisgruber and Lawrence G Sager, *Religious Freedom and the Constitution* (Harvard University Press 2010) 15.
[8] James W Nickel, 'Who Needs Freedom of Religion' (2005) 76 U Colo L Rev 941. Mark Tushnet goes further, contending that were the Free Exercise Clause simply ripped out of the Constitution little would change in contemporary constitutional law, Mark Tushnet, 'The Redundant Free Exercise' (2001) 33 Loy U Chi LJ 71.

covered by more general rights and liberties'.[9] Thinking about freedom of religion in this way goes beyond showing that a specific right of religious freedom is superfluous; it also allows an understanding of how the bases for religious freedom are the same as those underpinning other basic liberties. Others have specifically argued that freedom of religion is best understood as a right of expression and that religiously-motivated expression should be granted a degree of protection matching that afforded to other kinds of political speech.[10] Anat Scolnicov has forcefully argued that the 'hands-off' attitude of international human rights law to states' religious choices is unjustifiable once we acknowledge that religious speech is political speech.[11] For Scolnicov the way in which religious expression relates to and can even shape society means that it is undeniably an element in the 'marketplace of ideas'. Just as the ability of the individual to make rational choices about a political idea is debilitated when political speech is inhibited, religious choice is debilitated when some or all forms of religious expression are disallowed.

A freedom of expression approach also avoids some of the pitfalls of a solely religious-freedom based analysis. Many have found an approach to religious freedom that ties the need to accommodate to the mandated nature of practices flowing from religious identity[12] particularly problematic, not least the US Supreme Court.[13] At a certain point balancing competing interests in religious accommodation claims inevitably focuses on the 'centrality' of the practice to the claimed religious belief. Raymond Plant, in rejecting such identity-based rationales for religious freedom,

[9] ibid 942.
[10] Anat Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights*, vol 2 (Routledge 2010) ch 2, 194.
[11] ibid 196.
[12] See, for example, the 'encumbered' nature of religious individuals described by Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge Universtiy Press 1998).
[13] *Employment Division v Smith* 494 US 872 (1990).

puts forward the view that freedom of expression, alongside a focus on the harm principle and the principle of equal concern and respect, is superior to an approach centring on whether a particular practice is intrinsic or necessary to religious belief. He contends that freedom to express any significant conscientious position[14] should be permitted, subject to the operation of the harm principle and respect for civic equality: 'The issue is freedom of expression whether of a religious or a non-religious person … people of all sorts of beliefs should be free to express those beliefs both verbally and behaviourally so long as in so doing they did not cause harm to others'.[15]

This chapter builds on these approaches, arguing that thinking about certain religiously-motivated acts as expressive acts may get at something that we might otherwise fail to capture fully, that is, the value of manifesting a religious belief and the harm that occurs when such expression is forbidden or penalised. For various reasons English courts have shown themselves to have difficulty in attributing sufficient weight to the desire to manifest religious belief publicly and it is arguable that freedom of expression rationales can form a secularly-accessible 'placeholder'[16] for the reasons why a contestable religious expression might be valued. As we have seen in Chapter 1, judges may have a particular background conception of religion as something relevant only to private belief and specific instances of worship in defined settings. Equally, religious plaintiffs may have difficulty communicating their

[14] Raymond Plant, 'Religion, Identity and Freedom of Expression' (2011) 17 Res Publica 7. Plant builds on Bernard Williams' notion of 'ground projects', beliefs that give meaning and significance to lives, Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981).
[15] Plant (n 14) 16.
[16] See McCrudden's use of the term 'placeholder' in reference to a concept that can hold different content for different people simultaneously, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 678.

reasons for believing that public expression of their religious belief is of utmost importance. This problem of attributing weight to public expression of belief is one which courts are increasingly mindful of, as testified by the ECtHR's criticism in *Eweida and others* of the failure of English courts to attribute sufficient significance to Ms Eweida's belief in the necessity of wearing her cross. Defining harm in such cases and subsequently balancing that harm against other interests and the rights of other parties will be key elements in future cases involving religious manifestations. Judges may welcome the possibility of interpreting certain religious manifestations as expressive acts when adjudicating conflicts involving acts motivated by religious truth claims, the substance of which judges are unable to accept. Academics and jurists alike may view valuing expression of belief because of respect for various free speech rationales as preferable to courts engaging with questions surrounding the centrality of a particular manifestation to religious doctrine or subjective religious belief.

Prior to the ECtHR's judgment in *Eweida and others* the potential for reconceptualising freedom of religion as freedom of expression was perhaps more pressing; fitting one's claim into alternative articles was the sole avenue by which to question the proportionality of restriction on religious manifestation.[17] This is now no longer necessary in all cases, with the *Eweida and others* judgment bolstering the position of Article 9 arguments considerably, particularly as far as religious employees are concerned.[18] However, for those wishing to express their religion publicly in avowedly secular states, such as Sikhs or Muslim women in countries such as France, Turkey, and Switzerland, legal arguments based on Convention

[17] The litigation strategy of counsel for Ms Ladele in framing her case solely in terms of religious discrimination rather than Article 9 is reflective of this view, *Eweida and others* (n 6).
[18] ibid.

articles other than Article 9 may still be warranted. Equally, Article 10 may better get to the heart of controversies where the contested action has an expressive element, for example where proselytism or symbolic displays of religious affiliation are in question. Refusal of service cases can also be seen as an aspect of freedom of expression. Compelling someone to act in a manner contrary to his or her beliefs might be viewed as compelled speech.[19] Does requiring a wedding photographer or a baker to provide their creative services for same-sex weddings when this is contrary to their religious beliefs have freedom of expression implications?[20] Such persons have the freedom to resign rather than be compelled to act contrary to their beliefs. However, the freedom to resign has been judged not to prevent interference with Article 10.[21] Approaching religious manifestation through a freedom of expression model brings a wider range of interests and societal values into focus, particularly with regard to religiously-motivated refusals of service to same-sex couples.

A number of recent Article 10 cases have centred on the expression of religious beliefs about the wrongfulness of sex outside the context of heterosexual marriage.[22] Not long ago homosexuality was the subject of state regulation, defined as a criminal offence. The modern drive towards the elimination of prejudice and discrimination against homosexuals has made religiously-motivated views on homosexuality a public issue once more. Just as in Article 9 and religious discrimination disputes, the key issue is to what extent those who believe

[19] *West Virginia Board of Education v Barnette* 319 US 624 (1943).
[20] This argument was unsuccessfully made in the US case of *Elane Photography LLC v Wilock* 309 P3d 53 (NM 2013), cert denied, 134 S Ct 1787 (2014) (No 13-585). The US Supreme Court seemed to come close to viewing compliance with non-discrimination laws as compelled symbolic speech in *Boy Scouts of America v Dale* 530 US 640, 653 (2000) when it spoke of forbidding expulsion of a gay scout master as forcing the organization 'to send a message … that the Boy Scouts accepts homosexual conduct'.
[21] *Vogt v Germany* (1996) 21 EHRR 205; *Eweida and others* (n 6) para 83.
[22] *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741; *Black v Wilkinson* [2013] EWCA Civ 820, [2013] 4 All ER 1053; *Eweida and others* (n 6).

homosexuality is a sin should be tolerated. Considering the question of hate speech regulation in general, Robert Post asks 'How can we distinguish critique that is too extreme, that ought to be condemned as hatred, from mere disagreement?'[23] This broad problem with defining the scope of hate speech regulation is also central to conflicts involving religiously-motivated speech. This thesis argues that domestic Article 10 case law on these conflicts is revealing of a more permissive approach. To date it has centred on speech decrying homosexual conduct, but the same reasoning could in theory apply to cases involving religiously-based refusals of service.

When we look at the rationales underlying freedom of expression we can see that they encompass some of the concerns that arise when religious manifestation is penalised or curtailed. Not all religious acts are expressive, but some clearly are, such as when a preacher tells an assembled crowd that he believes homosexuality is a sin. Freedom of expression is not solely concerned with speech, but also expressive conduct and some forms of religiously-motivated conduct are clearly covered by freedom of expression protections, such as proselytising or refusing to swear an oath which is in conflict with one's religious beliefs.[24] In such contexts, both religion and freedom of expression are in play, and just as the religious context is important to understanding and evaluating the punishment of a controversial preacher's expression, the expression context is important in evaluating official responses to expressive religious manifestations. This chapter examines both sides of this equation in evaluating the benefits of recognising the connections between freedom of religion and expression.

[23] Robert Post, 'Hate Speech' in Ian Leigh and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 126.
[24] In *Kokkinakis* (n 2) the ECtHR found a violation of Article 9 and viewed separate consideration under Article 10 unnecessary. In *Buscarini* (n 5) Article 10 was not raised.

The arguments in this chapter are made subject to the caveat that an understanding of religiously-motivated acts as expressive acts may be of only theoretical relevance, given that the ECtHR has demonstrated a tendency to examine claims under whichever Convention right it sees fit, regardless of whether the claim is argued in terms of Article 9 or Article 10, a problem which is equally a factor for those wishing to formulate their claim in terms of Article 14.[25] Nonetheless, the existence of such a practice on the part of the ECtHR at present does not negate the worth of considering whether expression analysis might further protection of certain types of religious claimants. In particular, litigants may still succeed in convincing domestic courts of the value of publicly manifesting their belief through relying on freedom of expression rationales and putting forth arguments under Article 10.

The structure of this chapter is as follows: Section I considers the position in the United States as an example of how recognition of the interrelatedness of freedom of expression and religious freedom operates in practice. Section II considers how religious beliefs expressed in words have been dealt with within freedom of expression cases, highlighting how recognition of the interrelation of religion and expression has furthered the protection of religiously-motivated speech. Section III considers how this recognition might inform and impact upon judicial understanding of religiously-motivated actions, analysing the applicability of freedom of expression rationales to religiously-motivated acts and considering how such analysis might impact the balancing of interests within Article 10 proportionality analysis. This third section details how freedom of expression

[25] See discussion at text to n 104 in ch 3.

rationales might assist courts in defining the harm in suppressing controversial or contestable expressions of religious belief and how the margin of appreciation doctrine might operate in the context of religious expression protected by Article 10. Section IV considers how, even if courts are not willing to consider non-speech expression under Article 10, they could still draw on their Article 10 case law when balancing interests under Article 9(2). The section details how courts have balanced employee expression and employer interest under Article 10. Section V concludes with a practical examination of what an Article 10 approach to religiously-motivated conduct could add in relation to each of the categories of cases outlined in the introduction to this thesis.

A. The Interrelatedness of Speech and Religion: The US Example

In suggesting that freedom of expression rationales might inform the interpretation of religiously-motivated expression, this chapter considers some elements of US First Amendment case law. Whilst other scholars have compared American Free Exercise Clause case law to English and European Article 9 case law,[26] this chapter focuses on US case law from a freedom of expression rather than a free exercise perspective. The US example reflects the consequences that can flow from viewing religious manifestation as protected for reasons of respect for freedom of expression rather than religious freedom or concern for discrimination. Changing the rationale for protection in this way strengthens elements of religious manifestation that are normally the least protected within a religious freedom model, namely public

[26] See Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How not to Define Indirect Discrimination' (2011) 74 The Modern Law Review 287 and Stephanos Stavros, 'Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?' [1997] EHRLR 607 respectively.

conduct expressing religious belief and conduct motivated but not mandated by religious belief.

Reliance on any comparative source has its pitfalls; the problems and the limits of the comparative method are well documented.[27] As James Weinstein has noted, 'The unique history and culture of each nation threatens to confound any attempt at cross-cultural constitutional normative critique'.[28] These contextual pitfalls are especially apparent when proposing the relevance of American free speech jurisprudence to the practices of English courts. Numerous academics have provided weighty and convincing arguments on the fallacy of any attempt at a wholesale importation of the more speech-protective First Amendment jurisprudence into English case law.[29] Indeed, Jeremy Waldron has recently proposed that the inverse might be a better option.[30] What relevance American case law on freedom of expression can have as comparative material is clearly a matter of some debate. In contrast with the US, the vast majority of Western states view the potential for legitimate restrictions on freedom of expression as unavoidable. As distinct from the US Constitution, the text of the ECHR demarcates legitimate grounds for limiting freedom of expression using precisely the same formula as that used to define legitimate restrictions on freedom of religion, freedom of association, and rights of privacy and family life. Restraints on expression are judged in the same manner as

[27] See generally, Christopher McCrudden, 'Judicial Comparativism and Human Rights' in AE Örücü and D Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing Limited 2007). For more virulent criticism see the dissent of Justice Scalia in *Roper v Simmons* 543 US 551, 622 (2005).
[28] James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*' in James Weinstein and Ivan Hare (eds), *Extreme speech and democracy* (Oxford University Press 2009) 23.
[29] David Feldman, 'Content Neutrality' in Ian Loveland (ed), *Importing the First Amendment: freedom of expression in American, English and European law* (Hart 1998); Stephen Sedley, 'The First Amendment: a Case for Import Controls?' in Ian Loveland (ed), *Importing the First Amendment: Freedom of Speech in Britain, Europe and the USA, Oxford: Hart Publishing* (Hart Publishing 1998).
[30] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

restraints on other human rights, with the strength of claims to rights varying according to the range and value of the social and individual interests served by the particular right.[31] The reasons offered in explanation for the particular rigidity of American protection of speech in contrast with the approach of other countries vary. Many see US free speech jurisprudence as yet another example of American legal exceptionalism, with the strength of freedom of expression interests in American jurisprudence to a large extent rooted in America's distinct political and constitutional culture.[32]

This chapter does not seek to counsel for the importation of concepts developed in First Amendment jurisprudence into English law. Instead, it contends that consideration of First Amendment cases, particularly the distinct manner in which they acknowledge the expressive aspects of religious acts, illustrates the weaknesses and blind spots in domestic protection of religious freedom and in current Article 9 jurisprudence.[33] This is an important point because the problems of comparative law are certainly overcome more easily when it is being employed not as a means to import standards, but in order to seek counsel from different approaches whilst remaining mindful of the differences between the legal systems. Writing on the comparative merits of the US doctrine of content-neutrality, Christopher McCrudden cautions that though it is 'a useful barium meal (helping us to identify previously unnoticed elements in one's own jurisdiction's approach) it is

[31] Feldman (n 29) 140-141.
[32] ibid 139. Robert Post has contended that the US approach might be explained by the combined impact of two elements: the effects of 'highly ingrained and idiosyncratic American values like individualism and mistrust of government' alongside the nature of American community identity as less dependent on maintaining norms constitutive of social solidarity such as those at issue in hate speech regulation, Post, 'Hate Speech' (n 23) 137.
[33] This approach has been described as a dialogue approach to comparative method, McCrudden (n 27) 393-394.

a doubtful litmus test for the acceptability of our approach'.[34] It is the former, and arguably less controversial, usage that will be pursued in this chapter's analysis of US First Amendment jurisprudence. The US cases discussed in this chapter are chosen because they clearly convey the practical consequences of a commitment to the rationales underlying freedom of speech in cases involving religiously-motivated expression.

The United States Supreme Court has long been willing to consider religiously-motivated acts as speech acts, relying on freedom of expression rationales in doing so. Indeed, the Supreme Court has made clear that private religious speech is as fully protected under the Free Speech Clause as secular private expression, though the former may legitimately be limited by reason of compliance with the Establishment Clause.[35] In American law the crucial question is whether private speech endorsing religion, protected by the Free Speech and Free Exercise Clauses, might be viewed as government-sponsored, in which case it breaches the Establishment Clause.[36] As such, tests centre on the question of whether on the facts the speech is that of the government or a private individual.[37] The primary limitations on private religious speech come from zoning or tax laws.[38] Narrowly tailored and content-neutral time, place, and manner restrictions on private speech

[34] Christopher McCrudden, 'Freedom of Speech and Racial Equality' in Peter Birks (ed), *Pressing Problems in the Law* (Oxford University Press 1995) 129.
[35] See, for example, *Lamb's Chapel v Center Moriches Union Free School District*, 508 US 384 (1993).
[36] See *Board of Education of Westside Community Schools v Mergens* 496 US 226, 250 (1990).
[37] Arthur D Hellman, William D Araiza and Thomas E Baker, *First Amendment Law: Freedom of Expression and Freedom of Religion* (LexisNexis 2010) 110. See also, more generally Franklyn S Haiman, *Religious Expression and the American Constitution* (Michigan State University Press 2012).
[38] The Religious Land Use and Institutionalized Persons Act (RLUIPA) Public Law 106-274, 22 September 2000 requires that government bodies may not impose land-use restrictions on individuals or entities if those restrictions impose a 'substantial burden' on the free-exercise of religion unless the government can prove that the existence of a 'compelling government interest' furthered by the restriction and meet the 'least restrictive means' test.

are also permitted, provided they serve a significant government interest and 'leave open ample alternative channels of communication'.[39] If the religious speech is truly private then it is protected, regardless of whether it takes place on government property. Government officials may exclude speakers from such locations based on the content of their speech 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest'.[40]

It is of course necessary to acknowledge that the interrelation of speech and religion in American jurisprudence is certainly influenced by America's unique historical and constitutional context. As Justice Scalia remarked in *Capitol Square Review*,

> in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly we have not excluded from free speech protections religious proselytizing or even acts of worship.[41]

The structure of the First Amendment as including protection of free exercise alongside protection of speech and association also undoubtedly influences the American approach.[42] Without dismissing the importance of these contextual factors, we can still usefully look to US case law as an illustration of what the application of

[39] *Perry Educational Association v Perry Local Educators' Association* 460 US 37, 45 (1983). Jeremy Gunn, 'Religious Symbols and Religious Expression in the Public Square' in Derek H Davis (ed), *The Oxford Handbook of Church and State in the United States* (Oxford University Press 2010).
[40] *Cornelius v NAACP Legal Defense and Ed Fund, Inc* 473 US 788, 800 (1985).
[41] *Capitol Square Review and Advisory Board v Pinette* 515 US 753, 760 (1995).
[42] 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances', US Constitution, First Amendment.

free speech rationales to religiously-motivated expressive acts might look like in practice.

For the purposes of this admittedly brief survey, one case that certainly merits consideration is *Watchtower Bible and Tract Society of New York v Village of Stratton*.[43] In that case the Supreme Court found that a town ordinance making it a misdemeanour to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violated the First Amendment as applied to religious proselytising and the distribution of leaflets. Justice Stevens' opinion emphasized the value of the speech involved as a religious activity, recognising it as analogous to worship in churches and preaching from pulpits and equally deserving of protection.[44] He went on to recognise the value of such expression as freedom of speech, citing the 'historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas'.[45] Justice Stevens further added that the method of expression in question may be essential not only to religious groups but also to a wider category of advocates, particularly the 'poorly financed causes of little people'.[46] He also highlighted the judicial reliance on jurisprudence relating to religiously-motivated speech in cases involving environmental[47] and labour[48] groups, noting that 'the efforts of the Jehovah's Witnesses to resist speech regulation have not been a struggle for their rights alone'.[49]

[43] 536 US 150 (2002).
[44] ibid 161, citing *Murdock v Pennsylvania* 319 US 105, 108 (1943).
[45] ibid 151.
[46] ibid 163, citing *Martin v City of Struthers* 319 US 141, 144-146 (1943).
[47] ibid, citing *Schaumburg v Citizens for a Better Environment* 444 US 620 (1980).
[48] ibid, citing *Thomas v Collins* 323 US 516 (1945).
[49] ibid.

Recognising that there may be legitimate grounds to restrict door-to-door canvassing, such as where solicitation of money is involved,[50] Justice Stevens nonetheless stressed that courts must carefully weigh these interests against the effects of regulation upon First Amendment rights. The prevention of fraud and crime and protection of the privacy of residents, though important interests, could not justify an ordinance covering a wide variety of unsolicited speakers:

> it is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbours and then obtain a permit to do so.[51]

Speech of those who for religious or principled reasons were unable to request a permit would be silenced, the potential for anonymously supporting a cause would be removed, and a substantial amount of spontaneous speech would be barred by the ordinance.[52] The judgment in *Watchtower* reiterated the view expressed in *Grosjean v American Press Co*[53] that the First Amendment was concerned with 'any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens'.[54] In *Watchtower* a failure of narrow tailoring reinforced the ordinance's unconstitutionality, since the posting of 'No Solicitation' signs provided sufficient protection for privacy. Moreover, the requirement of a permit was unlikely to deter criminals engaging in conversations not covered by the ordinance.

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[50] ibid 162-163, citing *Cantwell v Connecticut* 310 US 296, 306 (1940).
[51] ibid 165-166.
[52] ibid 167-168.
[53] 297 US 233 (1936).
[54] *Watchtower* (n 43) 249-250.

The interrelatedness of religious acts and freedom of expression has been recognised by US courts on numerous occasions. In *Murdock v Pennsylvania* 'hand distribution of religious tracts', 'worship in the churches and preaching from the pulpits' were listed as religious activities enjoying free speech and free exercise protection.[55] Symbolic speech motivated by religious convictions has also been recognised as protected by the speech clauses of the First Amendment. In *Wilson v US West Communications* Judge Shanahan treated as religious speech a women's religiously-motivated wearing of an anti-abortion button featuring a colour photograph of a foetus.[56]

In some cases constitutional protections of speech and free exercise are invoked simultaneously. In *West Virginia Board of Education v Barnette* the Supreme Court held that the government could not require Jehovah's Witness school pupils to salute the flag and recite the pledge of allegiance.[57] The challengers had argued that the participation in these acts amounted to worship of 'graven images' and was forbidden by scripture. The Justices held that the government cannot require affirmation of belief and an attitude of mind and that to do so would violate the rights of free worship *and* free speech, since the latter encompassed freedom not to speak. Overruling the Court's earlier case law,[58] Justice Jackson asserted that the flag salute was a type of utterance, a primitive but effective way of communicating an idea: 'The use of an emblem or flag to symbolize some system, idea, institution, or

[55] *Murdock v Pennsylvania* (n 44) 108-109.
[56] 58 F.3d 1337 (8th Cir. 1995).
[57] *West Virginia Board of Education v Barnette* (n 19).
[58] *Minnersville School District v Gobitis* 310 US 586 (1940).

personality is a short-cut from mind to mind.[59] Justice Jackson went on to reject the governmental justification of 'national unity' stating that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[60]

In *Cantwell v Connecticut*, another case involving Jehovah's Witnesses, the Supreme Court held that a conviction for disturbing the peace, arising from the playing of phonograph records attacking the Roman Catholic Church in offensive terms, was incompatible with the First Amendment guarantees of freedom of speech and free exercise.[61] Justice Roberts stressed that exaggeration and even vilification must be tolerated in disputes involving religious affiliation, just as they are tolerated in political argument.[62] As Kent Greenawalt has noted, the *Cantwell* Court's treatment of the licensing scheme even seems to suggest that religious speech might receive greater constitutional protection than other types of speech,[63] since the Court did not say that *any* non-commercial solicitor could successfully challenge a licencing scheme.[64]

In contrast, in other cases US courts have relied on free speech rather than free exercise protections when balancing the requirements of the Establishment Clause with the need to avoid discriminating against religious viewpoints. The Supreme Court has made clear that access to government facilities is not only

[59] *Barnette* (n 19) 632.
[60] ibid 642.
[61] *Cantwell* (n 50).
[62] ibid 307.
[63] Kent Greenawalt, *Religion and the Constitution* (Princeton University Press 2006) 29.
[64] However, given current interpretations of the Establishment Clause, discussed below, the legislature cannot grant greater protection to speech based on religious viewpoint.

permitted by the Establishment Cause but can also be required by the Free Speech Clause. Free Speech Clause doctrine centres around three kinds of government-owned property: traditional public fora; designated or limited public fora;[65] and non-forum public property.[66] The second and third categories are open to private speakers but content-discrimination is permissible; limits on speech can be justified with reference to a speaker's identity or the subject matter of the speech.[67] Limitations on speech based on viewpoint discrimination are, however, not permissible.[68] As a result cases often focus on whether the restriction on speech in question is deemed to target content or viewpoint.[69] In *Good News Club v Milford* the Court applied the Free Speech Clause to strike down a public school's exclusion of a Christian group from school facilities based on religious viewpoint.[70] The distinction between content and viewpoint has become a key battleground and as a result has become somewhat convoluted. In *Rosenberger* the majority of the Supreme Court viewed a state university's denial of funding to a Christian journal, when that funding was available to similar secular student journals, to be viewpoint-based discrimination.[71] Justice Kennedy's opinion reasoned that though religion is a wide subject area it was the religious perspective and not the religious subject matter that was forbidden, since the subjects discussed in the publication were otherwise within the approved

[65] Defined in *International Society for Krishna Consciousness v Lee* 505 US 672, 678 (1992) as 'property that the state has opened for expressive purpose by part or all of the public'.
[66] Hellman (n 37) ch 9.
[67] In a limited forum government 'may legally preserve the property under its control for the use to which it is dedicated', *Lamb's Chapel* (n 35) 390. As such 'The necessities of confining a forum to the limited legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics', *Rosenberger v Rector and Visitors of the University of Virginia* 515 US 819, 829 (1995).
[68] *Perry Educational Association* (n 39).
[69] A key distinction with regards to limited public fora is that 'Access to a nonpublic forum can be based on subject matter or speaker identity so long as the distinctions drawn are reasonable and viewpoint neutral', *Cornelius v NAACP* (n 40) 806.
[70] Good News Club v Milford Central School, 533 US 98 (2001).
[71] *Rosenberger* (n 67).

category.[72] In contrast, the dissenting judgment of Justice Souter stressed that the criteria used 'deny funding for the entire subject matter of religious apologetics' and therefore 'do not skew the debate by funding one position but not its competitors'.[73] In Souter's view the Establishment Clause is clearly violated by students being required to fund religious expression.[74]

This brief survey demonstrates that there are numerous cases where US courts apply free speech provisions to circumstances that might equally be understood as covered by the Free Exercise Clause. Equally there are many instances where US courts rely on both freedom of expression and free exercise protections simultaneously. The interpretation of a refusal to comply with particular rules, such as a mandatory flag salute by students, as an expressive act rather than a religious claim for conscientious exemption arguably strengthens the claim of the religious individual as to the necessity of the exemption being permitted. Compliance in such a model is analogous to forced speech, such as requiring the swearing of religious oaths, a practice equally condemned in Strasbourg case law due to its potential to encroach upon the absolute *forum internum*.[75] On the other side of the coin, the recasting of religious activities such as preaching or praying as expressive activities opens the door to arguments that removing all religion from certain public fora is engaging in viewpoint discrimination against religion in general. As such, insistence on strict separation of church and state, as one might imagine the Establishment Clause requires, is instead recast as anti-religious and in breach of the viewpoint neutrality required by the First Amendment. It is important to note that this type of

[72] ibid 831.
[73] ibid 896.
[74] ibid 873.
[75] *Buscarini* (n 5).

argument's relevance is limited to the US context, where government's control of expression is subject to constitutional restrictions in relation to content and viewpoint neutrality.[76] Such neutrality towards content and viewpoint is not viewed as an essential part of the European system of free speech protection.[77] The point that is most pertinent from this overview, however, is that the introduction of expression as a descriptor of religiously-motivated conduct both alters and strengthens the claims of religious individuals. It is arguable that US courts' willingness to invoke speech results from the virtually absolute protection of speech in contrast with the relatively weak free exercise position towards claims of exemption from general and neutral rules post-*Employment Division v Smith*.[78] The particular constitutional context of this development need not be discussed here, beyond noting that such recourse to speech analysis may be viewed as strengthening the case of religious litigants.[79]

B. Freedom of Expression within the Convention

A key contention in this chapter is that freedom of expression maps onto and adds to the analysis of certain types of religious manifestation cases. Beyond its elucidating potential there are pragmatic reasons for litigants to rely on Article 10. This section outlines the negative manner in which religion has thus far featured in Article 10 case law, before explaining how Article 10 can nonetheless improve the level of protection for acts manifesting religious belief. This thesis' discussion of the Strasbourg Court's primarily limited approach to Article 9 may be contrasted with

[76] See *RAV v St Paul* 505 US 377 (1991).
[77] Demonstrated for example in the inclusion of hate speech in the numerous legitimate grounds for restriction of speech. See, for example, *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).
[78] *Employment Division v Smith* (n 13).
[79] For instance, Kent Greenawalt has critiqued the hybrid-claims exemption in *Smith* (ibid) on the grounds that hybrid expression and free exercise claims would rarely come about given the favourable protection under speech alone, Greenawalt, *Religion and the Constitution* (n 63) 80.

the more extensive protection afforded to freedom of expression under Article 10. The parties in *Eweida and others* and numerous academics[80] have highlighted the deficiencies of the ECtHR's protection of Article 9 in comparison with its protection of other Convention rights such as Article 10 and Article 8.[81] In contrast with Article 9 case law prior to *Eweida and others*, the freedom to resign from employment or the ability to find another avenue to express oneself have long been rejected as reasons for courts finding no interference with Article 10.[82] Similarly, in contrast with Article 9 the Court has made clear from an early stage that the fact that a person has placed themselves in a rights-restricting situation is irrelevant to the question of interference in relation to Article 10 rights.[83]

A possible objection to this point is that Strasbourg case law involving the suppression of expression on the grounds of protection of religious sensibilities shows that Article 9 receives strong protection and is in any event stronger than Article 10. In a number of cases the ECtHR has endorsed restrictions on expression viewed as contrary to morality or offensive to religious sensibilities, justifying this by reference to states' responsibilities to protect religious believers' positive rights to 'peaceful enjoyment' of their Article 9 rights. The Court's statements in *Otto-Preminger v Austria* reflect this view, with the ECtHR cautioning that 'the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful

[80] Samantha Knights, 'Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights' in RD Grillo (ed), *Legal Practice and Cultural Diversity* (Ashgate 2009) 291-291.
[81] The potential of Article 8 arguments as an alternative to Article 9 is unfortunately beyond the scope of this doctoral thesis.
[82] *Vogt* (n 21). In the Article 11 context see *Redfearn v UK* (2013) 57 EHRR 2.
[83] See in relation to Article 8 in the military context, *Smith and Grady v UK* (1999) 29 EHRR 493.

enjoyment of the right guaranteed under Article 9 … to the holders of those beliefs and doctrines'. [84]

Otto-Preminger involved the seizure and forfeiture of a film judged by domestic courts to characterise God, Jesus, and Mary in a manner that fell within the criminal offence of disparaging religious precepts.[85] The case was followed by *Wingrove v UK* in which the Court found no breach of Article 10 in the British Board of Film Classification refusing to issue a classification certificate for a short experimental video portraying Saint Theresa engaging in overtly sexual acts.[86] This line of cases has recently been confirmed in *IA v Turkey*.[87] In *IA* the applicant published a novel, 'The Forbidden Phrases', which conveyed the author's views on philosophical and theological issues and which resulted in the applicant being convicted of blasphemy and sentenced to two year's imprisonment, later commuted to a minor fine.[88] The Strasbourg Court found that the conviction did not violate Article 10 because the expression constituted 'an abusive attack on the Prophet of Islam'.[89] The Court noted that 'as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration'.[90] Given such cases, it may seem misguided to argue that religious manifestation might be better protected under Article 10 when its protections seems to be easily trumped by a concern as amorphous as that of protection of religious sensibilities. One might well assume that if religious offence is protected so strongly then surely freedom of expression arguments will equally give way to the public order concerns at issue in

[84] *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, para 47.
[85] ibid para 11.
[86] *Wingrove v UK* (1997) 24 EHRR 1, paras 9, 61.
[87] *IA v Turkey* ECHR 2005-VII 590.
[88] ibid. The fine amounted to approximately $16, para 13.
[89] ibid para 29.
[90] ibid para 24.

case such as *Hammond v DPP*,[91] detailed below, or the secularism and equality concerns cited in justification of restrictions on wearing of religious symbols such as the headscarf.

In answer it might be said that these cases should not be interpreted simply as religion trumping freedom of expression. In many ways these decisions reflect a complex range of factors at play. First, it is important to note that the Strasbourg Court has refused to extend the *Otto-Preminger* strand of jurisprudence to include either criticism of senior members of the Catholic Church or criticism of particular religious doctrines. In *Klein v Slovakia* the ECtHR held that the fact that some members of the Catholic Church could have been offended by the applicant's criticism of an archbishop did not justify interference with his Article 10 rights. His statements neither 'unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith'.[92] In *Giniewski v France* the Court found that the applicant's development of an argument critiquing a particular Catholic doctrine and its possible links with the origins of the Holocaust was a contribution to ideological debate on a 'question of indisputable public interest' and did not constitute an attack on particular religious beliefs.[93] In *Aydin Tatlav v Turkey* the Court found that though certain passages of the applicant's book contained 'strong criticism of religion in a social-political context', these passages 'had no insulting tone and neither contained an abusive attack against Muslims or against sacred symbols of Muslim religion'.[94] The Court warned that the

[91] *Hammond v DPP* [2004] EWHC 69 (Admin).
[92] *Klein v Slovakia* ECHR 2006-X 909, para 52.
[93] *Giniewski v France* (2007) 45 EHRR 23, para 51
[94] *Aydin Tatlav v Turkey* App No 50692/99 (ECtHR, 2 May 2006), para 28.

risk of a custodial sentence could discourage the publishing of non-conformist opinions about religion and impede the protection of pluralism.[95]

Such variation in the Court's concern for religious sensibilities perhaps reflects that some other factors are at play; the key issue might instead be the type of expression against which religious sensibilities are weighed. Under this analysis, the religious sensibilities line of case law might instead be better understood as representing the Court's hesitant protection of artistic, and non-political expression more generally, rather than as evidence of the strength of Article 9's protection of individual believers. The Court is most protective of speech where it identifies a public interest underlying the expression in question. As previous chapters have shown, the Court has on many occasions failed to view the harm to the feelings of religious individuals as justifying infringements on other Convention rights[96] or, indeed, state or private interests.[97] While the Court is protective of religious sensibilities when balanced against artistic freedom, they are less so where the competing interest is that of press freedom or free academic debate.[98] The speech's value to a democratic society appears to be a determinative element in the balancing process of such cases. Satirical literature such as that in *IA* or purely artistically-motivated expression of the sort at issue in *Wingrove* or *Otto-Preminger* is seen as 'gratuitously offensive' and failing to 'contribute to any form of public debate capable of furthering progress in human affairs'.[99] This point is reinforced by the

[95] ibid para 30.
[96] With regard to Article 8, see *Dudgeon v UK* (1982) 4 EHRR 149, para 60 where the Court judged the religiously-inspired moral views of members of the public as insufficient justification for the punishment in question.
[97] See Chapter 2.
[98] Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006).
[99] *Gündüz v Turkey* (2005) 41 EHRR 5, para 37.

remarks of the Court in *Gündüz v Turkey*.[100] In that case the Court emphasised that any judgment on the necessity of punishing the applicant's virulent criticism of democracy, secularism, and children born of civil, rather than religious, marriages should attach weight to the 'fact that the applicant was actively participating in a lively public discussion'.[101] The Court stressed that the context of the speech, which occurred as part of a 'pluralistic debate',[102] weighed in favour of its being protected by Article 10. The purpose of the expression at issue will thus clearly be a factor in the Court's analysis of any Article 10 claim.

Section II: Protection of Religiously-Motivated Speech under Article 10

Article 10 is by no means a panacea and a wide range of religious expression cases argued in terms of Article 10 before the ECtHR have been unsuccessful. The first part of this section outlines the cases that have come before the Court to date, arguing that the ECtHR case law on this issue has mainly related to religious advertising, viewed as akin to commercial speech and lacking a public interest, and that this to some extent explains the ECtHR's restrictive approach. Domestic case law on Article 10 reveals the importance of considering religiously-motivated expression in its context; failing to focus upon the religious context of the speech in question can lead to such expression being branded as unreasonable or gratuitous. However, where the religious context of speech has been highlighted in the application of Article 10 by domestic courts this has had a significant impact on the

[100] ibid.
[101] ibid para 49.
[102] ibid para 51.

determination of whether limiting religiously-motivated expression constituted unjustified interference with Article 10. The most recent consideration of religiously-motivated speech in *Core Issues Trust v Transport for London* reveals the potentially wide range of religiously-motivated expression which the English courts view as protected by Article 10.[103]

A. ECtHR Case Law

One possible objection to the argument that making ones case in terms of Article 10 may strengthen the value given to public manifestation of religion is that, in practice, the ECtHR's current approach to Article 10 offers little protection to non-political speech.

(i) Religious advertising cases

The ECtHR has made clear in a number of judgments that it does not view religious speech as attracting the same level of protection as political speech. Cases such as *Murphy v Ireland*[104] and *Mouvement Raëlien Suisse v Switzerland*[105] have shown the Court to be unwilling to extend categories of political speech or public interest speech to include religiously-motivated expression. In *Murphy* the Court upheld a ban on an advertisement about 'historical facts about Christ' and 'evidence of resurrection'. The Irish prohibition on advertisements 'directed towards any religious or political end' was aimed at ensuring 'respect for the religious doctrines and beliefs of others'.[106] The Court reasoned that the exercise of the right of freedom of expression carried with it the 'duty to avoid as far as possible an expression that is, in

[103] *R (Core Issues Trust Ltd) v Transport for London* [2014] EWCA Civ 34, [2014] WLR (D) 35. See text to n 204.
[104] *Murphy v Ireland* (2004) 38 EHRR 13.
[105] *Mouvement Raëlien Suisse v Switzerland* (2013) 56 EHRR 14.
[106] *Murphy* (n 104) para 63.

regard to objects of veneration, gratuitously offensive to others and profane'.[107] The Court did not explicitly consider the religious context of the advertising, declining to consider the relevance of Article 9 to the case.[108] Similar bans on political advertising on television and radio have been upheld, despite the Court acknowledging that debates on questions of public interest might fall within the ban.[109] However, in *Murphy* the Court explicitly highlighted the wider margin of appreciation generally available to contracting states when regulating freedom of expression 'in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion'.[110] This, combined with factors such as the propensity for audio-visual media to have a more immediate and powerful effect than the print media, justified the restriction.[111]

Mouvement Raëlien concerned the Swiss authorities' refusal to allow an association to put up posters featuring extra-terrestrials and a flying saucer on the ground that it engaged in activities that were considered immoral. An earlier Chamber judgment had found that though the poster contained 'nothing unlawful or shocking, either in its text or in its illustrations', the display of the association's website address amplified the effect of the poster's conveyance of information and meant minors would also have access to that information.[112] The Court agreed with the Swiss government that the speech in question was not political because the main aim of the website was to attract people to an association with a quasi-religious

[107] ibid para 65.
[108] ibid para 61.
[109] *Animal Defenders International v UK* (2013) 57 EHRR 21.
[110] *Murphy* (n 104) para 67.
[111] ibid para 69, citing *Jersild v Denmark* (1995) 19 EHRR 1, para 31.
[112] *Mouvement Raëlien* (n 105) para 33.

purpose rather than to address matters of political debate in Switzerland.[113] A broad margin of appreciation was deemed to apply because the speech was judged to be 'closer to commercial speech than to political speech *per se*, as it has a certain proselytising function'.[114] It is arguable that the context of such cases as arising in relation to advertising is important because the Court has focused on the commercial nature of the speech. The Grand Chamber particularly noted that 'individuals do not have an unconditional or unlimited right to the extended use of public space, especially in relation to facilities intended for advertising or information campaigns'.[115] These cases might arguably be best interpreted as a clear reflection of the permissibility of public bodies restricting advertising on the basis of content, rather than a reflection of the low value the ECtHR gives to religious speech.

(ii) Indications of a change in approach to non-political speech?

In any event, there are indications that the ECtHR is becoming increasingly protective of categories of speech outside of those solely or directly related to political debate. Rationales for protection of expression relating to democracy and individuals as democratic actors have traditionally been most prominent in the Court's current case law. The *Otto-Preminger* line of cases[116] in particular appears to indicate that artistic and self-expression rationales hold less sway before the ECtHR than they would, for example, before the US Supreme Court. It is broadly accepted that the ECtHR adopts a hierarchical approach to Article 10 in which political speech

[113] ibid para 62.
[114] ibid.
[115] ibid para 58.
[116] See text to n 84.

ranks highest, followed by artistic and commercial speech.[117] The traditional theorisation of the ECtHR's approach to freedom of expression under Article 10 appears to differ substantially from the rationales of free speech so central to US jurisprudence and to offer little encouragement to religious individuals. Writing on the rationales underpinning the ECtHR's approach in Article 10 cases, Fenwick and Phillipson have argued that the Court's emphasis on information and ideas that the 'public has a right to receive' suggests that the Court values freedom of expression as an audience-based rather than a speaker-based right, in contrast with theorisations of the US Supreme Court's approach.[118] In their view the Strasbourg Court has adopted a pragmatic approach to expression, valuing it for its contribution to the democratic process both in terms of education and in the media's role as a watchdog. For these reasons, the Court has been viewed as 'principally concerned with media freedom not individual freedom of expression'.[119] As a result 'freedom of expression is valued not really as an aspect of individual autonomy or for the contribution it makes to the flourishing of individuals but for the part it plays in maintaining a democratic society'.[120] They conclude that the Court has failed to insist upon proper justification of interferences where the suppressed speech does not engage the 'functionalist virtues of directly contributing to general debate on public-political matters'.[121] Rather than encouraging diversity of opinion, as the oft-cited goal of

[117] Though afforded the lowest weight and allowing states the widest margin of appreciation, a violation may still be found in such cases. In *Krone Verlag GmbH v Austria (No 3)* (2004) 42 EHRR 578 an injunction requiring a rival newspaper to alter an advertisement comparing it and its rival to include differences in their coverage of foreign and domestic affairs, culture and science etcetera was deemed to violate Article 10.
[118] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 98).
[119] ibid 68.
[120] ibid 71.
[121] ibid 106.

pluralism would seem to mandate, this approach limits the range of protected speakers to traditional sources of the media.[122]

However, there are some indications that members of the Court are increasingly protective of artistic and non-political expression. This is apparent in some majority judgments, but most tellingly in a number of dissenting opinions in closely split decisions. The ECtHR had the opportunity to confirm individual expression as having a lower value than expression by the press in *Steel and Morris v UK* and did not do so, instead finding that there was a strong public interest in enabling small campaigning groups and individuals outside of the mainstream to contribute to public debate.[123] *Steel and Morris* involved a challenge to the non-availability of legal aid in English defamation proceedings. The Court found that the absence of legal aid amounted to a disproportionate interference with the Article 10 rights of the applicants, who were defendants in a libel action by the McDonalds Corporation.

Moreover, there have been cases where the majority of the Court has supported artistic expression despite its offensiveness to certain persons. *VBK v Austria* involved a painting that depicted the faces of various well-known religious and political figures superimposed onto naked bodies engaged in sexually explicit acts.[124] The painting was displayed at a public exhibition and one of the public figures depicted, Mr Meischberger, obtained an injunction prohibiting its exhibition on the basis that it debased his reputation and political activities. The ECtHR found the injunction violated Article 10, stating that the painting 'related to Mr

[122] ibid 106-107.
[123] *Steel and Morris v UK* (2005) 41 EHRR 22.
[124] *VBK v Austria* (2008) 47 EHRR 5.

Meischberger's public standing as a politician' and that the painting could be understood as a constituting 'some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticised the painter's work'. [125] The Court implied that some public interest is invoked by the painting without specifying precisely what the public interest was or the extent to which the painting contributed to such debate.

The dissenting judgments in *IA v Turkey* also indicate that a number of the judges on the Court hold misgivings about the Court's case law on the protection of religious sensibilities and its concurrent lack of emphasis on protecting artistic expression in such cases.[126] The decision was split 4-3, with the majority finding that the expression in question, a novel critical of religious and particularly Islamic beliefs, amounted to an abusive attack on Islam and that the margin afforded to domestic courts had not been exceeded. The dissenting opinions of Judges Costa, Cabral Barreto, and Jungwiert forcefully criticised the majority's findings, emphasising that the fact that unorthodox religious views would 'offend or shock the faith of the majority of the population' was insufficient to justify the criminal sanctions against the applicant.[127] They further highlighted the chilling effect of any criminal conviction.[128] Their opinion stated that the impact of a novel was distinct from that of the films and video at issue in *Otto-Preminger* and *Wingrove* decisions, before adding that they anyway viewed these cases as deserving of reconsideration. They stated that those decisions 'place too much emphasis on conformism or uniformity of thought and … reflect an overcautious and timid conception of

[125] ibid para 34.
[126] *IA v Turkey* (n 87).
[127] 'Joint Dissenting Opinion of Judges Costa, Cabral Barreto, and Jungwiert', para 2.
[128] ibid para 6.

freedom of the press'.[129] The dissent in *Mouvement Raëlien Suisse v Switzerland* is equally telling.[130] Firstly, the tight 9-8 split in the judgment is indicative of an increasing reconsideration of the traditional approach described by Fenwick and Phillipson. The dissenting judgments each displayed strong support for a more robust protection of speech. Moreover, the narrow split decision is significant when we consider that the particular movement in question actually advocating breaking Swiss law.[131] Were the religious messages in question less contestable, the Court's view might be expected to be more speech-protective.

Notably, ECtHR judges increasingly cite and discuss US approaches to free speech when arguing for a more speech-protective approach in relation to artistic expression in non-traditional media. This is apparent in both majority and dissenting opinions. The dissenting judgment of Judges Sajó, Lazorova Trajkovska, and Vučinić in *Mouvement Raëlien* drew on US First Amendment case law in its language and terminology when making a case for a more robust protection of speech. The judges criticised the majority's introduction of a new category of 'lower-level' non-political and quasi-commercial speech and stressed the need for 'compelling reasons'.[132] Their dissenting opinion provided an appendix outlining the comparable approach of the United States Supreme Court in some detail and referring to Canadian and German case law to a lesser extent.[133] The opinion also alluded to concerns about viewpoint discrimination, highlighting the fact that the

[129] ibid para 8.
[130] *Mouvement Raëlien* (n 105).
[131] ibid. '[T]he [applicant] association's website contains a link to that of Clonaid, via which this company offers specific cloning-related services to the general public and announced, in early 2003, the birth of cloned babies. Cloning is prohibited under Swiss law, pursuant to Art. 119 of the Constitution and to the Medically-Assisted Reproduction Act (RS 814.90)': ibid para 21, where the Court quotes the domestic Federal Court judgment.
[132] ibid 'Joint Dissenting Opinion of Judges Sajó, Lazorova Trajkovska, and Vučinić', pt I.
[133] ibid, 'Appendix.

status of the association's views as contrary to that of the majority was offered by local police as an initial reason for refusing the association's request.[134] Referring to comparative US and Canadian jurisprudence, the dissenting judges contended that the nature of a public space that is accessible to all for the display of posters meant that it became a public forum and as such the government should exercise neutrality between speakers.[135] The dissenting judges stressed that the societal effects of the ban should not be underestimated, particularly given that the ban expressed an official legal disapproval of the association and its ideas.[136] These concerns reflect the real and practical ways in which concern for pluralism in expression cases involving religious belief may come into play.

(iii) Illiberal expression targeting homosexuals

Would the Court view speech expressing the view that homosexuality was wrongful or a sin as protected by Article 10? In *Vejdeland v Sweden* the ECtHR rejected an Article 10 claim by a group of individuals who had received criminal convictions for distributing leaflets denigrating homosexuality at a school.[137] The leaflets were apparently distributed with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The leaflets referred to homosexuality as a 'deviant sexual proclivity' that had a 'morally destructive effect on the substance of society'. The Court found that the statements amounted to 'serious and prejudicial allegations', particularly serious in the context of the leaflets being targeted at young people who were at 'an impressionable and sensitive age'.[138] It was also relevant that

[134] ibid (n 132) pt I.
[135] ibid pt II, 2.1.
[136] ibid pt V.
[137] *Vejdeland v Sweden* (2014) 58 EHRR 15.
[138] ibid para 56.

the pupils had no possibility to decline to accept the leaflets because the group had left the leaflets in or on the pupils' lockers, thereby imposing them on the pupils.[139] The Court reasoned that inciting hatred need not entail inciting violence and that attacks on persons committed by insulting, holding up to ridicule, or slandering specific groups of the population can be sufficient to justify restrictions on expression.[140] The conviction of the applicants and the non-custodial sentences imposed on them were viewed by the Court as not disproportionate to the legitimate aim pursued and as necessary for the protection of the reputation and rights of others.[141] In his concurring opinion Judge Spielmann warned that the Court should be not classify such speech as 'hate speech' without careful examination of whether there was in fact a 'hidden agenda' to incite hatred.[142] However, he favoured the finding of no violation of Article 10 because of the particular facts of the case, namely the age of the young people targeted, the fact that there was no possibility to decline the leaflets, and that the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.[143] It is hard to determine the extent to which the *Vejdeland* case is fact specific or marks a trend by which speech that is offensive to homosexuals will not be tolerated. The fact that the individuals in the case had been linked to neo-Nazism was likely an influential factor.[144] As the judgment makes clear, the unlawful entry into a school and the inability of students to avoid the leaflets were also clearly factors that influenced the Court. In light of this case it is hard to tell how the Court would react to a case involving a religiously-motivated speaker protesting against same-sex

[139] ibid.
[140] ibid para 55.
[141] ibid para 59.
[142] ibid 'Concurring Opinion of Judge Spielmann Joined by Judge Nussberger', para 4.
[143] ibid para 6.
[144] ibid para 8.

marriage[145] or a religiously motivated refusal of service case argued in terms of Article 10.

B. Religiously-Motivated Offensive Speech in the UK

Domestic interpretation of the protection afforded by Article 10 to insulting or illiberal speech has at times proved less than robust. However, this section argues that recent cases from Northern Ireland and the English Court of Appeal are indicative of a more liberal attitude towards religiously-motivated illiberal or offensive speech. In the UK speech may be punished because of its offensive content, as is clear from the provisions of the Public Order Act 1986. Part 3 of that statute prohibits expressions of racial hatred, defined as hatred against group of persons by reason of the group's colour, race, nationality, or ethnic or national origins. This has subsequently been added to by the Racial and Religious Hatred Act 2006, which covers expressions of racial hatred.[146] Homophobic speech is regulated in the UK under numerous separate provisions. For instance, section 146 of the Criminal Justice Act 2003 imposes a duty on courts to increase the sentence for any offence aggravated by hostility based on the victim's sexual orientation or presumed sexual orientation. Homophobic speech alone, absent any other criminal offence, is likely to be tackled under specific incitement to hatred provisions[147] or provisions of

[145] Such as Mr Hammond, discussed at text to n 151.
[146] Amending the Public Order Act 1986 by inserting Part 3A.
[147] The Criminal Justice and Immigration Act 2008 amended Part 3A of the Public Order Act 1986 to include the offence of inciting hatred on the ground of sexual orientation. Section 29B(1) provides: 'A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up ... hatred on the grounds of sexual orientation.' Section 29AB provides that '"hatred on the grounds of sexual orientation" means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both).

the Public Order Act 1986 that regulate insulting speech causing alarm or distress.[148] As distinct from the original Part 3 prohibition of racial hate speech, the incitement to hatred provisions relating to sexual orientation and religion require the additional elements that the act complained of must be intentional and be threatening and not just abusive and insulting.[149] An offence under Part 3 may arise from a diverse range of actions: the use of words or behaviour or display of written material, publishing or distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material.[150]

There have been several high profile cases involving the application of the Public Order Act 1986 to speech deemed offensive to homosexuals, with one of the most prominent being *Hammond v DPP*.[151] *Hammond* involved an elderly preacher who stood on a public street in Bournemouth wearing a large sign with the words 'Stop Immorality', 'Stop Homosexuality', and 'Stop Lesbianism'. An angry group gathered around Mr Hammond, some people threw soil and water at him, and he was at one point knocked to the ground by the crowd. A police officer witnessing these events asked Mr Hammond to leave the area, but he refused. After being approached by a group of persons angry that Mr Hammond had not been arrested, and concerned that further violence would ensue, the police arrested Mr Hammond for 'provoking

[148] See Public Order Act 1986 s 5 relating to the causing of harassment, alarm or distress' and s 4A inserted by the Criminal Justice and Public Order Act 1994 relating to the causing of intentional harassment, alarm or distress.
[149] In relation to religious hatred see Religious Hatred Act 2006, s 29B(1). For commentary on the distinctions between racial and religious hatred see Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred' [2006] Public Law 521.
[150] Part 3, ss 18-23. The Malicious Communications Act 1998 and the Communications Act 2003 s 127(1) may also be invoked in relation to homophobic offensive speech.
[151] *Hammond v DPP* (n 91).

violence' in breach of the peace.[152] Mr Hammond was convicted under Section 5(1) of the Public Order Act 1986 which makes it an offence to use 'any threatening, abusive or insulting words or behaviour, or disorderly behaviour or [to display] any writing, sign, or other visible representation which is threatening, abusive, or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby'.[153] The Magistrates Court found his sign to be 'insulting' and to have 'caused distress to persons who were present'. The 'pressing social need' for restricting Mr Hammond's expression was provided by the 'need to show tolerance towards all sections of society'.[154] His protest was viewed by the court as going 'beyond legitimate protest' and 'provoking violence and disorder' and interfering with the rights of others. Given these factors, the interference of the Public Order Act with his freedom of expression was judged proportionate.[155]

Mr Hammond's estate launched a posthumous appeal on a point of law, arguing that his rights of religious freedom and free expression under Articles 9 and 10 of the Convention had been violated. However, the High Court upheld the magistrates' factual finding. May LJ ruled that it was 'open to the justices' to reach the view that the words on the sign were 'insulting' within the meaning of the Act,[156] caused harassment, alarm, or distress to persons present, and that the applicant was aware of that fact. Counsel for Mr Hammond argued that the fact that the sign formed part of sincere religious expression meant that it should be distinguished from intentionally insulting expression and that it was necessary to find compelling

[152] ibid [5].
[153] Public Order Act 1986, s 5(1).
[154] *Hammond* (n 91) [19].
[155] ibid.
[156] ibid [32].

grounds for interfering with such expression.[157] However, May LJ ruled that, even taking into account Article 10 and Article 9 considerations, the Magistrates Court had not erred in finding Mr Hammond's conduct was not reasonable.[158] The High Court held that the lower court had 'considered the questions they were obliged to consider' in relation to the Act and the Article 10 rights of the appellant.[159] The possibility of challenging the decision before the ECtHR was blocked by Mr Hammond's death prior to the petition being determined.[160]

One key problem with the decision in *Hammond* relates to the High Court's findings in relation to Article 10. Many commentators have contended that a violation of the Convention would likely have been found had the appeal on behalf of Mr Hammond's estate been admissible.[161] It seems likely that the treatment of Mr Hammond falls below the standard of protection guaranteed by Article 10.[162] The domestic courts of other Convention states have found that convictions of street preachers in similar circumstances breached Article 10. In *Ake Green* the Swedish Supreme Court viewed as a breach of the Convention the sentencing to one month's imprisonment of a Swedish pastor who preached and published a sermon in which he contended homosexuality was immoral.[163] The severity of the sentence, alongside the fact that the pastor's statements were made in the context of a sermon and were regarding a theme found in the Bible, informed the domestic court's view that the restriction on Article 10 was not proportionate. Thought the sentence in *Hammond*

[157] *Hammond* (n 91) [30].
[158] ibid [19], [33].
[159] ibid [33].
[160] *Fairfield v UK* App No 24790/04 (ECtHR, 8 March 2005)
[161] Ian Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty' 10 Ecclesiastical Law Journal 337, 341.
[162] Eric Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998 Symposium: An Ocean Apart - Freedom of Expression in Europe and the United States' (2009) 84 Indiana Law Journal 851; Weinstein (n 28).
[163] *Prosecutor General v Åke Ingemar Teodor Green* Case No B 1050–05, (29 November 2005).

was less severe, it is arguable that a breach of the Convention would similarly have been found had the case proceeded before the ECtHR.

Post-*Hammond*, the legal position of controversial speakers where the Public Order Act was invoked was for some time unclear. With regards to public order, where there is no threat of violence the speaker may feel on surer ground.[164] However, at times police practices displayed an understanding of the Act as including any speech which had been complained of as insulting. Police investigations have been launched into numerous high-profile figures, including the Anglican Bishop of Chester, the Secretary-General of the Muslim Council of Great Britain, and the Roman Catholic Archbishop of Glasgow.[165] Reports of police treating comments which amount solely to a disapproval of homosexual conduct as homophobic 'hate incidents'[166] display the potential for misapplication of hate speech and public order protections and the potential 'chilling effect' of such regulations on controversial speech. However, the fact that prosecutions were dropped or not even instigated in these cases is indicative of the realisation that Article 10 protects such forms of controversial speech.

A key criticism of the *Hammond* case is the failure of the High Court to give adequate weight to the core right of an individual to speak publicly on matters of public interest. James Weinstein has highlighted how Mr Hammond was exercising his right to free speech on the street of the town square, a setting particularly

[164] See *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin) [12].
[165] Described in Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty', (n 161) 339.
[166] A 'hate incident' is defined as 'Any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by prejudice or hate', Association of Chief Police Officers and Home Office Standards Unit, *Hate Crime: Delivering a Quality Service* (London, 2005) para 2.2.1.

identified with an individual's right to contribute to public debate.[167] He was also expressing a view upon a matter of public concern; given on-going policy debates about same-sex marriage and ordination of homosexual clergy in Britain, expression of an opinion on the morality of homosexuality clearly fell within such a category. As numerous commentators have noted, the most fundamental problem with the decision in *Hammond* is that the individual in question was in effect left unable to communicate his beliefs, because their core message is inescapably insulting to homosexual persons.[168] This is because it is not the manner of communication that the court found to be 'insulting' within the terms of the Public Order Act, but rather the content of the idea that Mr Hammond sought to communicate.[169]

Yet another clear problem in *Hammond* is the High Court's failure to give weight to the fact that it was the reaction of the crowd rather than the speaker that created the violence and disorder. The fact that the aim of the speaker was not to instigate such disorder but to peacefully express his beliefs also seems to be a factor deserving of more attention. Indeed, these elements appear decisive in a number of earlier decisions dealing with similar factual scenarios. The judgment in *Hammond* certainly appears at odds with the spirit of the Court of Appeal's earlier judgment in *Redmond-Bate v DPP*.[170] Like Mr Hammond, the appellant in *Redmond* was a Christian street preacher. The case involved the conviction of the appellant for obstructing a police officer in the execution of his duty.[171] Though factually similar, the case was thus framed around a different legal question, namely whether the

[167] Weinstein (n 28) 32.
[168] Andrew Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? - "Insulting" Expression and Section 5 of the Public Order Act 1986' [2004] Public Law 853, 865.
[169] Weinstein (n 28) 33.
[170] *Redmond-Bate v DPP* [1999] EWHC Admin 733, [2000] HRLR 249.
[171] Police Act 1996, s 89(2).

appellant's arrest was lawful given the police offer's perception that there was about to be a breach of the peace, and did not involve the Public Order Act 1986. The court found that any violence or likely threat of violence apprehended by the police officer emanated from others present rather than the appellant. Revealingly, Sedley LJ stated:

> Free speech includes not only the inoffensive but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.[172]

In finding for the appellant the Court of Appeal applied an early case, *Beatty v Gillbanks,* involving the practice of the Salvation Army of marching through the streets promoting temperance, despite knowing that those who opposed them would likely disrupt the march and cause a public disturbance.[173] In that case the Queen's Bench supported the Salvation Army, observing that 'a man may [not] be convicted for doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act'.[174]

There have been attempts to clarify the law in this area. In relation to hate speech legislation, the Criminal Justice and Immigration Act 2008, which extended existing hate crime legislation to cover homophobic hate speech,[175] also inserted

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[172] *Redmond-Bate* (n 170) [20].
[173] *Beatty v Gillbanks* [1882] 9 QB 308 (HC). David Feldman argues this case is less supportive of street preachers than might appear, since the case centred on whether the Salvation Army was engaged in an unlawful assembly, David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press 2002) 1023.
[174] See also the House of Lords decision in *R (La Porte) v The Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 All ER 529, which emphasised that the police may only intervene when violence is imminent and there is no other way of preventing a breach of the peace.
[175] Amending Part 3A of the Public Order Act 1986. *R v Ihjaz Ali, Razwan Javed and Kabir Ahmed* Crown Ct (Derby) 10 February 2012 (Judge Burgess V-C) was the first prosecution under the 2008 legislation.

section 29JA, a provision which clarified that 'the discussion or criticism of sexual conduct or practices or the urging of persons to refrain or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred'. Though the Government contested the necessity of the provision,[176] prosecutions of religious traditionalists under incitement to hatred legislation in other countries such as Sweden[177] and the Netherlands[178] evidenced the need to distinguish between criticism of homosexuality and threats or incitement. In relation to public order legislation, the Government recently agreed to remove the reference to 'insulting' in Section 5 of the Public Order Act where a victim is not clearly identifiable.[179]

(i) Taking account of the religious context of expression in Article 10

Where religiously-motivated speech is offensive or insulting courts have viewed Article 10 rather than Article 9 as the governing Convention right. Given the limitations inherent to the concept of religious manifestation within the *forum externum,* religiously-motivated speech that is offensive or insulting is unlikely to be successfully defended under the auspices of Article 9. In *Redmond-Bates v DPP* Sedley LJ observed, in the context of a conviction against a Christian street preacher, that 'Article 9 rights … [did] not usefully add to the rights recognised by Article 10'.[180] While it appears correct that considering religious manifestation within Article 10 would increase the protection available to the individual, the religious

[176] See Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty' (n 161) 343.
[177] *Prosecutor General v Åke Ingemar Teodor Green* (n 163).
[178] 'Dutch Court Clears Anti-gay Imam' (*BBC News*, 9 April 2002) <http://news.bbc.co.uk/2/hi/europe/1917905.stm> accessed 4 August 2014.
[179] Controversial arrests under the Act included that of a 16 year old boy holding a placard saying 'Scientology is a dangerous cult', Robert Booth, ''Insulting' to be Dropped from Section 5 of Public Order Act' (*The Guardian*, 14 January 2013) <http://www.theguardian.com/world/2013/jan/14/insulting-section-5-public-order-act> accessed 4 August 2014.
[180] *Redmond-Bate v DPP* (n 170) [12]. A point recently repeated by Lord Dyson MR in *Core Issues Trust (CA)* (n 103) [92].

context of the speech should not be disregarded. Religiously-motivated speech is currently covered by Article 10 and normally cases will involve the use of the spoken or written word. Such expression may take the form of proselytism, public protest, or various other forms of engagement such as letter-writing campaigns.[181]

If courts were to consider non-speech religiously-motivated expression within Article 10, the religious context informing that conduct would remain an important consideration. Where the impugned expression is religiously-motivated there are a number of distinct factors in play. First, the individual may be motivated not only by the normal desire to express themselves, but may also be acting upon a perceived religious duty to do so. Second, the content of their beliefs may be such that their expression is irreducibly offensive. Traditional understandings of homosexuality that are part of numerous religions' teachings and doctrines are offensive to many. From a free speech perspective, a particularly problematic aspect of these cases is that in some instances punishment of the speech follows solely from the insulting nature of its religiously-inspired content and is not based upon the manner in which the message is conveyed. Ignoring the religious context of such speech leads to a situation where the rationales underlying protection of freedom of expression and mere dislike of the message conveyed, independent of any immediate prospect of damage or harm, lead to that expression being curtailed or penalised.

In a *Hammond* type case, an important element is that the religious message that homosexuality is a sin contains an irreducibly offensive content. It seems extremely doubtful that any articulation of such biblical teachings could avoid

[181] See, for example, *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

insulting and offending members of the public, particularly those of homosexual or bisexual orientation. References to the scriptural passages underlying such controversial statements are equally likely to cause insult or offence. As discussed above, this creates a situation where a particular viewpoint becomes essentially incommunicable, at least without fear of incurring punishment under public order or hate speech legislation. Undoubtedly there is a 'chilling effect', one which also touches on Article 9 given the ECtHR's recognition that 'bearing witness in words and deeds' is an essential aspect of religious freedom.[182] It might seem that such cases create a fundamental impasse between the State's positive obligation to promote non-discrimination and protect citizens' Article 8 rights of respect for private life, including sexuality, and individuals' Article 9 right to bear witness to teachings denouncing homosexuality. However, as Lord Steyn famously observed 'in law, context is everything'[183] and the same can surely be said of such conflicts. Context is arguably the guiding principle that should guide courts' actions in reconciling freedom of expression, religion, and respect for private life. In this respect courts might borrow the approach adopted in reconciling Article 10 and offensive speech in the context of protecting religious sensibilities and ask whether the expression is gratuitous and unnecessary for the communication of the message.

In Article 10 cases where harm to religious sensibilities is invoked the Strasbourg Court centres its proportionality analysis on whether the offence in question is of a gratuitous nature, that is whether the offensive language or references used are essentially unnecessary or ancillary to the information or message which the speaker is intending to convey. In *Otto-Preminger* the ECtHR

[182] *Kokkinakis* (n 2) para 31.
[183] *R v SSHD ex p Daly* [2001] UKHL 26, [28].

noted that though criticism or denial of religious beliefs must be tolerated, 'the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the state'.[184] The speaker's responsibilities and duties include 'an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement on their rights, and which do not therefore contribute to any form of public debate capable of furthering progress in human affairs'.[185] Though these principles have been developed in the context of protecting religious sensibilities they have also been applied in other contexts, for example in the English case of *Gaunt v OFCOM* where the claimant's use of the terms 'Nazi', 'health Nazi', and 'ignorant pig' to describe a local councillor was deemed to be gratuitously offensive.[186] Blair J found that the statutory regulator's finding against the broadcast company airing the show did not constitute a material interference with the claimant's freedom of expression because 'An inhibition from broadcasting shouted abuse which expresses no content does not inhibit, and should not deter, heated and even offensive dialogue which retains a degree of relevant content'.[187] The case appears to come close to the US Supreme Court's approach in *Chaplinsky v New Hampshire*, whereby gratuitously offensive 'fighting words' were found to be categorically excluded from First Amendment protection.[188]

In finding Mr. Hammond guilty and in arresting and instigating investigations of preachers who criticise homosexual sexual conduct it seems likely that the

[184] *Otto-Preminger* (n 84) para 47.
[185] ibid para 49.
[186] *Gaunt v OFCOM* [2010] EWHC 1756.
[187] ibid [50].
[188] 315 US 568 (1942). The status of such an exception is unclear; the Court never sustained another conviction on the basis of the doctrine after *Chaplinsky*. See also *Cohen v California* 403 US 15 (1971).

relevant decision makers gave little weight to the specific religious context of the speech acts in question or to the inevitable nature of offence arising from the expression of the religious beliefs in question. In these types of cases the aim of the speaker is not to insult but to proselytise, to 'save' those who have strayed from religion or from what they see as the correct interpretation of their faith. Moreover, regardless of the manner in which the religious belief is expressed, its content is inescapably offensive to members of the homosexual community. If these elements of the expression are ignored or brushed over then the expression appears gratuitous and needlessly offensive. However, the religious speaker in such cases has not gratuitously embellished their message; the fact remains that the religious doctrines and religious teachings of many major religions denounce homosexual acts as sinful. In disseminating the content of their religion's doctrine the creation of offence by individual speakers may be to some extent unavoidable. Certainly, the elements of the speech causing offence cannot be said to be gratuitous or unnecessary for the communication of the belief in question.

(ii) The impact of recognition of the interrelation of religion and expression

There is no need to theorise hypothetically how cases such as *Hammond* might have fared were the religious nature of the message, and the inevitable level of offensiveness intrinsic to some religious content, taken into account. *Kirk Session of Sandown Free Presbyterian Church*, a recent Northern Ireland High Court decision, provides a strong indication of how such considerations affect the proportionality analysis under Article 10.[189] In that case the High Court quashed a decision of the Advertising Standards Authority (ASA) that an advertisement entitled 'The Word of

[189] *Re Kirk Session of Sandown Free Presbyterian Church* [2011] NIQB 26, [2011] NI 242.

God Against Sodomy' was homophobic. The advertisement had been placed in response to the holding of a Gay Pride parade in Belfast and it invited members of the public to join an assembly for a gospel witness against the act of sodomy. The text referred to the act of sodomy as 'a grave offence to every bible believer who, in accepting the pure message of God's precious Word, express the mind of God by declaring it to be an abomination', citing Leviticus 18:22, 'Thou shalt not lie down with mankind as womankind; it is an abomination'.[190] The applicant church argued that their religious convictions mandated that they speak out against what they saw as immoral behaviour and call for Christian repentance and redemption.[191]

Treacy J found that there had been an interference with the applicant's Article 10 rights. However, he also concluded that the ASA had pursued a legitimate aim in maintaining a system of self-regulation of advertising including controls of publication of material that would cause widespread offence, including offence interfering with the rights of readers of a particular sexual orientation to respect for their dignity and private life.[192] In determining the proportionality of the ASA's actions Treacy J balanced the extent and severity of the interference with Article 10 against the community's interest in prohibiting gratuitous offence.[193] The ASA submitted that its adverse adjudication did not stop the applicant from placing another advertisement stating its opposition to sodomy or the march in more temperate and less offensive language.[194] The applicant responded that the offence generated by the advertisement was 'outweighed by the interest in the Church being

[190] ibid [14].
[191] ibid [39].
[192] ibid [52]-[53].
[193] ibid [55].
[194] ibid [61].

able to express its religious views, as part of the manifestation of their beliefs, and to do so by Scriptural quotation'.[195]

In response to these arguments Treacy J stressed the importance of context,[196] noting that at the previous year's Gay Pride march a participant had carried a banner saying 'Jesus is a fag'.[197] He also noted that the advertisement incited neither violence nor any other illegal or improper activity.[198] Importantly, he took account of the religious context of the expression in question:

> [The advertisement] was placed by people whose deeply held religious views on the practice of homosexuality are probably well known. By the advertisement they were seeking to stand up for their beliefs and to encourage others to do so by bearing public witness.[199]

The judge went on to note that 'since the essence of the applicant's belief is based on biblical scripture' it was unsurprising that such persons would express themselves through quoting scripture, since it 'underpinned their deeply held religious faith'.[200] The effect of the ASA's decision would be to materially inhibit their use of certain biblical scripture.[201] Importantly, he stressed that if the applicant were prohibited or inhibited from articulating their religious conviction and from calling on others to bear witness through referencing the very scripture underpinning those beliefs, then such a restriction could appear akin to censorship.[202] Whilst their religious views and the biblical scripture underlying those views undoubtedly cause offence to those of a

[195] ibid [64].
[196] ibid [68].
[197] ibid [69].
[198] ibid.
[199] ibid.
[200] ibid [70].
[201] ibid [71].
[202] ibid [72].

certain sexual orientation, Article 10 protects expression which offends, shocks, and disturbs. The Convention protection extends to the means of dissemination of information, since any restriction on the means necessarily interferes with the right to receive and impart information. In these circumstances Treacy J found the ASA had failed to establish convincingly the necessity of restrictions which amounted to a disproportionate interference with the applicants' freedom of expression.[203] In focusing on the religious context of the expression in question and simultaneously recognising Article 10's protection of controversial speech, the judgment clearly conveys how religiously motivated speech can benefit from being judged in light of both religious and expressive contexts.

The recent judgment in *Core Issues Trust v Transport for London* confirms this more speech-protective stance towards religiously-motivated controversial speech.[204] The Court of Appeal endorsed Lang J's High Court judgment in which she had found that a restriction of the applicant's Article 10 rights, arising from Transport for London refusing to carry an advertisement on London buses contending that homosexuality was a curable medical condition, was in the circumstances both justified and proportionate.[205] However, the case is revealing of the current more liberal view of the scope of Article 10's protection of controversial speech. While highlighting a number of factors that weighed in favour of her decision, including the intrusive location, the number of people exposed to the advertisements over a number of weeks, the nature of the message and its effects on gay persons,[206] Lang J had made the following statement:

[203] ibid [73].
[204] *Core Issues Trust (CA)* EWCA (n 103).
[205] *R (Core Issues Trust Ltd) v Transport for London* [2013] EWHC 651 (Admin), [2013] PTSR 1161.
[206] ibid [129].

> In order to give effect to the primary right of freedom of expression in a democratic society, those who wish to promote an offensive or controversial message should be entitled to do so. In my view, it is proportionate to ask those people to express those views in a way other than by advertising on buses in a major city. Posters, leaflets, articles, meetings and the internet all provide an alternative vehicle for expression of these views.[207]

This statement, which was endorsed by Lord Dyson MR in the Court of Appeal, suggests that a wide range of religiously-motivated expression should be considered to be protected by Article 10.[208] Lang J had stressed that the factors such as the intrusive and widespread nature of the proposed advertisement distinguished it from the newspaper advertisement approved by the High Court of Northern Ireland in *Sandown*.[209] The *Core Issues Trust* judgment implies that the sort of speech at issue in the *Hammond* case would now be viewed as protected by Article 10 because banning it would not be proportionate to its nature or impact. The speech at issue in *Core Issue Trust* was both abrasive and particularly denigrating of homosexual identity. Lord Dyson MR agreed with Lang J that not only was the advertisement liable to interfere with the Article 8 rights of gay persons,[210] but was also 'liable to encourage homophobic views' which could in turn place gays at risk.[211]

Lord Briggs' concurring judgment indicates that the religious context of the expression in *Core Issues Trust* was considered relevant and given some weight by the Court of Appeal in reaching its final determination. In the High Court Lang J had found that TfL's previous acceptance of an advertisement by Stonewall which stated 'Some People Are Gay. Get Over It!' was in breach of Transport for London's

[207] ibid [146].
[208] *Core Issues Trust* (CA) (n 103) [63].
[209] *Core Issues Trust* (HC) (n 205) [138].
[210] *Core Issues Trust* (HC) (n 205) [138]; *Core Issues Trust* (CA) (n 103) [84].
[211] *Core Issues Trust* (HC) (n 205) [142]; (CA) (n 103) [85].

equality policy. Briggs J approved this finding and criticized the 'confrontational' nature of the Stonewall advertisement. He went on to express the concern that religious persons might view such a message as 'at least disrespectful of their sincerely held beliefs, and to some as suggesting that there is no place for the toleration of their beliefs in modern society'.[212] Briggs J expressed the following view on the conflict at issue in the case:

> There are many people, of many different faiths and none, who have been brought up and taught to believe that all homosexual conduct is wrong. Many have, after long and careful thought, arrived at a different view. Some have been encouraged along the way by bold expressions of the type found in the Stonewall advertisement. But many others continue sincerely to hold that belief, and some regard a departure from it as inconsistent with the maintenance of their faith. Some would rather give up their jobs, or discontinue their businesses, than act in a way which they believe condones such conduct, whether by conducting civil partnership or gay marriage ceremonies, by admitting gay couples to bed and breakfast accommodation, or by providing adoption training to gay couples. Sincere differences of view about this issue are tearing apart some religious communities, both here and abroad.[213]

These remarks reflect a notable sensitivity to the difficulties apparent in reconciling the position of persons with sincere religious opposition to homosexuality and the pursuit of sexual-orientation equality in modern society. The sensitivity to the religious context of such views on homosexuality is to be welcomed.

This consideration of the domestic application of Article 10 to religiously-motivated controversial speech in the UK has highlighted how ignoring the religious context of speech can lead to religiously-motivated speech being branded unreasonable or illegitimate. It has also examined how domestic case law has

[212] *Core Issues Trust (CA)* (n 103) [105].
[213] ibid [104].

evolved to become increasingly protective of illiberal or offensive religiously-motivated speech and how recent judicial comments suggest that the street preacher in *Hammond* would likely now be viewed as protected by Article 10. The next section considers the potential to view non-speech expressive conduct, such as the wearing of religious dress or the refusal to act in a manner contrary to religious beliefs, as aspects of freedom of expression, considering the applicability of freedom of expression rationales to such conduct. It argues that taking account of the pluralism and autonomy rationales for freedom of expression when judging religious manifestations can radically alter how we perceive the conflicting interests in religious dress, religious employee, and refusal of service cases. The final section of this chapter surveys the practical litigation strategies that might bring the freedom of expression aspect of religious manifestation into play in future cases.

Section III: The Applicability of Article 10 to Conduct other than Speech

This chapter has already considered the importance of acknowledging the relationship between religious belief and the treatment of expression under Article 10. This section considers the relevance of Article 10 to expression of religious belief in ways other than speech. This section contends that some of the rationales for freedom of expression are equally applicable to religiously-motivated conduct not traditionally understood as protected by Article 10, such as the wearing of religious symbols and the refusal of service for religious reasons. It also looks at how arguing for accommodation of religious manifestation in terms of Article 10 might potentially impact two important questions. First, how might freedom of

expression rationales assist courts in defining the harm in suppressing contestable expressions of religious belief? Second, how might the operation of justification analysis, and particularly the margin of appreciation doctrine, be impacted by a claimant framing their case in terms of Article 10 rather than Article 9?

A. The Advantages of a Freedom of Expression Approach

There are many reasons why formulating a religious manifestation case in terms of Article 10 might be beneficial. An approach which emphasises the freedom of expression aspect of religiously-motivated acts might be beneficial from the perspectives of both the judiciary and litigants in providing non-controversial grounds by which such forms of expression may be assessed and by circumventing the wide margin of appreciation traditionally applied in Article 9 cases.

(i) Problems with valuing religious manifestation

Judges may welcome the possibility of interpreting certain religious manifestations as expressive acts for a number of reasons. First, such an approach may help courts overcome some of the problems inherent in adjudicating conflicts involving acts motivated by religious truth claims, the substance of which judges are unable to accept. Academics and jurists alike may view valuing expression of belief because of respect for various free speech rationales as preferable to courts engaging with questions surrounding the centrality of a particular manifestation to religious doctrine or subjective religious belief. As previous chapters have detailed, a significant flaw of traditional understandings of religious freedom under Article 9 has been a failure to reflect the importance of public manifestation as well as private belief. In addition, the failure in communication between religious believer and judge

within the circumscribed and avowedly secular realm of legal argument means that religious litigants often fail to communicate the reasons underlying their insistence upon public expression of their religion. Even where courts acknowledge that weight should be given to them, such concerns rarely fare well when balanced against secular interests or the rights of other persons.

(ii) Stronger scrutiny of necessity of restrictions on Article 10

It is arguable that the ECtHR has been more protective of freedom of expression than freedom of religion, a point highlighted by Judge Tulkens in her dissenting opinion in *Sahin.*[214] As Judge Tulkens highlighted, the headscarf's effect on others is speculative compared to the far more extreme and palpable effects of expression which the Convention has been deemed to protect. Though the approach of the Court has moved beyond discussion of religious coercion, the current justification for restrictions in *SAS* still focuses on the effect of religious symbols on those who perceive them, and the ensuing damage to the overall aim of pluralism and 'living together'.[215] In *Sahin* Judge Tulkens' dissent pointed to the Court's decision in *Gündüz v Turkey*,[216] where the Court held that there had been a violation of Article 10 when a Muslim religious leader had been convicted for violently criticising the secular regime in Turkey, calling for the introduction of sharia law and referring to children born of marriages celebrated solely before the secular authorities as 'bastards'.[217] Judge Tulkens highlighted the asymmetry whereby manifesting one's religion by peacefully wearing a headscarf may be prohibited, whereas remarks

[214] *Sahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber) 'Dissenting opinion of Judge Tulkens'.
[215] See discussion of *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) at text to n 167 in ch 2.
[216] *Gündüz* (n 99).
[217] See text to n 99.

which could be construed as incitement to religious hatred are protected by freedom of expression.[218]

B. The Practical Limitations of Article 10 Arguments

The judgment in *SAS v France* highlights the extent to which making Article 10 arguments to the Court does not guarantee that the case will be decided on those grounds.[219] In *SAS* the applicant stated that there were certain times, such as religious holidays, when she believed she ought to wear her *niqab* in public to 'express her religious, personal, and cultural faith' and that the aim of such expression was to 'feel at inner peace with herself'.[220] However, the government party argued, inter alia, that such expression was contrary to the values of the French Republic, particularly gender equality and fraternity.[221] While rejecting the first of these contentions, the Court accepted the latter as a legitimate aim proportionally pursued.[222] Despite accepting that 'the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public', the Court viewed the government party's pursuit of preserving 'a principle of interaction of individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society'.[223] This twists the logic of pluralism and tolerance on itself: if pluralism is guaranteed by a particular form of facial interaction in public places then a ban on covering ones face in public places actually supports pluralism. The damage caused to pluralism by the negative expressive meaning of such a targeted ban and by the

[218] *Sahin* (n 214) 'Dissenting Opinion of Judge Tulkens', para 9.
[219] *SAS* (n 215).
[220] ibid para 12.
[221] ibid para 82.
[222] ibid paras 153-158.
[223] ibid para 153.

explicitly Islamophobic nature of the debate was not dealt with by the Court. Evidence was presented to the Court on the rise of Islamophobic attacks since the ban, arguably a clear indicator that the value of pluralism in French society has in fact been diminished.[224] On the other hand, the assumption that seeing another's face in public is a pre-condition of pluralism was given preponderant weight, without its underlying basis being examined in any meaningful way. In contrast with evidence of the ban's negative impact on respect for pluralism in France, whether the possibility of seeing a Muslim woman's face directly impacts upon respect for pluralism in society remains largely speculative.

Construing the value of 'living together' as legitimising the banning of certain religious expression from the public space, as the Court has done in *SAS*, essentially places the right not to be offended above the right to express one's religious beliefs in day-to-day life. This is at odds with the Court's Article 10 jurisprudence establishing that freedom of expression includes things which shock and offend.[225] The *SAS* judgment is also in contrast with cases where the Court has found controversial symbolic speech to be protected by Article 10. In *Donaldson v UK*, a case involving the wearing of a political symbol commemorating the deaths of Irish republicans in the Easter 1916 Rising, the Court stated that the level of offence caused by a particular emblem cannot alone set the limits of freedom of expression.[226] The Court emphasised that it was the acute risk of disorder in a prison context during periods of conflict which on the particular facts of the case justified the restrictions in question.[227] In *Vajnai v Hungary* the Court ruled that Hungary was

[224] ibid paras 104, 149.
[225] *Handyside v UK* Series A no 24 (7 December 1976).
[226] *Donaldson v UK* (n 4).
[227] ibid para 29.

not entitled to restrict the wearing of a red star, a political symbol associated with a previous totalitarian regime, despite the offence caused to those who observed the wearer.[228] The Court accepted that 'the display of a symbol which was ubiquitous during the reign of … [totalitarian] regimes' might create uneasiness or a sense of disrespect amongst past victims and their relatives. Nonetheless, the ECtHR found a ban on the wearing of the symbol of a red star to be too broad given the multiple meanings of the symbol.[229] The Court noted that uneasiness experienced by viewers of the symbol could not be allowed to set the limits of Article 10.[230] It went on to state that:

> In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto. [231]

This highly speech-protective language, and its warning of the dangers of transforming public feeling into law, seems particularly apt in considering the conflict at issue in the French *burqa* ban. The acknowledgement of the multiple meanings that a symbol may hold echoes one of the major criticisms of the Court's religious symbols case law.[232]

These cases had been highlighted as indicative of the potential for the Strasbourg Court to hold that an absolute ban on the wearing of the *burqa* was an

[228] *Vajnai v Hungary* (n 4).
[229] ibid para 54.
[230] ibid para 57.
[231] ibid.
[232] Dominic McGoldrick, *Human Rights And Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing Limited 2006) 8-12.

undue restriction on freedom of expression.[233] However, as is clear from the finding in *SAS*, the Court's views towards the wearing of a political symbol cannot be generalised so as to predict its treatment of other forms of symbolic speech. This is perhaps unsurprising given that the Court's Article 10 jurisprudence draws a clear line between the strength of its protection of political expression and that which it affords to other forms of expression.[234] Moreover, the treatment of religious dress was inevitably likely to be coloured by the Court's unwillingness to wade into issues at the heart of the relationship between Church and State, as previous challenges to far-reaching headscarf bans have revealed.[235] The fact that the applicant made an Article 10 argument before the Court was no guarantee that the Court would choose to respond to it. Previous headscarf cases have been argued in terms of numerous Convention rights, only for the Court to address the Article 9 claims alone and briskly dismiss the alternative forms of argument offered.[236] Given the numerous factors in play, the outcome in *SAS* is not entirely surprising. As ever, in reality it appears the innovative legal strategies adopted may be no match for the ECtHR's unwillingness to risk embroiling itself in such a culturally and politically sensitive issue.[237]

The following discussion of the applicability of freedom of expression rationales to religious dress is accordingly undertaken with an awareness that its value may be largely theoretical in the ECtHR context, given that to date the Court has shown no willingness to address arguments put before it in terms of Article 10, instead dealing with such claim in terms of Article 9. There may be future cases

[233] Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13 HRLR 57, 69.
[234] See text to n 96.
[235] *Sahin (Grand Chamber)* (n 214)
[236] ibid.
[237] A factor also highlighted in McCrea, 'The Ban on the Veil and European Law' (n 233) 97.

where the prospects for an Article 10 approach are stronger, but for now the ECtHR seems to have implicitly rejected the applicability of Article 10 arguments to the question of religious dress. From a practical perspective, the relevance of freedom of expression rationales to religiously-motivated dress is still worth considering, in light of the potential to raise such arguments before domestic courts. Since domestic courts draw on Convention jurisprudence, the ECtHR's Article 10 case law is still relevant to the applicability of these rationales.

The following section also considers how freedom of expression rationales might apply to refusal of service cases. There is some authority from Northern Ireland indicative of a willingness to consider Article 10 in conflicts involving regulations prohibiting discrimination and harassment on grounds of sexual orientation and orthodox Christian beliefs about same-sex relationships. In *An Application for Judicial Review by the Christian Institute* the applicants raised, inter alia, the concern that the prohibition on harassment in the 2003 (Sexual Orientation) Regulations was incompatible with Articles 10 and 9.[238] Weatherup J noted that:

> Where the exercise of the right to freedom of speech also involves the manifestation of a religious belief there will be an added basis on which to seek to justify the action. This provides an added consideration in the case of sexual orientation that may not apply in relation to harassment on the grounds of gender, race or religious belief.[239]

The court went on to find that any determination on interference with the applicant's rights, and whether there was justification for such interference, would require an assessment of the balance of interests according to factual issues such as the actions

[238] *An Application for Judicial Review by the Christian Institute* [2007] NIQB 66, [2008] IRLR 36.
[239] ibid [42].

of the parties, the measures in question, the value of the policy promoted and the rights diminished. The court accordingly refused to decide such issues in the abstract.[240]

In the *Christian Institute* case Weatherup J considered the Canadian case of *Ontario Human Rights Commission v Brockie*, where the Ontario Superior Court of Justice held that it was not enough to say simply that those who hold certain religious beliefs should not be free to offer services to the public unless they were prepared to act inconsistently with their beliefs.[241] The Court reasoned that commercial services offered to the public are at the periphery of freedom of religion[242] and that limiting freedom of religion to ensure the ability to obtain services on a non-discriminatory basis in the public sphere was justifiable.[243] The Court held, however, that to require a printer with the religious belief that homosexuality was sinful to print materials supporting causes or activities repugnant to his fundamental beliefs would go too far. While Mr Brockie could be ordered to provide printing services on a non-discriminatory basis, this should be subject to the condition that he not be required to print material of a nature that could reasonably be considered in conflict with the core of his religious beliefs.[244] Some academics have welcomed the approach in *Brockie* as a useful illustration of the potential for balancing in cases where expressive rights are indirectly implicated.[245] In this respect, it is not yet clear how either the ECtHR or domestic courts would react to arguments made in terms of

[240] ibid [64]-[65].
[241] *Ontario Human Rights Commission v Brockie* [2002] 22 DLR (4th) 174 considered in *An Application for Judicial Review by the Christian Institute* [86]-[88].
[242] ibid [54].
[243] ibid [55].
[244] ibid [56].
[245] Carl F Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 Oxford Journal of Legal Studies 729, 751-754.

Article 10.[246] The *Brockie* case and the ways in which a commercial activity can involve an expressive message were only briefly considered by the Court of Appeal in *Bull v Hall*, and were not addressed by the Supreme Court at all.[247] The Court of Appeal detailed the ruling in the *Brockie* case, but distinguished it on the grounds that in *Brockie* the printer was required positively to do something, whereas the owners of the private hotel in *Bull v Hall* were not.[248] Where there is a positive requirement of expression, there may be room for the religious individual to build on this distinction and argue that considerations such as those in *Brockie* have a place in English law.

C. The Applicability of Expression Rationales to Non-Speech Expression

(i) Rationales for protection of freedom of expression

The relevance of freedom of expression to religious manifestation can be explored by consideration of the rationales underlying freedom of expression protections. The following types of rationales may be in play when we consider religiously-motivated expression.

(a) The Marketplace of Ideas

This basis for free speech is both longstanding and controversial. It can be traced back to Milton's *Areopagitica* and his claim that in any free debate truth will win

[246] None of the applicants in *Eweida and others* raised Article 10. *Ladele* and *McFarlane* were argued under the 2003 discrimination regulations, with additional arguments raised in respect of Article 9: *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955 [2], [53]; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880, [2010] IRLR 872. *Bull v Hall* was argued in terms of discrimination law and Article 8, 9, 14, and 17, *Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83, [2012] 2 All ER 1017, [10]; *Bull v Hall (SC)* (n 22). The similar case of *Black v Wilkinson* (n 22) involved arguments in terms of discrimination law and Articles 8, 9, and 14, ibid.
[247] *Bull v Hall (CA)* (n 246) [50].
[248] ibid [50].

out.[249] Though there are numerous articulations of this argument from truth, Frederick Schauer has usefully identified a few core principles that hold true across different articulations: first, a 'belief that freedom of speech is not an end but a means, a means of identifying and accepting truth'; second, faith in the power of truth to prevail in an adversary process; and third, a scepticism of accepted beliefs and established truths.[250] Accordingly, an open and unregulated 'marketplace of ideas' will be most likely to produce truth and overcome falsity. As Schauer notes, this final element of the rationale holds that 'By relying on the operation of the market to evaluate opinion, we subject opinions to a test more reliable than the appraisal of any one individual or government'.[251] The marketplace rationale is frequently invoked in freedom of expression cases across jurisdictions. The US case law arguably provides a good illustration of a judicial approach displaying close fidelity to the ideal of a free marketplace of ideas and a belief in the necessity of an open marketplace for true democracy to exist.[252]

(b) Democracy

Free speech is in many respects instrumental to democratic governance, in that government determined by popular vote presumes an electorate informed on all issues.[253] The democratic rationale relates both to the notion of popular sovereignty and the individual's right of political participation.[254] As such it is both

[249] 'Let [truth] and falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing,' *Areopagitica* (1644) in John Milton, *Areopagitica: and Other Prose Works* (JM Dent 1955).
[250] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 16.
[251] ibid.
[252] Eric Barendt, *Freedom of Speech* (Oxford University Press 2007) 11-12.
[253] Alexander Meiklejohn, *Free Speech and its Relation to Self-government* (Lawbook Exchange 1948) 26-27, cited by Weinstein (n 28) 26.
[254] Weinstein (n 28) 26-27.

instrumentalist in relation to democratic governance and an audience-based right.[255] According to the first variant the freedom of citizens to express their opinion is related to their right of democratic participation. This view is particularly associated with the theorist Alexander Meiklejohn,[256] who emphasises the right of citizens in a democracy to be informed so that they may discharge their political responsibilities as citizens.[257] For Meiklejohn the importance of protecting freedom of expression derives not from any rights of the speaker but from the need to protect 'the freedom of those activities of thought and communication by which we govern'.[258] The stronger form of this argument is that free speech legitimises democracy.[259] This version of the democracy argument has close links to the self-fulfilment argument, discussed below,[260] in contending that people may only be legitimately bound by an official policy if they have had the opportunity to participate through their speech in the process of formulating official policy.[261]

(c) Autonomy

The argument from self-fulfilment may be made in a consequentialist or intrinsic form. With regard to the former, it might be said that a self-reflective and intellectually mature citizenry is important for the proper function of the state.[262] The latter form of the rationale would hold that the individual's own interest in self-development is a stand-alone right, regardless of the benefits or otherwise for

[255] See analysis of the rationale from democracy by Scanlon in Thomas Scanlon, 'Freedom of Expression and Categories of Expression Principles of Expression and Restriction: A First Amendment Symposium' (1978) 40 U Pitt L Rev 519, particularly 529-531.
[256] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 Sup Ct Rev 245. See also Stanley Fish, *There's No Such Thing as Free Speech: And it's a Good Thing, too* (Oxford University Press, USA 1993).
[257] Meiklejohn (n 256) 255.
[258] ibid.
[259] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 15-26.
[260] Barendt (n 252) 21.
[261] Ronald Dworkin, 'A New Map of Censorship' (2006) 35 Index on Censorship 130, 131.
[262] This relates to Meiklejohn's concern about censorship impeding citizen's ability to make democratic decisions, Alexander Meiklejohn, *Free Speech and its Relation to Self-government* (1st edn, Harper 1948) 22-27.

society. The latter form of the self-fulfilment rationale is based on the intrinsic value of protecting speech; the right to expression should stand even if the exercise of that right has negative effects for the welfare of society as a whole.[263] Supporters of this variation of the rationale contend that restrictions on speech 'inhibit our personality and its growth'.[264] This rationale may also be conceived as a speaker-based autonomy right or as an audience-based autonomy right.

Thomas Scanlon has put forth one of the strongest variants of an audience-based autonomy rationale.[265] His argument is premised upon the stance that 'the powers of the state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents'.[266] Scanlon contends that a person can only be autonomous if they are free to determine for themselves whether or not to follow the arguments for the various courses of action put to them by other persons. The government cannot suppress speech in order to prevent persons from forming harmful beliefs or in order to prevent persons acting in a harmful manner as a result of such beliefs. Unlike Mill, Scanlon's theory does not aim at the discovery of truth through discussion; a person simply has a right to receive all available views and consider acting upon those views if they so determine.[267]

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[263] For discussion of arguments valuing speech from the perspective of personal development see Barendt (n252) 7-18; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 199-213.
[264] ibid 13.
[265] Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204. See also John Rawls' contention that political equality requires that citizens be allowed to develop their own conceptions of justice and the good, John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) 334-336. See also Martin H Redish, 'First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression' (1970) 39 Geo Wash L Rev 429 and Martin H Redish, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy* (Stanford University Press 2013).
[266] Scanlon, ibid 162.
[267] See further discussion of Scanlon's later revision of his position at text to n 296.

(d) Pluralism

Joseph Raz has highlighted the 'validating' role of expressive activities and the consequent invalidating role of state censorship.[268] Expressive actions reflect peoples' ways of life and identities. Freedom of expression is valuable because it validates different forms of life, such as life as a homosexual person, life as a member of certain cultures, or life as a member of a religious community.[269] Raz argues that public expression of a way of life is of crucial importance to the well-being of those who share that way of life and that freedom of expression represents a culture of tolerance and acceptance.[270] Charles Taylor has highlighted the importance of recognition of identity, which he defines as 'a person's understanding of who they are, of their fundamental characteristics as a human being'.[271] Taylor theorises that a person's 'authenticity' is linked to their dignity and involves a process of defining and articulating each person's uniqueness.[272] Recognition by others forms part of a person's understanding of who they are. Taylor contends that 'nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being'.[273]

State censorship of expressions of particular identities or lifestyles conveys a message of societal disapproval. Such condemnation undermines the individual's sense of equal membership of their community and sense of security in their

[268] Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 Oxford Journal of Legal Studies 303, 311.
[269] Ibid. Lee Bollinger presents a related argument from pluralism. He argues that freedom of speech helps to develop a practice of tolerance, with hate speech cases presenting a good opportunity to cultivate tolerance and posing little danger to societal cohesion, Lee Bollinger, *The Tolerant Society* (Oxford University Press 1986).
[270] ibid 312-313.
[271] Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press 1994) 25.
[272] ibid 31.
[273] ibid.

environment. One need not look far to see how state support or condemnation of particular ways of life can be reflected in legislation and other government choices. Such communication may be blatant, as in the case of Section 28 of the Local Government Act 1988, which banned local authorities from promoting the teaching of 'the acceptability of homosexuality as a pretended family arrangement'. John Gardner highlights this legislation as an example of the kind of state condemnation which can negatively impact upon self-identity.[274] However, legislation and policy choices may cover a range of implicit messages about those who are viewed as included or excluded.

(ii) The applicability of freedom of expression rationales

Protection of certain forms of religious manifestation can be justified by reference to the same rationales that underlie society's protection of other forms of contested expression. However, the applicability of freedom of expression rationales to religiously-motivated conduct varies greatly. As with the case of artistic speech, some rationales clearly do not apply or only partially apply, whilst others appear to easily map on to religiously-motivated speech. Just as a democracy-based rationale's particular focus on a right of citizens to be informed in order to exercise their voting rights effectively will only rarely be furthered by artistic expression, the same can be said with regard to religiously-motivated speech. This, of course, is not an absolute rule; some listeners, particularly those who share the religion or viewpoint of the speaker, might, for example, feel that such speech strengthens their resolve with respect to expressing their religion in their democratic choices. However, the nexus

[274] John Gardner, 'Freedom of Expression' in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Oxford University Press 1994) 211.

between democracy rationales and religiously-motivated speech is clearly weaker than in the cases of pure political speech or speech disclosing information related to public interests.

Similarly, reliance on a marketplace of ideas or truth rationale for religious expression also appears conceptually difficult. An initial problem with applying the marketplace of ideas rationale to religion is that some religions simply do not conceptualise themselves in this fashion. Academics such as Makau Mutua have argued that whilst proselytising religious traditions may fit into the marketplace of ideas framework more easily, followers of religions such as Hinduism and Buddhism and various native African religious traditions may not conceptualise themselves as competing with other religions and as such the 'marketplace' model may be inappropriate.[275] Moreover, from a practical perspective the potential for arguing that marketplace of ideas or democracy rationales are engaged by religious expression appears limited; the ECtHR has made clear in a number of judgments that it does not view religious speech as attracting the same level of protection as political speech.[276]

Rationales from autonomy do seem to reach beyond political speech and include a wider category of the kinds of expression with which religious persons might be concerned, such as religious beliefs that are contrary to liberal norms or religious dress that may be viewed as proselytising on behalf of 'powerful' and intolerant belief systems.[277] At a general level it can be said that a society which allows public or private actors, such as employers, to reject religious individuals'

[275] Makau Mutua, 'Proselytism and Cultural Integrity' in W Cole Durham Jr Tore Lindholm, Bahia G Thazib-Lie (ed), *Facilitation of Freedom of Religoin or Belief: A Deskbook* (Oslo Coalition 2004).
[276] *Murphy* (n 104); *Mouvement Raëlien* (n 105).
[277] See remarks in *Dahlab v Switzerland* ECHR 2001-V 449 discussed in ch 1.

claims for accommodation of their religious practices without requiring strong justification undermines that society's claim of of being respectful of the autonomy of its people. Both speaker-based and audience-based autonomy rationales appear highly applicable to religiously-motivated expressive acts.

Speaker-based autonomy

The autonomy rationales for protecting speech are arguably also applicable to non-speech actions. First, the wearing of a symbol has been recognised as the expression of an idea. As noted above, the ECtHR recently recognised that 'display of vestimentary symbols falls within the ambit of Article 10' in the recent cases of *Vajnai v Hungary*[278] and *Donaldson v UK*.[279] Arguably, individual autonomy is curbed when expression of religious belief is denied. This rationale appears equally applicable whether the individual is expressing religiously-motivated views through speech in a public forum, as Mr Hammond was, or using symbols or dress to express commitment to a particular religious tenet or religious way of life, as was the case for Ms Eweida and the various claimants in Strasbourg Muslim dress cases. The religious individual's interest in expression is analogous to that of a political speaker, though, as acknowledged at the start of this chapter, there are certainly also additional elements at play, such as a religious individual's feelings of duty and obligation, which are distinct from the moral or intellectual motivation of the political or artistic speaker. Both English courts and Strasbourg frequently draw upon the autonomy rationale in terms of a right of self-expression for the speaker. Lord Steyn invoked this latter conception in *Ex parte Simms* where he identified free

[278] *Vajnai* (n 4) para 47; *Fratanolo v Hungary* [2011] ECHR 1834.
[279] *Donaldson* (n 4).

speech as promoting an individual's self-fulfilment.[280] The ECtHR's reasoning also seems to reflect concern for the individual's intrinsic right to self-expression. In *Salov v Ukraine* the Court stated that Article 10 protects discussion and dissemination of information even where it may be strongly suspected that this information is false. The Court contended that protection of such information was necessary because to do otherwise would place an unreasonable restriction on individuals' Article 10 rights by restricting the ability to express one's views and opinions.[281]

Like the other rationales of expression, applying a speaker-based autonomy rationale to religious expression involves some conceptual and practical difficulties, albeit less overriding. Some of these difficulties relate to perceived flaws in the speaker-based autonomy rationale itself. Eric Barendt has questioned whether this rationale can reasonably be distinguished from general claims to personal autonomy and liberty.[282] However, in terms of the potential to draw upon an autonomy-based expression rationale in religious manifestation cases this factor may be an asset rather than a failing. There is no reason why speech need 'trump' competing rights and interests on all occasions, and the reality of the European jurisprudence on speech, particularly in relation to the types of artistic and non-political speech covered by this rationale, is that it does not do so. If speech valued for autonomy reasons is subject, both conceptually and practically, to the same balancing of interests as other exercises of autonomy then this makes an autonomy rationale all the more suited to the balancing-intensive context of religious manifestation claims.

[280] *R v SSHD, ex p Simms, R v SSHD, ex p O'Brien* [1999] UKHL 33, [2000] 2 AC 115.
[281] *Salov v Ukraine* (2007) 45 EHRR 51, para 113.
[282] Barendt (n252) 13-15.

Moreover, this element of an expressive-autonomy approach saves it from 'proving too much' by being too strict in application and forcing courts to determine cases in ways that are harsh on non-religious respondents. For instance, if expression is interpreted as a 'trump' right and religious manifestation as an expressive action then it might be argued that it is always wrong to force someone to say that which is contrary to his or her religious conscience. An analogy might be drawn from the case of Jehovah's Witness schoolchildren refusing to recite the pledge of allegiance in *Barnette*[283] to the case of an employee such as Mr McFarlane refusing to engage in psycho-sexual therapy of homosexual couples.[284] It could be said that in both cases freedom of expression buttresses the right of conscience to the extent that the competing interests of the State should give way, since a person should not be punished for refusing to act in a manner contrary to their religious convictions. However, such a bright line approach cannot be correct. Requiring someone to act in a manner contrary to their religious beliefs is in some circumstances utterly appropriate. A delay in obtaining a medical procedure because of the conscientious objections of doctors or other medical staff is unacceptable.[285] It is important to take account of the employment context, which is distinct from that of compulsory school attendance. Moreover, such an approach would ignore the ways in which the religious person may be complicit in creating the conflict at issue. In Mr McFarlane's case he chose to undertake psycho-sexual therapy training knowing that the terms of his employment required him to treat homosexual and heterosexual clients with equal dignity and respect. Considering his peculiar difficulty with providing that specific type of therapy to homosexual clients, Mr McFarlane might

[283] *Barnette* (n 19).
[284] Eweida and others (n 7).
[285] *Tysiąc v Poland* (2007) 45 EHRR 42. Carl Stychin contrasts such delay with a delay in obtaining a marriage ceremony date in arguing that courts should consider whether accommodating religious employees significantly burdens same-sex couples, (n 245) 752.

have escaped any potential conflict merely by deciding not to pursue that particular form of additional training.

Audience-based Autonomy

Audience-based autonomy rationales also appear clearly applicable. For the same reasons that it is wrong for the State to punish expression of a viewpoint for fear it will spread,[286] governments should generally not punish expression of a religious belief or a religiously-motivated viewpoint with which they disagree out of fear that such a religion or view will spread. One of the most problematic elements of cases such as *Hammond* is the use of the Public Order Act 1986 to punish challenges to a dominant cultural narrative, namely that homosexuality is consistent with a moral life. We should feel similarly troubled where expression of a symbol is concerned. Symbols can convey meaning just as well as words, and in some cases more effectively.[287] As Judge Power noted in *Lautsi*, 'symbols (whether religious, cultural or otherwise) are carriers of meaning. They may be silent but they may, nevertheless, speak volumes'.[288] Just as the government should not curb expression of unpopular ideas through speech without good reason, they should similarly eschew restrictions on religious symbols unless good reason can be shown. Refusal of service cases may also be seen as the expression of a message in the public sphere, and the requirement that religious persons be prepared to act in a manner contrary to their religious beliefs or leave their employment or businesses could equally be seen as suppressing religious beliefs contrary to mainstream norms.

[286] Scanlon (n 265).
[287] See the discussion above in *Barnette* (n 19) and in *Tinker v Des Moines Independent Community School District*, 393 US 503, 509 (1969). See the discussion of Power J in, *Lautsi v Italy* (2012) 54 EHRR 3 (Grand Chamber).
[288] *Lautsi* ibid para 45.

We can see judicial reflection of Scanlon's concerns that the audience have full access to all competing arguments most clearly in US First Amendment jurisprudence. Since the early 1970s the US Supreme Court has developed concepts of 'content neutrality', 'viewpoint discrimination', and the requirement that government cite a 'compelling' interest if it is to regulate speech on grounds of its viewpoint.[289] The relationship between these concepts and an audience-based autonomy rationale is clear: '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'.[290] However, it is difficult to argue that there is any consistent adherence to Scanlon's version of the autonomy rationale on the other side of the Atlantic. There is certainly political and judicial respect for a right of the audience to the free flow of information and opinion without state censorship; the various 'public interest' exceptions in statutes and common law principles in relation to concepts such as defamation and confidentiality reflect this concern for the free flow of information.[291] This version of the autonomy rationale is equally reflected in numerous ECtHR judgments on press freedom.[292]

It is, however, equally clear that the State certainly does censor certain forms of expression, such as hate speech or child pornography, and also limits the dissemination of information that might damage state interests, such as national security or relations with foreign governments. Bans on political advertising or

[289] James Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech' in James Weinstein and Ivan Hare (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 82-91. See, for example, *Police Department Of City of Chicago* v *Mosley* 408 US 92 (1972).
[290] *Mosley* (n 289) 95.
[291] Gardner (n 274).
[292] ibid; Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n98).

religious advertising, such as those at issue in *Animal Defenders International v UK*[293] and *Murphy v Ireland*[294] respectively, have been approved by both national courts and Strasbourg. Such regulation of expression based on its content appears at odds with the idea of rejecting any power on the part of governments or courts to 'determine what communications or forms of expression are of value to the individual'.[295]

Scanlon has acknowledged that his theory should allow for particular worthy restrictions on free speech to be justified in certain circumstances; for example, in order to promote a climate of rational thought or in some cases on paternalistic grounds, for instance prohibiting cigarette advertising on television.[296] Expression that 'influences us in ways that are unrelated to relevant reasons, or in ways that bypass our ability to consider these reasons' is potentially open to restriction under this revised view.[297] At one level, these concerns do not seem applicable to religious speech, if we accept that judgments relating to religious commitments are still subject to rational thought processes. However, this point may be problematic; while an adult convert may decide to commit to a particular religion for numerous rational reasons, the same cannot necessarily be said of those born into religious traditions. Where a person is born into a doctrinally-prescriptive religious tradition the question of rational choice is more problematic still. If some religious believers live their lives in such a manner that religious authority is determinative to such an extent that it blocks out the relevancy of other reasons, then some forms of religious expression

[293] *Animal Defenders International* (n 109).
[294] *Murphy* (n 104).
[295] Martin H Redish, 'The Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 591, 637.
[296] Scanlon, 'A First Amendment Symposium' (n 255) 532.
[297] ibid 525.

may fall into the category of speech with which Scanlon is concerned. As such, the applicability of audience-based autonomy rationales to religious manifestation may not cover all forms of religiously-motivated expression. This rationale would exclude religiously-motivated expression directed at fellow believers who do not view their religion as 'one option amongst others',[298] and with a sense of rational distance in terms of reasons for and against adherence. This caveat is not, however, particularly damaging to the overall persuasiveness and applicability of Scanlon's argument. In the end, it is expression aimed at those who do not share your beliefs that will be most likely to result in punishment or restriction and which is accordingly of primary concern in the context of this chapter.

Pluralism

Free speech rationales that build on an idea of expression as a positive feedback of identity in a plural society are strongly applicable to religious manifestation. The Strasbourg Court has explicitly linked pluralism and freedom of thought, conscience, and religion on numerous occasions.[299] Pluralism and religion are also frequently invoked side-by-side by the Strasbourg Court in cases involving violations of Article 2 of Protocol No 1.[300] There are also instances of pluralism of religious belief being invoked in the context of Article 10 litigation. As will be recalled, *Aydin Tatlav v Turkey* involved a blasphemy prosecution of a book containing 'strong criticism of religion in a social-political context'.[301] In that case the Court highlighted protection of pluralism in relation to religious belief, warning that the risk of a custodial

[298] Charles Taylor, *A Secular Age* (Harvard University Press 2007) 3.
[299] *Serif v Greece* (2001) 31 EHRR 20, para 49; *Kokkinakis* (n 2) para 31.
[300] *Folgerø v Norway* (2008) 46 EHRR 47; *Appel-Irrgang v Germany* App no 45216/07 (ECtHR, 6 October 2009).
[301] *Aydin Tatlav v Turkey* (n 94).

sentence could discourage the publishing of non-conformist opinions about religion and could impede the protection of pluralism. In the context of domestic adjudication of Article 10, English courts have also linked tolerance of controversial expression with the value of pluralism. It is certainly arguable that the view of Tugendhat J on the nature and value of the pluralism rationale for free speech, expressed in the recent case of *Trimingham v Associated Newspapers*, applies equally to religious expression:

> [P]luralism requires members of society to tolerate the dissemination of information and views which they believe to be false and wrong. This can be difficult for people to understand, especially if the subject is an important one and they are so convinced of the rightness of their views that they believe that any different view can only be the result of prejudice. Welcoming pluralism cannot be justified by logic. But in a society where people in fact hold inconsistent views about important matters, pluralism is a practical necessity if that society is to be free. [302]

There appears to be a clear connection between valuing pluralism and tolerating the expression in the public sphere of a wide variety of religious beliefs. In the context of refusal of service cases, Carl Stychin has contended that 'Real pluralism is about the reality of the irreconcilable existing side by side, civilly, in the public sphere, and of finding ways of living together'.[303] The pluralism rationale for freedom of expression clearly plays into the conflict between veiled women and those who see the wearing of religious dress such as the *niqab* or *burqa* as an affront to values such as gender equality or fraternity. The banning of such practices clearly expresses a message of societal disapproval. The same message of disapproval is expressed in refusal of service cases. Requiring those with religious beliefs opposed

[302] *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB).
[303] Stychin (n 245) 753.

to same-sex relationships[304] or about the wrongfulness of extramarital sex[305] to withdraw from employment or their businesses if they are not willing to act in a manner contrary to their beliefs clearly provides negative expressive feedback to such persons.

D. The Impact of Conceiving of Religious Manifestations as Expressive Acts

Respect for autonomy and pluralism have been highlighted as the most relevant and readily applicable freedom of expression rationales. This section considers whether freedom of expression rationales can help identify some particular types of harm that can result from suppression or punishment of religious manifestation. It also considers the impact of considering religious manifestations as expression upon balancing of interests in the context of the margin of appreciation doctrine.

(i) The impact of applying autonomy and pluralism rationales: identifying the harm in restricting religious manifestation

One clear benefit of conceiving of religious manifestation as expression is the potential to redefine how the impact of denying expression of religious belief is understood. Restriction and penalisation of expression can affect not only the speaker, or those who share the beliefs in question, but can also impact upon the wider society in terms of the degree to which that society can then be said to respect individuals' autonomy and pluralism of belief.

[304] *Ladele* (n 246); *McFarlane* (n 246); *Black and Wilkinson* (n 246) [2].
[305] *Bull v Hall* (SC) (n 22) [17], [34].

Autonomy

Though judges may disagree with the content of certain speech they can nonetheless value the speaker's right to express themselves and the audience's right to access information. Many of the elements at play in autonomy-based arguments for freedom of expression are equally at issue in autonomy-based arguments for religious manifestation. Courts in religious manifestation cases could draw on their considerable experience in determining the extent to which individuals' exercise of autonomy through expression should be valued when it comes into competition with other aspects of human dignity, such as the right to reputation or confidentiality.[306] An autonomy-based expression rationale for valuing religious manifestation allows courts to build upon the type of Article 10 balancing analysis that they currently undertake within the context of religious expression.

Religious Symbols

The concept of self-expression at the centre of speaker-based autonomy appears to be strongly applicable to conduct involving the wearing of religious symbols. The former Commissioner for Human Rights of the Council of Europe, Thomas Hammerberg, has argued that the wearing of the *niqab* can be 'understood as an expression of a certain opinion', and that the Strasbourg Court should see such conflicts in the context of its freedom of expression case law.[307] He argued that just as it would have been wrong to ban the Danish cartoons which caused controversy

[306] Lucy Vickers, *Freedom of Speech and Employment* (Oxford University Press 2002) 20.
[307] Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights* (Council of Europe Publishing 2011) referred to in *SAS* (n 215) [37].

and offended some Muslims,[308] it would equally be wrong to ban the wearing of the *niqab*, and the Court should instead 'promote multicultural dialogue'.[309] The right of self-expression has also been highlighted by the UN Human Rights Committee in commenting on restrictions on the *niqab*.[310]

Cases involving the wearing of religious symbols and dress often centre on the visibility of the symbol. At times, employers or schools are willing to allow the symbol or dress so long as it is covered, but the religious individual is unwilling to do so because they wish to express their faith publicly.[311] If religion is simply private belief then such insistence seems unreasonable, but if a self-expression rationale is applied and such religious conduct is understood as expression of commitment to a particular religious belief then an insistence on hiding or covering a religious symbol clearly interferes with freedom of expression because it undermines individuals' capacity to express themselves. While in *Eweida and others* the ECtHR accepted that both Ms Chaplin's and Ms Eweida's insistence on visibly wearing a cross at work was motivated by their desire to bear witness to their Christian faith,[312] the refusal of Ms Chaplin's employers to allow this was deemed to be justified and proportionate with relatively scant investigation of the reasons offered. While the Court stated that the importance to Ms Chaplin of visibly wearing her cross must 'weigh heavily in the balance'[313], it accepted the hospital management's contention that her conduct could undermine clinical safety without questioning the specific

[308] The Danish Muhammad cartoons controversy involved depictions of the Islamic prophet Muhammad published in *Jyllands-Posten* on 30 September 2005
[309] Hammarberg (n 307).
[310] UN Human Rights Committee, *General Comment no 28, concerning Article 3 of the International Covenant on Civil and Political Rights (Equality of Rights between Men and Women)* (adopted 29 March 2000), cited in *SAS* (n 215) para 38.
[311] *Eweida and others* (n 7) paras 10, 19-21, and 89.
[312] ibid paras 89, 97.
[313] ibid para 99.

probability that a patient might injure themselves by pulling at the chain, a concern easily remedied by the use of a magnetic clasp, or that the chain might come in contact with an open wound.[314] The credence given to the latter concern is at odds with the lack of restriction on the commonplace practice of male doctors wearing neckties, since they are equally susceptible to such contact and likely more difficult to routinely sterilise.

Applying an audience-based autonomy rationale would weigh against allowing restrictions on expression of religious beliefs simply because the State disapproves of those beliefs. This expression rationale appears highly applicable to both religious symbols cases and cases involving religious individuals with opposition to same-sex relationships. In much of the ECtHR case law on the headscarf there is a clear indication that veiling is viewed in negative terms.[315] The wearing of the *niqab* and *jilbab* have also previously been described as 'very ostentatious' in English cases.[316] The fact that English schools generally permit the headscarf, to the extent that the appropriate colour of *hijab* may often be specified in school uniform policies, whilst other forms of Muslim dress are restricted, suggests that the wearing of headscarf is a preferred version of Muslim practice.[317] In *X v Y Headteacher* a school's ban on the wearing of the *niqab* was viewed as a justified interference with Article 9 on the basis of the school's view that were it not banned this might cause pressure on other Muslim girls to wear the *niqab*.[318] In that case,

[314] ibid para 98-99.
[315] See text to n 169 in ch 2.
[316] *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] ELR 561 [7].
[317] As was the case in *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [7] and *R (X) v The Headteachers of Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249 [72].
[318] *X v Y*, [90]-[94].

unlike in *Begum*,[319] there was no evidence of pupils expressing fear of such pressure. Nor was there evidence of other girls being pressurised to wear the *niqab* in previous years when the school had allowed the claimant's sisters to wear the *niqab*. Justifying a ban on the basis of speculative fears about coercion inevitably expresses disapproval of the religious belief in the necessity of wearing the *niqab* and of those who adhere to such a belief. The argument accepted by the Court is akin to reasoning that a schoolgirl cannot wear an ankle-length skirt in case other pupils are forced by their parents to wear ankle-length skirts. Such reasoning would equally seem to imply that there was something wrong with schoolgirls wearing ankle-length skirts in the first place.

Refusal of Service

In refusal of service cases, there is clearly an interest analogous to speaker-autonomy in a religious individual not being required to act in a manner which appears to condone acts which that individual finds reprehensible. Some cases may actually involve speech to a certain extent. Both Ms Ladele and Mr McFarlane employer's required that they verbally participate in creating civil partnerships and counselling same-sex couples respectively, and such participation necessarily involved speech. However, other refusal of service cases, such as the guesthouse cases, do not involve speech. Nonetheless, requiring those who run guesthouses to accept same-sex couples as customers may still involve the compulsion of an expressive message condoning same-sex relations or extra-marital relations. The more a particular

[319] *Begum* (n 317) [98].

service involves expression, the stronger the grounds are for considering a refusal of service case under Article 10.

Arguments from audience-based autonomy can also inform the value which judges attribute to contested religious manifestation. Scanlon's description of the rationale reflects the real concerns of courts, particularly the ECtHR, that citizens have free access to information that they need to make up their own minds in terms of political choices, and it is arguable that an analogy can be drawn between political and religious choices in this context.[320] Like Scanlon it might be necessary to enter some caveats in this respect; some religious beliefs, such as the belief in the necessity of female genital mutilation or in forced marriage, are deemed by society to be so harmful that they cannot be allowed. Admittedly, the prohibition of such religious beliefs' manifestation is motivated not only by a desire to stop immediate harm to women and young girls; such prohibitions also involve an attempt to stem further propagation of those beliefs. However, the government acts to stem all sorts of beliefs, political, ethical, or otherwise, that have harmful effects and on this basis we must accept that the government's respect for the autonomy of its citizenry can never be as absolute as the initial formulation of Scanlon's theory would require. With this in mind we can be suspicious of restrictions on speech that would be characterised in the American jurisprudence as content-based or viewpoint-based, without going so far as to say that religious manifestation can never be restricted because of the content of a religious belief.[321]

[320] For a stronger version of the argument for the relationship between religious choice and political choice see Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* discussed at text to n 10 above.

[321] This view is in line with the views of authors such as David Feldman who favour viewing content-based controls on speech with suspicion but disfavour an American style prohibition on non-neutral interference with expression, Feldman, 'Content Neutrality' (n 29) 139.

The comments of Rafferty LJ in the Court of Appeal's judgment in *Bull v Hall* are reflective of the concern that expression of such religious beliefs should not be stifled, while at the same time revealing the limits of an Article 9 approach when applied to such conflicts. Rafferty LJ, considering the difficulties raised in balancing the right to manifest religious beliefs and the right to provision of services on an equal basis, made the following remarks:

> Whilst the Appellants' beliefs about sexual practice may not find the acceptance that once they did, nevertheless a democratic society must ensure that their espousal and expression remain open to those who hold them. It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the Appellants' beliefs); rather there should be achieved respect for the broad protection granted to religious freedom as underlined in *Kokkinakis*.[322]

He went on to reason that he did not find any difficulty in holding that the same-sex couple denied accommodation at the applicants' private hotel had been directly discriminated against. He reasoned that although interferences with Article 9 and Article 14 must satisfy a test of 'anxious scrutiny', the fact that the applicants remained free to manifest their religious beliefs weighed in favour of there being no such interference. Again, the view of Article 9 as primarily a matter of private belief came into play and no interference was found in religious businesspeople being 'merely' prohibited from expressing their beliefs 'in the commercial context they have chosen'.[323] The Supreme Court's judgment similarly stressed that the applicants were 'free to manifest their religion in many other ways', including the provision of bibles, the symbolism of their stationery, and various other decorative items in their

[322] *Bull v Hall* (CA) (n 246) [56].
[323] ibid [57].

hotel.[324] From a freedom of expression view, these findings still essentially require that persons such as the Bulls not express their religiously-based view about the wrongfulness of unmarried sexual relations.[325] There is clearly a restriction on the expression of the Bulls; while they may express one message through symbols and stationary, they are crucially required to act in a manner contrary to that message in allowing unmarried couples to share a bed. Restrictions on freedom of expression have been held to include restrictions on the means chosen to express that message, in recognition that restriction of means of expression can fundamentally undermine the essence of Article 10.[326]

In refusal of service cases there is equally a message that certain views are not favoured by the State. On the one hand this is unsurprising, since the State rightly seeks to support and increase sexual-orientation equality in society. Allowing a widespread practice of denying same-sex couples service on the grounds of their sexuality, or the different status of civil partnership to marriage, would be contrary to the State's positive duty to ensure non-discrimination on the grounds of sexuality under the Convention and EU law.[327] However, the question of whether a minority of service providers should be allowed to continue in their businesses and jobs despite their unwillingness to serve same-sex couples, if this involves condoning acts they consider to be sinful, is more nuanced. Where there is no impact in service, as in the *Ladele* case, the issue is the expressive message that persons with such beliefs are tolerated. In *Ladele* the aim pursued by Islington LBC was explicitly content-based.

[324] *Bull v Hall* (SC) (n 22) [39].
[325] The Bulls claimed their refusal of service was motivated by their belief that they should not facilitate a sin by allowing unmarried couples to share a bed, ibid [17], [34].
[326] *Murphy* (n 104) para 61; *Öztürk v Turkey* Application no 22479/93, ECHR 1999-VI, para 49.
[327] As well as the legislative requirement that civil partnership be treated as equal to marriage contained in Regulation 3(4) of the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, discussed in *Bull v Hall (SC)* (n 22) [26]-[32].

While hate speech regulation is accepted as valid, the question of to what extent religious beliefs about same-sex relationships should be restricted on the grounds of their content is more nuanced. Thus far, neither English courts nor the ECtHR has judged restrictions on employees or service providers on these grounds as illegitimate, though the cases dealing with these questions have to date not been argued on Article 10 grounds.[328]

Pluralism

Eweida and others to some extent demonstrates how religious individuals bringing their cases before adjudicators can invoke pluralism by highlighting the expressive meaning of accommodating or failing to accommodate religious manifestation. However, claimants might draw on both autonomy and pluralism expression rationales within the proportionality exercise more clearly if they more boldly frame their claims in terms of Article 10 rather than Article 9. In brief, this section contends that concepts of pluralism and autonomy can be invoked at both a principled general level, pointing to the impact of a failure to accommodate on a society's actual and perceived diversity, and at a more specific individualised level, by identifying the negative impact of a failure to accommodate on the particular religious individual in question.

Religious Symbols

In evaluating whether certain restrictions of religious manifestation are justified judges can look to the negative impact such restriction might have upon religious

[328] *Ladele* (n 246); *Eweida and others* (n 7).

diversity and to the negative expressive feedback of restricting manifestation. At a general level, respect for the societal value of pluralism supports the case for permitting public expression of religious beliefs. In *Eweida and others* the ECtHR discussed the value of pluralism to society as a whole in evaluating whether a fair balance was struck between Ms Eweida's desire to manifest her religious belief and her employer's wish to project a certain corporate image.[329] In explaining the importance of the right to religious manifestation the Court invoked the need for 'a healthy democratic society … to tolerate and sustain pluralism and diversity'.[330] The importance of a society adhering to and displaying commitment to this value weighs in favour of accommodating diverse and distinct forms of religious manifestation. This is particularly so where the religious practice in question is controversial or in conflict with the majority's sensibilities. Moreover, some claims for religious accommodation involve litigants who are members of racial and ethnic minorities.[331] Given these various concerns, it is reasonable to contend that a society that restricts the public reflection of the diverse range of religious practices in its territory undermines its claim to respect pluralism and this is a tangible harm that judges may rightly consider when balancing the conflicting interests arising in religious manifestation claims.

As well as undermining a society's principled commitment to pluralism, it is arguable that the perception of a society is also negatively affected when public or private actors suppress or penalise the manifestation of religion outside of church and home. The negative feedback from state actions to individuals' perceptions of

[329] *Eweida and others* (n 7) para 94.
[330] ibid.
[331] At times the claim is formulated in terms of ethnic minority status rather than religious status, see *Watkins-Singh* (n 316).

the society they live in may have deep and long-lasting practical effects, impacting the success of the various integration strategies and multicultural projects which most modern states are currently undertaking.[332] If first- and second-generation immigrants feel that a society is intolerant, unwelcoming, or largely homogenous then the chances of positive integration are diminished. In a variety of cases involving religious symbols we can see that negative feedback arises where governments, courts, or employers forbid or discourage the expression of certain religious beliefs through the wearing of religious symbols or modes of dress. In the domestic adjudication of *Eweida* there was arguably a failure to understand and value the diversity of interpretations of the practice of wearing the cross across Christian cultures. The applicant, Ms Eweida, came from the Coptic tradition within Christianity, where the display of the cross has particular significance, reflected for example in the traditional Coptic Christian practice of tattooing a cross on the inside of the right wrist. Though such representation of the symbol 'principally serves their religious and ethnic identification in a predominantly Muslim and Arab society', it may also be believed to serve as a protective device against evil spirits and disease. It is also thought to act as a 'permanent reminder' of vows made and blessings received.[333] The religious importance of wearing the cross is still emphasised by modern Coptic churches across the world.[334] Dismissing the religious importance of this practice for the applicant because it was not commonly understood as similarly

[332] French notions of integration are distinct from the multicultural model adopted in the UK, see discussion in Siobhán Mullally, 'Civic Integration, Migrant Women and the Veil: At the Limits of Rights?' (2011) 74 The Modern Law Review 27.

[333] Otto FA Meinardus, *Two Thousand Years of Coptic Christianity* (American University in Cairo Press 1999) 'Appendix A'.

[334] See, for example, Coptic Church Diocese of Los Angeles, 'On Wearing the Cross' (25 August 2010) <http://lacopts.org/2010/08/25/wearing-the-cross/> accessed 10 August 2014, where the Coptic Church Diocese of Los Angeles reminds its members that 'Infants and adults who are baptized in the Coptic Orthodox Church typically receive a small image of the Holy Cross to be worn around the neck. From this time until the time of a person's departure, every Orthodox Christian should wear the Holy Cross at every moment'.

important across the English Christian community and was not understood as a mandatory observance in mainstream Christian doctrine ignored the diversity within Christian culture. This in turn could be interpreted as diminishing that particular interpretation of Christianity in the eyes of the wider community and causing negative self-reflective effects on persons sharing that particular belief. Telling a religious adherent such as Ms Eweida that her religious observance is just a personal choice and not religious is dismissive of her particular religious identity. The negative effects of favouring one interpretation of a religion over another are clearer still in some of the Muslim dress cases that have come before the ECtHR. Negative judicial statements on the wearing of the *hijab* and other forms of Muslim dress in cases such as *Dahlab*[335] and *Sahin*[336] have been widely criticised by academics concerned about the negative message such remarks convey to persons holding that religious belief.[337] If we take these elements into account, there seems to be a strong case for taking account of the effects upon societal perception flowing from the denial of accommodation for the wearing of religious symbols and dress by employers, public bodies, and courts.

The *Watkins-Singh* case, which was dealt with as a case of racial and religious discrimination, reflects how concerns about negative feedback to the individual and to society resulting from restricting non-verbal expression might come into play in cases involving the wearing of religious symbols.[338] In that case Silber J found that the refusal of the applicant's school to permit the wearing of the

[335] *Dahlab* (n 277).
[336] *Sahin (Grand Chamber)* (n 214); *Dahlab* (n 277).
[337] Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52; Anastasia Vakulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 Social & Legal Studies 183.
[338] *Watkins-Singh* (n 316).

Sikh *kara* bangle was unjustified race discrimination. He highlighted the importance to the individual of expressing their religious and cultural identity, finding the school's response disproportionate because it should have allowed exemptions for an unobtrusive religious symbol that was 'a matter of *exceptional* importance as an expression of [the student's] race and culture'.[339] The claimant's testimony that the *kara* was in her mind 'one of the defining physical symbols of being a Sikh' and that the claimant considered wearing the *kara* on the wrist as demonstrating and reminding her of her faith led the judge to conclude that the symbol was of exceptional racial and religious importance to the claimant. Silber J criticised the school's attitude in regarding the *kara* as 'only a piece of jewellery', viewing such a statement as reflecting a lack of understanding about the religious and racial significance of the student's expression.[340] Silber J particularly emphasised the obligation schools have to ensure that pupils are tolerant towards 'the religious rites and beliefs of other races and other religions' and respectful of other people's religious wishes as a prerequisite to achieving a cohesive and tolerant multi-cultural society.[341] Such comments are suggestive of the societal integration aspect of pluralism rationales for freedom of expression.

At a more specific level, judges can also readily assess the impact of the negative expressive meaning that feeds back to the *individual*. The value of holding and expressing an aspect of your identity and seeing that reflected in society through your and others' expression is significant. In the context of particular cases judges can consider the harm to emotional wellbeing that individuals experience when their mode of life is denied expression. Just as telling homosexuals to stay 'in the closet'

[339] ibid [92].
[340] ibid [58], [114].
[341] ibid [84].

was harmful to the self-perception of individual homosexual persons, the same can be said of persons who are told that the wearing of their religious symbols is prohibited or the expression of their religious opinions merits their demotion or dismissal.[342] In *Eweida* the ECtHR pointed to this type of harm when it spoke of the 'value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others'.[343] The Court appeared to invoke , at least implicitly, an awareness of how suppressing or punishing such a person's expression necessarily lessens their sense of well-being.

Refusal of Service Cases

The negative feedback experienced by religious individuals holding conservative beliefs about marriage or the wrongfulness of homosexual conduct is reflected in some religious representatives' interventions in recent refusal of service cases. The former Archbishop of Canterbury Lord Carey of Clifton prominently intervened in *McFarlane v Relate Avon*, complaining that English courts display ignorance and 'clear animus' towards Christian beliefs.[344] Lord Carey's intervention may have been largely misjudged,[345] particularly his request for a panel of judges with a 'proven sensitivity and understanding of religious issues' to hear such cases,[346] but it is

[342] Carl Stychin invokes this analogy in Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (n 245).
[343] *Eweida and others* (n 7) para 94.
[344] *McFarlane* (n 246) [17].
[345] Christopher McCrudden, 'Catholicism, Human Rights and the Public Sphere' (2011) 5 International Journal of Public Theology 331.
[346] *McFarlane* (n 246) [17].

reflective of a view amongst some that their views are being simply overridden or rejected as 'discriminatory'.[347]

Although it involved verbal expression of religious belief, the case of *Kirk Session of Sandown Free Presbyterian Church*,[348] discussed in detail earlier in this chapter,[349] reflects what concern for pluralism rationales underlying freedom of expression being applied to religious beliefs in conflict with sexual orientation equality might like in practice. As will be recalled, the case involved a decision of the Advertising Standards Authority (ASA) that an advertisement entitled 'The Word of God Against Sodomy' was homophobic. The advertisement cited Leviticus 18:22, 'Thou shalt not lie down with mankind as womankind; it is an abomination'.[350] Treacy J clearly invoked concern for pluralism of belief and audience autonomy in balancing the Article 10 rights of the religious community with the rights of members of the homosexual community to be protected from gratuitous offence. He stressed that if the applicant were prohibited or inhibited from articulating their religious convictions and from calling on others to bear witness then such a restriction could appear akin to censorship.[351] In invoking concerns about perception of censorship Treacy J's remarks reflect elements of both Raz's and Scanlon's arguments. First, his judgment suggests concern for the religious community's negative self-perception as a result of feeling they have been censored, and, second, it reflects concern about the effect on society if citizens feel that expression is restricted or filtered based on content.

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[347] For other criticism of this sort see Russell Sandberg, 'Laws and Religion: Unravelling McFarlane v Relate Avon Limited' (2010) 12 Ecclesiastical Law Journal 361. More generally, see Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9ibid 24, 52.
[348] *Re Kirk Session of Sandown Free Presbyterian Church* (n 189).
[349] See text to n 189.
[350] ibid [14].
[351] ibid [72].

(ii) The impact of applying autonomy and pluralism rationales to religious manifestation: the margin of appreciation

It is important to note that to some extent the impact of the wide margin of appreciation applied in Article 9 cases has lessened somewhat. The ECtHR has shown that despite states' broad discretion in areas relating to church-state relations, they still have a positive duty to ensure fair balance in the treatment of religious persons. *Eweida and others v UK* was a key turning point in this regard; the Strasbourg Court recognised that an individual's desire to express their religious belief *publicly* could outweigh the secular interests of an employer.[352] The case stands as an important recognition of the need to attribute a basic weight to an individual's desire to manifest their religion outside of church and home.

However, the degree of weight to be attached to the individual's right to religious manifestation is still unclear. From the *Eweida and others* decision it is apparent that the Court will accept justificatory reasons which were appropriately serious on their face. Thus, even though in Ms Chaplin's case the specific fears cited by her employer appeared relatively weak and speculative, the Court nonetheless took these fears seriously and, in line with the margin of appreciation doctrine, treated the seriousness of the health and safety implications as a matter best decided by her employers.[353] It is also clear from the Court's treatment of Mr McFarlane and Mr Ladele's claims that a religious manifestation's encroachment on the rights of others need not be concrete or tangible for it to fall within a state's margin of

[352] Eweida and others (n 7).
[353] ibid para 99.

appreciation. The Court explicitly declared that in their view 'the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination'.[354]

In contrast, the Court has more strictly scrutinised the justifications of state parties in Article 10 claims. In *Observer and Guardian v UK* the Court observed that the importance of the right meant that although it is subject to a number of exceptions 'they must be narrowly interpreted and the necessity for any restrictions must be convincingly established'.[355] The Court will take into account a number of factors including the position of the speaker; the State has a far more substantial margin of appreciation in relation to restrictions on the expression of public officials[356] than restrictions on journalists[357] and politicians.[358] The status of persons targeted by the remarks is also relevant,[359] as is the nature of the restraint; a prior restraint will receive closer scrutiny.[360] The Court's jurisprudence makes clear that Article 10's protection is concerned not only with the content of the information or idea imparted, but also with the means of transmission, since 'any restriction imposed on the means necessarily interferes with the right to receive and impart information'.[361]

From a litigant's perspective, framing a religious manifestation case in terms of Article 10 might be beneficial in terms of the margin of appreciation that would be

[354] ibid para 109.
[355] *Observer and Guardian v UK* (1992) 14 EHRR 153 para 51.
[356] *Seurot v France* App no 57383/00 (ECtHR, 18 May 2004).
[357] *Jersild v Denmark* (n 111).
[358] *Incal v Turkey* (2000) 29 EHRR 449, para 46.
[359] Politicians are expected to tolerate criticism to a greater extent than private individuals, *Lingens v Austria* (1986) 8 EHRR 407, para 42.
[360] *Observer v UK* (n 355) para 60.
[361] *Autronic AG v Switzerland* (1990) 12 EHRR 485, para 47; *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39.

likely to be applied. Reframing religious manifestation as Article 10 may have a significant impact on the manner in which the proportionality of interference is determined. The history of strong protection of expressive activity will benefit a religious claimant. Moreover, the focus on expression means that the importance of actually practicing one's religion openly and publicly cannot be relegated by reference to the fact that an individual is still free to practice in private and believe what they wish.[362] An individual's freedom to resign or their ability to find another avenue to express themself have never been held as reasons for a finding of no interference with Article 10. Similarly, the fact that a person has placed himself or herself in a rights-restricting situation is irrelevant to the question of interference in relation to such rights.[363]

The purposes informing particular expressions of religious belief would undoubtedly become particularly relevant under an Article 10 analysis. As we have seen, whether expression is sought for artistic, informative, or political purposes appears to play a significant role in the Court's application of the margin of appreciation when balancing Article 10 and other interests. The role of this factor in Article 10 cases could be significant where religiously-motivated expression is concerned. Under Article 9 the closer expression is to the *forum internum* the more strongly it is protected, meaning that church worship and acts of private religious significance are more guarded than those religiously-motivated acts which are merely expressive of belief. This traditional view of Article 9 is reflected in the *Arrowsmith* finding that conduct motivated by belief is distinct from religious

[362] See comments in *Ladele* (n 246) [52].
[363] See in relation to Article 8 in the military context, *Smith and Grady* (n 83).

manifestation and is not protected by Article 9.[364] The impact of an Article 10 approach on the margin of appreciation is that the more the expression of religious belief is targeted towards contributing to political debate and influencing public opinion, the narrower the margin of appreciation that should be allowed. In contrast, the more the expression is motivated simply by self-expression, the closer it would seem to come to artistic speech. On the other hand, the position of religious minorities and tolerance for a wide array of religious views and religious identities are matters of public interest and debate. The discussion of pluralism and audience-based autonomy above highlights the societal importance of non-speech conduct expressing religious beliefs. Such considerations would seem to weigh in favour of viewing religiously-motivated expression as a matter of public interest. However, in the past the ECtHR has appeared to view religiously-motivated expression with a proselytising function as being akin to commercial expression.[365] The case law to date underlines the extent to which the context of the expression and the purpose of the expression will inform the Court's approach. As such, it cannot be said with certainty whether the ECtHR would view religious expression involving the wearing of religious dress or the refusal of service as closer to political or artistic speech. In any event, there are indications that the Court is starting to rethink its lesser standard of protection of the latter form of speech, so in time the distinction between such categories of speech may become less important.

[364] *Arrowsmith v UK* (1981) 3 EHRR 218.
[365] See discussion of *Mouvement Raëlien* (n 105) at text to n 131.

Section IV: Article 10 as a Framework for Balancing Public Expression of Religion and other Interests

Even if judges are not yet willing to accept arguments that freedom of expression and Article 10 protect religiously-motivated conduct beyond speech, they may still draw on Article 10 in defining the boundaries of Article 9, following the shift away from interference as a filter after *Eweida and others*.[366] Now that balancing and proportionality are key, Article 10 might usefully serve as a framework for how the ECtHR and domestic courts alike will work out the appropriate response to Article 9 claims, which like similar claims relating to Article 10 may arise in employment and educational contexts and amid varying conflicts with other Convention rights.

A key concern about religious freedom claims stems from the fact that there are many religious practices that the State rightly condemns and prohibits. Respecting religious freedom potentially requires that the State allow practices such as drug use,[367] female circumcision,[368] and various other harmful practices. The religious practice of one citizen may also negatively affect the freedoms and rights of other citizens to varying extents; respecting the proselytising of religious co-workers may irritate and insult some.[369] Equally, if religious freedom requires a general right of conscientious objection to the homosexual lifestyle, as some argue it does,[370] then accepting that some religious persons may refuse to treat homosexuals as equals

[366] *Eweida and others* (n 7).
[367] *R v Taylor* [2001] EWCA Crim 2263, [2002] 1 Cr App R 37.
[368] See the recent debate about male circumcision in Germany, 'German Court Rules Circumcision is "Bodily Harm"' BBC News, 26 June 2012 <www.bbc.co.uk/news/world-europe-18604664.> accessed 28 September 2014.
[369] See discussion of such conflicts in Greenawalt, *Religion and the Constitution* (n 63) 372-374.
[370] Such arguments have been set forth in cases such as *McFarlane* (n 246) involving a sexual psycho-therapy counsellor. See also in the Canadian context *Ontario Human Rights Commission v Brockie* (n 241), involving a publisher refusing to publish leaflets of a homosexual organization.

would seem to be a grave imposition on homosexual and non-homosexual citizens alike.

There are good reasons, then, for assuming that the scope and limits of religious freedom protections are both contestable and significant. The difficulty of these questions is reflected in the continuing appeal for some authors of a 'bright line' public-private or conduct-belief filter for determining the scope of religious freedom.[371] These concerns perhaps also partially illuminate the numerous admissibility decisions in early Commission and ECtHR case law which consistently found no prima facie interference with the Article 9 right, and thus avoided the Article 9(2) balancing stage discussed in Chapter 2. Such definitional filtering of claims makes sense when we consider the difficulties faced by courts in trying to delineate acceptable religious practices from unacceptable ones without seeming to pass judgment on the content of religious belief.[372] Acting as a neutral arbitrator appears in some cases to be near impossible.

Similarly, prior to *Eweida and others*,[373] a purported reason for the endurance of the free-contract doctrine was that viewing work-based detriment as an infringement of Article 9 would open the veritable 'floodgates' and cause havoc and uncertainty in workplace relations. In the US context it has been noted that 'Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from

[371] See, for example, Robert Wintemute, 'Religion vs. Sexual Orientation - A Clash of Human Rights' (2002) 1 JL & Equal 125.
[372] *Sahin (Grand Chamber)* (n 214) para 107; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, para 78.
[373] *Eweida and others* (n 7).

religious deviants of every stripe'.[374] Such concerns are expressed by Justice Scalia in the seminal US free exercise case of *Employment Division v Smith*,[375] when he warned that applying the compelling interest test to generally applicable laws burdening religion would be 'courting anarchy'.[376] However, in *Eweida and others*, the ECtHR implicitly rejected such arguments, holding that Article 9 can be interfered with in the workplace context and insisting that courts must strive to strike a 'fair balance' between employers and religious employees.[377] Given that balancing of competing interests of employees and employers is now key in Article 9 cases, litigants and domestic courts might usefully look to Article 10 case law for examples of how protecting expression of controversial and inherently contestable ideas may be balanced against the interests of employers.

Article 10 gives a clear indication of how these problems might be overcome; the right to freedom of expression has necessitated the development of a framework of factors that courts should rightly take into account when considering whether suppression or punishment of a contested expression violates Article 10. This section argues that some of the factors used in Article 10 jurisprudence are equally applicable to certain types of religious expression. The attribution of weight to contested or offensive viewpoints in Article 10 cases provides an indication of how courts might articulate and attribute weight to similarly controversial religious beliefs. The mere existence and application of this framework shows how proportional balancing in relation to Article 9 might operate and that, as such, the court's role in contextualised decisions on individual instances of religious

[374] Ira C Lupu, 'Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion' [1989] Harvard Law Review 933, 947.
[375] *Employment Division v Smith* (n 13).
[376] ibid 888-890.
[377] *Eweida and others* (n 6) para 94.

manifestation need not be especially problematic. Moreover, in *Eweida and others* the ECtHR has acknowledged to a limited extent the relevance of Article 10 employment law case law to Article 9 employment disputes. The Court accepted that the application of the free-contract doctrine in relation to Article 9 was anomalous, given that employment sanctions could give rise to findings of interference in respect of other Convention rights such as Article 10.[378]

A. Balancing under Article 10

Article 9 and Article 10 are both structured as bifurcated rights; punishment or restriction of expression amounting to an interference with Article 10 may be justified under Article 10(2). As discussed above, in *Observer and Guardian v UK* the Court observed that the importance of the right meant that although Article 10 is subject to a number of exceptions they must be narrowly interpreted.[379] The Court will therefore take into account a number of factors, including the position of the speaker, the status of persons targeted, and the nature of the restraint.[380] The Court's jurisprudence makes clear that Article 10's protection is concerned not only with the content of the information or idea imparted, but also with the means of transmission.[381] Where Article 17 is judged to apply then balancing does not occur, since Article 17 prevents the use of the Convention by persons engaging in activities aimed at the destruction of the rights and freedoms contained in the Convention. The Court may apply Article 17 where the expression is viewed as hate speech or as

[378] ibid para 83.
[379] *Observer and Guardian v UK* (n 355) para 51.
[380] Text to n 357.
[381] Text to n 361.

negating the fundamental values of the Convention.[382] English courts have shown themselves to be proficient with weighing and valuing the particular concerns that arise in the balancing of interferences with Article 10. Domestic courts have considered Article 10 in the context of conflicts with other Convention and common law rights, such as safeguarding the right to life[383] and the right to respect for private life.[384]

B. Freedom of Expression and Employment

This section focuses on the example of balancing freedom of expression and other interests in the context of employment as an example of the kind of reasoning which courts can draw on when balancing interests that arise in relation to employment and Article 9 cases. Article 10 may be invoked in the context of domestic public employment relations because public employers are bound by the Human Rights Act 1998. In relation to private employment relations there is ECtHR case law suggesting that states have a positive obligation to protect freedom of expression from infringement by private persons,[385] namely the case of *Fuentes Bobo v Spain*.[386] Following a demonstration by staff about mismanagement at Spanish broadcaster TVE, the applicant co-wrote an article in a daily newspaper criticising the broadcaster's management. The applicant also appeared in two radio programmes in which he strongly criticised disciplinary action taken against him. He was

[382] *Glimmerveen and Hagenbeek v the Netherlands* (1978) 18 DR 187. See in relation to religious hatred, *Hizb Ut-Tahrir v Germany* App no 31098/08 (ECtHR, 19 June 2012).
[383] *Venables v News Group Newspapers Ltd* [2001] EWHC QB 32, [2001] 1 All ER 908.
[384] Compare *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Re S* [2004] UKHL 47, [2005] AC 593.
[385] See *Young, James and Webster v UK* (1983) 5 EHRR 201 in relation to Article 11.
[386] In earlier contexts the Commission had held that dismissal of an employee for criticising their employer, and in so doing breaching a contractual duty of loyalty, did not involve direct state interference *Rommelfanger v FDR* (1989) 62 DR 151.

subsequently dismissed. The ECtHR ruled that the statements in issue had been made in the context of an employment dispute and contributed to a wider, on-going public debate about TVE. As such, the applicant's remarks concerned issues of public interest. While the language used had been offensive, the Court reasoned that his statements appeared to have been provoked by the radio-show hosts in lively and spontaneous exchanges. The Court also referred to the fact that neither TVE nor its managers had instituted defamation or other legal proceedings against the applicant and that his employers had applied a severe penalty of dismissal hurriedly. The Court held that in such circumstances the applicant's dismissal was a disproportionate interference with his Article 10 right to freedom of expression. This positive obligation has been most recently emphasised by the Court in *Redfearn v UK*, a case involving the dismissal of a bus driver who was dismissed after being elected as a councillor for the British National Party.[387]

A number of key cases set out and expanded the Convention's protection of the right to freedom of expression at work.[388] In *Van der Heijden v the Netherlands* the Commission recognised that dismissal as a result of exercising speech rights restricts and penalises the exercise of the right. Indeed, the Commission noted that the threat of dismissal might be as strong a deterrent of speech as a total prohibition.[389] In *Glasenapp* the Commission acknowledged that the scope of Article 10(1) went beyond full prevention of expression and might include other restrictions

[387] *Redfearn v UK* para 43, 57.
[388] Earlier unsuccessful cases included *Pay v UK* App no 32792/05 (ECtHR, 16 September 2008) (dismissal for expressing aspect of sexual identity was 'necessary in a democratic society') and cases involving dismissal from the public service, *Glasenapp v Germany* (1987) 9 EHRR 25 and *Kosiek v Germany* (1986) 9 EHRR 328.
[389] *Van der Heijden v Netherlands* (1985) 41 DR 264.

or penalties resulting from the exercise of the right.[390] Finally, in *Vogt v Germany* the Court took the view that dismissal amounted to an interference with the right to freedom of expression under the Convention.[391] The case was factually similar to the earlier case of *Glasenapp*, involving the dismissal of a teacher for membership of the German Communist party. However, the Court distinguished the earlier case on the grounds that it involved a probationary employee and thus related to access to the civil service. The dismissal of a permanent civil servant on the other hand amounted to an interference with the rights guaranteed by the Convention.[392] The Court noted the severe effect of dismissal, highlighting the negative effects on reputation and the loss of one's livelihood, which were particularly severe given the limited availability of teaching jobs outside the civil service.[393] The applicant's post as a teacher of German and French did not involve any security risks and she had not sought to indoctrinate or influence her pupils. Moreover, her political activities were themselves lawful.[394] The Court found the dismissal of Ms Vogt to be disproportionate and to constitute a violation of Article 10.

(i) Religiously-motivated expression in the workplace

Religiously-motivated expression in the workplace can be problematic in certain cases: an employee's proselytising in the workplace may negatively impact fellow employees, customers, or the employer, who may find the content of the expressions disagreeable or simply view such expression as unprofessional.[395] In proselytizing

[390] *Glasenapp* (n 388).
[391] *Vogt* (n 21).
[392] ibid para 44.
[393] ibid para 60.
[394] ibid.
[395] See in the US context see Michael D Moberly, 'Bad news for those proclaiming the Good news: the employer's ambiguous Duty to accommodate religious proselytizing' (2001) 42 Santa Clara L Rev 1.

religions, particularly certain forms of Christianity, bearing witness to one's faith is seen as a religious duty, a conception at odds with an understanding of expressive action as a liberty in which individuals may choose to engage. The context of such proselytism may be key. Where a more senior employee or manager proselytises their subordinates this raises distinct issues. In the military context the ECtHR found the disciplining of two Jehovah's Witness officers who proselytised more junior personnel to be legitimate.[396] In *Larissis v Greece* the Court outlined a test of improper proselytism with reference to examples of 'offering of material or social advantage or the application of improper pressure'.[397]

(ii) Religiously-motivated expression outside the workplace

It is equally understandable that employers might rightly be concerned about the expressions of their staff in contexts outside of the workplace: an employee's letter to a newspaper criticising their firm's actions or falsely purporting to represent the employer's position on a controversial topic would rightly justify an employer's concern. A high profile example of dismissal following religiously-motivated expression outside of the workplace involved the England football manager Glen Hoddle. The English Football Association dismissed Hoddle following a newspaper interview in which he expressed his belief in reincarnation and the view that disability was penance for transgressions in a former life.[398]

[396] *Larissis v Greece* (1999) 27 EHRR 329.
[397] ibid para 45.
[398] Patrick Elias and Jason Coppel, 'Freedom of Expression and Freedom of Religion: Some Thoughts on the *Glen Hoddle* Case' in Jack Beatson, Yvonne M Cripps and David Glyndwr Tudor Williams (eds), *Freedom of expression and freedom of information: essays in honour of Sir David Williams* (Oxford University Press 2000).

However, there are limits to how far the employer's right to discipline staff for religiously-motivated expression outside of the workplace extends. In *Smith v Trafford Housing Trust* the claimant, a housing manager employed by the Trust, was demoted to a non-managerial position, with a 40 per cent reduction in salary, for posting comments on his personal Facebook page which were critical of the prospect that same-sex marriages might be conducted in churches.[399] Though only registered friends could view his Facebook page, and it was therefore not viewable by the general public, colleagues who had read his remarks claimed to be offended[400] and a complaint against him was made.[401] The Trust argued that posting such comments on Facebook had the potential to prejudice the reputation of the Trust[402] and breached the staff code of conduct by promoting religious views to colleagues and customers and by being judgmental and disrespectful.[403] A disciplinary hearing found that Mr Smith's actions amounted to gross misconduct.[404]

Briggs J determined that although on his Facebook page Mr Smith had listed his occupation as a manager at the Trafford Housing Trust, no reasonable reader would conclude that his postings were made on behalf of the Trust.[405] He also considered that there was no realistic damage to the reputation of the Trust by association with the comments, given that an employee made them in his private capacity,[406] outside of working hours, and in a moderate way.[407] Briggs J found that Mr Smith had a right to promote his religious views in his own time on his Facebook

[399] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] IRLR 86, [1]-[5].
[400] ibid [38].
[401] ibid [36].
[402] ibid [56].
[403] ibid [80].
[404] ibid [41].
[405] ibid [57].
[406] ibid [75].
[407] ibid [62]-[63], [84].

page and that his colleagues and customers had the option of whether or not to subscribe to it.[408] Briggs J concluded that to suggest that a code of conduct could be interpreted to extend so far into an employee's private life as to fetter his religious expression outside of work would amount to an infringement of rights of freedom of expression and belief and was unsustainable.[409]

C. Reasoning by Analogy: Contextual Factors in Proportionality Analysis

Some of the issues relevant to proportionality analysis in Article 10 employment conflicts appear to be broadly analogous and applicable to Article 9 employment conflicts involving contested expressions of religious belief. For example, in the Court's Article 10 case law the role of the employee is a key consideration; the political expression of a local authority officer or a police officer is treated differently than that of a teacher.[410] The nature of the employee's expression and the level of the offence it generates may also be analogous factors which might be taken into account in Article 9 disputes in a manner similar to how they feature in Article 10 cases. The impact of the expression on the employer's business or reputation might also rightly be considered. As we have seen, both these factors were key in *Smith v Trafford Housing Trust*.

Equally, there are distinct elements that enter into consideration where religiously-motivated actions are in question. In considering the balancing of concerns about freedom of religion and non-discrimination and calling for a contextualised form of analysis, authors such as Carl Stychin have considered some

[408] ibid. [76].
[409] ibid [82].
[410] *Vogt v Germany* (n 21).

of the factors that might come into play in balancing competing interests in specific contexts.[411] For instance, in the context of the debate surrounding the conscientious objections of marriage commissioners in Canada, Stychin has suggested the following factors ought to be taken into account:

> [T]he sincerity of subjective belief; a consideration of whether the right in issue is core to the system of beliefs (secular or religious); the degree of difficulty involved in accommodation by the employer; whether accommodation would significantly impair the exercise of the competing right; and the material consequences of any impairment.[412]

Arguably, similar factors might be understood as generally relevant in disputes between religious employees and their employers.

Moreover, there are also factors that play a prominent role in Article 10 balancing in the employment context which might not be appropriate in an Article 9 context. In domestic case law a recurring element in determining the legitimacy of the sanction imposed on the employee is the employee's willingness to accept that they have spoken out mistakenly or in an inappropriate fashion.[413] In *Stephens v Halford plc* the applicant created a Facebook page expressing his dissatisfaction with changes to his employer's distribution of working hours and the increased number of weekends which employees were being asked to work.[414] Realising that the page breached his employer's policy he quickly took it down, acknowledged his wrongdoing, and apologised, promising not to act in such a way again. In such

[411] Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (n 245) 749; Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17 Res Publica 21.
[412] Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (n 411) 752.
[413] Dominic McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13 HRLR 125, 140-141.
[414] *Stephens v Halford plc* UK ET/1700796/10.

circumstances the Employment Tribunal held the employee had been unfairly dismissed.[415] This case contrasts with the outcomes for employees who have refused to remove offending expressions after repeated requests.[416] An expectation of some form of contrition or reparation in the context of religiously-motivated expression would arguably be misplaced and might unfairly distort the position of the employee by depicting them as obstinate or unreasonably inflexible.

Section V: Conclusion

This chapter has contended that a subset of religious freedom claims might be better articulated in terms of Article 10. It contends that the distinction between religious belief manifested in words and religious belief manifested by conduct should not be determinative of whether a claim is considered under Article 9 or Article 10, and that religious individuals should be able to make their cases in terms of Article 10 where this best fits the expression in question. This argument is, admittedly, to some extent only hypothetical. Despite the Article 10 arguments put forth in *SAS v France* the Court nonetheless followed its traditional approach of focusing predominantly on Article 9.[417] Further, the weight the ECtHR attributes to self-expression and pluralism in the context of religious manifestation is also in some doubt given the approach in *SAS*. It is important to note that, where religiously-motivated expression is considered under Article 10, effective protection necessitates the consideration of the religious context of such expression. Equally, were non-speech religiously-motivated conduct to be considered under Article 10 a focus on religious context would remain important.

[415] ibid. Similarly, see *Whitham v Club 24 trading as Ventura* [2011] UKET 1810462/10.
[416] *Teggart v Teletech UK Ltd* [2012] NIIT 00704/11IT.
[417] *SAS* (n 215).

Returning to the different contexts introduced at the beginning of this thesis, the following conclusions can be made about the impact of Article 10. In general, a focus on expression as opposed to religious freedom suggests scope for a narrower margin of appreciation and a potential to focus upon public expression of religious belief as being at the core of the right to expression, and consequently less subject to curtailment. In terms of identifying the harm caused by restricting expression of religious beliefs, autonomy and pluralism rationales appear to provide a non-religious basis through which the value of allowing such expression can be articulated in the judicial context. In religious freedom cases, the harm of being denied the ability to manifest religious belief is the harm of such restriction upon one's freedom to believe. As discussed in Chapter 1, this harm can be difficult to articulate in a courtroom context, where judges will only be persuaded by reasons framed in non-religious terms and upon bases that accord with the confines of public reason.[418] The weight that ought to be given to the prevention of such harm is also difficult to assess. This chapter has detailed the applicability of some key rationales for freedom of expression as a means to reinterpret the harms associated with limiting religiously-motivated expression and to understand such harms in a manner comparable with the balancing exercises carried out in relation to other Convention rights. This chapter has contended that considering religious expression in light of speaker autonomy rationales would allow courts to view harm to the individual as akin to that arising from restrictions on the expression of non-religious ideas and opinions in public fora. Rather than accepting restrictions upon the manifestation of belief because religious freedom is a right primarily guaranteeing freedom to believe,

[418] This principle is reflected in Laws LJ's comments in *McFarlane* (n 246) that 'The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves', [21].

an expression approach focuses on the harms specifically associated with limiting *public* manifestation of belief. Consideration of audience-autonomy rationales for freedom of expression protections opens up the potential for restrictions on religious manifestation to be understood as a wrongful intervention by the State to prevent the transmission of potentially powerful ideas. Consideration of pluralism rationales identifies how negative expressive feedback to society can undermine the position of religious minorities in society, both in terms of how they are perceived and in terms of how they see themselves. The type of harm to the individual flowing from a negative expressive message of society's view of their religious identity provides another factor weighing in favour of public expression.

Applying these understandings of harm to the categories of cases outlined at the introduction of this thesis, it is apparent that focusing on freedom of expression can support a more permissive approach to religiously-motivated expression. In refusal of service cases courts may feel more comfortable attaching weight to the value of self-expression than to the 'incommunicable' religious bases motivating such religious persons.[419] Autonomy rationales valuing self-expression reflect the individual's interest in living all aspects of their life in a manner which is authentic and reflective of their understanding of themselves and the world around them. Just as a person may live their life in accordance with their political ideals, so too is there a value in living one's life in accordance with religious ideals. Just as a fervent supporter of the UKIP party might not wish to host a Liberal Democrat party conference at their hotel, so too a person with a religious belief in the sinfulness of sex outside of marriage might want to avoid facilitating what they view to be a sin. A

[419] ibid [21] (Laws LJ).

court does not need to endorse the UKIP activist's zealous political opinions in order to accept that they should be free to express their political preferences by refusing to publicly facilitate that which they are opposed to. Equally, audience-autonomy rationales provide reasons why courts should be hesitant to require persons holding such beliefs to retreat from the public sphere. The eradication of unpopular beliefs from public fora provides a standalone ground for reconsidering such an approach. In terms of pluralism rationales for freedom of expression, the negative expressive feedback to those holding such beliefs is already clearly apparent in recent interventions by some faith leaders.[420]

While a drive for sexual-orientation equality may involve the hope that one day such beliefs will be less prevalent, in the meantime society's respect for the pluralism underlying freedom of expression militates in favour of adopting a more conciliatory approach than has operated to date. Of course, protection from discrimination on grounds of sexual orientation means that such religiously-motivated refusal of service may often arise in the very limited context of direct discrimination, where issues of justification are simply not in play. However, in indirect discrimination claims there is greater prospect for reconciling different interests and considering discrimination law in light of Convention rights. Expressive analysis of the sort undertaken in *Brockie* might allow courts to distinguish between the provision of services with expressive connotations and the facilitation of services which do not compromise the expression of religious beliefs. Refusal of service cases with particularly expressive connotations, such as those involving marriage registrars and guesthouse owners, might benefit from framing their claims under

[420] See Lord Carey's intervention in *McFarlane*, where he contended that judges had likened Christians to bigots in a number of cases, ibid [16]-[17].

Article 10, in order to highlight the particular harm caused by compelling expression which the speaker does not endorse.

Even if courts are not yet willing to consider arguments for protection of religiously-motivated conduct in terms of Article 10, freedom of expression case law can still serve as an important element in the future development of Article 9 case law. Courts in Europe and England may both look to their experience in balancing in Article 10 cases when determining the scope and content of Article 9 in future cases. The final substantive section in this chapter contained a detailed analysis of how courts might draw on their experience balancing employees' freedom of expression with employers' interests in Article 9 cases. The discussion in that section indicates how Article 10 allows for a wide degree of protection of employee expressive conduct without undermining employer interests.

Chapter 5 Conclusion

At various points in English history culture and religion have overlapped significantly. In the past majority, mainly Christian religious groups have benefitted from an alignment of the culture and religion of the majority. Many of the benefits and exceptions granted to religious individuals were protected by common cultural assumptions rather than by any legal basis relating to the concept of religious freedom. It is only in recent years, as the concern for non-discrimination increases and the plural and secularised approach to belief amongst the majority becomes more apparent, that the true boundaries of religious freedom have come into relief. As cultural norms change and the majority as represented by the State moves away from endorsing religious norms in favour of new norms, such as equality and non-discrimination, the old settlements and understandings between Church and State have required renegotiation. This has already happened, to a certain extent, with the passing of various pieces of equality legislation, as amalgamated in the Equality Act 2010. The place of the new religious norms and practices that have become part of society's cultural make-up is still in flux and the relationship between members of less-established religious groups and the State remains in need of further development.

All human rights judgements are to some extent counter-majoritarian. The less well-reasoned a judgement is, the closer it is to mere judicial fiat. These considerations are no less at issue in national courts, but they are particularly stark where transnational courts are concerned. In recent judgements, most notably in *Eweida and others*, the ECtHR has made a number of significant steps towards strengthening and improving the coherency of its Article 9 jurisprudence. It is no

small step that the process by which challenges to limits on Article 9 will be adjudicated has been clearly set out as one which will primarily be determined by proportionality reasoning, in line with the other bifurcated rights in the Convention, rather than through the deployment of questionable filters to exclude particular types of claims. However, there are a number of key remaining questions about how far the minimum standard of protection offered by Article 9 will actually extend, particularly in countries with secular church-state models and in situations where the right comes into conflict with other Convention rights. The question of how proportionality reasoning will work in determining the justifiability of restrictions on religious freedom is still unclear. This thesis has highlighted how the concept of religious freedom that has been developed in human rights law contains a number of assumptions and blind spots that can undermine the claims of members of minority or unpopular religions.

> In *Copsey v WWB Devon Clays* Mummery LJ predicted that:
>
> > It is probably only a matter of time … before the fundamental and pervasive character of Article 9 will be more fully revealed. If the Article means what it says, it has the potential to be far reaching in its legal, social, economic and political effects.[1]

There is much to suggest that the role of Article 9 in determining the appropriate limits of the freedom to act in accordance with one's religious beliefs will continue to be the subject of much litigation, as religious individuals test the extent of protection under Article 9 post-*Eweida and others*. Over time, there may be further radical expansions in interpretation matching that case's overhaul of Article 9 jurisprudence. However, there is cause for caution in predicting the expansion of

[1] *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2006] ICR 55, [3].

Article 9 as a means of protection for religious individuals. The Strasbourg Court's willingness under the auspices of Article 9 to engage with and scrutinise contracting states' treatment of unpopular or misunderstood religious minorities has been tested and largely found wanting in the recent high-profile case of *SAS v France*.[2] As detailed in Chapter 2, whilst the Court has made greater efforts to justify its treatment of restrictions on Article 9 and to dispel many of its previous, highly criticised interpretations of Muslim dress, in the end it is unwilling to require contracting states to alter domestically-popular restrictions on the visibility of an unpopular minority.

In addition to the Strasbourg Court's unwillingness to take on such a politically difficult role, this thesis has detailed larger conceptual difficulties with Article 9 as a system for protecting the religious manifestations of individuals, which are key to understanding the approach of both the ECtHR and domestic courts. Despite the freedom of domestic courts to go beyond the protection afforded by Convention jurisprudence,[3] they have in the past tended to retreat to reasoning that restrictions on public manifestation are proportionate because the freedom to believe and practice privately remains unaffected.[4]

Of course, domestic courts may be of the view that the courtroom is not the best place to define the parameters of liberal secularism. Concerns about institutional legitimacy may lead judges to defer to previous legislative decisions and to leave it

[2] *SAS v France* App no 43835/11 (ECtHR, 1 July 2014).
[3] In relation to the contrasting domestic test of proportionality see discussion at text to n 294 in ch 2 of *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] 1 AC 700. In relation to declarations of incompatibility under the Human Rights Act 1998, s 4 see *R (Nicklinson) v Minister for Justice* [2014] UKSC 38, [2014] 3 WLR 200.
[4] *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955, [51]-[52].

to the legislature to extend existing protections.[5] Some have argued that such deference is most justified where the legislature has taken religious views into account when debating policy, but nonetheless determined not to extend legislative exemptions in a general manner.[6] However, concern for minorities may at times mandate that courts intervene; as Lord Mance recently noted, 'while the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure equal treatment of all'.[7] The difficulty of translating the importance of manifesting religious belief into cognisable legal arguments remains an overarching problem in the religious freedom model. The need for alternative models and modes of seeking protection for acts motivated by religious belief remains apparent despite the significant developments in Article 9 protection.

This thesis has detailed how at present there appears to be limited potential for substantially increasing protection upon a discrimination law model for religious individuals wishing to manifest their beliefs publicly. Chapter 3 detailed how judicial approaches often limit the ostensibly promising potential of the textual provisions prohibiting religious discrimination in EU law, Article 14 of the Convention, and domestic statutory schemes of protection. Despite the apparently promising nature of EU protections, the CJEU has to date substantially failed to address the question of religious discrimination in its case law, at least as far as the actions of member states

[5] In *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] WLR (D) 151, [121]-[123] the plaintiff was explicitly advised to seek accommodation in the political rather than the judicial realm. See Peter Cumper and Tom Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (2011) 22 King's Law Journal 131, 133.
[6] Carl F Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 Oxford Journal of Legal Studies 729.
[7] *Nicklinson* (n 3) [164].

are concerned,[8] and appears unlikely to influence English law in the near future. Claims under Article 14 are addressed rarely or in a manner indistinct from Article 9, apart from some of the more obvious and extreme cases of religious discrimination.[9] Though religious discrimination is now considered a suspect ground deserving of particularly strict scrutiny,[10] subsequent ECtHR decisions such as *SAS v France* indicate that this should not be taken as a certain indicator that the Court will strictly scrutinise the strength of ostensibly general and neutral justifications in all future cases.[11]

Case law interpreting domestic discrimination protections suggests a reluctance on the part of the English judiciary to match the UK legislature's apparent desire to 'equalise upwards' across the various grounds of equality, as reflected in the Equality Act 2010. This may be because the religious discrimination model may threaten to go too far for some to fully endorse it. A strong discrimination approach might not only affect historically-negotiated compromises between the State and majority religions, but it might also lead to outcomes which are difficult to endorse on a practical level, such as requiring employers to accommodate staff, such as the teacher at the centre of the *Azmi* case, whose manner of religious manifestation appears to undermine their ability to work effectively.[12] The boundaries of 'religion or belief' are more open-ended than other grounds and affect a wide range of actions. As a result, the religion or belief ground may require the protection from direct discrimination of persons manifesting philosophical beliefs that are extremely

[8] Case 130/75 *Prais v Council of Ministers of the European Communities* [1976] ECR 1589 involved a claim of religious discrimination by a member of staff of the EU institutions.
[9] *Grezlak v Poland* App no 7710/02 (ECtHR, 15 June 2010).
[10] *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 February 2013) para 124.
[11] *SAS* (n 2).
[12] *Azmi v Kirklees MBC* [2007] UKEAT 009/07, [2007] ICR 1154.

illiberal or potentially undermine the rights of others, such as the support for the British National Party at issue in *Redfearn*. Continuing debates about the need for hierarchies between grounds[13] and whether religious discrimination is distinct from other grounds in being a matter of choice rather than identity[14] suggest that a more expansive approach by the domestic courts towards religious discrimination is unlikely to be forthcoming. This continuing debate about hierarchies is in part informed by concern about the impact upon other protected grounds of limitations deemed necessary in interpreting religious discrimination and the risk of diluting the standard model of equality protection.[15] Protection of religious discrimination in a more expansive manner might also exacerbate existing difficulties with consistent use of comparator analysis and with emerging concepts such as expressive harm, which have already proved potentially unwieldy.

At present, it appears courts will continue to 'fudge' the distinction between direct and indirect discrimination in order to avoid some unattractive consequences of applying direct discrimination protections. Where indirect discrimination is considered, the centrality of the question of proportionality means that often the balancing process is relatively similar to that under Article 9. The difficulties religious persons face in communicating the value of their exercises of religious manifestation, and the harm caused by their curtailment, are consequently equally relevant under a religious discrimination model.

The potential to accommodate a religious individual is currently just one factor considered amongst others when determining within indirect discrimination

[13] See text to n 254 in ch 3.
[14] *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890, [40] (Sedley J)
[15] See text to n 276 in ch 3.

analysis the proportionality or otherwise of a refusal to accommodate or grant an exemption. An explicit duty of reasonable accommodation, whether developed in terms of Article 9 or discrimination law, would greatly improve the extent of protection available to religious individuals, particularly in relation to issues such as symbols and dress and accommodation of religious needs in contexts such as schools and employment. A fully developed conception of reasonable accommodation might significantly address some of the gaps in Article 9 protection without the conceptual problems caused by extending discrimination provisions. The difficulties of communicating religious motivation and religious harm play a far less dominant role when a litigant does not need to convince the court that a particular action or failure to act has unjustifiably interfered with their religious freedom and the question is instead framed in terms of the respondent justifying a failure to accommodate. A reasonable accommodation duty would avoid the hurdles of defining comparators and disadvantage and remove religious manifestation claims from concerns about the potential consequences of a stronger notion of religious non-discrimination. However, neither Article 9 nor non-discrimination protections currently require reasonable accommodation and it is difficult to predict the scope for judicial activism or legislative action in creating such a duty.

Given the pitfalls of other approaches, considering religious manifestation through the lens of freedom of expression case law and rationales may help courts to attribute a secular weight to religious expression. Recognising the relevance of freedom of expression in religious cases may assist courts in understanding and communicating the full context of the acts upon which they adjudicate. Freedom of expression analysis may be especially pertinent when considering instances where

expressions of controversial religious beliefs have resulted in suppression and penalisation. Where religious beliefs run contrary to liberal norms and are viewed by the majority as offensive, the ECtHR's freedom of expression case law can shed new light on the kinds of harm arising in such cases, as well as the individual and public interests furthered by protecting such expression.

Unlike religious freedom or religious discrimination models, a freedom of expression model offers some means by which courts might value the expression of persons' whose religious beliefs fall foul of discrimination law principles. The US model shows us a clear outline of how expression and religious belief are linked. This thesis argues that the autonomy and pluralism rationales underlying freedom of expression make a strong case for non-speech religiously-motivated expression to be understood in the context of Article 10. This may be in some ways aspirational, given the current practices of the ECtHR, particularly in relation to religious symbols, but it is still an argument worth developing in any case. In English courts there appears to be an evolving appreciation of religiously-motivated expression, particularly in relation to controversial speech. The domestic courts may yet provide the most promising setting for such arguments to be considered in future cases.

The changing demographics in terms of immigration in Europe and in England will undoubtedly merit reconsideration of these issues in future years. As minorities become more substantially visible, greater understanding and empathy may follow. On the other hand, the relationship between migration and restriction on manifestation of religious beliefs in other European countries paints a more negative prediction. Future study in this area may reflect dramatic changes in the relationship

between the ECtHR and domestic courts. A realisation of the election promises of the Conservative Party to 'scrap' the Human Rights Act 1998 and potentially withdraw from the Convention 'if necessary' would radically alter the manner in which manifestation of religious belief is protected.[16]

In conclusion, it seems that no one model provides a comprehensive answer to the religious individual wishing to act in accordance with their beliefs. The fact that religious freedom or discrimination may not fully answer, or even be relevant to, every case that arises in this area does not mean they are any less valuable tools where they can be effectively applied. The same may be said of freedom of expression. Not every conflict involving religiously-motivated acts will merit freedom of expression analysis, but that does not mean that courts should not be alive to the occasions where such considerations are pertinent.

Significant progress has come about in recent years in terms of Article 9's potential to protect the religious manifestations of individuals, particularly in the workplace context. The ECtHR's emphasis in *Eweida and others* on the need to balance the competing interests at stake in such claims will hopefully go some way towards addressing the concerns of religious communities that religious belief was simply not valued by courts in terms equal to non-religious goals.[17] However, there are still clear limits on what religious freedom models can achieve. The focus on private belief as the core of religious freedom undermines the claims of those who view manifestation of belief as equally important. The significant gaps in meaning

[16] Alan Travis, 'Conservatives Promise to Scrap Human Rights Act after Next Election' (The Guardian, 30 September 2013) <http://www.theguardian.com/law/2013/sep/30/conservitives-scrap-human-rights-act> accessed 29 September 2014.
[17] See, for example, Lord Carey's intervention in *McFarlane* (n 1). He proposed the introduction of a special system of courts to address the claims of religious individuals.

between courts and religious individuals are difficult to overcome when the onus is on the individual to prove that their Article 9 rights have been interfered with to a disproportionate extent. The weight to be given to religious harm caused by the inability to manifest belief publicly is particularly difficult to articulate within a religious freedom model inherently structured around protecting freedom to believe rather than act.

A religious discrimination model will be able to address the key aspects of cases where there is a clear motive of religious animus or a clear failure to accommodate some and not others. However, the extent to which general and otherwise neutral rules should be altered for religious individuals will depend on factors such as efficiency, cost, and the rights of others. In difficult cases where there is some apparent downside to accommodation, convincing a court that this cost is outweighed by the benefit to the religious individual will be undermined by the same difficulties of communication affecting religious freedom claims.

In contrast, a freedom of expression model for protecting religiously-motivated conduct gets to the heart of the value of publicly manifesting belief in a way that is communicable in secular courtrooms. Tolerance, religion, and diversity of belief are particularly difficult concepts to balance. The assertion of belief or non-belief typically necessitates denial of the veracity of differing beliefs and by nature that assertion will be, to some extent, intolerant. The challenge for courts to arbitrate between individuals whose actions are motivated by different belief systems is undoubtedly a significant one. It is as yet unclear whether the traditional human rights tool of justification of limitations by proportionality analysis can operate fairly

in this context. A focus on understanding religiously-motivated conduct as expressive action under Article 10 might act to redress the balance and lead to religious interests being valued in the public realm, rather than being simply relegated to the realm of private belief.

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