Paying for another's belief: the law on indirect religious discrimination
[Draft 02]

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The Equality Act 2010 designates 'religion or belief' a 'protected characteristic'. The Act protects people in respect of all such characteristics from both direct and indirect discrimination. A discriminates against B *directly* if 'A treats B less favourably than A treats or would treat others' (Pt 2, ch.2, s.13). An employer is, for example, guilty of direct religious discrimination if he refuses to employ or promote a Muslim because he is a Muslim. A discriminates against B *indirectly* if A applies to B 'a provision, criterion or practice' (PCP) that disadvantages people who shares B's characteristic, even though the disadvantage may be an incidental and unintended consequence of the PCP. If, for example, an employer has a dress code for his employees and if it is more difficult for Muslims than for others to comply with that dress code, he is guilty, prima facie, of indirect religious discrimination (IRD). He can, however, escape the charge of IRD if he can show that his PCP is 'a proportionate means of achieving a legitimate aim' (Pt 2, ch. 2, s.19).

The claim that direct discrimination, including direct religious discrimination, is unfair is unlikely to be challenged. The claim that indirect discrimination, particularly indirect religious discrimination, is unfair is altogether more controversial. Consider the following case.

Sarah Desrosiers owned and ran a small hairdressing salon in North London, named 'Wedge'. She advertised for an assistant stylist and Bushra Noah applied for the position. Noah was a Muslim who wore a headscarf that covered her hair entirely. That itself was not for Desrosiers an obstacle to her employing Noah. However, during the course of an interview, Desrosiers discovered that Noah would refuse to remove her headscarf while she was working in the salon. That was a problem for Desrosiers, since she required the hair-styles of her hairdressers to be visible to the salon's customers. Her salon offered an 'alternative' form of hair dressing, which she described as 'ultra-modern' and 'urban, edgy and funky'. She wanted her hairdressers to use their own hair to model the salon's style (a practice common in hair salons in Britain). Because Noah was unwilling to comply with that

practice, Desrosiers did not offer her the position. Noah responded by registering a claim of unlawful discrimination against Desrosiers.

An Employment Tribunal heard the case during Spring 2008. Noah claimed she had been subject to both direct and indirect discrimination. The Tribunal dismissed her claim of direct discrimination, but decided her claim of indirect discrimination was well-founded. Desrosiers' practice of requiring her employees to show their hair placed female Muslims, who, like Noah, wore a headscarf for religious reasons, at a disadvantage compared with those who adhered to other faiths or to none. Moreover, the Tribunal decided that Desrosier had not shown that her PCP, requiring employees to reveal their hair, was 'a proportionate means of achieving a legitimate aim'.[1] Noah claimed compensation of £34,000. The Tribunal awarded her £4000 in respect of 'injury to feelings'. Of greater moment for Desrosiers was the estimated £40,000 she had to sacrifice in preparing for the trial and the prospect of bankruptcy.[2]

How should we view the outcome of this case? Was it a triumph for fairness, since it upheld Noah's right not to be deprived of an employment opportunity because of her religious faith? Or was it an injustice, since it deprived Desrosiers of the right to run her business according to her own preferred (and not unreasonable) practice, simply because that practice did not suit a religious believer whose beliefs Desrosiers did not share?

The answer to those questions depends in large part on where we should place the responsibility for the situation in which Noah found herself. Was Desrosier at fault for having a PCP that did not accommodate Noah's religion, or should Noah have borne the 'cost' of complying with her religious belief rather than export that cost to someone else? [3]

Choice, responsibility and belief

People's religious beliefs, it is often claimed, differ from their race or gender in being chosen and they warrant different treatment because they are chosen. We are unlikely to find that claim persuasive in relation to direct discrimination; even if people do choose their beliefs, we are unlikely to accept that, as a consequence, they should be open to direct discrimination in employment and in their access to goods and services. But choice may well make a difference to our thinking on IRD. If my chosen beliefs clash with an employer's practice, why should it fall to the employer to bear the costs of my choice? People cannot reasonably

expect to choose without bearing the consequences of their choice. If my choice renders me less eligible for employment, I should not be able to offload the cost of that choice onto an employer.

So can people be said to choose their beliefs? The notion that they do runs into two objections. First, people cannot choose what to believe; they can believe only what appears to them to be the case. I cannot choose to believe that Madrid is in France rather than Spain and I cannot choose to believe that the earth is flat rather than spherical. Secondly, the notion that people choose their religious beliefs flies in the face of sociological reality. For most of the world's population, religious belief is a consequence of family or community socialisation. Catholic communities beget Catholics and Muslim societies beget Muslims. Of course that is not true without exception but, in the context of world's believing population, converts into and out of faiths constitute a tiny minority.

The first of these objections is less than conclusive. Choices do not have to be arbitrary to be real. I may have reason to pursue a career in law rather than medicine and that reason may outweigh all reasons to the contrary, but my career in law can still be 'chosen'. Moreover, since religious belief is underdetermined by evidence, it is clearly different in character from belief that Madrid is in Spain or that the earth is spherical. There is scope for epistemic discretion in matters of religious belief, even though the language of 'choice' is too gauche to describe that discretion appropriately. If there were no discretion, the idea of 'freedom of belief' would make little sense. (Compare the oddity of 'freedom of race' or 'freedom of gender'.)

The second objection is harder to gainsay. It is just a fact about our world that, for the great majority of religious believers, the social context in which they have developed has been the principal determinant of their religious belief. That is one reason why the phenomena of religion and culture are so closely associated. Should this feature of religious belief preclude our requiring people to take responsibility for what they believe and for the consequences of their belief?

Arguably, it matters less how people have come to hold their beliefs than how they now regard them. There may be a large element of inheritance in their beliefs but, if they now embrace and endorse those beliefs, they cannot present them to others as burdens with which they have been saddled by circumstance and for which they should receive compensation. The reality is, of course, that people do not present their beliefs to others in that way. They

hold that others should take their beliefs seriously because they take them seriously; it is because they embrace and endorse their beliefs that others must respect their beliefs. So the claims that the religious make upon others in respect of their beliefs is typically grounded in their strong identification with their beliefs, not in the complaint that their beliefs are burdensome misfortunes with which they have been saddled by the past and for which they should take no responsibility. They are wise to do so, since the 'burdensome misfortune' complaint would invite others not to take seriously the beliefs of the complainers.

The principle of freedom of belief involves the notion that your beliefs are 'none of my business'. It does, of course, leave me free to make my own assessment of your beliefs. But, even if I assess your beliefs as bizarre, implausible, heretical, benighted or lacking merit in some other way, the principle debars my impeding or interfering with your freedom to hold and pursue whatever beliefs you possess. But if your beliefs become a source of positive rather than merely negative claims against me, so that I have, for example, to give up resources or to adjust my behaviour out of deference to your belief, your belief does reasonably becomes 'my business'. If your belief is going to impose positive obligations on me, it is entirely reasonable that I should judge it and, if I find it wanting, dismiss it as a reason for my having those positive obligations.

We can add the more general point that freedom of belief is supposed to work both ways round: it is freedom to embrace and freedom to reject a belief. If X's embracing *p* is reason for Y's incurring positive obligations with respect to X, why should that reason not be cancelled by Y's believing in *not-p*? Why should my belief that Christ was the Son of God count for more than your belief that he was not; and why should your belief that Mohammed was God's Prophet count for more than my belief that he was not? After all, we find it no more acceptable that people should be made to comply with religious beliefs they reject than that they should be prevented from complying with religious beliefs they accept.

A final consideration is the way the courts deal with religious belief. Their practice is to refrain from subjecting religious beliefs to any sort of test of plausibility, reasonableness, or orthodoxy. They do subject claims of belief to a sincerity test and they will not protect manifestations of belief that are inconsistent with 'basic standards of human dignity and integrity'.[4] But, within those broad limits, courts do not subject the content of beliefs to any form of quality control. It is entirely appropriate that they should not; courts are not the right bodies to rule on abstruse and contentious points of theology. But if a legal system leaves the

religious beliefs that people are free to embrace and pursue so comprehensively free of quality control, if it imposes no check upon their plausibility or reasonableness, it is hard to accept that a believer, merely in virtue of embracing a belief, should be able to impose positive obligations upon others.

Beliefs and consequences

The considerations marshalled in the previous section argue strongly for requiring people to take responsibility for their beliefs and for the demands of their beliefs. But they relate to only half the picture. There are consequences of belief that we can regard as uniquely consequences of belief, such as the Christian sabbatarian's having to forgo the recreational activites in which others engage on Sundays and the Muslim's having to devote time to praying five times a day. But the consequences at stake in IRD are not of that kind. They are consequences that arise from the intersection of belief with a social arrangement that is external to the belief. For example, Bushra Noah ran into problems not merely because her religion required her to cover her hair but because that requirement in combination Sarah Desrosier's practice of requiring her hairdressers to show their hair, precluded her gaining employment in Desrosier's salon. Her failure to gain employment was not uniquely a consequence of her belief; it was the joint consequence of her belief and Desrosier's practice. We might therefore hold Noah and Desrosier jointly responsible for Noah's predicament or assign primary responsibility to Desrosier.

If people are to take responsibility for their belief, it follows that a society should provide for the distribution of freedom and resources amongst its citizens without reference to the different beliefs of different believers. So we might imagine a society first establishing a basic structure of freedoms and making provision (through the market or other mechanisms) for the distribution of resources; it will then leave citizens at liberty to use their freedom and resources to pursue their beliefs as they see fit. The demands of people's *particular* beliefs should not dictate the freedoms or the resources to which they are entitled.

Consider, for example, believers who subscribe to faiths that require them to go on pilgrimages and to construct places of worship such as churches, temples, mosques and synagogues. The approach I have proposed will require them to fund pilgrimages and places of worship from their own resources, rather than, say, through public taxation that would

oblige those who do not share the relevant beliefs to contribute to the costs of those religious endeavours. This may seem nothing like the case of indirect discrimination, but it is to the extent that it is not their beliefs alone that oblige the religious to devote resources to pilgrimages and religious buildings. It is also the fact that those who provide travel services and construct buildings charge for materials and labour at the going rates. Thus, the expense incurred by believers is not uniquely a consequence of their belief; it is a consequence of the intersection of their beliefs with a social arrangement concerning the provision of goods and services. We could therefore hold that, since believers' having to pay for pilgrimages and buildings is not a state of affairs produced by the believers alone but is jointly brought about by the believers, on the one hand, and the suppliers of goods and services on the other, the two parties should share joint responsibility for the 'consequence'. The believers should pay half the cost and the suppliers should bear the other half or perhaps receive it in the form of a public subsidy provided by a society at large. That proposal is unlikely to find favour with anyone. It is perfectly true that believers are not the only agents responsible for the costs of going on pilgrimages and constructing places of worship; but, provided the believers have been treated in the same way as others in the background system for allocating resources, it will be fair that they should bear those costs and not export them to others.

Where does that leave the case for making legal provision against IRD? There is one feature of existing British law that is congruent with what I have argued above. As previously indicated, a PCP used by an employer or provider of goods and services does not fall foul of discrimination law if it is 'a proportionate means of achieving a legitimate aim'. The spirit of that provision is that people should not be prevented by the beliefs of others from pursuing the normal aims of normal organisations, or from doing so in ways that are clearly appropriate to those aims. Up to the threshold set by the proportionality criterion, the employer or provider is obliged to accommodate the believer but, once that criterion is met, the wish of the employer or provider prevails. Thus, the proportionality test functions, or should function, as a priority rule in which an organisation's 'normal activity' trumps the competing claims of a believer.

It is well to remember that this priority rule applies not just to business organisations whether they are large corporations or small businesses like Sarah Desrosiers's. It applies to any organisation that is an employer or a provider of goods or services, including government departments, government agencies, local authorities, charities, schools and universities. Its spirit also applies to religious organisations. The law allows religious organisations to

discriminate on grounds of religious belief, within limits, in employment and in the provision of goods and services and it would be absurd if it did not. It also allows organised religions to discriminate on grounds of gender and sexual orientation insofar as compliance with their doctrines and the strongly held convictions of their followers requires that discrimination. I shall not pause to consider the details here.[5] I draw attention only to the fact that the discrimination law governing organised religions and other religious organisations embodies the same principle that an organisation should not be prevented by obligations to accommodate others from pursuing its core aims through proportionate means.

Providing against indirect religious discrimination

Is there then a case for combatting IRD at all? There are several considerations, other than those that have been my central concern, that bear on the case for IRD legislation. One is the need to provide against covert direct discrimination. Another is the desirability of weeding out practices that disadvantage the religious for no good reason; practices that may have been costless in a largely mono-faith society may not remain so once the religious make-up of the society changes. A third is the social issues that we run into when religious differences track ethnic divisions, as they do in Britain and many other European societies, so that religious disadvantage compounds racial disadvantage.

These considerations argue powerfully for some legal provision against IRD. However, I do not mean to rely on them to the exclusion of the consideration that has been my primary concern: the claims that people have simply as conscientious bearers of religious belief. Freedom of belief requires that people should not be prevented from living in accordance with their beliefs. If we are committed to that freedom, it is entirely intelligible that we should regret clashes between the demands of a religious belief and a society's public or private arrangements that result in believers being 'burdened' in ways that other people are not. Such burdens may not deprive people of freedom of belief strictly speaking, but they are a form of cost or disadvantage and we may reasonably regret that people's religious beliefs should be a source of social disadvantage for them. A society committed to freedom of belief can therefore reasonably wish to mitigate the burdens that people incur when beliefs clash with its public or private arrangements, insofar as that mitigation is reasonable. But we are then left with the question of what sort or degree of mitigation is 'reasonable'. My answer is: mitigation that does not impose significant costs upon others.[6] That is also the answer

implicit in the test that provides a legal defence against claims of IRD: whether the PCP at issue is a proportionate means for achieving a legitimate aim. If a PCP fails that test, the implication is that it can be set aside without significant cost to the employer or provider.

It remains important, however, that the proportionality test should be conceived in the right way. The thrust of my argument is that it should be conceived as a priority rule that sets a threshold rather than as a balancing rule that weighs competing interests. The proportionality of the employer's or provider's means (his PCP) should be judged in relation to his aim, provided the aim is 'legitimate'; if the means so judged is proportionate, that should trump the competing claim of the believer. The test should not be one in which the interest of the believer is weighed against that of the employer or provider and the proportionality of the PCP is made to turn on the relative weight of the interests at stake. Frequently, when courts apply a test of proportionality in other areas of law, they adopt a balancing approach and that approach has sometimes been used by Tribunals dealing with cases of IRD. Indeed, it figured in the Tribunal's assessment in *Noah v. Desrosier*.[7] What I have argued here challenges the rightness of that approach. Rather, we should begin by assessing the legitimacy of the employer's or provider's aim. If it is legitimate, we should judge the proportionality of the means (the PCP) solely in terms of that aim. If accommodating the wish of the believer is consistent with proportionate means so judged, it should be accommodated; if it is not, it should not be accommodated.

Notes

1. My account of *Noah v. Desrosiers* is based on details given in the (unreported) judgement of the Employment Tribunal, case number 2201867/2007. The case preceded the Equality Act 2010 and was pursued under the Employment Equality (Religion or Belief) Regulations 2003, but, for the most part, the substance of those Regulations remains unchanged in the Equality Act 2010.

2. Report, including an interview with Desrosiers, *Mail Online*, 18 June 2008, http://www.dailymail.co.uk/femail/article-1027300/How-I-nearly-lost-business-refusing-hire-Muslim-hair-stylist-wouldnt-hair.html; accessed 1 August 2012

3. The issues raised by IRD share something in common with those raised by 'exemptions', such as the well-known exemption enjoyed by turban-wearing Sikhs from the law that requires motorcyclists to wear crash helmets. However, a significant difference is that, in the case of exemptions, it is the state or society at large that does the accommodating whereas, in the case of IRD, the obligation to accommodate falls upon a particular member of civil society.

4. *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, para.23.

5. The relevant parts of the Equality Act 2010 are schedule 3, para. 29; schedule 9, paras 2 and 3; schedule 23, para. 2. See also Russell Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), pp. 117-128.

6. The language of 'costs' applies to many cases of indirect religious discrimination only in a highly figurative sense. For example, in *Ladele v. London Borough of Islington* – a case in which a registrar sought exemption from her employer's requirement to officiate at civil partnership ceremonies, since she believed that actively participating in enabling same sex unions was contrary to her Christian faith – Islington Council conceded that it could fully employ Ladele in other tasks and without anyone having to forego a civil partnership; to that extent, it could accommodate her request entirely without cost. Nevertheless, the Council, the Employment Appeal Tribunal and the Court of Appeal deemed that immaterial; the relevant consideration was that accommodating Ladele's request would be (they held) inconsistent with the Council's 'Dignity for All' policy. *Lillian Ladele v. London Borough of Islington*, [2008] UKEAT/0453/08/RN; [2009] EWCA Civ 1357.

7. *Noah v. Desrosiers* [2008], Employment Tribunal judgement, case number 2201867/2007, 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). The Employment Tribunal in *Eiweda v. British Airways*, commented, 'We do not consider that the blanket ban on everything classified as jewellery struck the correct *balance* between corporate consistency, individual need and accommodation of diversity'; quoted in *Eiweda v.*

British Airways [2010] Civ 80, para. 32 (my emphasis). In addition, Lucy Vickers has suggested that the number of individuals affected by a requirement might be taken into account in assessing proportionality; 'Religious Discrimination in the Workplace: an Emerging Hierarchy?' *Ecclesiastical Law Journal*, 12 (2010): 280-303, at 289-90.