Religion and the Law in modern pluralist states: Towards a more balanced judicial approach to manifestation of belief in secular societies

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Abstract

The work presented for the Phd by publication is located within the law and religion sub-discipline and is committed to enhancing religious freedom. It focuses on manifestation of belief and is dedicated to the legal protection of religious minorities. It highlights the difficulties of adjudicating conflicts related to religious symbols in modern liberal states and aims to deepen the understanding of manifestation of belief. It shows that religious symbols contribute to the making of contemporary individual and collective identities. The thesis advocates a more contextual approach to manifestation of belief which views religion as an element of identity rather than an elective characteristic of the individual. It therefore promotes collaborations with other disciplines within the social sciences such as history, sociology, and anthropology in order to enhance the legal approach and move the field in new directions.

1. General Background & Context

Religion has always had an ambivalent relationship with law. This is reflected in the rich and diverse literature produced by legal scholars.[1] The Law and Religion discipline in the UK however is still in its adolescence in comparison to its US counterpart and some scholars consider the field to be at a stage of stagnation in part due to what has been termed the 'ghettoization of law and religion.'[2] It has been acknowledged that '…managing the practical ramifications of the coexistence of contrasting beliefs and ideologies is a work in progress.'[3]

Indeed, religion has commonly been conceptualised as an elective characteristic of individuals which is a matter of choice and as such has often been downgraded in relation to other protected characteristics such as sex, gender or disability.[4] This is evident from the legal approach to manifestation of belief which my thesis is critical of.[5] I submit that the law of religion and the legal approach are rooted in liberal values and as such, place a large emphasis on individual autonomy. What I call the 'liberal law of religion' wrongly assumes that everyone is on an equal level playing field when it comes to making choices about their religion. Recognising religion as a fundamental characteristic of the individual however rather than a life choice promotes the recognition of the right to accommodation of religious and cultural practices. Yet, there has been a tendency for the debate to focus on the religious vs. secular binary[6] thus associating religious accommodation with an approach that sees religion as special or superior and therefore in need of special treatment.[7] My thesis highlights the necessity to consider religion as an element of personal identity while attempting to break out of this binary hence moving the debate in new directions.[8] I take a critical approach to the the existing law on religion and argue that it is possible to protect religion without putting it on a pedestal. I approach religion from the standpoint of manifestation of belief and religious symbols as it is the most controversial aspect within pluralist secular societies.[9] My work takes a broad interpretation to religion which includes non-religious beliefs such as humanism, agnosticism or atheism.

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[1] See for instance in the UK work by Russell Sandberg, Norman Doe, Malcom Evans, Julian Rivers, Rex Ahdar, Ian Leigh, Peter Edge and Anthony Bradney.

[2] Sandberg, R., *Leading Works in Law and Religion* (Routledge: 2019) 9. Despite a few exceptions, the field has remained a fairly closed group and work has been mainly disseminated in places which have limited its appeal to those outside of the group.

[3] Canamares, S, in Bacquet S., *Religious Symbols and the Intervention of the Law: Symbolic Functionality in Pluralist States* (Routledge: 2019), foreword.

[4] Idem.

[5] See Bacquet above n. 3 chapters 5, 6 and 7 which provide a critical analysis of the case law in England, France and the United States.

[6] By the secular vs religious binary, I refer to the act of classifying symbols, rituals and practices within one or the other category. It is this categorisation which then becomes a determining factor for something to be worthy of legal protection. This is discussed further throughout the commentary.

[7] See for example Evans, C., *Freedom of Religion under the European Convention on Human Rights* (OUP: 2011); Eisgruber, C. L. and Sager, L. S., *Religious Freedom and the Constitution* (Harvard University Press: 2007) 279.

[8] Religion throughout the work is taken loosely to include non-religious beliefs in line with the European Court of Human Right's broad approach to religion and belief. The Human Rights Committee concurs with this approach in its General Comment 22 on article 18 of the ICCPR (CCPR/C/21/Rev.1/Add.4, 30 July 1993).

[9] Throughout my publications, pluralism is considered as an inevitable consequence of globalisation and migrations and is taken to mean the coexistence of several faith group within one territory.

In keeping with the current realisation that the future of the discipline is dependent on a 'deconstruct and reconstruct' of the status quo approach[10] my thesis is to move away from a purely legal approach to social and cultural phenomenon such as religion and religious manifestation and to explore the possibilities of collaborations within the social sciences with fields such as history, sociology and anthropology which are more attuned with the intricacies of religious and cultural symbols. To this end my publications and more specifically my monograph ***Religious Symbols and the intervention of the Law*** highlight the need for an interdisciplinary approach to religious symbols and manifestation of belief more generally.[11]

The thesis explored through the work and this commentary is that in modern pluralist democracies there is an unavoidable interaction between religion and the law. This interaction is complex and legal discourse has mainly focused on the extent of state intervention with manifestation of religion in the public sphere.[12] While states have generally been reluctant to intervene with certain aspects of religion,[13] the resurgence of religion in the public sphere partly due to the nature of pluralist societies and partly due to the 'failure' of the secularisation thesis[14] has heightened this need for regulation. State intervention however if not balanced against individual interests can be perceived as an interference with manifestation of belief and religion itself. I argue that a contextual approach which considers religion as an intrinsic characteristic of the individual is necessary in order to gain a deeper understanding of modern individual and collective identities and their relationship with the manifestation of belief. I encourage a broad approach to religion which goes beyond the strictness of legal definitions[15] and which is broadly inclusive of theistic and non-theistic beliefs alike, traditional, and non-traditional religions as well as newly established ones.[16] I highlight inconsistencies in legal methods, review religion/state relations in three jurisdictions (England, France and the United States) using a comparative approach and explore the benefits of a multidisciplinary approach for the regulation of manifestation of belief.

Symbols are at the heart of my thesis as they are the vehicle through which belief is manifested and as such the centre of attention in many legal disputes. Throughout my work, particular attention is given to religious symbols and the body (this includes

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[10] Sandberg, R. 'A Systems Theory Re-Construction of Law and Religion', *Oxford Journal of Law and Religion*, Volume 8, Issue 3, October 2019, 471.

[11] Bacquet, above n.3.

[12] This is evident from the vast literature on manifestation of belief in the public sphere particularly in relation to dress and more specifically Muslim dress. See for example: Howard, E, *Law and the Wearing of Religious Symbols in Europe*, 2nd edition (2019: Routledge); McCrudden, C. 'Religion, human rights, equality and the public sphere' (2011) *Ecclesiastical Law Journal*, 13 (1), pp. 26-38 as well as many of the publications cited in this commentary.

[13] This is apparent in the area of judicial review (UK) for instance where religious organisations are regarded as private bodies and therefore not amenable to judicial review actions.

[14] The secularisation thesis is a sociological theory which emerged in the second half of the 20th century and which advanced that modernisation would contribute to the decline of religion and religious activity. See further Bacquet above n. 3 at 56.

[15] On the difficulty of defining religion see Gunn, J. 'The complexity of Religion and the Definition of 'Religion' in International Law' (2002) *Harvard Human Rights Journal*, Vol. 16, 189.

[16] With this approach there is no reason why Christianity or Judaism for instance would be given more protection than say scientology, Jehovah witnesses or the Hare Krishna. Similarly, there is no reason why humanism would not be given the same level of protection than say Islam. On the potential for legal definitions to be inclusive or exclusive see further Sandberg, R., *Religion, Law and Society*, (Cambridge University Press: 2014) at 30 onwards.

jewellery and clothing), religious symbols in space (religious architecture for instance) and religious symbols in action (this includes rituals such as baptism or circumcision). I propose that a contextual understanding of symbols is key to adopting a more holistic approach to religious manifestation.

My thesis however is mindful of secularist theorists who warn against a devotional view of religion which considers religion and by extension religious manifestation as in need of special legal protection.[17] But nevertheless, it maintains that it is possible to accommodate religious manifestation without putting religion on a pedestal. Throughout my monograph, I point out that the current legal approach to religious manifestation is 'discriminatory' to groups which the law does not classify as 'religious'. This could be because those groups do not fit in the Western legal categories as in the case of orthopraxy faith or because they fall outside the traditional conception of 'religion' as in the case of groups with distinctive identities such as Goth or new religious movements. I suggest that a more suitable approach would not attempt to use the 'legal definition'[18] of religion itself but look at other indicators of a particular practice such as identity, culture or function rather than trying to fit symbolic manifestation into predetermined categories which, as discussed in my publications is what the law tends to do.[19] I argue that by removing 'religion' from the equation more adequate protection can be offered to those beliefs and practices which go to the core of individual and collective identity but may not fit neatly into the legal categories.[20] Unlike some radical secularists though I do not propose to remove religion as a protected category altogether and argue that freedom of religion must remain as a potent reminder of the historical struggle for the recognition of pluralism and is a fundamental aspect of democracy.[21]

My work focuses on three longstanding liberal democracies with different approaches to state/religion relations. The published work looks at the secular model (France), the establishment model (England) and the US neutrality.[22] All three countries make an interesting case for comparison as France lies at the more extreme/militant end of the secularism spectrum while the US lies at the other end with its relatively tolerant neutrality. England is an example of a fusion between church and state but with fairly secular practices and a multicultural stance. As is demonstrated by the country approach there is a direct correlation between how a country deals with religion and their past hence the need to understand the countries' history and tradition towards religion.

Inevitably and more so than other areas of law, work published in the field of law and religion is rarely completely neutral and tends to be approached from either a secular or religious perspective. This is somewhat an oversimplification as there are many declinations and variations within those perspectives, but I shall return to those further below in part 3. My own position tends to be relatively empathic towards religion but

[17] See further Bacquet S. above n. 3 chapter 8.
[18] The reason I refer to the legal definition in inverted commas is because there no legal definition as such within international law or indeed national constitutions, but it is of course subject to judicial interpretation which has given rise to many controversies. See further Bacquet above n. 3 at 15-20. See also Gunn above n. 13.
[19] See Bacquet n. 3 at 17.
[20] Winnifred Sullivan makes a similar argument in the context of the United States in *The Impossibility of Religious Freedom* (Princeton University Press: 2005)
[21] Bacquet above n. 3 at 155.
[22] Idem respectively chapters 5, 6 and 7.

in favour of a broad interpretation of the religious concept hence leaning towards what I would call a 'pluralist benevolent secularism.' In dealing with religion it is difficult to remain neutral and one's approach is inevitably influenced by one's lived experience. Having encountered both the French *laïcité* and the English multicultural establishment it is clear that my perspective has been shaped by those two legal systems and that my position comprises elements of both systems while studying the US approach has enabled me to further refine my position.[23]

2. Research Methods

The research is empirical, comparative, and interdisciplinary. It partly relies on interviews and focus groups I carried out for a project on modern individual and collective religious identities.[24] As such, a number of different socio-legal qualitative methods have been adopted including content analysis of interview transcripts, documentary and case law analysis. In keeping with religious studies methodology, the overall approach was comparative with the geographical focus of the study being England, France and the United States. As Clark points out a comparative research approach is at the heart of religious studies and such approaches are beginning to be used in law and religion work.[25] Law and religion is no longer an isolated field of study particular to the traditions and values of a single culture and therefore comparisons can help to critically examine how church/state relations are handled within different jurisdictions and the implications of those approaches for individuals.[26] While England and France lie at opposite ends of the spectrum in relation to their model of religion/state relations, the US has features of both countries. The English establishment model was contrasted to the French secularism (*laicité*) model and both were compared to the US's tolerant neutrality. Three main forms of religious expression were explored; namely, symbols that believers wear on their body, symbols in the public space such as religious edifices and rituals that believers perform as a manifestation of their faith. Non-religious symbols were also included in the study.

The originality of the method lies in the interdisciplinary approach to religious symbols which combines history, sociology and anthropology to provide context to the legal approach and enhance one's understanding of the role of symbols in 21st century pluralist states. The merits of multidisciplinary approaches to Law and Religion have been recognised in the literature although the focus so far in the UK has been on understanding religion legally rather than from a religious perspective.[27] The published

[23] The value of reflexivity in qualitative research within the social sciences has been acknowledged as a tool to enhance the credibility of qualitative findings. See Patnaik, E., 'Reflexivity: Situating the Researcher in Qualitative Research' (Sept. 2013) *Humanities and Social Science Studies*, Volume 2, Issue 2, pp. 98-106.

[24] See Bacquet, S., 'Religious Symbols and the Making of Contemporary Identities' in Sandberg. R. (ed.) *Religion and Legal Pluralism* (Ashgate: 2015).

[25] See for instance Myriam Hunter-Henin's recently published *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic vivre ensemble* (Hart: 2020).

[26] Clark B., 'A comparative method for the study of law and religion: is this a defensible methodology?' in Sandberg, Doe, Kane and Roberts (ed.) *Interdisciplinary Approaches to Law and Religion* (Edward Elgar: 2019). For examples of comparative studies see Doe, N., *Law and Religion in Europe: A comparative introduction* (OUP: 2011) or Cumper, P. and T. Lewis (eds.) *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar: 2012).

[27] Sandberg R., 'The lure of Luhmann: a systems theory of law and religion' in Sandberg et al. above n. 26 at 221.

work presented for the PhD by publication addresses this gap. While history, sociology and anthropology are used in my publications the main focus here will be on anthropology due to its particular significance to manifestation of belief. This method has enabled me to provide new insights into the place of religion and its relationship with identity, community and culture.

Relevance of sociology and anthropology to law and religion scholars

There has been a reluctance within the Law and Religion field to engage with other disciplines within the social sciences[28] and lawyers have tended to rely on political philosophy rather than social theory. Nehushtan points to this lack of engagement with other fields as a 'methodological deficit'[29] while Sandberg accuses the discipline of ghettoization [30] and alongside with Doe has called for more engagement with sociology.[31] As explained by Sandberg, in England and Wales, Law and Religion as an institutionalised discipline of law and 'academic industry' with research networks, peer-reviewed journals and research centres only fully developed in the 21st century[32] however by contrast to its US counterpart, the discipline has remained an 'inward looking' 'niche specialism' mostly confined to law schools.[33] In the US, where the discipline is more firmly established, there has over the years been a move to what John Witte has called 'a new interdisciplinary movement.'[34] It is clear therefore that the future of the field is dependent on opening up to other disciplines and creating opportunities for cooperation allowing the discipline to go beyond a purely rights based approach and challenge Western expectations of religion merely as a private endeavour.[35]

Sandberg, Ferrari, Fokas, Cotterrell and others have acknowledged the potential for sociology to contribute to the field of law and religion.[36] Sociology, by employing an interpretive approach[37] has the power to bridge the gap between law and society. As

[28] Ferrari, S. (ed.), *Routledge Handbook of Law and Religion* (Routledge: 2015) at 4.
[29] Nehushtan, Y., *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing: 2015) at 1.
[30] Sandberg above n. 2 at 8.
[31] The original argument for a sociology of religion was first advanced by Norman Doe in 'A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe' (2004) 152 *Law and Justice* 68. The idea was later developed by Russell Sandberg in 'The Sociology of the Law on Religion' (2007) *SSRN Electronic Journal*. 10.2139/ssrn.2032647 although he has most recently argued against the institutionalisation of Law and Religion as a sub-discipline see Sandberg et al. above n. 26.
[32] There were of course precursors in the 20th century such as Robilliard, St.John A., *Religion and the Law: Religious Liberty in Modern English Law* (Manchester University Press: 1984) or Bradney, A. *Religions, Rights and Laws* (Leicester University Press: 1993) but the bulk of the existing literature in England and Wales blossomed post 9/11.
[33] For reflections on the development of the discipline see further Sandberg above n. 10.
[34] See further Witte, J., 'The Study of Law and Religion in the United States: An Interim Report'. *Ecclesiastical Law Journal*, 2012 14(3), 327-354.
[35] This aspect of the current approach is further discussed in section 4 on the 'the liberal law of religion.'
[36] Sandberg above n. 16; Ferrari above n. 28; Fokas E., 'Sociology at the intersection of Law and Religion' in Ferrari above n. 28 at 59, Cotterrell, R. 'The Struggle for Law: Some Dilemmas of Cultural Legality' (2008) *International Journal of Law in Context* 4(4): 373–84.
[37] The interpretive approach derives from Max Weber's interpretive sociology which centres on the importance of meaning and actions when studying social problems. This approach entails that one develops a meaningful understanding of social phenomena from the standpoint of those involved in

put by Ferrari, while law is specific, sociology is discursive and as such it can provide a deeper understanding of judicial discourse and attitudes as well as add nuances to judicial approaches thereby managing the impact of judicial approaches to law and religion on both individuals and groups.[38] Travers and Ezzy for instance emphasise the value of employing an interpretive approach in researching law and religion using empirical research methods such as participant observation or in-depth interviews and suggest that this could be used to study how legal practitioners conduct cases about religion in secular courts.[39] Whilst the value of sociological approaches has been recognised by law and religion scholars, they have not engaged as fully with anthropology.[40]

McIvor argues that anthropological methods (especially social anthropology) can be applied to the field of law and religion and provide a complement to abstract legal concepts which may be remote from life on the ground.[41] Ferrari also points out that engaging with the questions paused by anthropologists and other human scientists is unavoidable if law and religion wants to keep up with the challenges of globalisation and religious diversification[42] while Jivraj calls for a critical approach to religion deriving from anthropology, religious and critical race studies.[43]

Anthropology seeks to understand how people and communities ascribe meaning to their social worlds and includes the detailed study of human culture and daily rituals. It provides us with a detailed knowledge of cultures and people[44] and as such is well suited to understanding manifestation of belief. It allows legal scholars to approach manifestation of belief from a more informed perspective rather than making assumptions about for instance what is essential to a faith or culture. As such it can provide legal professionals and scholars with the foundation they need to approach law and religion from a more nuanced perspective. As argued by McIvor, anthropology allows for 'the deconstruction of the social taxonomies we take for granted.'[45] Ethnographies such as Inge on Salafist women[46] or McIvor's[47] on Evangelism can provide an insight into lived experience and social context that legal methods often lack by entering a world that would otherwise be unknown and as such subject to prejudice and value laden interpretation. An anthropological approach therefore can complement the work of law and religion scholars as it approaches religion contextually and

such phenomena. This approach motivated my empirical project on religious symbols which was carried out in 2011/12. The results are published in Sandberg, R. above n. 24 at 113.

[38] Ferrari above n. 28 at 4.

[39] Travers M. and Ezzy D., 'Interpretive issues in researching law and religion' in Sandberg et al. above n. 26 at 219.

[40] Empirical research within Law and Religion in the UK has mainly focused on religious courts, see for instance 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' by G. Douglas, N. Doe, S. Gilliat-Ray, R. Sandberg and A. Khan from Cardiff University 2010/2011 (AHRC funded research). Although there are a few exceptions such as Inge, A, *The Making of a Salafi Muslim Women* (2017: OUP) or Alves Pinto, T. 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights,' *Religion & Human Rights* (2020) 15(1-2), 96-133.

[41] McIvor, M., *Social Anthropology* in Sandberg et al above n. 26 at 243.

[42] Ferrari above n. 28 at 4.

[43] Jivraj S., *The Religion of Law* (Palgrave: 2013) at 7.

[44] McIvor above n. 41 at 244.

[45] Idem 247.

[46] Inge above n. 40.

[47] McIvor above n. 41 at 252.

historically in order to make sense of the unfamiliar and the unknown. Anthropologists themselves have advocated a 'multi-contextual analytical approach' in order to tackle the complexity of the law and religion relationship.[48] As put by Ferrari, while lawyers take a practical and normative approach by looking at legislation and case law, anthropologists are more theoretical and descriptive performing 'a cross cultural analysis of the ordering of human societies.'[49] As such, anthropology provides insights into lived experiences that legal methods fail to elicit. Gaining those insights would benefit those who are involved in law and policy making as well as judicial personnel. This approach is particularly relevant to my research as it allows for a ground up exploration of symbols which is mindful of the context and as such allows for a holistic approach to manifestation of belief via symbols which my thesis puts forward. These anthropological insights could be deployed in a number of ways from scholarly cooperation to anthropologists acting as experts in courts[50] or providing advice to legal activists.

Despite the benefits of an interdisciplinary approach law and religion scholars have been reluctant to engage with other disciplines. Adopting a multidisciplinary approach indeed is not without its own difficulties. Assuming competency in any field could be problematic and attract the legitimate condemnation of being too superficial in one's approach. This is feedback I have had to consider from one of the anonymous reviewers of my initial book proposal. As pointed by D'Costa et al., we have all been too aware of the 'jack of all trades'[51] risks but we have also come to the realisation that our work needs to extend beyond the confines of our own discipline. It has become impossible to ignore the call for more interdisciplinary work and being aware of the danger will mean that it is even more important that we enter into a dialogue with our counterparts in the social sciences. As proposed by Sandberg it is time for the field to 'zoom out.'[52] Avoiding it altogether and remaining in our comfort zones is not a solution if we want the field to move forward.

3. The religious vs. secular binary in legal and political theory discourse

In relation to manifestation of belief in the public sphere which is what my publications focus on, scholars have been drawn to the issue of religious accommodations and have debated the extent to which religious manifestation deserves special treatment.[53] There has also been a lot of scholarship on church-state relations and whether there is an ideal model.[54] In debating those core issues, scholars have tended to place themselves within a religious or secular binary. My thesis uniquely attempts to break this pattern in order to shift the debate in new directions not by attempting to be neutral i.e. neither secular nor religious but rather by defending an approach that avoids the need for categorisation

[48] See for instance von Benda-Beckmann, K., 'Beyond the Law and Religion Divide: Law and Religion in West Sumatra' in Turner, T.G. and Kirsch B. (eds) *Permutations of Order* (Ashgate: 2009) 227-46.
[49] Ferrari above n. 28 at 4.
[50] This has already taken place in asylum seekers cases. See further Good, A., *Anthropology and expertise in the asylum courts* (Routledge: 2006).
[51] D'Costa G., Evans M., Modood T, and Rivers J., *Religion in a Liberal State* (OUP: 2013) 2.
[52] Sandberg at al above n. 26 at 27.
[53] See for instance Eisgruber and Sager above n. 7; Laborde, C., 'Religion and the Law: the disaggregation approach' (2015) *Law and Philosophy* 34(6): 581-600; Koppelman, A. 'Is it fair to give religion special treatment?' (2006) *University of Illinois Law Review*, (3): 571.
[54] See for example Ahdar R. and Leigh I., *Religious Freedom in the Liberal State* (OUP: 2015).

altogether. This section outlines some of the key features of the theories which have shaped my thesis.

Religion as a public good – the 'religious' approach

At one end of the spectrum is the religious approach which sees religion as special and therefore in need of special treatment. Ahdar and Leigh for instance take a non-neutral Christian perspective and advocate a level of interaction and cooperation between the government and religious communities.[55] As such, they support exemptions from the general law to accommodate religious practice. Those accommodations would not in their view amount to special treatment but rather form part of a corrective action. Ahdar and Leigh recall that the plea of religionist is not to be treated differently but rather seriously in the sense of being understood.[56] Garcia Oliva and Hall in their *Religion, Law and the Constitution* also advocate a level of cooperation between religion and the state. Their in-depth study of the UK Constitution leads them to conclude that the UK 'religious' constitution has resulted in all faiths being treated favourably and that this model indirectly protects non-religious beliefs.[57] I agree that with this approach it is possible for the state to protect religion despite the absence of a formal separation between religion and the state. My issue with this model however is that while it may function in the UK there is no guarantee that transposed elsewhere it would provide the same level of protection to religious minorities.[58] In particular, there is a danger with establishment that the majority faith will always be given a privileged position[59] hence the need to look towards a system that offers some level of separation and neutrality between church and state.

My thesis, to a certain extent aligns with Modood's 'moderate secularism' as it is favourable to state recognition of religion as an element of identity alongside other protected characteristics. My position differs slightly however in relation to church state separation as Modood's 'moderate secularism' does not require a formal separation between church and state as long as religious authorities do not exercise any influence on political authorities.[60] For Modood, the reality of multiculturalism and the presence in Western Europe of minorities that focus on their religious identities require a rethinking of secularism which includes respect for difference and the recognition of the interdependence between public and private sphere. State recognition and support for religion therefore is necessary for minorities to be accommodated and belong to society.[61] Modood is critical of the French radical secularism which marginalises religion against other protected characteristics and rejects multiculturalism. Instead he advocates a multiculturalism that includes equality of treatment and respect for differences.[62] This is based on a conception of religion as a public good which may require the state to help religion further this good.[63] My thesis

[55] Idem at 124.
[56] Idem at 13.
[57] Garcia Oliva, J. and Hall, H., *Religion, Law and the Constitution: Balancing Beliefs in Britain?* (Routledge: 2017).
[58] For an in-depth study of manifestation of belief in England see further Bacquet above n. 3 ch. 6.
[59] This is happening in England – see the ongoing campaign of the secular society https://www.secularism.org.uk/disestablishment/ [accessed 25.10.20].
[60] Modood, T., *Essays on Secularism and Multiculturalism* (ECPR Press: 2019).
[61] Idem.
[62] Modood above n. 60 at 2.
[63] Idem.

is not averse to the possibility of seeing religion as a public good provided it is not given priority above other conceptions of the good.[64]

Religion as a force to be reckoned with - the 'secular' approach

While some scholars see religion as a public good and argue in favour of state accommodations others single it out as a negative force that needs to be relegated to the private sphere. Nehushtan for instance, quite radically proposes that religion should not be tolerated in tolerant-liberal democracy.[65] It is interesting that the author makes the assumption that liberal democracies are necessarily tolerant. I shall return to this point later on in section 4. For Nehushtan, religion should be singled out for negative or less favourable treatment because it is illiberal and intolerant and as such has no place in liberal democracies. Nehushtan explains that the link between religion and intolerance is the result of seven characteristics including that religion's main function is the preservation of its existence, that it aspires to gain control over its believers, that it perceives its characteristics as sacred, has a unique perception of the truth, is absolute and is always almost composed on intolerant value.[66] As a result, states should be reluctant to accommodate religious demands and non-religious demands should be treated more favourably. His argument is based on a conception of religion as potentially dangerous. The State therefore should be suspicious of religion. In his view, the tolerant liberal state has a right to encourage its citizens from choosing a secular way of life over a religious one as this will further its aim of reinforcing its liberal and secular values.[67] The problem with this approach is that the liberal secular state as described by Nehushtan has an inherent bias against religion which it is encouraged to view as intolerant. This in itself makes the so called tolerant liberal state become intolerant.[68] Nehushtan's theory may be used to provide a justification to the French approach which results in a militant and extreme form of secularism which pushes religion away from the public sphere. My thesis is critical of this perspective as it places the secular above the religious and presupposes a view of religion which is purely dogmatic and as such ignores religion as culture and identity.[69] While I agree with Nehushtan that religion should not be given special treatment I do not suggest that it should be given any less values than other conceptions of the good. It is enough that legal restrictions are placed to control and limit the excesses of religion which may be harmful to the public or private sphere. But not all secularists see religion as a negative force.

My thesis aligns better with the view of political theorist Laborde who is also against providing religion with special treatment but does not go as far as excluding or marginalising religion. Laborde's justificatory secularism like Modood's moderate secularism is compatible with state recognition of religion but only with a mild/symbolic form of establishment.[70] The key aspect of justificatory secularism is that there should be no imposition of religious norms by the State. Any State actions,

[64] Bacquet above n. 3 ch. 8.
[65] Nehushtan above n. 29. See also Palmer H. and S. Toddington, *Architecture of Justice* (Ashgate: 2007) in particular chapter 6.
[66] Idem at 68.
[67] Ibid.
[68] On this aspect see the case of *R. v. Secretary of State for Education and Employment and others ex parte Williamson and others* [2005] UKHL 15 § 15 onwards.
[69] Bacquet above n. 3 chapter 4.
[70] Laborde, C. in D'Costa et al. above n. 51 at 164.

laws and policies should not be justified by religious truths. Laborde's justificatory secularism however is mild and as such she too sees the demands of French secularism as illegitimate because it places an obligation of restraint on citizens as well as state officials.[71] Moreover, Laborde acknowledges the religious origin of our political morality and does not negate the value of bringing all perspectives including religious ones within public debates. Justificatory secularism therefore unlike more extreme forms of secularism does not have on its agenda the secularisation of society. In that sense it is more likely to promote religious freedom than its more militant counterparts such as the French *laïcité*.

While those theories are useful in understanding the complexities of the interaction between church and state and as such informing a legal approach my thesis takes a step back and questions the very essence of religion in order to enhance our understanding of the need for state recognition and religious accommodation.

4. Theorising Manifestation of Belief in modern pluralist states

My research aims to shed some light on the importance of manifestation of belief through symbols and seeks to look at religion and religious manifestation as an element of individual and collective identity. This would result in a conception of symbols as an aspect of identity rather than merely a religious requirement or on the other hand a secular artefact. As such, my thesis distances itself from the above religious vs secular debate and delves into the social meaning of manifestation of belief. By focussing on religion as an aspect of identity we are able to move away from this binary and focus on individuals rather than seeking to protect religion per se.

My thesis recognises that the law and religion relationship is deficient, and this is reflected in the courts approach to manifestation of belief which has led to inconsistencies in decision making and to judges often being perceived as arbiters of faith.[72] I argue that judicial approaches can benefit from looking at religion and religious manifestation from different angles in order to gain new understandings of what manifestation of belief means to individuals. In assessing whether manifestation ought to attract the protection of the law, judges have often resorted to categorising manifestation as either religious or secular.[73] As a result, manifestation of belief that was deemed by the courts as non-religious has at times been rejected giving a message to followers that it may not be worthy of protection[74] while religious symbols have been classed as 'cultural' in order to garner the acceptance of the secular state.[75] Throughout my study it becomes apparent that the law has an inadequate view of religious symbols, yet this view is based on what I call the 'liberal law on religion.' In the next section I explore the origin and nature of this approach.

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[71] Idem. See also Bacquet above n. 3 chapter 5.
[72] See further Bacquet above n. 3 chapters 5, 6 and 7.
[73] This has been the case both at the national and ECtHR level in cases such as *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin), [2007] ELR 484; *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin); *Eweida v British Airways plc* [2010] EWCA Civ 80 CA in the UK or *Lautsi and Others v. Italy*, (App no. 30814/06) 18 March 2011 at the ECtHR level.
[74] See for instance in the UK *Playfoot* and *Eweida*, idem but this has also happened in the US see further Bacquet above n. 3 chapters 5 and 7.
[75] *Lautsi* above n. 73.

The Law on Religious Freedom is anchored in liberal values

What I have termed 'the liberal law of religion'[76] is the existing legal framework for the protection of religious freedom. Religious freedom is derived from international human rights law including article 18 of the International Covenant on Civil and Political Rights and article 9 of the European Convention on Human Rights. Human rights can be seen as the embodiment of liberal values such as autonomy, equality and individualism. As many have noted, the law on religious freedom reflects an implicit Christian focus on belief[77] and the construction of article 9 of the ECHR is a testament to this. While the *forum internum*[78] benefits from absolute protection, the *forum externum*[79] is subject to limitations and as such it has been argued that the Convention excludes a number of groups (orthopraxy faith) for whom it is difficult to disconnect beliefs from the way they wish to manifest such beliefs.[80] Anthropologist Talal Asad rightly observes that the right to freedom of religion and belief is the product of a specific culture and as such it is more functional to that particular culture than others.[81] Despite our expectation that the law ought to be a neutral and objective norm, it is in fact value laden and this is particularly salient in relation to religious freedom. As put by political philosopher Plant 'the legal and regulatory requirements of a liberal political order in many respects challenges religious practices and the ways in which religious beliefs are manifested.'[82] To this end Plant questions whether only a 'liberalised' form of religion can seek a role in a liberal society.

Before moving further with this argument, it is necessary to outline the main features of a 'liberal society' and what it expects of religion.

Liberalism and Religion

The controversies which have emerged in relation to the place of religion in 21st century liberal states and which I have discussed in my publications are a testimony to the potential for conflicts between some forms of liberalism and more visible expression of religion. While liberalism initially emerged as a solution to religious conflicts and has liberty at its core, some of its values may be ambivalent with religion. There are multiple declinations of liberalism and attempting to define them all is beyond the scope of this paper, but it is interesting to look at some common features which are present in most variants.[83]

Adhar and Leigh identify four common attributes of liberalism which are particularly salient to the field of law and religion, namely individualism, rationalism, neutrality and the privatisation of religion. Let us now see how each of those features may impact manifestation of belief in 21st century modern pluralist states such as England, France

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[76] Bacquet above n. 3 at 141.
[77] McIvor above n. 41; Jivraj above n. 43.
[78] The individual freedom to believe (article 9.1 of the ECHR).
[79] The freedom to manifest that belief (article 9.2 of the ECHR).
[80] See for instance Peroni, L. 'Deconstructing 'Legal' Religion in Strasbourg' (2014) *Oxford Journal of Law and Religion*, Vol. 3(2), pp.235-257.
[81] Asad, T., *Formations of the Secular. Christianity, Islam, Modernity* (Stanford University Press: 2003) see chapter 4 and in particular his theory on 'the self-owning human.'
[82] Plant R. 'Religion in a liberal state' in D'Costa et al above n. 51 at 9.
[83] I use the term 'liberalism' loosely to refer to the main political philosophy underpinning the Western ideal of democracy.

and the United States which were the subject of my study. Individualism is at the centre of liberalism. As put by Tushnet the liberal state focuses on the relationship between the State and the individual and what he calls 'intermediate institutions' such as the family, churches and voluntary societies are accorded less importance.[84] Individual autonomy can indeed be a difficult concept to grapple with for some religious minorities who tend to identify in relation to the group rather than as an autonomous being.[85] Many conflicts which have arisen in relation to manifestation of belief have touched upon this notion of autonomy when the liberal state attempts to impose its liberal stance on a specific religious group. This has been particularly relevant in relation to Muslim women and dress.[86]

The second common feature, rationalism implies that primacy is given to reason over feelings, emotions and superstition that characterise religion. Cook comments that liberalism has a 'structural bias' against religious knowledge.[87] This is not surprising given that liberalism emerged post enlightenment when there was an emphasis on the discord between faith and reason. This is very visible within the French model which my research focuses on.[88] The third common feature, neutrality[89] means that the liberal state sees religion as one of the many conceptions of the good and not as something sacred and superior which should be given special treatment. In that respect, my thesis fits in within a liberal framework, but it also seeks to highlight that there is a disconnect between the liberal understanding of religion which tends to focus on the individual and the private sphere, and manifestation of belief as seen through the lens of religious followers i.e. as an element of individual and collective identity.

The fourth common feature is the privatisation of religion. This is directly linked to the third common feature. If the state is 'neutral' then there is no place for religion in the public domain. Religion therefore becomes a private matter hence a preference for secularism rather than establishment models of church/state relations. We can clearly see here how manifestation of belief in the public sphere becomes a salient issue in liberal states. The extent to which states can be neutral however is questionable and many scholars have accused liberalism of being biased towards secularism and against religion. Gedicks for instance sees the relegation of religion to the private sphere 'as an exercise in power'[90] while Gaus comments that 'the liberal secular tendency to equate public reason with secular reason needlessly alienates those with strong religious commitments who might otherwise be supportive of liberalism.'[91] Ahdar and Leigh talk about 'the mirage of neutrality'[92] and are critical of a secularist liberalism.[93] My

[84] Tushnet, M., 'Red, White and Blue: A critical Analysis of Constitutional Law' in Ahdar and Leigh above n. 54 at 54.
[85] This is the case of some religious minorities such as Orthodox Jews or practicing Muslims. This is apparent in their sense of dress which tends to create a group identity where every individual looks the same and therefore only exists as part of the group.
[86] See for instance the ban on religious symbols at schools in France which is discussed in Bacquet above n. 3 chapter 5.
[87] Cook A., 'God Talk in a Secular World' in Ahdar and Leigh above n. 54 at 55.
[88] On the French model see Bacquet above n. 3 chapter 5.
[89] While neutrality is common to many conceptions of liberalism it is not always the case – see for instance Raz and his perfectionist liberalism. See further Wall S., 'Neutralism for Perfectionists: The Case of Restricted Neutrality', Ethics, vol. 120, no. 2, 2010, pp. 232–256.
[90] Gedicks, 'Public Life and Hostility to Religion' in Ahdar and Leigh above n. 54 at 68.
[91] Gaus, 'Religious Belief in Public Reason Liberalism' in Ahdar and Leigh ibid.
[92] Adhar and Leigh above n. 54 at17.
[93] Idem and see also Adhar, R. 'Is Secularism neutral?' (2013) *Ratio Juris*, 26(3).

research goes some way towards evidencing some of those criticisms. The French State's claim to neutrality for instance is highly questionable and my analysis of the French system concludes that it is more favourable to non-religious than religious views[94] - this can be termed the secular bias. On the other hand, the American secularism tends to be more benevolent towards religion but its neutrality is questionable as it tends to lean more towards religious than secular views.[95]

The extent to which liberalism is compatible with religious manifestation in the public sphere therefore very much depends on states' interpretations of the various elements which contribute to a liberal state. My thesis is supportive of the liberal state but highlights certain deficiencies in relation to how the 'liberal law of religion' approaches manifestation of belief. To return to the above question on what a liberal state expects of religion then it appears that it is more suited to more discreet and private forms of religions which do not have a strong emphasis on manifestation. In modern pluralist societies where diverse faith communities coexist this represents a major challenge and has been amply evidenced within the courts.[96]

The 'liberal law of religion' therefore favours orthodoxy faith such as Christianity. My thesis proposes that by taking a holistic approach to manifestation of belief we can close the gap that currently exists between the law's conception of manifestation of belief and religious symbols and religious individuals and communities' views of the same. I argue that this requires a shift of approach from religion to both individual and collective identity.

Religion as Identity

My findings were that throughout history, religious or cultural symbols and rituals have shaped human consciousness by making them aware of their individual and collective identity.[97] In modern pluralist states symbols and rituals contribute to the making of individual and collective identity.[98] It is now well established that religion has not disappeared with modernity as predicted by sociologists in the second half of the 20th century. The transformation of religion[99] that we are witnessing has brought about many challenges for states not least having to deal with the threat posed by extremism and fundamentalism. Although those extreme forms of religious manifestation go beyond the scope of my research, I have pointed out that they have contributed to the negative stereotyping of religion in its most visible forms.[100] This is particularly salient in the three countries which I have studied in my publications.

Against this background scholars who work in the field have started to acknowledge the emergence of religion as an intrinsic aspect of identity rather than an elective characteristic of individuals.[101] In the UK, this is reflected in the legislation with the

[94] See further Bacquet above n. 3 chapter 5.
[95] This is discussed in Bacquet idem, chapter 7.
[96] See for instance Bradney, A. *Law and Faith in a Sceptical Age* (Routledge: 2009); Sullivan, W. F., 'The Impossibility of Religious Freedom' (Princeton University Press: 2005) and Peroni above n. 80.
[97] Bacquet above n. 24.
[98] See further Bacquet, idem at 113.
[99] See further Bacquet above n. 3, chapter 4.
[100] Bacquet above n. 3 at 61.
[101] See for instance Bradney, A. 'Faced by Faith' in P., Oliver, S. D., Scott and V. Tadros, eds., *Faith in Law*, (Bloomsbury: 2000) ch. 5; Eisenberg, A., 'Religion as Identity' (2016) *Law & Ethics of Human*

Equality Act 2010 which lists religion alongside the other protected characteristics such as sex, gender, age, race or disability.[102] My empirical research provides evidence to support a shift in approach from seeing religion as a chosen characteristic to an aspect of identity which is innate.[103] I have argued that religiosity of an individual is both acquired through birth status (ascribed) and developed throughout upbringing and family history (achieved) and that in some cases manifestation of belief through religious symbols or rituals are to be considered as intrinsic characteristics of individuals.[104] The Sikh turban is a good example of a religious symbol that believers consider as part of their body.[105]

Eisenberg has discussed how understanding religion as identity as opposed to religion as choice affects public decision making about religious freedom.[106] While she acknowledges that the identity framework just as the choice one is imperfect, she nonetheless posits that the identity approach is more effective at 'tracking social exclusion and historical injustice towards groups.'[107] With religion as identity there is a greater impetus for the state to respect religious manifestation whereas with religion as choice the focus is on removing any barriers which prevent the individual from choosing their religion and the way they manifest their belief.[108] The French *laïcité* which I have studied is a classic example of a state that considers religion as a choice and it goes a step further in actively seeking to ban practices which it sees as potentially restricting the choice that the individual ought to have as an autonomous being. In that approach religion as identity is lost and many religious minorities are left with choosing between protecting the law of the state or following the law of God. As a result of this overly simplistic and binary understanding of autonomy, minorities are discriminated upon and not afforded the recognition they should expect from a democratic society.[109]

As Jivraj comments, this conceptualisation of religion linked to identity and community has not yet been fully explored despite its importance to understanding contemporary religion.[110] To this end, my publications shed light on the complex relationship between individuals and manifestation of belief in contemporary pluralist states. More of this understanding is needed in order to operate a shift in approach from seeing religion as merely a matter of choice to acknowledging it as an aspect of identity alongside other social values. In the final section of this paper I explore how I propose for this shift to work in practice.

Rights. Volume 10, Issue 2, Pages 295–317; Oppong, S. H., 'Religion and Identity' (June 2013) *American International Journal of Contemporary Research*. Vol. 3 No. 6;10-16. See also Jivraj above n. 43.

[102] See the Equality Act 2010 S. 4.

[103] See further Bacquet above n. 24 at 113.

[104] Bacquet above n. 3 at 64.

[105] See further Bacquet above n. 24 chapter 7 especially page 118.

[106] Eisenberg above n. 101.

[107] Idem at 309.

[108] Idem at 296.

[109] There is ample literature on this aspect of the French system in relation to the courts' approach to the Islamic headscarf. See for example Wallach Scott, J. *The Politics of the Veil* (The Public Square: 2010). In relation to the ECtHR approach see Van Engeland A., 'What if? An Experiment to Include a Religious Narrative in the Approach of the European Court of Human Rights' (2019) *Journal of Law, Religion and State* 7, 213-241.

[110] Jivraj above n. 43 at 23.

5. Beyond the 'liberal law of religion'

Theoretical standpoint

My thesis posits that legislators and courts have a tendency to see religion as a choice and that this approach is consistent with the 'liberal law of religion' which greatly values the right of the individual as an autonomous being able to make choices about his/her religion. This approach however, as discussed in this commentary, wrongly assumes that every individual has access to an equal level playing field. While this trend is mostly evident within the French approach to religious freedom, it can also be observed in both the US and UK courts' approaches which I have discussed in my publications.[111] This perspective also makes a number of assumptions about religion and belief more generally. It considers religion as an elective characteristic of the individual rather than an intrinsic aspect of identity alongside race, ethnicity, or gender. This perpetuates misconceptions about manifestation of belief and portrays religious symbols and rituals as non-essential artefacts which can easily be separated from belief. Belief therefore in the eyes of the legislator and the courts takes precedence over manifestation. I have highlighted that while this is less likely to be an issue with Christianity which is the majority faith in Western democracies it has the effect of disadvantaging religious minorities such as Muslims, Jews or Sikhs for whom belief and manifestation cannot be separated and whose followers can usually be identified by their dress. As put by Ahdar and Leigh, the dominant position is one of suspicion towards what they call 'strong religions' with 'serious manifestation' of belief.[112] This is particularly salient in respect of Islam and more visible religious garbs generally.[113] In that respect I agree with Eisenberg who points out that 'the role of the court is not to question whether individuals are free to choose, but rather to accept the individual's religious commitments as given and then to ask whether the state treats individuals with these commitments with equal respect.'[114] The claim here therefore is not for religion to be given special treatment but rather equal treatment which is consistent with my thesis.

While some judges have warmed to this approach,[115] the dominant perspective remains the 'choice approach' arguably because legal methods have not provided us with the tools to understand the meaning and value of manifestation of belief through symbols and rituals. While there is ample academic literature on the problematic nature of the legal approach to religious manifestation,[116] few have attempted to offer any practical solutions.[117] My thesis proposes a shift of approach by opening up to other disciplines

[111] Bacquet above n. 3 chapters 5, 6 and 7.
[112] Ahdar and Leigh above n. 54 at 12.
[113] There is ample literature on the struggle of Muslim women to be allowed to don their headscarf in the public sphere and more particularly within the education and employment context. The European Court of Justice recently ruled on two such cases. See *Achbita & Anor v G4S Secure Solutions NV* [2017] CJEU C-157/15 and *Bougnaoui and ADDH v Micropole SA* [2015] CJEU C-188/15.
[114] Eisenberg above n. 101 at 308.
[115] See for instance the minority in *R (Begum (by her Litigation Friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 and in *SAS v France* (App no. 43835/11) 1 July 2014.
[116] See for instance Scharff, B., 'The role of judges in determining the meaning of religious symbols' in Temperman, J. (ed.) *The Lautsi papers: multidisciplinary reflections on religious symbols in the public school classroom* (Martinus Nijoff: 2012); see also McCrudden, C., *Litigating Religions* (OUP: 2018).
[117] In relation to school see notably Gereluk, D., *Symbolic Clothing in Schools* (Continuum:2008); see also Paul Horwitz' 'constitutional agnosticism' in Adhar and Leigh above n. 54 at 13.

which have the power to transform our understanding of symbols but it also begins a discussion on how this shift would operate in practice and in that sense it moves the field in new directions.

Before discussing the practicalities of this approach, it is necessary to come back to some of the most problematic features of judicial approaches to manifestation of belief. When more visible forms of manifestations find themselves in the court room it too often becomes a case of deciding two things. First, whether the symbol in dispute is actually a manifestation of religion and second, whether said manifestation is an actual requirement of the claimant's religion or belief. This amounts to categorising symbols and manifestation into either the secular or the religious and is an attempt to assign a 'true' meaning to symbols. I agree with Scharff that methods of judicial interpretation are disconnected from the very essence of symbols. While lawyers are in search for a single or true meaning, symbols are based on cultural assumptions and are context dependant.[118] In other words, symbols may mean different things to different people at different times. Any attempt therefore by the courts to attribute a 'true meaning' to a symbol has the potential to exclude those who do not align with this interpretation. It is impossible to decipher the true meaning of a symbol without unwrapping the layers of history which have shaped it.[119] In the next section I begin a discussion on how we could start to operate a shift towards a more balanced judicial approach to manifestation of belief through symbols.

Practical standpoint

I put forward that the first step towards acknowledging the value of manifestation of belief as an aspect of identity in 21st century pluralist states is to gain a thorough understanding of the place of religion within secular societies. I argue that legal methods alone cannot provide this understanding and that therefore collaborations with other disciplines within the social sciences must become the norm. I have proposed that anthropology and sociology are particularly relevant to religious symbols but there are of course other disciplines which can assist us in this endeavour such as for instance history, psychology or theology.

The second step is to adopt what I have termed 'a holistic approach' to religion and manifestation of belief which shifts focus from religion itself towards the person both as an individual and as a member of the community. This approach is 'holistic' because it is above all contextual and looks at individuals and their symbols within the wider environment rather than in a vacuum.

In order for this 'holistic approach' to operate in practice, a modification of existing legal tests would be required so as to give effect to a more human and inclusive method. Currently, the test used by the ECtHR which is also the test used by UK courts focuses on the extent to which the right to freedom of religion and belief (article 9) is engaged, whether there has been a restriction placed on that right and the extent to which that restriction can be justified taking into account the nature and purpose of the restriction. It is the first two limbs of the test which are the most problematic and which run the risk of judges becoming arbiters of faith. The holistic approach would instead question

[118] Scharff above n. 116.
[119] Idem at 41.

the extent to which a particular action, ritual or symbol is essential to a person's identity.[120] This would entail using a more subjective test asking whether the manifestation in question is central to the individual's life and wellbeing considering such factors as race, ethnicity, family life, expression, identity as well as religion. This would take away the need for the courts to elucidate whether a particular symbol is indeed a manifestation of the belief in question and therefore also move away from the need to define religion altogether.

I propose that the approach used by the UK Employment Tribunal in determining a philosophical belief is more suitable. Following the test used in *Grainger PLC v Nicholson,*[121] courts would need to have regard to the honesty of the belief, its weight and substance in relation to human life and behaviour as well as its seriousness, cogency and importance. In addition, the belief must be worthy of respect in a democratic society and compatible with human dignity and fundamental human rights. Using an approach which incorporates some elements of the *Grainger* test would guard against opening the floodgates and ensure that offensive and dangerous symbols are prohibited.[122]

It is interesting to consider whether this approach would have changed any of the decisions on symbols which have been made to date.[123] In *Eweida v British Airways plc*[124] for instance it was first held by a UK employment tribunal following advice from religious experts, that the visible display of Nadia Eweida's cross was not a requirement of the Christian faith. Here we have a 'secular' tribunal declaring that clearly some symbols are more important than others as well as openly siding with the religious experts and therefore implying that there is only one way of practicing ones' faith. Further up, the Court of Appeal of England and Wales refused to consider article 9 altogether referring to the 'specific situation rule'[125] and the contractual relationship between Ms Eweida and her employer British Airways. The decision was eventually overturned by the ECtHR which found a violation of article 9 and accepted that Ms Eweida's behaviour was indeed a manifestation of her religious belief as well as acknowledging that '[Her] *desire to manifest her religious belief … is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because 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*.'[126] Strasbourg's decision in this case is a major step forward in acknowledging the importance of

[120] Bacquet above n. 3 at 147.
[121] UKEAT 0219/09/0311.
[122] While the Grainger test seems like an attractive alternative to assess the extent to which manifestation of religion requires protection it must be acknowledged that its application has produced a very contradictory case law. Perhaps the test has been misunderstood. See Sandberg R, 'Is the National Health Service a Religion?' (2020) 22 *Ecclesiastical Law Journal* 343.
[123] While some of the decisions I discuss in this paragraph are now dated, they have contributed to shaping judicial approaches to religious manifestation in the UK and therefore remain landmark decisions within the field.
[124] [2010] EWCA Civ 80 CA.
[125] See *Kalaç v Turkey* (1997) 27 EHRR 522, §27 and *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, § 23 "*The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience*" per Lord Bingham.
[126] *Case of Eweida and Others v. the UK* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013 at §94.

manifestation of belief but unfortunately in matters of religious freedom is one of the rare cases where the ECtHR overruled the decision of a member state. Cases like *Eweida* therefore remain an exception.[127] Applying the holistic approach here would have meant that the case might have been resolved at the Employment Tribunal. Ms Eweida's cross was discreet and had no impact on health and safety. Moreover, there was evidence that her Sikh counterparts were allowed to wear a turban and upon authorisation a kara bangle while her Muslim colleagues could wear a hijab provided it was in British Airways approved colours.[128]

Similarly, in *R (Playfoot) v Governing Body of Millais School*[129]the High Court of England and Wales refused to acknowledge that Miss Playfoot's purity ring could be a manifestation of her belief in chastity before marriage while in *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School*[130] Sarika Singh's kara bangle was seen as a requirement for baptised Sikhs and as such it could attract the protection of the law. Moreover, in the famous *Begum* case[131] the House of Lords at least accepted that article 9 of the ECHR was engaged but was still not prepared to admit that the restriction by the school to allow Shabina to wear a jilbab represented an interference with her right to manifest her belief.[132]

Had the holistic approach been used, the reasoning if not the outcome of all of the above cases would have greatly differed. As they stand, those decisions may lead us to conclude that a kara bangle is a 'true' religious symbol whereas a purity ring and a jilbab are not. Considering all the circumstances of the case however and focusing on the individuals concerned rather than the symbols themselves is likely to yield different results. All those symbols could reasonably be linked to the claimants' identity, religion and culture. This is not to say however that they could not be limited if there was a proportionate justification based on health and safety, harm to others or discrimination but a more holistic approach would at least go some way towards acknowledging religion as an integral part of identity. To the same end, Cumper and Lewis have proposed an approach that uses empathy and 'a fresh willingness [for the ECtHR] to 'stand in the shoes' of those who wish to manifest their faith through the religious attire of their choice.'[133]

6. Conclusion

While the holistic approach would need thorough testing and fine tuning and is bound to have its own limitations it would go some way towards addressing the existing concerns with how the law has dealt with religious manifestation. It would acknowledge

[127] On the ECtHR and the consequences of applying the margin of appreciation see further P. Cumper and T. Lewis, 'Empathy and Human Rights: The Case of Religious Dress', *Human Rights Law Review*, 2018, 18, 61–87.
[128] Eweida case above n. 126 at §11.
[129] [2007] EWHC 1698 (Admin).
[130] [2008] EWHC 1865 (Admin).
[131] Above n. 115.
[132] For a critique of this series of cases see further Bacquet S. 'School uniforms, religious, symbols and the Human Rights Act 1998: the 'purity ring' case,' 2008. *Education Law Journal*. 9 (1), pp. 11-18 and Bacquet, S., 'Manifestation of Belief and Religious Symbols at School: Setting Boundaries in English Courts'. 2009. *Religion and Human Rights*. 4 (2-3).
[133] Cumper and Lewis above n. 127.

the subjective importance of the belief being manifested by the person concerned as well as weigh the consequences of restricting such belief.

Until such a shift is operated religious minorities will be left with an 'impossible compromise'[134] that of either abandoning their religious identity in order to fit in with the secular practice of the state or fighting for their religious identity and risk being excluded from society altogether. Throughout my publications I have demonstrated that 'the liberal law of religion' is more favourable to traditional forms of religion and privileges orthodoxy faith resulting in the alienation of minorities. I have shown that legal methods of analysis are not suited to the nature of religious symbols and have proven to be inadequate. Comparative and interdisciplinary approaches provide a more nuanced and richer way of looking at the topic.

My thesis puts forward an approach which acknowledges the centrality of the individual and their experience of the symbol but also accepts the collective nature of religion and other value systems as underpinning the individual understanding, it allows for the symbol or practice to be prohibited if there is harm to the community. It acknowledges that individual identity is constructed by drawing on religious and other social values based on race, nationality or ethnicity. Symbols are deeply rooted in these values and should be respected. With this conception, it is individuals' values that need to be protected as a conception of the good rather than religion as a collective endeavour per se.

[134] Sandberg R., above n. 24 at 1-17.

7. Bibliography

Books

Ahdar R. and Leigh I., *Religious Freedom in the Liberal State* (OUP: 2015)

Asad, T., *Formations of the Secular. Christianity, Islam, Modernity* (2003: Stanford University Press)

Bacquet S., *Religious Symbols and the Intervention of the Law: Symbolic Functionality in Pluralist States* (Routledge: 2019)

Bradney A., *Law and Faith in a Sceptical Age* (Routledge: 2009)

Bradney A., *Religions, Rights and Laws* (Leicester University Press: 1993)

Cumper P., and Lewis, T. (eds.) *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar: 2012)

D'Costa G., Evans M., Modood T. and Rivers J., *Religion in a Liberal State* (OUP: 2013)

Doe, N., *Law and Religion in Europe: A comparative introduction* (OUP: 2011)

Eisgruber C. L. and Sager L. S., *Religious Freedom and the Constitution* (Harvard University Press: 2007)

Evans, C., *Freedom of Religion under the European Convention on Human Rights* (OUP: 2011)

Ferrari, S. (ed.), *Routledge Handbook of Law and Religion* (Routledge: 2015)

Garcia Oliva, J. and Hall, H., *Religion, Law and the Constitution: Balancing Beliefs in Britain?* (Routledge: 2017)

Gereluk, D., *Symbolic Clothing in Schools* (Continuum: 2008)

Good, A., *Anthropology and Expertise in the Asylum Courts* (Routledge: 2006)

Howard, E, *Law and the Wearing of Religious Symbols in Europe*, 2nd edition (2019: Routledge)

Hunter-Henin, M., *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic vivre ensemble* (Hart: 2020)

Inge, A, *The Making of a Salafi Muslim Women* (2017: OUP)

Jivraj S., *The Religion of Law* (2013: Palgrave)

McCrudden, C., *Litigating Religions* (OUP: 2018)

Modood, T., *Essays on Secularism and Multiculturalism* (ECPR Press: 2019)

Nehushtan, Y., *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing: 2015)

Oliver, P., Scott, S.D. and Tadros V. (eds.), *Faith in Law* (Bloomsbury: 2000)

Palmer H. and S. Toddington, *Architecture of Justice* (Ashgate: 2007)

Robilliard, St.John A., *Religion and the Law: Religious Liberty in Modern English Law* (Manchester University Press: 1984)

Sandberg, R., *Leading Works in Law and Religion* (Routledge: 2019)

Sandberg, Doe, Kane and Roberts (ed.) *Interdisciplinary Approaches to Law and Religion* (Edward Elgar: 2019).

Sandberg. R. (ed.) *Religion and Legal Pluralism* (Ashgate: 2015)

Sandberg, R., *Religion, Law and Society*, (Cambridge University Press: 2014)

Sullivan, W., *The Impossibility of Religious Freedom* (Princeton University Press: 2005)

Temperman, J. (ed.) *The Lautsi papers: multidisciplinary reflections on religious symbols in the public-school classroom* (Martinus Nijoff: 2012)

Turner, T.G. and Kirsch B. (eds) *Permutations of Order* (Ashgate: 2009)

Wallach Scott, J. *The Politics of the Veil* (The Public Square: 2010)

Articles

Adhar, R. 'Is Secularism neutral?' (2013) *Ratio Juris*, 26(3)

Alves Pinto, T. 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights,' (2020) *Religion & Human Rights*, 15(1-2), 96-133

Bacquet, S., 'Manifestation of Belief and Religious Symbols at School: Setting Boundaries in English Courts' (2009) *Religion and Human Rights*. 4 (2-3)

Bacquet S. 'School uniforms, religious, symbols and the Human Rights Act 1998: the 'purity ring' case,' (2008) *Education Law Journal* 9 (1), pp. 11-18

Cotterrell, R. 'The Struggle for Law: Some Dilemmas of Cultural Legality', (2008) *International Journal of Law in Context*, 4(4): 373–84

Cumper P. and Lewis, T., 'Empathy and Human Rights: The Case of Religious Dress' (2018) *Human Rights Law Review*, 2018, 18, 61–87

Doe N. in 'A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe' (2004) 152 *Law and Justice* 68

Eisenberg, A., 'Religion as Identity' (2016) *Law & Ethics of Human Rights*. Volume 10, Issue 2, Pages 295–317

Gunn, J. 'The complexity of Religion and the Definition of 'Religion' in International Law' (2002) *Harvard Human Rights Journal*, Vol. 16, 189

Koppelman, A. 'Is it fair to give religion special treatment?' (2006) *University of Illinois Law Review* (3): 571

Laborde, C., 'Religion and the Law: the disaggregation approach,' (2015) *Law and Philosophy* 34(6): 581-600

McCrudden, C. 'Religion, human rights, equality and the public sphere' (2011) *Ecclesiastical Law Journal*, 13 (1), pp. 26-38

Oppong, S. H., 'Religion and Identity', (June 2013) *American International Journal of Contemporary Research*. Vol. 3 No. 6;10-16

Patnaik, E., 'Reflexivity: Situating the Researcher in Qualitative Research' (2013) *Humanities and Social Science Studies* September, Volume 2, Issue 2, pp. 98-106

Peroni, L., 'Deconstructing 'Legal' Religion in Strasbourg' June 2014. *Oxford Journal of Law and Religion*, Volume 3, Issue 2, pp. 235–257

Sandberg R., 'The Sociology of the Law on Religion' (2007) *SSRN Electronic Journal*. 10.2139/ssrn.2032647

Sandberg, R. 'A Systems Theory Re-Construction of Law and Religion' (October 2019) *Oxford Journal of Law and Religion*, Volume 8, Issue 3, 471

Van Engeland A., 'What if? An Experiment to Include a Religious Narrative in the Approach of the European Court of Human Rights' *Journal of Law, Religion and State* 7 (2019) 213-241

Wall S., 'Neutralism for Perfectionists: The Case of Restricted Neutrality' (2010) *Ethics*, vol. 120, no. 2, pp. 232–256

Witte, J., 'The Study of Law and Religion in the United States: An Interim Report' (2012) *Ecclesiastical Law Journal*, 14(3), 327-354

Research reports & Online resources

Douglas, G., Doe, N., Gilliat-Ray, S., Sandberg, R. and Khan, A. 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' (June 2011) Report of a

research study funded by the AHRC available at: http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf [accessed 27.09.20)

National Secular Society Campaign to disestablish the Church of England, https://www.secularism.org.uk/disestablishment/ [accessed 25.10.20].

Legislation

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

International Covenant on Civil and Political Rights, 1966

General Comment 22 on article 18 of the ICCPR (CCPR/C/21/Rev.1/Add.4, 30 July 1993)

UK Equality Act 2010

UK Human Right Act 1998

Cases

Achbita & Anor v G4S Secure Solutions NV [2017] CJEU C-157/15

R (Begum (by her Litigation Friend, Rahman)) v Headteacher and Governors of Denbigh High School [2006] UKHL 15

Bougnaoui and ADDH v Micropole SA [2015] CJEU C-188/15

Eweida v British Airways [2010] EWCA Civ 80 CA

Eweida and Others v. the UK (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013

Grainger Plc v Nicholson [2010] 2 All E.R. 253 (03 November 2009)

Kalaç v Turkey (1997) 27 EHRR 522

Lautsi and Others v. Italy (App no. 30814/06) 18 March 2011

R (Playfoot) v Governing Body of Millais School [2007] EWHC 1698 (Admin), [2007] ELR 484

SAS v France (App no. 43835/11) 1 July 2014
R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 (Admin)

R. v. Secretary of State for Education and Employment and others ex parte Williamson and others [2005] UKHL 15