
Jones P. [Toleration, Religion, and Accommodation](#). *European Journal of Philosophy* 2015, 23(3), 542-563.

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Date deposited:

12/10/2015



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Toleration, Religion, and Accommodation

Peter Jones

Abstract: Issues of religious toleration might be thought dead and advocacy of religious toleration a pointless exercise in preaching to the converted, at least in most contemporary European societies. This article challenges that view. It does so principally by focusing on issues of religious accommodation as these arise in contemporary multi-faith societies. Drawing on the cases of exemption, Article 9 of the ECHR, and law governing indirect religious discrimination, it argues that issues and instances of accommodation are issues and instances of toleration. Special attention is given to issues that arise when the claims of religious belief conflict with those of other legally protected characteristics, especially sexual orientation. The article uses a concept of toleration appropriate to a liberal democratic political order – one that replaces the ‘vertical’ ruler-to-subject model of toleration that suited early modern monarchies with a ‘horizontal’ citizen-to-citizen model appropriate to a political order that aims to uphold an ideal of toleration rather than itself extend toleration to those whose lives it regulates.

Historically the idea of toleration has been most associated with religious belief and practice. Even nowadays we are inclined to think of religious toleration as the paradigm case of toleration. Why should that be? The obvious answer is that religious disagreements have been so prominent in human history – particularly in modern European history – and have fuelled such bitter and bloody conflicts that toleration has been especially necessary to deal with them. If there is to be peace without repression amongst the adherents of different religious beliefs, ‘live and let live’ is the only feasible option. But there is also a less contingent reason. To hold a particular religious belief is necessarily to dissent from and to reject other religious beliefs. To be a Muslim is to dissent from Christianity and to be a Christian is to reject Islam, just as to be a Protestant is to dissent from Catholicism and to be a Sunni is to reject Shi’ism; while to be an atheist is to reject all of these faiths and all of their variants. So different religious beliefs are not merely different; they are also conflicting. To embrace a particular religious belief is necessarily to reject others and

that is why religious difference provides a paradigmatic site for toleration.

Disapproval or rejection is a necessary feature of the circumstances of toleration and it is also a necessary feature of religious difference.

In saying that different religious beliefs conflict, I do not mean to say that their adherents must come to blows, even though they frequently have. I mean only that those adherents are putting forward rival sets of belief and, to that extent, they must disagree with one another. If they hold, nevertheless, that they should refrain from coercing or persecuting or disadvantaging those whom they reckon propagate and pursue mistaken beliefs, they are committed to toleration; and, if all parties to the dispute take that view, they will engage in mutual toleration. They may very well find reasons within their own faiths for desisting from intolerance but, even if they do, those will still be reasons for toleration.

Some people are uncomfortable with these obvious truths and insist that we should *celebrate* rather merely tolerate our differences. In the case of religious differences, however, it is very hard to make sense of that injunction. If I am a Muslim, how can I celebrate the fact that others refuse to recognise Mohammed as God's prophet, fail to accept that the Koran is the word of God, and pursue unIslamic forms of life? If I am a Christian, how can I celebrate others' failure to recognise that Jesus Christ was the Son of God, that faith in him is the path to salvation, and that the worship of other gods or no god is deeply mistaken? To assimilate differences in religious belief to the kind of differences we *can* celebrate – differences in, for example, dress or music or literature or diet – is not to take them seriously.

1. Religious Toleration: Unnecessary and Moribund?

All that said, we might still question how much religious toleration matters nowadays. In the European world, people seem now to care less about religion than they did in the past and, the less they care, the less religious toleration matters. Moreover, even if we cannot yet do without religious toleration altogether, that sort of toleration might be thought dead as an issue. The battle for religious toleration was fought and won long ago and preaching the virtues of religious toleration is now a pointless exercise in preaching to the converted. In this article I challenge those dismissals of religious toleration. I shall say a little about why we still need religious toleration, but I shall devote most of the article to challenging the claim that religious toleration is now a

dead issue. I shall do so primarily by arguing that issues of accommodation, which have become highly contentious in many European societies, are issues of toleration. Those issues have risen to prominence partly, though not wholly, as a consequence of the transformation of societies like Britain, France, Germany, Italy and the Netherlands, from largely mono-faith (if multi-denominational) societies to multi-faith societies. But first a few words on why we still have, and still need, religious toleration.

Because religious toleration is such a widely accepted ideal in liberal democratic societies, it is easy to overlook its existence. Indeed, perversely, its widespread acceptance is sometimes mistaken for its non-existence. Commentators sometimes suppose that toleration is toleration only if it hurts. If it comes easy, there is not much that is tolerant about it. There may be some merit in that view if we conceive toleration as a psychological phenomenon. The more people undergo inner torment and have to struggle to make themselves endure the conduct of others, to which they deeply object, the more toleration they actually display; and, if we think toleration is virtuous, the more virtuous they will be. By contrast, the non-chalant and the laid-back, to whom toleration comes easy, may be thought to display little of it and perhaps for that reason to be less worthy of congratulation.

However, logically, there is nothing to commend the view that toleration has to be painful to be real. Suppose I object to x, but I am so persuaded of the merits of toleration in cases like x, that I tolerate x painlessly and without hesitation. It would be perverse to hold that, because I am so convinced of the case for toleration, I do not really tolerate x. A tolerant society does not cease to be a tolerant, just because its population is wholly sold on the merits of toleration. Of course, we must distinguish toleration from mere indifference and, insofar as the current age lives more comfortably with religious diversity than previous ages, that condition may owe more to indifference than to toleration (Williams 1996). That claim is not wholly mistaken, but it is very far from being wholly true. There are large swathes of people in European societies who are strongly committed to religious beliefs of various sorts; there are also large numbers of people who are deeply hostile either to religious belief in general or to particular faiths. Insofar as those people do not follow their historical predecessors and resort to political power to promote their own beliefs and to suppress the objectionable beliefs of others, why is that? The answer is not that they hold their beliefs any less fervently; it is that they are more persuaded of the rightness

of mutual toleration. So, even if the battle for religious toleration has been fought and won, it is a simple error to suppose that religious toleration is no longer a feature, and no longer need be a feature, of contemporary European societies.

But has the battle for religious toleration been fought and won? If we cast our eyes beyond Europe, it clearly has not. Think, for example, of conflicts between Sunnis and Shi'as in different parts of the Muslim world, or of the attacks suffered by the Ahmadi sect in Pakistan, or of conflicts between Christians and Muslims in Nigeria, Sudan and, more recently, Egypt. Post-War Europe has also seen bitter and bloody conflicts between religiously divided populations in areas such as Northern Ireland and Bosnia. These may seem exceptional cases and, even though they have been associated with differences in religious identity, we may doubt how far the conflict has really been about religion. But we can still turn to cases like the Rushdie Affair, or the Danish cartoons, or the issues raised by niqabs and burkas, or conflicts over the merits of Sharia courts and legal pluralism, to show that issues concerning religious toleration are far from moribund. However, what is at stake in that last set of issues is not so much whether there should be religious toleration but what sort of religious toleration there should be. That is also true of the issues surrounding accommodation.

By religious accommodation I understand an arrangement that is designed to ease the lot of the accommodated and, without which, they would find themselves disadvantaged compared with others. As Martha Nussbaum (2008: 21) says, accommodation aims to give religious people a 'break' by, for example, exempting them from general rules that would otherwise compel them to betray their beliefs or to bear a burden not borne by others. However, I do not mean 'accommodation' to encompass just any adjustment a society makes in response to changes in the religious make-up of its population. If, for example, the religious make-up of chaplaincies in hospitals or prisons is adjusted to match changes in the religious make-up of a population, there is no reason to describe that as 'accommodation'. I limit the idea of accommodation to cases in which an adjustment is made to provide for the particular demands of a particular faith, such as a particular dress code or dietary requirement. Accommodation, as I shall use the term, is therefore difference-sensitive rather than difference-blind.

This idea of accommodation is particularly associated with multiculturalism; indeed it is often now treated as definitive of multiculturalism. I shall explain later

why I choose to examine it with respect to religion in particular rather than culture in general. I shall draw my examples from Britain, simply because that is the case I know best, but the issues they exemplify are common to other European societies (Doe 2011), and to many non-European societies, that have multi-faith populations. First, however, I need to explain the kind of toleration of which accommodation is a part.

2. Toleration and Liberal Democracy

How are we to understand a tolerant political regime under modern liberal democratic circumstances? In simple analyses of toleration, we frequently use a model of person-to-person toleration. Person A objects to the conduct of person B, is able to prevent B's conduct if he so chooses, but allows B to continue with that conduct. In that case, A tolerates B's conduct. If we turn to the types of regime that were prevalent in post-Reformation Europe, we can model their toleration or intolerance on the simple person-to-person case. An early modern monarch who was a Catholic, but who had Protestants amongst his subjects, could tolerate those subjects by, for example, allowing them to engage in Protestant forms of worship. Alternatively, he could opt not to tolerate them by suppressing their forms of worship. We can tell the same story about a Protestant monarch and his Catholic subjects. In both cases, it is clear who was doing the tolerating (or not) and who and what was being tolerated (or not).

Now fast forward to our own age. Where do we find religious toleration in contemporary liberal democratic regimes? We might try to find the answer by searching for an equivalent to the early modern monarch. But there are two problems with that strategy. First, liberal democratic regimes, at least ideally conceived, do not commit themselves to a particular religious faith or to a particular variant of a religious faith. On the contrary, we would think it quite improper for a liberal democracy to privilege, patronise or promote any religious faith. But if a regime remains neutral on matters of religious faith, it will neither approve nor disapprove of any and so will be incapable of the toleration or intolerance that was open to an early modern monarch.

Secondly, it is not all clear who or what we should conceive as the equivalent of the early modern monarch. Assuming that the democracy we are contemplating is an indirect democracy, the most obvious candidate might seem to be its elected

government. But a democratic government (again in idea) stands in a quite different relation to its population than did an early modern monarch. An elected government is supposed to be the servant rather than the master of its population and it has no business either tolerating or not tolerating the population that it serves. Perhaps, then, it is the democratic majority that equates with the monarch and the minority with his subjects so that the ‘monarchical’ majority tolerates (or not) a ‘subject’ minority. However, that simple model of superordinate and subordinate fits ill with the equality that we associate with liberal democracy, especially with the equal status of citizens. It also misrepresents the reality of many modern democratic societies in which there is no simple majority that tolerates an identifiable minority.

It would seem, then, that if we are to make sense of toleration as a characteristic of a liberal democratic regime, we should turn away from the model provided by post-Reformation monarchies. It could be, of course, that toleration is a quality we cannot ascribe to contemporary democratic regimes. As a political ideal it may belong to a pre-democratic age; liberal democratic arrangements, rather than instantiating toleration, may have superseded it (Heyd 2008; Newey 1999). Yet, tossing the idea of toleration aside in that manner also seems odd, since we typically conceive *liberal* democracy as in part driven by, and as realising, an ideal of toleration.

The solution to these puzzles lies, I suggest, in conceiving a liberal democratic order as one that is committed to an ideal of toleration and that seeks to uphold that ideal. It is an order that secures freedom of religion for its citizens by not allowing them to use political power either to privilege their own faith or to suppress the faiths of others. The Christian is precluded from not tolerating the Muslim, and the Muslim is precluded from not tolerating the Christian; similarly the Sikh is not free to be intolerant of the Christian or the Muslim, and neither of them is free to be intolerant of the Sikh. Thus, subject to a qualification I shall make in due course, the religious toleration secured by a liberal democratic regime is not one in which the regime itself does the tolerating. Rather, the toleration it secures is the toleration it requires of its citizens in relation to one another; it is ‘horizontal’ toleration amongst citizens, rather than ‘vertical’ toleration of subjects by government. It is toleration amongst people of equal status rather than the toleration of subordinates by a superordinate.¹

The most obvious way in which a liberal democratic society can secure that tolerant order is by establishing rights to religious freedom for all of its members and

by imposing upon them corresponding duties to respect the rights of others. It might do that by entrenching religious freedom in its constitution, through a bill of rights for example, so that citizens enjoy rights in the form of constitutional immunities. Or it might secure those rights through ordinary legislation. Or its commitment to mutual toleration may be deeply ingrained in its political culture, so that its citizens enjoy secure rights of religious freedom *de facto* even if not *de jure*.

One feature of this way of understanding political toleration is that it is an arrangement that *requires* people to be tolerant of one another, most obviously by subjecting them to a legal obligation that prohibits intolerance. But is 'required' behaviour of that sort consistent with the idea of toleration? If A is legally prohibited from violating B's religious freedom, does not that simply pre-empt A's toleration? A's being *able* to prevent B's conduct, if he so chooses, is normally regarded as a necessary condition of A's being capable of tolerating B; if A is deprived of that ability, he is in no position either to tolerate or not tolerate B. Thus, if a society establishes a legal arrangement that secures A's and B's religious freedom by prohibiting their being intolerant of one another, that arrangement might seem to displace, rather than to realise, toleration.

However, that chain of thinking relies on the person-to-person model of toleration, whereas my concern is with toleration as a feature of a political and legal system. If a society is committed to an ideal of toleration and seeks to organise itself in a way that realises that ideal, how can it do so except by upholding and limiting its citizens' freedom in relation to one another? It will not establish an order that leaves citizens free to tolerate one another, or not, as they so choose. Rather it will secure its citizens' freedom so that they are unprevented from doing those things that they ought to be unprevented from doing; it will secure toleration by holding possible or potential intolerance at bay. Thus a tolerant political order will be distinguished not by its allowing citizens to tolerate or not tolerate one another as they choose, but by the complex of freedoms and unfreedoms it secures for its citizens (Jones 2012).

We should note, however, that it is not the case that such an order must deprive individual citizens of the possibility of acting on their own commitment to toleration. On the contrary, A in his treatment of B can still be motivated by his own beliefs about how he should treat B. The existence of a law requiring him not to infringe B's freedom does not mean that his conduct must be motivated (only) by that legal obligation, just as the existence of a law prohibiting murder or assault does not

render us incapable of refraining from murder or assault for any reason other than our being subject to that legal obligation.

The political liberalism of John Rawls (1993) provides a clear example of this sort of tolerant political order. It aims to provide a conception of justice for a society whose members possess different and conflicting comprehensive doctrines, including different and conflicting religious doctrines. Of the two principles of justice that Rawls constructs for this diverse society, it is the first that most obviously relates to religious toleration since it includes the right to religious freedom. But in fact both principles are relevant in that both embody the notion that a just liberal society would not use political power of *any* sort either to promote or to disadvantage any reasonable comprehensive doctrine or its associated conception of the good. The ‘neutrality’ of Rawls’s just society is a consequence of its thoroughgoing commitment to toleration (Jones 2003). The feature of Rawls’s just and tolerant society to which I want to draw attention is that it is not a society that leaves its citizens free to tolerate one another in the political domain as they so choose. On the contrary, the society’s basic structure is one whose laws and institutional design secure toleration by depriving citizens of the freedom to be intolerant of one another. Certainly good Rawlsian citizens will embrace the principles of justice and will therefore endorse the justice of their society’s arrangements, including the justice of mutual toleration, but the society’s commitment to toleration lies chiefly in the character and make-up of its basic structure rather than in the attitudes of its citizens.

3. Toleration and Accommodation

How then does this relate to the issue of accommodation? Rawls’s conception of a just society is often described as ‘difference blind’. It is blind to difference because it establishes the rules and arrangements of a just society without reference to the specific demands of any particular comprehensive doctrine or conception of the good. By contrast, the idea of accommodation is associated with ‘difference sensitivity’ – with the need to take account of, and to adjust a society’s arrangements to, the different demands of different religions and cultures. The move from difference-blindness to difference sensitivity is frequently associated with the rejection of neutrality. In fact, there is no reason why it should be, since the complaint that difference blindness fails to be genuinely neutral can be accompanied by the claim

that genuine neutrality, genuine even-handedness, requires difference sensitivity, though that is not an issue that I shall pursue here.

While I do not intend to tie my argument on the relation between toleration and accommodation to Rawls's theory of justice, it is an argument that is broadly consistent with his theory. The kind of accommodation that is relevant to the polyethnic and multi-faith character of Britain and other European societies, and that has been pursued in those societies, tends to be of two sorts. It consists either in refinements to what Rawls calls the 'basic structure' of those societies, or in adjustments to public policies pursued within that basic structure.

4. Toleration and the ECHR, Article 9

So consider the decisions made by the courts when they deal with cases relating to Article 9 of the European Convention on Human Rights (ECHR). The first clause of Article 9 gives everyone 'the right to freedom of thought, conscience and religion', including the 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' (my emphasis). Its second clause, however, subjects the freedom to manifest one's religion or belief 'to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'. Cases concerning Article 9 that come before the courts are typically cases in which a person claims that his right to manifest his religion in particular circumstances has been interfered with, while others either resist that claim of interference or argue that it is justified by the limitations listed in the Article's second clause.

The ECHR was drafted and ratified long before the issue of multi-faith or multicultural accommodation arose to prominence. Even so the issues that courts face in relation to Article 9 are frequently issues of accommodation. They raise the question of whether someone has the right to manifest his particular religion in particular circumstances and, in resolving that question, courts take account of the specific demands of a person's faith as well as of the specific features of the circumstances in which he wishes to manifest his faith. They are cases, that is, in which the issue is whether and how far a person's wish to manifest his religion should be accommodated by others. Thus, in Britain, such cases have concerned the right of

a Christian employee to be exempt from his employer's practice of requiring Sunday working;² the right of a Muslim teacher to attend Friday prayers, even though his doing so entailed his being absent from school during teaching hours;³ the right of a Muslim schoolgirl to attend school wearing a jilbab, rather than the shalwar kameez provided by the school's uniform;⁴ the right of a Christian schoolgirl to wear a 'purity' ring contrary to her school's no jewellery policy;⁵ and the right of a Hindu on his death to be cremated by open pyre rather than by the enclosed form of cremation currently provided in Britain.⁶

These cases exemplify what I mean by 'refining' the basic structure. They take the right of freedom of religion (which, as a general right, is not in dispute) and consider how far that right should entitle the bearer of a specific religious belief to have that belief accommodated by others, in public or private capacities, so that he can manifest his religion (which, as a specific right, is in dispute). These are issues of religious toleration in that they concern the scope of freedom that a society should secure for its religious adherents, within which they can manifest their beliefs. Indeed, the toleration required in cases of accommodation is typically more demanding than in the 'standard case'. In the standard case, toleration requires no more of people than that they abstain from persecuting others for their religious beliefs or from preventing others' pursuit of their beliefs. In the case of accommodation, toleration typically requires people to make a sacrifice or bear a cost or endure an inconvenience for the sake of beliefs they do not share, and that can be significantly more demanding than the standard case. That is why this form of toleration remains controversial even in societies that claim to be wholly committed to religious toleration.

Another area of law that can be seen as refining the basic structure as it relates to religious freedom is the law on religious discrimination. In Britain, discrimination law often secures a greater measure of accommodation for the religious than human rights law. It has, for example, required a greater measure of accommodation from employers, in respect of their employee's beliefs, than has human rights law (Vickers 2008: 86-94; Ahdar and Leigh 2005: 165-8). But, before turning to that case, I want to consider a different sort of religious accommodation – accommodation through exemption.

5. Toleration and Exemption

Accommodation through exemption has attracted a great deal of attention, perhaps because exemptions are more conspicuous forms of accommodation than those provided by human rights law or discrimination law. In Britain, three cases of exemption are particularly well known: the exemption of turban-wearing Sikhs from the requirement to wear a crash helmet if they ride a motorcycle; the exemption of Sikhs from law that prohibits the carrying of knives in public, so that they can carry the kirpan as their faith requires; and the exemption of Jews and Muslims from animal welfare legislation requiring the stunning of animals before slaughter, without which Jews and Muslims would be unable to slaughter animals according to the rites of their religion.

These exemptions do not comport wholly with the model of political toleration that I sketched earlier, in that they are not cases in which the state acts as a third party that lays down rules requiring its citizens to be tolerant of one another. Rather in these cases the state secures toleration by itself granting the exemption. In relation to Rawls's theory, these are most appropriately seen as cases that arise *within* the basic structure. That is why they typically have an *ad hoc* character. In each case, a particular public policy has been adopted that comes up against a particular demand of a faith and, in each case, adherents of that faith receive an exemption so that they will not be 'burdened' by the policy in ways that others are not.

What justifies our conceiving these exemptions as exercises in toleration? The reasons that justify the policies from which religious groups are exempt are reasons that apply to the exempted groups no less than to other members of the population. Public efforts to prevent head-injuries, reduce knife crime, and avoid unnecessary animal suffering are as relevant to and for Sikhs, Jews and Muslims as they are for other citizens of the UK. That need not always be true of a public policy that makes an exception. Suppose, for example, that a government commits itself to a campaign of mass vaccination but that it can readily identify members of the population who possess a natural immunity to the disease it is combating. In that case, the government has reason to except those with a natural immunity from its campaign since that exception will in no way conflict with the campaign's purpose: vaccinating people who are already immune would be entirely pointless. In that sort of case, there

are no conflicting considerations and nothing that requires toleration. But that is not true of the religious exemptions I have cited. Motor-cycling Sikhs, for example, are exempted from wearing crash helmets not because turbans provide the same degree of protection from injury as crash helmets but in spite of the fact that they do not. Similarly, Muslims and Jews are exempted from animal welfare legislation not because concerns for animal welfare do not arise when animals are ritually slaughtered, but in spite the fact that they do. The reasons driving the public policy apply to all but, in the case of Sikhs, Jews and Muslims, reasons grounded in respect for their beliefs are allowed to override the reasons for the public policy. That is why they constitute ‘exemptions’ rather than mere ‘exceptions’. These exemptions might also seem to have the classic structure of a tolerated condition. The authors of the public policy have reason to object to anyone’s not complying with the policy but, out of deference to the beliefs of Sikhs, Jews and Muslims, they refrain from making those groups comply with the policy.⁷

There is, however, reason to question whether exemptions exhibit that ‘classic’ tolerant structure. It is clear enough who and what are being tolerated, but who is doing the tolerating? I previously spoke of the ‘authors’ of the policy from which the religious groups are exempt, but those who first devise the policy are not the only or the most significant party. No less relevant is the government that adopts the policy and the legislature that approves it and turns it into law. But the laws that instantiate the policy and that exempt religious groups from it will remain on the statute books and govern people’s conduct long after those who were involved in their drafting and enactment have disappeared from the scene. Once again, the problem of identifying a tolerator arises from use of the person-to-person model of toleration. Rather than viewing exemptions according to that model, we would do better to see them as representing a society’s public stance on what should and should not be tolerated. Toleration is a feature of the exemptions themselves rather than an expression of any particular person’s or party’s toleration. Because the religious groups involved are minorities, it is tempting to say that the exemptions constitute toleration of minorities by the majority. But that is likely to misstate the facts (e.g. how many members of the majority are even aware of the exemptions, and how and when have they bestowed that toleration?) and there is no reason why Sikhs, Jews and Muslims should not endorse the society’s general policy alongside their own exemption. For example, turban-wearing Sikhs can be expected to endorse their own

exemption from crash helmet legislation, but they can also endorse the law that requires non-Sikhs to wear crash helmets: they can recognise that, since non-Sikhs do not possess the reason that Sikhs possess for not wearing crash helmets, the balance of considerations applying to non-Sikhs justifies the compulsory wearing of helmets. Similarly, Jews and Muslims can accept that, in the absence of reasons provided by their own faiths, the public policy that requires animals to be stunned before slaughter is entirely justified. Insofar as a population adopts that ‘public’ perspective, the toleration it secures through exemption fits ill with the imagery of ‘vertical’ toleration, even though the locus of this form of accommodation is the state rather than civil society.

6. Toleration and Indirect Religious Discrimination

In Britain the most comprehensive provision for religious accommodation is now legislation governing indirect religious discrimination. British law prohibits both direct and indirect religious discrimination in employment and in the provision of goods and services.⁸ If we take the case of employment, an employer discriminates *directly* against an employee if he treats that employee less favourably than he treats, or would treat, others because of the employee’s religion or belief; if, for example, he refuses to employ or to promote a Muslim because he is a Muslim. An employer discriminates *indirectly* against an employee if he has a provision, criterion or practice (PCP) that he applies to an actual or potential employee, which disadvantages the employee by comparison with other employees because of the employee’s religion or belief. However, an employer is not guilty of indirect discrimination if he can show that the application of his PCP is a ‘proportionate means of achieving a legitimate aim’. If, for example, a security company required its officers not to leave their place of work during each working day of the working week, that PCP would, *prima facie*, discriminate indirectly against a Muslim employee who wished to be absent from his place of work during lunchtimes on Fridays so that he could attend a local mosque for Friday prayers. If, however, the security company had a contractual obligation to its client to provide day-long security and would suffer financial penalty if it did not honour that obligation, a tribunal or court might deem the company’s PCP requiring the employee to remain on-site a ‘proportionate means of achieving a legitimate aim’, in which case the company would be not guilty of indirect discrimination.⁹

We might be reluctant to treat the prohibition of *direct* religious discrimination as a requirement of toleration, perhaps because direct religious discrimination seems so obviously wrong, as does direct discrimination on grounds of race, gender or sexual orientation. But we should remember that the standard case of religious toleration requires people only to refrain from persecuting others because of their religion or from actively impeding the practice of their religion. Prohibiting direct religious discrimination does not seem very far removed from that standard case. However, I shall not press that point since my concern is with toleration and accommodation, and merely refraining from direct discrimination does not entail ‘accommodation’, as I use that term.

Proscribing *indirect* religious discrimination, by contrast, does entail requiring a form of accommodation. That accommodation differs from the accommodation secured by exemptions in that in discrimination law it is not the state, or the public qua public, that does the accommodating. Rather the state requires members of civil society – employers and providers of goods and services – to do the accommodating. The relevant accommodation is therefore more straightforwardly ‘horizontal’ than in the case of exemptions, although civil society includes the government in its role as employer and provider of goods and services. To simplify matters here, I shall focus on the case of employment. The law on indirect religious discrimination requires an employer to accommodate the demands of an employee’s religious faith insofar as her doing so is consistent with her using proportionate means to pursue a legitimate aim. This may involve her in a degree of genuine inconvenience and require her to subordinate her own preferred way of running her organisation to the demands of an employee’s faith. To that extent, it imposes an obligation of toleration upon the employer.

The kind of accommodation that this obligation can entail is well illustrated by the case of *Noah v. Desrosiers*.¹⁰ Sarah Desrosiers ran a small hairdressing salon in London. She described the kind of hairstyling the salon offered as ‘funky, spunky and urban’. Bushra Noah was a Muslim and Desrosiers was aware of that when she invited her to attend an interview for a position in the salon. However, during the course of the interview, Desrosiers discovered that Noah would refuse to remove her headscarf, which covered her hair entirely, while she worked in the salon. Desrosiers required her staff to make their own hair visible to customers so that customers could see the sort of styling the salon offered (a practice that is apparently common in hair

dressing salons in Britain). For that reason, she did not offer the position to Noah. Noah then registered a complaint of direct and indirect discrimination against the Desrosiers. An Employment Tribunal found Desrosiers not guilty of direct discrimination but guilty of indirect discrimination. In particular, the Tribunal held that Desrosiers's applying to Noah her PCP requiring staff to make their own hair visible to customers did not constitute 'a proportionate means of achieving a legitimate aim'. Thus, in this case, Desrosiers was required to tolerate the demands of Noah's religious faith as Noah herself interpreted them, and the demands of a faith that Desrosiers did not share, to the extent of having to sacrifice her own (not unreasonable) preference about how she should run her salon.

In the eyes of the Employment Tribunal, Desrosier's application of her PCP to Noah failed to pass the test set by the proportionality criterion. The natural way of understanding 'proportionate' here is with reference to the employer's aim: given the employer's aim and supposing it to be legitimate, what sort of means is proportionate to that aim? In other words, it will be the end that justifies, or fails to justify, the means. Understood in that way, the proportionality criterion sets a simple threshold test: up to that threshold the employer is obliged to accommodate the demands of his employee's faith, but, once the threshold is reached, she is freed from that obligation, even if her failure to accommodate affects the religious employee more adversely than the employer herself. However, tribunals and courts in Britain have often interpreted the proportionality test more expansively: to be proportionate the means must take account of the extent of the PCP's impact upon religious employees, or potential employees, as well of its relation to the employer's aim.¹¹ That interpretation sets a test that potentially enlarges the domain in which an employer is required to accommodate.

British law allows employers to take account of a 'protected characteristic', including religion or belief, if it is a genuine occupational requirement. Both 'organised religions' (e.g. churches and mosques) and organisations with an 'ethos based on religion' (e.g. religious charities and faith schools) are entitled to discriminate, directly as well as indirectly, on grounds of religion in employment, provided the religious requirement they apply is an occupational requirement and a proportionate means of achieving a legitimate aim (Equality Act 2010, schedule 9, paras 2 & 3). So, for example, there is no problem in a church's discriminating on religious grounds in its appointment of a priest or in a mosque's doing so in its

appointment of an imam, although there may well be a problem if either takes account of an applicant's faith when it appoints a gardener or a cleaner or an accountant.

In addition, 'organised religions' (but not organisations merely with an 'ethos based on religion') have a limited right to discriminate on grounds of gender, sexual orientation and marital status.¹² That right clearly ranks as an 'exemption'. How should we understand it in relation to toleration? If we take the Catholic Church as our example, from its perspective taking account of gender, sexual orientation and marital status in making ecclesiastical appointments may be no different from taking account of a candidate's faith. It is simply a matter of complying with the doctrines and traditions of the Church; gender, for example, is a relevant job qualification for a Catholic priest, just as plumbing skills are for a prospective plumber and medical qualifications are for a prospective doctor.

But how should these exemptions be understood from the perspective of public policy? They might be understood in precisely the same way as they are by the Catholic Church. Discrimination on grounds of gender, sexual orientation or marital status, which would ordinarily be wrong, is rendered right – or at least not wrong – when it is engaged in for religious reasons. In that case, exempting the Catholic Church would be like exempting the naturally immune from a public vaccination campaign; there would be nothing for public policy to tolerate. However, the character of recent British public policy on these forms of discrimination indicates otherwise. The exemption enjoyed by the Catholic Church (and other organised religions) is more analogous to exemptions that allow biking Sikhs not to wear crash-helmets and Jews and Muslims not to stun animals before slaughter. Public policy in Britain now embodies a clear commitment to the wrongness of discrimination on grounds of gender, sexual orientation or marital status. It also embodies a more general commitment to the equal status of men and women and of heterosexuals and homosexuals. It is committed to giving gays and lesbians equal public recognition, where 'recognition' means accepting their identity as normal, legitimate and unexceptionable. It is similarly committed to rejecting and opposing treatment of homosexuals that implies that their homosexuality marks them out as perverse, inferior or unfortunate. But, where religious beliefs sanction discrimination on grounds of gender or sexual orientation, public policy allows its own commitment to non-discrimination and equal recognition to be overridden by deference to the beliefs of organised religions. In other words, for public policy the exemptions it grants to

organised religions in relation to gender and sexual orientation are exercises in toleration.¹³

That is also indicated by the way in which public policy has tightly limited the religiously inspired discrimination that it is willing to tolerate. Organised religions are not at liberty to discriminate on grounds of sex and sexual orientation in employment merely as they see fit. Discrimination is permitted only if it is needed ‘to comply with the doctrines of the religion’ or to avoid conflict with ‘the strongly held religious convictions of a significant number of the religion’s followers’ (Equality Act 2010, schedule 9, para. 2). The exemptions are ‘intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion’ (Equality Act 2010: Explanatory Notes, para. 799). The discriminatory requirement must also be ‘crucial to the post and not merely one of several important factors’ (ibid., para. 800).¹⁴

The limited extent to which public policy is willing to tolerate religiously inspired discrimination is also indicated by the way in which judicial decisions have prioritised the claims of sexual orientation over those of individual religious believers. Amongst several cases in which the claims of individual religious belief and sexual orientation have clashed, those of Lillian Ladele and Gary McFarlane are particularly instructive.

Lillian Ladele had worked for the London Borough of Islington since 1992 and became a registrar of births, deaths and marriages in 2002. The Civil Partnerships Act came into force in 2005, enabling gays and lesbians to enter into legally recognised partnerships. Ladele asked not to be required to officiate at civil partnership ceremonies, since she believed that actively participating in enabling same sex unions was contrary to her Christian faith. The Registrar’s Office at which she worked stated candidly that it would have no problem in fully employing Ladele in other duties; moreover, other registrar’s offices were known to have accommodated requests like Ladele’s. Even so, Ladele lost her job because she was unwilling to officiate at civil partnership ceremonies. She took her case to an Employment Tribunal, claiming direct and indirect discrimination and harassment. The Tribunal found in her favour on all counts.¹⁵ The case then went to an Employment Appeal Tribunal, which overturned the previous ruling and held that the Council was entitled to require all of its registrars to participate in the full range of its services.¹⁶ The Court of Appeal upheld that decision.¹⁷

Gary McFarlane worked for the relationship counselling service, Relate. Like Ladele, he was a committed Christian and, because of his Christian beliefs, he was unwilling to provide sex therapy for gay and lesbian couples. Relate found his unwillingness contrary to its Equal Opportunities and Professional Ethics policies and dismissed him from his post. McFarlane claimed he had suffered direct and indirect discrimination and unfair dismissal, but the tribunals that heard his case rejected his claim and the Court of Appeal dismissed his application for permission to appeal against their decision.¹⁸

I cite these cases to illustrate the issues of toleration they present. Of course, a court or tribunal is not itself engaged in decisions about the rights and wrongs of toleration and accommodation. Its task is only to determine what the law requires in cases that come before it, although what the law requires in this area is often far from straightforward. But the existence of these sorts of case obliges legislators, and ultimately the citizens on whose behalf they act, to confront issues that are essentially about how much, and what sort of, toleration people should be able to demand of one another.

The Ladele and McFarlane cases are interestingly complicated in relation to toleration. Was the issue here not one of toleration *simpliciter*, but rather one of whose intolerance should prevail? We might think that the employers' negative response to Ladele's and McFarlane's requests was no more than intolerance of intolerance. Glen Newey (1999) has argued that demands that are ostensibly demands for toleration are typically demands by competing parties for intolerance of the other. Is that true of these cases?

Ladele's and McFarlane's disapproval of same-sex relationships might attract the description 'intolerant', but disapproval is a normal feature of toleration. Toleration consists in not preventing what we disapprove of or dislike. In orthodox usage, if we take no exception to the conduct that we refrain from preventing, our non-prevention does not constitute toleration. But Ladele and McFarlane did not merely disapprove; they acted on the principles and beliefs that underlay their disapproval. Should that earn them the description 'intolerant'? We would not normally describe someone as intolerant merely in virtue of their refraining from doing what they believe to be wrong. For example, we would not normally describe as 'intolerant' a vegetarian's refraining from eating meat, or a Muslim's insisting on attending Friday prayers, or a Catholic doctor's refusal to perform an abortion, or a

conscientious objector's refusal to fight in a war, even though others may wish those individuals to behave differently. If we are intolerant merely in virtue of not behaving as others wish us to, toleration turns into nonsense. The Christian would be intolerant because he does not comply with the Muslim's wish they he should convert to Islam, and the Muslim would be intolerant because he does not comply with the Christian's wish that he should convert to Christianity (see further, Jones 2007).

There is, however, a further consideration. Had Ladele's and McFarlane's request for exemptions been granted, that might have adversely affected the opportunities of others. In fact, in the case of Ladele sufficient registrars were available to take her place in officiating at civil partnership ceremonies and she could have been fully employed on other tasks of her post. McFarlane too claimed that it was entirely practicable for Relate to exempt him from counselling same-sex couples.¹⁹ However, had enough registrars and enough counsellors requested and received the exemptions that Ladele and McFarlane sought, the opportunities of same-sex couples to enter into civil partnerships and to receive sex therapy might have been seriously diminished. It would be odd if we accounted people's conduct tolerant or intolerant according to the contingencies of circumstance, so that they were 'intolerant' if circumstances were such that, in remaining faithful to their convictions, people just happened to diminish the options available to others, and they were 'not intolerant' if circumstances conspired to preclude any adverse effect for others. It is intentions rather than consequences that mark people out as tolerant or intolerant. Someone who intends to impede another's conduct behaves intolerantly even if he fails in his aim; and someone who unintentionally impedes another's conduct is not intolerant in spite of the impediment he actually causes.

Another consideration is that Ladele and McFarlane occupied professional roles. Normally we would think that the demands of toleration are satisfied by restraint rather than positive assistance – it is enough that we refrain from preventing what we object to; we need not positively promote it. But if employees occupy a role in which they are tasked with providing a service for others and if they withhold that service, their act of withholding can reasonably count as intolerance.

However, Ladele and McFarlane might have met these points by protesting that they sought exemption only insofar as that was consistent with their organisation's continuing to provide a full service to all of its clients, including same-sex couples. If their exemption would really have impeded the delivery of services,

they would have recognised the unreasonableness of that state of affairs and have been willing to resign from their posts. If that was their position, so that they did not seek to prevent the activities from which they wished to be exempt, their requests for exemption would not qualify as intolerant. A gay and a lesbian work colleague did claim to have been ‘victimised’ and ‘discriminated against’ by Ladele and those two individuals played a leading role in securing her dismissal; but their complaint seems to have been only that Ladele’s unwillingness to officiate at civil partnerships constituted an ‘act of homophobia’.²⁰

If Ladele and McFarlane were not themselves being intolerant, what could justify the law’s intolerance of their belief-based wishes? It is here that the claims of toleration come up against those of recognition. In *Ladele* the Employment Appeal Tribunal and the Court of Appeal treated as irrelevant the fact that Ladele’s wish could be accommodated without impairing the service the Council provided for civil partnerships. Ladele was requesting an exemption for a discriminatory reason and her request was contrary to Islington’s Dignity for All policy; that sufficed to make the Council’s treatment of Ladele proportionate.²¹ Similarly McFarlane lost his case because his request to be exempt from giving sex therapy to same-sex couples amounted to discrimination against gays and lesbians, which was in direct conflict with Relate’s equal opportunities policy. In *Ladele*, there was also argument, endorsed by the Court of Appeal, that the Council was legally obliged *not* to accommodate Ladele’s wish.²² The sum of all this is that the exemptions requested by Ladele and McFarlane were found intolerable not – or not only – because they were liable to reduce the opportunities actually open to gays and lesbians. They were intolerable because they were an affront to gays and lesbians; they were at odds with the equal status and the equal respect to which gays were entitled. It is in that sense that public policy prioritised the claims of the gay community to recognition over those of religious adherents to toleration.

But, if that is the legal position with respect to religious individuals, why is it not also the position with respect to organised religions? Why should public policy tolerate the wishes of some, but not of others, to discriminate against gays for religious reasons? The answer would appear to lie in a balancing of competing considerations – a balance of a sort that we frequently confront when we have to set the boundary that divides the tolerable from the intolerable. There are many forms of employment in which those who have religious objections to homosexual conduct

need encounter no conflict between their religious convictions and their legal obligation not to discriminate on grounds of sexual orientation. Many such employment options were open to Ladele and McFarlane, so that not permitting them to discriminate in their roles as, respectively, registrar and counsellor did not compel them to compromise their religious convictions. Similarly, religious organisations that do not have clear doctrinal obligations to discriminate on grounds of gender or sexual orientation are not compelled to betray their beliefs by being prevented from practising those forms of discrimination. By contrast, if the doctrine of an organised religion requires it not to have female or sexually active homosexual priests or imams, a law requiring it not to discriminate on grounds of sex and sexual orientation in appointing priests and imams would prevent it from complying with its own doctrine. That would be a serious infringement of its religious freedom and would almost certainly contravene Article 9 of the ECHR. So, although there is an element of compromise in the way British public policy has dealt with the conflicting claims of religious belief and sexual orientation, there is a rationale for the particular compromise that it has adopted. That is not to say that the compromise upon which it has settled is uncontroversially 'right'. For example, discrimination law does not condone gender or racial disadvantage in employment on the ground that the employees who are the victims of that disadvantage have many other jobs open to them in which they would suffer no such disadvantage. Ladele and McFarlane might therefore ask why, when they suffer disadvantage because of their religious beliefs, it should fall to them to avoid that disadvantage by finding another job.

7. Conclusion

I conclude, then, that issues of religious accommodation present us with issues of toleration and issues that we cannot plausibly pronounce 'dead'. People's reluctance to conceive issues as issues of toleration often stems from their belief that toleration must entail an unequal relationship between tolerator and tolerated and that toleration itself must be a form of condescension, a matter of grace and favour (e.g. Addis 1996; Brown 2006; Phillips 1999). I cannot refute that belief here, so I simply observe that both of its elements are false.²³ Toleration can be mutual and equal, and it can be grounded in deontological reasons such as respect for persons. Indeed, as Rawls argues, it can be a matter of right and a requirement of justice.

Would it be more appropriate in contemporary circumstances to characterise the issues I have examined here as issues of ‘cultural’ rather than religious difference? Most of the cases I have considered could be characterised as issues of cultural accommodation,²⁴ but polyethnic societies do not typically treat all aspects of culture as having the same claim to accommodation. In the cases I have considered, the conduct that has been eligible for accommodation is rule-governed conduct rather than merely habitual conduct; it is conduct that people understand themselves to be obligated to engage in or to refrain from. The degree to which the accommodation of a group’s culture in European societies turns out to be accommodation of its religion is striking and is, I believe, no accident, since it is people’s believing themselves to be normatively not at liberty to behave or not to behave in certain ways that is so often crucial to the case for accommodation (Jones, forthcoming). I see no good reason therefore to pretend that the differences that have been my concern are other than religious differences, particularly since the religious do not see themselves in other terms.

At the same time, my argument about the relationship between toleration and accommodation does not apply only to religious belief. It applies equally to cases in which the different and conflicting beliefs are moral but non-religious in character.²⁵ It is worth recalling in this connection that Article 9 of the ECHR accords people freedom of thought and conscience as well as religion, and that British discrimination law applies to ‘belief’ as well as to religion, although what sort of non-religious belief counts as ‘belief’ for purposes of discrimination law the courts have still largely to settle.²⁶

Just as I have not substituted the language of culture for that of religious belief, so I have not couched my argument in the language of ‘identity’. ‘Identity’ is too indiscriminating a notion. It cannot begin to explain why polyethnic or multi-faith societies do, or why they should, accommodate some practices and not others. And there is another way in which the notion of (mere) identity seems inadequate for the issue of religious accommodation. On many occasions religion does serve merely as a marker of identity in the same way as does race or ethnicity or sexuality or occupation or class. Indeed, bloody conflicts in religiously divided societies often seem to owe more to differences in identity than to differences of belief. Moreover, where religion is a mere marker of identity, where it is only ‘skin-deep’, toleration can seem as inappropriate as it is in cases of racial difference. But, in cases of religious

accommodation, belief matters. In all three of the forms of accommodation I have considered – exemptions, Article 9 of the ECHR, and the law on indirect religious discrimination – people’s *believing* that certain forms of conduct are required of them is crucial to the existence, and to the case for, the accommodation. If the relevant population did not hold different and conflicting beliefs, the need for accommodation would not arise, and it is because these accommodations cater for different and conflicting beliefs that they present us with *bona fide* issues of toleration.²⁶

Peter Jones

Emeritus Professor of Political Philosophy

School of Geography, Politics, and Sociology

University of Newcastle

Newcastle upon Tyne

NE1 7RU

UK

p.n.jones@ncl.ac.uk

Notes

1. I set out and defend this view of liberal democratic toleration at greater length in Jones 2007.

2. *Copsey v. WWB Devon Clays Ltd*, [2004] UKEAT/0438/03/SM; [2005] EWCA Civ 932. The Court of Appeal’s judgement in this case is particularly interesting in relation to accommodation. While all three judges found against Copsey (the employee), they expressed different views on the degree of accommodation Article 9 requires of employers.

3. *Ahmad v Inner London Education Authority*, Employment Appeal Tribunal: [1976] ICR 461; Court of Appeal: [1978] 1 QB 36; [1977] 3 WLR 396. I examine this case in Jones 1994.

4. *Begum v Denbigh High School*, [2004] EWHC 1389 (Admin); [2005] EWCA Civ 199; [2006] UKHL 15. A subsequent and similar case concerned the right of a twelve

year-old Muslim schoolgirl to wear a niqab contrary to her school's uniform policy: *X (by her father and litigation friend) v. The Headteachers and Governors of Y School*, [2007] EWHC 298 (Admin).

5. *R (Playfoot) (A Minor) v. Governing Body of Millais School*, [2007] EWHC 1698 (Admin)

6. *Davender Kumar Ghai v. Newcastle City Council* [2009] EWHC 978 (Admin); [2010] EWCA Civ 59.

7. The case of Sikhs' exemption from the law prohibiting the carrying of knives in public is not so clear. The toleration required in this case might be thought all the greater, since the potential consequences for others (being stabbed and possibly killed) are so much more severe. On the other hand, the aim of the law is to prevent knifings and therefore to prevent those people carrying knives who intend to use them, or who are liable to use them, to harm others. People who carry knives for innocent reasons are not the law's target; the legislation that exempts people who carry knives for religious reasons also exempts those who do so for reasons related to their work, and those for whom knives are part of their national dress (e.g. Scotsmen wearing Highland dress, which includes a dirk inserted into a sock). So the general spirit of the law is that people should not carry knives in public unless they have good reason to do so. Read in that way, the 'exemption' enjoyed by Sikhs is more like an exemption enjoyed by the naturally immune from compulsory vaccination and makes no call upon toleration.

8. In Britain, legislation governing religious discrimination in relation to employment was introduced in the Employment Equality (Religion or Belief) Regulations 2003, in response to an EU Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC). Legislation prohibiting religious discrimination in the provision of goods and services was included in the Equality Act 2006. Both sorts of regulation were incorporated in the Equality Act 2010, which harmonised the law governing discrimination in relation to a number of 'protected characteristics' including disability, race, gender, and sexual orientation, as well as religion or belief.

9. This example is based on *Cherfi v. G4S Security Services Ltd* [2011] UKEAT/0379/10/DM, in which the Muslim employee's claim of indirect discrimination was dismissed. Two other important features of that case were that a prayer room was available to the employee at his place of work, and the company offered him the option (which he declined) of working on Saturdays or Sundays instead of Fridays.

10. My account of this case is based on details given in *Noah v. Desrosiers* [2008], (unreported) judgement of the Employment Tribunal, case number 2201867/2007.

11. E.g. *ibid.*, para.160: 'the function of the legislation, in its application to indirect discrimination, is to outlaw particular means of pursuing what may be found, in principle, to be entirely legitimate aims, *because of their disproportionately discriminatory impact.*' (My emphasis) In addition, Lucy Vickers (2010: 289, 295-6) has suggested that the number of individuals affected by a requirement might be taken into account in assessing proportionality, as might the issue of whether a belief is, or is not, core to the believer's faith, although courts have not been consistent on that issue.

12. In addition, 'organisations relating to religion or belief' are permitted to restrict their memberships and those to whom they provide goods and services on grounds of sexual orientation as well as religion, provided such restrictions are necessary to comply with the organisation's doctrines or to avoid conflict with the strongly held convictions of a significant number of the religion's or belief's followers (Equality Act 2010, schedule 23, para. 2).

13. Anna Elisabetta Galeotti (2002) has argued that recognition can be itself a form of toleration. However, if by 'toleration' we mean enduring what we view negatively (the sense in which I use the term in this article), recent British public policy in relation to homosexuality has been committed to combating the negativity that toleration presupposes, so that the recognition it directs towards the gay population has been quite different from toleration. Indeed, one might say that public policy has

sought to substitute recognition for toleration. For more general reservations about the possibility of combining recognition with toleration, see Jones 2006.

14. For analysis and comment on the law now relating to who may and who may not discriminate on grounds of religion, including in respect of gender and sexual orientation, see Sandberg 2011a: 117-128, and Sandberg 2011b: 173-180.

15. *Lillian Ladele v. London Borough of Islington* [2008], (unreported) judgement of the Employment Tribunal, case number 2203694/2007.

16. *Ladele v. London Borough of Islington*, [2008] UKEAT/0453/08/RN.

17. *Ladele v. London Borough of Islington*, [2009] EWCA Civ 1357. For discussion of *Ladele*, see Vickers 2010.

18. *Gary McFarlane v. Relate Avon Ltd*, [2009] UKEAT 0106/09/DA; [2010] EWCA Civ 880. The facts and the legal considerations relating to *Ladele* and *McFarlane* were complicated and I use the cases here only to highlight the issues of toleration they raise; I do not pretend to give a full and fair account of all the factors that bore on them.

19. Relate disputed McFarlane's claim that it was practicable to exempt him from same-sex therapy, although the organisation's main claim was that his exemption would be unacceptable in principle rather than merely inconvenient in practice. [2009] UKEAT 0106/09/3011, paras 25, 26, 29.

20. *Ladele* [2009] EWCA Civ 1357, para.40. In fact *Ladele*'s objection was not directed only at homosexual relations. She held it a sin for sexual relations to take place outside marriage; [2008] UKEAT/0453/08/RN, para.3. Two fellow employees of *Ladele* also objected to officiating at civil partnerships. One accepted the offer of different employment by the Council. The other, a Muslim, left the Council's service. [2009] UKEAT/0453/08/RN, para.6.

21. [2008] UKEAT/0453/08/RN, paras 95-117; [2009] EWCA Civ 1357, paras 43-53.

22. [2008] UKEAT/0453/08/RN paras 102-107; [2009] EWCA Civ 1357, paras 62-75.

23. I endeavour to refute that view in an, as yet, unpublished paper, ‘Toleration, Supererogation and Rights’.

24. It might then become relevant that both Ladele and McFarlane are members of the British Afro-Caribbean community and that their evangelical Christianity has strong roots in that community.

25. I believe it, for example, to be consistent with the claims of ‘self-legislation’ (as opposed to ‘divine legislation’) that Emanuela Ceva examines in Ceva 2010.

26. One case in which this issue has arisen is *Grainger PLC and others v. Nicholson*, [2009] UKEAT/0219/07/ZT. In that case, the judge ruled that a belief in man-made climate change, and the moral imperatives arising from that belief, did qualify as a ‘philosophical belief’ for purposes of the 2003 Religion or Belief Employment Regulations.

27. This article draws on a paper presented to a conference held in July 2010 at the University of Copenhagen on ‘Toleration, Respect and Space – Concepts, Conceptions and Applications’, which formed part of the RESPECT Research programme, and on another paper presented in May 2011 to a conference on Toleration organised by the Political Theory Group of the Irish Political Studies Association. I am grateful to the participants in both events for their comments on those papers. Special thanks to Ian Carter, Emanuela Ceva, Elisabetta Galeotti, Iseult Honohan, Sune Laegaard, Andrew Shorten, and this journal’s referees.

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