

# ‘Public Reason’, Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998

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## 1. *Introduction*

Human rights claims are often motivated by weighty considerations. But few motivating factors are arguably as powerful as those which typically underpin claims involving the right to freedom of religion and belief under Article 9 of the European Convention on Human Rights (ECHR). In such cases litigants often consider that they have a sacred duty to act (or refrain from acting) in a particular way, believing that failure to do so may displease a supreme being or even lead to dire consequences in an afterlife, perhaps for all eternity. To date the courts have acknowledged, in express terms, the unparalleled and existential significance of particular manifestations of religious belief to believers themselves. British judges have made a number of statements in which they have accepted the centrality of faith in the lives of those bringing such claims before them, recognising that in view of religion’s association with the transcendental, the divine and the eternal, it is *the* most important thing for many people.<sup>1</sup>

However, although judges avowedly recognise the subjective importance of manifestations of religious belief, there has been a tendency for the courts to permit such manifestations to be restricted by legislatures and governments with relative ease, occasionally in pursuit of seemingly

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<sup>1</sup> See eg Cranston J in *R (Ghai) v Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2009] EWHC 978 (Admin), [2009] WLR (D) 151, [93]; Lloyd LJ in *R (Suryananda) v Welsh Ministers* [2007] EWCA Civ 893, [83].

inconsequential aims. Accordingly, there exists something of a disconnect within the judicial discourse on freedom of religion and belief under Article 9. Although judges *say* that the manifestation of a person's faith or beliefs is of crucial importance to religious claimants, their words appear not always to be matched by their actions, for the 'public good' grounds on which the courts permit such manifestations to be restricted are, on occasion, incongruously slender. As a result, the courts risk appearing disingenuous, and a religious believer may ask, 'If the court *really* accepted that this manifestation of my belief is as significant to me as it maintains, why restrict it on such flimsy grounds?'

One particularly credible explanation for this disconnect is the fact that the courts, when adjudicating religious rights claims, are obliged to employ only neutral reasons that are accessible to, and graspable by, everyone. This judicial obligation is rooted in one of the deepest strands of liberal thought, going back to the religious conflicts of the seventeenth century and the philosophy of Locke and Spinoza: the need for a separation of church and state, so as to ensure respect for the conscience of individuals, and to avoid the suppression of minorities.<sup>2</sup> An important part of this principle is that, in a democracy, people with particular religious beliefs—which are not understood, still less held, by others—should not be able to influence the formulation of coercive law and public policy solely on the basis of these same beliefs. As Thomas Nagel has put it:

... it must be possible to present to others the basis of your own beliefs, so that once you have done so, *they have what you have*, and can arrive at a judgment on the same basis. That is not possible if part of the source of your conviction is personal faith or revelation—because to report your faith or revelation to someone else is not to give him what you have, as you do when you show him your evidence or give him your arguments.<sup>3</sup>

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<sup>2</sup> John Locke, 'A Letter Concerning Toleration' (1685) in David Wootton (ed), *John Locke: Political Writings* (Penguin, 1993) 390; Benedict de Spinoza, *A Theologico-Political Treatise and a Political Treatise*, RHM Elwes (trans) (Dover, 2004).

<sup>3</sup> Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16 *Philosophy and Public Affairs* 215, 232 (emphasis in original).

The core reason for this doctrine of restraint is the necessity of preventing unbridled religious influence within the public forum leading to the elevation of one religion over other systems of belief and, ultimately, to the placing of restrictions on (or even the snuffing out of) the freedoms of others.<sup>4</sup>

John Rawls, with whom this theory is usually associated, refers to the type of reason that must be used in the public domain as ‘public reason’,<sup>5</sup> although others refer to similar (although distinct) concepts of ‘secular reason’<sup>6</sup> and ‘civic reason’.<sup>7</sup> While there has been much criticism of the idea and ideal of public reason,<sup>8</sup> a general consensus exists on at least one aspect of this theory: that when state officials are exercising *judicial* power they should not let religious views influence their judgments. As Rawls observed, the Court is the ‘exemplar of public reason’,<sup>9</sup> and today, on matters of religion as elsewhere, this point of principle is sufficiently well established to be regarded as a virtual axiom.

In this article we contend that, whilst correct as a matter of principle, this adherence to public reason has certain unforeseen consequences for the adjudication of religious rights, and contributes to the disconnect identified above. Even though the courts seem willing to accept that claimants genuinely

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<sup>4</sup> See Robert Audi, ‘The Separation of Church and State and the Obligation of Citizenship’ (1989) 18 *Philosophy and Public Affairs* 259. Moreover, even Kent Greenawalt, who is much more open to the influence of religious reasons in the public sphere than Audi, accepts that ‘the legislator should eschew reliance on religious premises insofar as he can’: Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford University Press, 1988) 237.

<sup>5</sup> John Rawls, *Political Liberalism—with New Introduction and ‘Reply to Habermas’* (Columbia University Press, 1996).

<sup>6</sup> See Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, 2000).

<sup>7</sup> See Abdullahi An-Na’im, *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard University Press, 2008).

<sup>8</sup> See eg Nicholas Wolterstorff, ‘The Role of Religion in Political Issues’ in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman and Littlefield, 1997); Jeremy Waldron, ‘Religious Contributions in Public Deliberation’ (1993) 30(4) *San Diego Law Review* 817; Jürgen Habermas, *Between Naturalism and Religion* (Polity, 2008) ch 5.

<sup>9</sup> Rawls (n 5) 216. This of course goes much further back than Rawls. For example, see Locke (n 2) 405.

believe that particular manifestations of religion or belief are of existential importance, they (the courts) remain unable to give voice to these beliefs so as to reflect, adequately, the importance placed upon them by believers. In short there is an absence of vocabulary—an ineffability—which prevents a court in a modern liberal democracy from taking account of manifestations of belief in a way that adequately conveys the profundity with which claimants hold these very beliefs.

This disconnect is closely associated with the sense of unease that appears to characterise judicial decision making in respect of religious claims—an unease which often leads, in turn, to the courts affording considerable discretion to legislatures and governments when restrictions are imposed on manifestations of religious belief.<sup>10</sup> Whilst willing to accept the great significance of particular manifestations of belief to the claimants themselves, the courts find such manifestations important for very different reasons than people of faith. Thus, unlike the believer, for whom the religious manifestation or practice is important because they believe the underlying doctrine to be *true*, judges accept that religion is to be valued for reasons such as respect for individual autonomy, collective identity or the need for pluralism in a democratic society.<sup>11</sup> As a result UK courts have often been willing to accept that, notwithstanding the importance of religion to the individuals concerned, legislatures and governments are better placed (due to their democratic credentials and/or superior expertise) than judges to assess the necessity of restrictions on manifestations of religious belief.<sup>12</sup>

In this regard our argument is not that the UK courts have necessarily made the wrong decisions when adjudicating on the basis of Article 9 of the ECHR. Rather, it is their reasoning and, in particular, the

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<sup>10</sup> We use the terms ‘deference’, ‘due deference’, ‘margin of discretion’ and ‘latitude’ interchangeably in this article to refer to the ‘area of discretionary judgment’ afforded by domestic courts under the Human Rights Act 1998. We use the term ‘margin of appreciation’ only in the context of the jurisprudence of the European Court of Human Rights.

<sup>11</sup> See eg Timothy Macklem, ‘Faith as a Secular Value’ (2000) 45(1) *McGill Law Journal* 1; *Kokkinakis v Greece* (1993) 17 EHRR 397, [31].

<sup>12</sup> See eg *Suryananda* (n 1) [79]–[80] (Thomas LJ); *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2005] 5 WLR 3372, [34] (Lord Bingham); [63]–[64] (Lord Hoffmann); [84] (Lord Scott); [97] (Baroness Hale).

way in which their decisions have been characterised by the affording of judicial deference, that is problematic.<sup>13</sup> We contend that, in deciding many of the cases under Article 9, the same results could have been reached without such excessive margins of discretion being afforded by the judges to the executive and/or legislature, since the state's arguments for restriction in most of these cases would have been relatively strong in any case. The courts' tendency to grant decision-makers a wide margin of discretion in the field of religion and belief, has served to muddy further what are (given the challenges of accommodating faith in a predominantly secular age) already murky waters, making judges *appear* to be loath to protect religious human rights. Perhaps even more significantly, the use of such judicial deference in future Article 9 cases may well have a decisive effect upon their outcome, even in those cases where the state's arguments for restriction are comparatively weak. That the risk of this is real can be seen in a case whose particular facts illustrate graphically the 'disconnect' highlighted above, the Administrative Court's decision in *Ghai v Newcastle City Council*, where a local council's refusal to allow a Hindu man to be cremated on an outdoor funeral pyre was held not to breach Article 9.<sup>14</sup> In this case the wide latitude afforded by the court resulted in a serious undervaluing of the religious manifestation at stake, in pursuit of a remarkably tenuous governmental/legislative aim. The case of *Ghai*, we suggest, provides a cautionary tale and a timely warning of possible problems associated with the affording of due deference in relation to Article 9. If the logic of the Administrative Court in *Ghai* were to inform future adjudication, this would almost

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<sup>13</sup> Constraints of space demand that, for the purposes of this article, we consider only cases that were decided on the basis of Art 9 ECHR, as opposed to ones where the claims were based primarily on discrimination law (such as the Employment Equality (Religion or Belief) Regulations 2003, the Equality Act 2006, and now the Equality Act 2010), which raise different, albeit oft related, issues.

<sup>14</sup> *Ghai (Admin)* (n 1). As will be seen, this decision was overturned by the Court of Appeal, which, as a result of its interpretation of the contested provisions, was able to avoid engaging with the human rights arguments in the case. See n 90 below.

certainly add weight to the arguments of faith leaders who maintain that the UK courts fail to take religion seriously.<sup>15</sup>

The article is structured in six parts. Part 2 sketches out the doctrine of public reason as developed by Rawls and (for the sake of balance) briefly outlines some of the relevant critiques. Part 3 summarises Article 9 of the ECHR, with particular reference to the ways in which the UK courts have applied the principle of proportionality, and have sanctioned curbs on the manifestation of religious freedom in the interests of the public good. Part 4 outlines the Administrative Court's decision in *Ghai v Newcastle City Council*, a case whose particular facts illustrate, with great clarity, the 'disconnect' highlighted above. Part 5 suggests why this is a problem, before, tentatively, proposing a way forward. Part 6 is the conclusion.

## 2. Rawls's Doctrine of Public Reason

### A. An Introduction to Public Reason

John Rawls was undoubtedly 'one of the most important political philosophers of the twentieth century'.<sup>16</sup> His work on the issue of public reason provides an especially useful framework for examining how the law should respond to religious faith in an increasingly secular age,<sup>17</sup> as evidenced by the number of scholars who have advanced versions of this theory.<sup>18</sup> It was in *Political Liberalism*

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<sup>15</sup> See eg the comments of the former Archbishop of Canterbury, Lord Carey of Clifton, in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1, [17]; [2010] ICR 507 (EAT) where he claimed that the judiciary has a 'disparaging attitude' and a 'clear animus' towards the 'Christian faith and its values'.

<sup>16</sup> David Reidy, 'Rawls's Religion and Justice as Fairness' (2010) XXXI *History of Political Thought* 309, 310.

<sup>17</sup> Rawls (n 5). See also John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) *University of Chicago Law Review* 765.

<sup>18</sup> See eg Audi (n 6); An-Na'im (n 7); Stephen Macedo, 'In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?' (1997) 42 *American Journal of Jurisprudence* 1; J Bohman, 'Deliberative Toleration' [2003] *Political Theory* 759.

that John Rawls argued that citizens, when engaged in public discourse about ‘constitutional essentials’ and/or ‘matters of basic justice’, owe it to each other to give generally accessible reasons for their arguments.<sup>19</sup> Thus when citizens in a democracy, who exercise ultimate authority through the democratic process, take part in public debate about the coercive powers of the state they should only advance reasons for coercion that all reasonable members of society can understand and accept. Accordingly, they should not offer reasons based on their own exclusive ‘comprehensive’ world views (eg religious beliefs, or philosophical or moral views), that those with alternative world views cannot fully comprehend.<sup>20</sup>

The starting point for *Political Liberalism* was an issue left unanswered in Rawls’s earlier work, *A Theory of Justice*:<sup>21</sup> the extent to which, in liberal democratic societies, the ‘fact of reasonable pluralism’ means it is possible to have a stable and just society of free and equal citizens who are profoundly divided by reasonable religious, philosophical and moral doctrines—or as Rawls called them, ‘comprehensive doctrines’. Given that the guaranteed rights and freedoms (including those of thought, conscience, religion and expression) which liberal democracies protect, typically lead to a plurality of incompatible religious, philosophical and moral world views, what is to prevent social disintegration?

Addressing this issue, Rawls argued that since comprehensive doctrines of the good (both religious and non-religious) tend to be irreconcilable, citizens will not be able to rely on them in order to reach agreement or even mutual understanding. Citizens should be willing to recognise that reasonable people may differ profoundly with regard to their conceptions of the human good and views of religious truth.<sup>22</sup> As a result, citizens should exercise their power only to the extent that they can reasonably justify their political decisions to *everyone* as free and equal members of society; and

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<sup>19</sup> Rawls (n 5).

<sup>20</sup> Rawls (n 5) xlix, 214. According to Rawls, *Political Liberalism* is impartial as between various competing comprehensive doctrines, and views its own political conception not as ‘true’, but rather as ‘reasonable’: Rawls (n 5) xi.

<sup>21</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

<sup>22</sup> Rawls refers to this as the ‘burdens of judgment’: Rawls (n 5) 54–58.

holders of incompatible doctrines should consider what arguments they can reasonably offer to each other when questions of coercion are in issue. Thus, Rawls concluded that:

As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.<sup>23</sup>

The concept of ‘reciprocity’ is central to Rawls’s scheme: the exercise of political power can only be legitimate when we sincerely believe that the reasons we would offer for our political actions are sufficient, and we reasonably believe that other citizens might also reasonably accept those reasons.<sup>24</sup> Accordingly, the motivation that is counted upon lies somewhere between altruism and self-interest, or what has been termed a ‘willingness to do your fair share ... so long as others will do the same’.<sup>25</sup> Therefore, according to Rawls, *Political Liberalism* is a ‘free standing’ doctrine having its own intrinsic (moral) political ideal expressed by the criterion of reciprocity.<sup>26</sup>

For Rawls the duty of public reason is one of ‘civility’ and thereby a ‘moral’ rather than ‘a legal duty’,<sup>27</sup> which applies to both citizens and public officials<sup>28</sup> when they engage in political advocacy in the public square on matters of constitutional importance or basic justice (eg the programmes of political parties, candidates seeking election and citizens voting).<sup>29</sup> However, it does not apply to the

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<sup>23</sup> Rawls (n 5) 217–18.

<sup>24</sup> Rawls (n 17). On reciprocity see also Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996).

<sup>25</sup> Macedo (n 18) 12. Rawls envisioned a ‘reasonable overlapping consensus’ of political (ie non-comprehensive) views among people with different comprehensive views: Rawls (n 5) xlvii–xlvi.

<sup>26</sup> How truly ‘free standing’ the nature of the doctrine is has been called into question, particularly because of its reliance on its ‘Enlightenment understanding’ of rationality and reason. See Wolterstorff (n 8) 97–98.

<sup>27</sup> Rawls (n 17) 769.

<sup>28</sup> *Ibid*, 768–9.

<sup>29</sup> Rawls (n 5) 215.



‘background culture’ of civil society (eg reasoning within associations of all kinds such as churches and universities, scientific societies and professional groups).<sup>30</sup> What is more, for Rawls the court is the ‘exemplar of public reason’:

It is the only branch of government that is visibly on its face the creature of reason alone. [The role of judges is to] justify by public reason why they vote as they do, [and] make their grounds consistent and fit them into a coherent constitutional view over the whole range of decisions.<sup>31</sup>

As a consequence, judges may invoke neither personal morality (and morality generally) nor their own (or other people’s) religious or philosophical views. On the contrary, they must appeal to those political values which belong to the most reasonable understanding of the public conception and its political values of justice and public reason—values which they believe (in good faith) that all rational citizens might reasonably be expected to endorse.<sup>32</sup>

## B. Public Reason: Critiques and Judicial Affirmation

Notwithstanding its considerable influence,<sup>33</sup> Rawls’s theory has been the subject of several weighty and wide-ranging criticisms.<sup>34</sup> For a start, it appears ill equipped to deal with the situation where

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<sup>30</sup> *Ibid*, 220–2. Rawls later modified his position in *Political Liberalism*, expressing the view that citizens (but not courts or legislators) may introduce their comprehensive doctrines into political discussion at any time, on the proviso that (in due course) they must give proper public reasons to support their views: Rawls (n 17) 777.

<sup>31</sup> Rawls (n 5) 235.

<sup>32</sup> *Ibid*, 236.

<sup>33</sup> See eg Audi (n 6), where it is argued that secular grounds should inform, equally, the reasoning of all citizens (both religious and non-religious) wishing to participate in public debate.

<sup>34</sup> See eg Waldron (n 8); Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press, 1995); Jürgen Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s *Political Liberalism*’ (1995) XCII (3) *Journal of Philosophy* 109; Wolterstorff (n 8); Habermas (n 8) 114–48; Veit Bader, ‘Secularism, Public Reason or Moderately Agonistic Democracy’ in Geoffrey Brahm Levy and

people of faith claim to be under a sacred duty to bring their religious beliefs into the public sphere, because the doctrine of public reason prevents them from so doing.<sup>35</sup> Furthermore, Rawls's theory can lead to those engaging in public debate downplaying their true 'religious' motives, so that people of a religious faith find themselves essentially having to 'pretend' to be driven by other considerations,<sup>36</sup> which is 'hardly the standard of transparency toward which democratic debate supposedly strives'.<sup>37</sup> Another critique of the doctrine relates to its exclusivity, on the basis that public debate 'should be open to "all comers" and not simply the preserve of elites' with the education or ability to construct their arguments in appropriate forms.<sup>38</sup>

A final criticism of the doctrine of public reason relates to the argument that the various strands of liberalism may themselves be seen as secular versions of comprehensive doctrines of the good.<sup>39</sup>

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Tariq Modood (eds), *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, 2009)

110. For a useful summary of the doctrine and its critiques see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 46–54. For a recent defence of public reason and response to these criticisms see Stephen Macedo, 'Public Reason, Democracy, and Political Community: The Critics Revisited', Montreal Neutrality Conference, May 2008, [www.creum.umontreal.ca/IMG/doc/Macedo\\_Montreal\\_Neutrality\\_Conference\\_4\\_25.doc](http://www.creum.umontreal.ca/IMG/doc/Macedo_Montreal_Neutrality_Conference_4_25.doc) (accessed 30 June 2011).

<sup>35</sup> See Wolterstorff (n 8) 105; Benjamin L Berger, 'The Limits of Belief: Freedom of Religion, Secularism and the Liberal State' (2002) 17 *Canadian Journal of Law and Society* 39, 47.

<sup>36</sup> See Greenawalt (n 34) 7, who argues that this has 'the unappealing feature of encouraging some discrepancy between actual bases of judgment and stated reasons'.

<sup>37</sup> Marion Maddox, 'An Argument for More, Not Less, Religion in Australian Politics' (2009) 22(3) *Australian Religion Studies Review* 353.

<sup>38</sup> Bader (n 34) 121–2. Another common observation is that many of the great social reform movements, such as the abolition of slavery, or civil rights in the US have been inspired by religions belief, see Michael J Sandell, 'Political Liberalism' (review of Rawls's *Political Liberalism*) (1994) 107(7) *Harvard Law Review* 1765, 1791; Wolterstorff (n 8) 110.

<sup>39</sup> See eg John Gray, *Two Faces of Liberalism* (Polity, 2000); Rawls (n 5) xxviii–xxx; Rawls (n 17); Rawls (n 22).

Rawls accepted that ‘justice as fairness’, the theory developed in his earlier *Theory of Justice*, is an example of such a secular comprehensive world view,<sup>40</sup> but he maintained that political liberalism, with its arguments based on reciprocity and the use of public reason, is a ‘freestanding doctrine’, independent of such comprehensive world views.<sup>41</sup> In contrast, however, others have argued that even the doctrine of public reason cannot truly be said to stand free of comprehensive doctrines, due to the fact that it is heavily dependent on an ‘Enlightenment understanding’ of the person, of reason and of rationality.<sup>42</sup>

Despite these and other doubts as to whether and how Rawls’s doctrine applies to citizens, there is nonetheless a general consensus that the courts are, and ought to be, bound by the strictures of public reason—that the judiciary is the exemplar of public reason and should eschew any resort to comprehensive doctrines.<sup>43</sup> Indeed, within the liberal democratic state, this is a principle so well ingrained that it is seldom given explicit recognition. Yet one such instance was the forceful riposte of Laws LJ recently to a call by the former Archbishop of Canterbury, Lord Carey of Clifton, for the establishment of a specialist panel of judges to adjudicate on claims involving matters pertaining to religious freedom.<sup>44</sup>

... the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of

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<sup>40</sup> Rawls (n 17) 806.

<sup>41</sup> See *ibid.*

<sup>42</sup> See Wolterstorff (n 8) 98–99; Sandell (n 38); Gray (n 39). For a general review of the debate see Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Blackwell, 2nd edn 1996).

<sup>43</sup> Kent Greenawalt is an exception, in that, whilst broadly agreeing that the judiciary should not use comprehensive reasons, he accepts that in very limited circumstances (eg in very hard cases) they may be permitted to do so: Greenawalt (n 34) 148–9.

<sup>44</sup> Lord Carey (n 15).

everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.

The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion—any belief system—cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.<sup>45</sup>

A clearer and more unequivocal judicial exposition of the principle of public reason as it applies to the courts is hard to find. Yet the words of Laws LJ are unlikely to assuage the fears of Lord Carey and his supporters, not least because ‘the terms of the debate about the place of religion within society are set by a secular liberalism that does not and cannot view religion through religion’s own eyes’.<sup>46</sup> Such considerations may also help to explain why faith groups are often sceptical about the law’s ability to protect religious belief in an increasingly secular age—and why, prior to the enactment of the Human Rights Act 1998 (the HRA), claims that the incorporation of Article 9 of the ECHR into UK law might paradoxically *undermine* religious freedom led to (unheeded) calls for faith groups to be exempt from the remit of the legislation.<sup>47</sup> Today, with the HRA already a decade old, the principle of public reason underpins the approach of the courts when adjudicating on religious rights claims under

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<sup>45</sup> *McFarlane v Relate* (n 15) [17].

<sup>46</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish, 2009) 33.

<sup>47</sup> See Peter Cumper, ‘The Protection of Religious Rights under Section 13 of the Human Rights Act 1998’ [2000] *Public Law* 254.

Article 9. With such considerations in mind it is necessary to explain (briefly) the right to freedom of religion and belief under Article 9 of the ECHR, before proceeding to summarise the relevant case law in this area.

### 3. *Freedom of Religion and Belief under Article 9 of the ECHR*

#### A. Article 9: The Constituent Elements

Article 9 of the ECHR provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9(1) protects, in absolute terms, the principle of freedom of thought, conscience and religion. A person may believe whatever they want because the state has no power to interfere with this internal sphere, the *forum internum*. By contrast, under Article 9(2), the manifestation of religion or belief may be subject to restrictions by the state as long as these are 'prescribed by law', in pursuance of one of the legitimate aims listed, and 'necessary in a democratic society'. This last requirement has been held by the European Court of Human Rights (the European Court) to mean that any restriction must be proportionate to the aim that the state is claiming to protect.<sup>48</sup>

Various principles can be gleaned from the Article 9 case law of the European Court.<sup>49</sup> These in turn have been implemented and developed by the domestic courts since the coming into force of the

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<sup>48</sup> *Manoussakis v Greece* (1997) 23 EHRR 387, [44]; *Şahin v Turkey* (2007) 44 EHRR 5, [109].

<sup>49</sup> See David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *The Law of the European Convention on Human Rights* (Oxford University Press, 2nd edn 2009) 425–41.

Human Rights Act 1998. They have been set down in their clearest form in what is arguably the leading UK case in this area—*R (Williamson) v Secretary of State for Education and Employment*<sup>50</sup>—and can be discerned by examining the questions that the court asks (and answers) when dealing with an Article 9 claim: is there a ‘religion or belief’ attracting protection under Article 9?; is there a ‘manifestation’ of that religion or belief?; has it been subjected to a ‘limitation’?; and, if so, is the limitation justified under Article 9(2)? As will be observed, the willingness with which the courts have been prepared to answer the first two of these questions in the affirmative—in accepting that the beliefs of claimants are sincere, and that their manifestations of belief are of central significance to their lives—is in marked contrast to the third, where the arguments of claimants have often been superseded by a judicial willingness to find that the measures taken by the state to impose restrictions on these manifestations have been justified.

(i) Is it a Religion or Belief?

In examining complaints under Article 9 of the ECHR, the court must first make sure that the litigant’s avowed ‘religion’ or ‘belief’ is ‘neither fictitious nor capricious’, and is actually protected by Article 9.<sup>51</sup> However, beyond this, judges refuse to inquire as to the asserted belief’s ‘validity’ in relation to the doctrines of the religion in question,<sup>52</sup> and will not assess ‘the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion’.<sup>53</sup> Thus, only rarely will an applicant fail to surmount this initial threshold, because the courts have tended to afford great weight to what the claimant maintains is his/her religion or belief.<sup>54</sup>

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<sup>50</sup> [2005] UKHL 15, [2005] 2 AC 246.

<sup>51</sup> *Ibid*, [22] (Lord Nicholls), quoting Iacobucci J in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27 at [52].

<sup>52</sup> See *Blake v Associated Newspapers* [2003] EWHC 1960 (QB), [21], Gray J.

<sup>53</sup> See *Williamson* (n 50) [22] (Lord Nicholls); *Varsani v Jesani* [1999] Ch 219; *R v Chief Rabbi, ex parte Wackman* [1992] 1 WLR 1036.

<sup>54</sup> In *Williamson* (n 50) Lord Nicholls expressed the view that a person is free to hold their religious beliefs no matter how ‘irrational or inconsistent they may seem to some’ (at [22]).

(ii) Is it a ‘Manifestation’ of Religion or Belief?

A second issue that judges must address relates to the manifestation of religion or belief. The vast majority of challenges under Article 9 usually involve *manifestations* of religion or belief, for it is only when a religion or belief emerges into the external domain (ie the *forum externum*) that it is likely to attract the restrictive attention of the state.<sup>55</sup> In relation to the issue of manifestation, a person’s belief must relate to matters that are ‘more than merely trivial’, ‘possess an adequate degree of seriousness and importance’, and be consistent with ‘basic standards of human dignity and integrity’.<sup>56</sup> However, once these minimal thresholds have been satisfied (as with question (i) above), the courts have generally been reluctant to enquire any further,<sup>57</sup> because religious belief ‘is not always susceptible to lucid exposition or, still less, rational justification’.<sup>58</sup> Thus, the courts are usually willing to accept the submissions of claimants that their faith has to be manifested in a particular way.

(iii) Is the Interference Justified?

A different approach, however, is evident where judges consider whether manifestations of religion or belief may justifiably be subjected to limitations. In such circumstances, the courts must examine not

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<sup>55</sup> Whilst Art 9 applies to non-religious beliefs and philosophies (‘thought and conscience’), the notion of manifestation is ‘particularly appropriate to the area of religious belief’: *Williamson* (n 50) [62] (Lord Walker). Manifestations of ‘thought and conscience’ are protected by Art 10 ECHR. See Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 284–6.

<sup>56</sup> *Williamson* (n 50) [23] (Lord Nicholls), [62] (Lord Walker).

<sup>57</sup> A rare example of a failure to surmount this threshold requirement of manifestation can be seen in *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin), where the wearing of a ‘purity ring’ by a Christian school pupil, which contravened the school’s no jewellery policy, was found not to be intimately linked to the belief in chastity before marriage.

<sup>58</sup> *Williamson* (n 50) [23] (Lord Nicholls).

just whether a particular manifestation of belief has been ‘prescribed by law’,<sup>59</sup> but whether it can also be restricted as being ‘necessary in a democratic society’ in the pursuit of one of the legitimate aims listed in Article 9(2). Typically this means that the court must ask whether the limitation on religious freedom constitutes a proportionate response to a ‘pressing social need’.<sup>60</sup>

The exact form and content of proportionality, as developed by the domestic courts under the HRA, is far from clear, one commentator having described the case law as being ‘murky’ and a ‘muddle’.<sup>61</sup>

The analysis and formulation most widely accepted and cited is that of Lord Steyn in *R (on the application of Daly) v Secretary of State for the Home Department*.<sup>62</sup> This three-stage test, drawn from the Privy Council decision in *de Freitas v Permanent Secretary of Ministry of Agriculture*,<sup>63</sup> asks whether: (1) the legislative objective is sufficiently important to justify limiting a fundamental right (which corresponds roughly to the question of whether a legitimate aim is being sought); (2) the measures designed to meet the objective are rationally connected to it; and (3) the means used to impair the right are no more than is necessary to accomplish the objective. It is at the third stage that the bulk of the judicial assessment of whether the interference with the right is proportionate takes

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<sup>59</sup> See *Kokkinakis v Greece* (n 11) [37]–[41].

<sup>60</sup> *Ibid*, [27]–[41]. There is an ongoing debate concerning what a proper proportionality analysis, in a human rights context, requires. In particular, there is argument about whether the concept of ‘balancing’ rights against public interests is appropriate in human rights adjudication, especially since it seems to require a mechanistic weighing of incommensurable values. See eg Steven Greer, ‘“Balancing” and the European Court of Human Rights: A Contribution to the Alexy-Habermas Debate’ (2004) 63(2) *Cambridge Law Journal* 412; Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468; Madhav Khosla, ‘Proportionality: An Assault on Human Rights?: A Reply’ (2010) 8(2) *International Journal of Constitutional Law* 298.

<sup>61</sup> Tom Hickman, ‘The Structure and Substance of Proportionality’ [2008] *Public Law* 694, 711.

<sup>62</sup> [2001] UKHL 26, [2001] 2 AC 532, [25]. The formulation was approved by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, [13].

<sup>63</sup> [1999] 1 AC 69, 80. The Privy Council in turn drew the test from the Canadian case of *R v Oakes* [1986] 1 SCR 103.



place. There is debate about what exactly this stage requires.<sup>64</sup> However, some clarity was provided by the House of Lords in *Huang v Secretary of State for the Home Department*. In a Joint Opinion their Lordships approved of the three-stage *de Freitas* test, but also stated that any judgment on proportionality ‘must always involve the striking of a fair balance between the rights of the individual and the interests of the community’, and that the ‘severity and consequences of the interference will call for careful assessment at this stage’.<sup>65</sup>

There have been several examples of cases where the courts have examined the proportionality of interferences with the manifestation of religious beliefs, although the structured tests set out above have only been sporadically referred to, still less applied with any degree of rigour. In *Williamson*,<sup>66</sup> the claimants (the head-teachers, teachers and parents of children at four independent Christian schools) argued that corporal punishment of pupils should be permitted at school, on the basis of their belief in the Biblical injunction, ‘He who spares the rod hates his son, but he who loves him is diligent to discipline him’.<sup>67</sup> The House of Lords held unanimously that whilst this was a manifestation of belief, it could be legitimately interfered with in order to protect the physical and mental well-being of children. Without citing the *de Freitas* test, their Lordships nevertheless had no difficulty in reaching this conclusion because the statutory ban pursued a legitimate aim—the protection of children who are vulnerable from the deliberate infliction of physical violence, and the pain and suffering which this would cause. And, their Lordships held, the ban on corporal punishment was not a disproportionate interference with the claimants’ rights, since the legislature had been entitled to take the view that such punishment in the classroom was undesirable and unnecessary.<sup>68</sup>

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<sup>64</sup> Hickman (n 61); Julian Rivers, ‘Proportionality and the Variable Intensity of Review’ (2006) 65(1) *Cambridge Law Journal* 174.

<sup>65</sup> [2007] UKHL 11, [2007] 2 AC 167, [19].

<sup>66</sup> *Williamson* (n 50).

<sup>67</sup> *The Bible*, Proverbs 13:24.

<sup>68</sup> *Williamson* (n 50) [49]–[50] (Lord Nicholls); [69] (Lord Walker); [86] (Baroness Hale). Lords Bingham and Brown also agreed.

Another example of a lawful curb on religious freedom is *R (Suryananda) v Welsh Ministers*,<sup>69</sup> which concerned a Hindu religious community (the Community of the Many Names of God) in South West Wales, whose members believe that all life (both human and animal) is sacred. In an effort to control the spread of bovine tuberculosis (bTB), which was a particularly serious problem in this area, the Welsh Assembly Government ordered the slaughter of Shambo, the sacred temple bull, which had tested positive as having been exposed to the bTB bacterium.<sup>70</sup> All of the parties accepted that, for this religious community, the bull's destruction 'would be a particularly sacrilegious act, a serious desecration of the temple, and comparable ... to the killing of a human being'.<sup>71</sup> Thomas LJ put it thus:

The cornerstone of the beliefs of the ... Community is the sanctity of life and the worship of God through caring for its animals. The respondent is utterly committed to the preservation of this life, regarding all animals as having a spark of divinity. The Community would regard the slaughter of the bullock as a sacrilege and a desecration of their temple.<sup>72</sup>

The Community's beliefs in relation to the religious significance of Shambo were found to be 'patently sincere and most deeply held'.<sup>73</sup> Nevertheless, the Court of Appeal held, unanimously, that the destruction was a proportionate response to the serious threat to animal and public health, and necessary as part of the overall policy of controlling the spread of the disease, in order to protect the agricultural industry, animal welfare and public health.<sup>74</sup>

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<sup>69</sup> [2007] EWCA Civ 893.

<sup>70</sup> An infection of bTB but not necessarily the disease, which is detected through post-mortem testing.

<sup>71</sup> *Suryananda* (n 69) [3] (Pill LJ), quoting *R (Suryananda) v Welsh Ministers* [2007] EWHC 1736 (Admin), [17] (Hickinbottom J).

<sup>72</sup> *Ibid*, [83] (Thomas LJ).

<sup>73</sup> *Ibid*, [3] (Pill LJ).

<sup>74</sup> Pill LJ quoted the *Government Veterinary Journal* which referred to bTB as 'the most difficult animal health programme we face in Great Britain today' (at [4]).

Finally, the case of *R (Begum) v Governors of Denbigh High School*, where a 15-year-old Muslim school girl (Shabina Begum) argued that her faith required her to wear a *jilbab* (a long, loose fitting over-garment) in contravention of her school's uniform policy, is another example of the judiciary having to consider the legality of restrictions on religious freedom. The majority of the House of Lords held that there had been no interference with Begum's Article 9 rights because she could have attended another school which permitted the *jilbab*. Nevertheless several of their Lordships took the opportunity to examine the proportionality of the measure at issue.<sup>75</sup> Whilst accepting that the claimant was sincere in her beliefs, the House of Lords held that the school's policy, which accommodated to a large extent the beliefs of 'mainstream' Muslim pupils by allowing the headscarf and *shalwar kameeze*, was justified, for it ultimately protected social harmony within the school and the rights of other pupils.

Factual differences aside, the approach of the courts in *Begum*, *Suryananda* and *Williamson* was similar, for in each of these three cases a margin of discretion was accorded to the primary decision-makers. The implications of this judicial tendency to defer to primary decision-makers in relation to determinations under Article 9 of the ECHR will now be explored in more detail.

## B. Judicial Deference and Article 9

A key element of the proportionality question that judges must consider in regard to Article 9 is whether the courts should afford a degree of latitude to executive/legislative decision-makers in seeking to balance the rights of the believer and the public interest. In this respect the European Court has typically granted states a wide 'margin of appreciation' in relation to the imposition of restrictions on manifestations of religion or belief.<sup>76</sup> The granting of this margin has been justified on the basis

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<sup>75</sup> [2006] UKHL 15, [2005] 5 WLR 3372, [26]–[34] (Lord Bingham); [58]–[68] (Lord Hoffmann); [86]–[88] (Lord Scott); [94]–[98] (Baroness Hale). Strictly speaking, since the majority had found there to be no interference with the claimant's Art 9 rights their Lordships were not compelled to consider the proportionality of the measure.

<sup>76</sup> On the margin of appreciation generally, see George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705; Yutaka Arai-Takahashi, *The Margin of*

that, within the member states of the Council of Europe, there is little consensus on the significance of religion in society and that, as a consequence, states should be given a certain leeway as to what restrictions they may impose. Thus, for example, in *Şahin v Turkey*—a case concerning the banning of the Islamic headscarf in Turkish universities in order to preserve their secular nature and the principle of gender equality—the Grand Chamber of the European Court held:

It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context.<sup>77</sup>

This latitude granted to states by the European Court has distinct echoes in the domestic Article 9 case law.<sup>78</sup> Indeed, in *Begum*, Lord Hoffmann expressly stated that the margin of appreciation granted at Strasbourg should be reflected in the adjudications of domestic courts:

In applying the principles in *Şahin v Turkey* the justification [for restriction] must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school.<sup>79</sup>

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*Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

<sup>77</sup> *Şahin v Turkey* (n 48) [109] (citations omitted). See also *Dogru v France* (2009) 49 EHRR 8, [63]; Tom Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56(2) *International and Comparative Law Quarterly* 395.

<sup>78</sup> On the issue of judicial deference under the HRA see *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 380–1 (Lord Hope); *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [83]–[87] (Laws LJ); *R (ProLife Alliance) v BBC* [2004] 1 AC 185, [74]–[77] (Lord Hoffmann); Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346. The use of the term 'deference' was called into question by Lord Hoffmann in *ProLife*, due to its 'overtones of servility, or perhaps gracious concession' (at [75]).

<sup>79</sup> *Begum* (n 75) [64].

The affording of latitude by *domestic* courts to other decision-makers has been justified on at least two grounds: first, on the basis that the other body possesses greater democratic legitimacy—that it is elected and its members ‘face the consequences of their decisions through their accountability to the electorate’;<sup>80</sup> and secondly, on the ground that the decision-maker has greater expertise or ‘relative institutional capacity’ than the court in the area under review.<sup>81</sup>

In all of the domestic decisions outlined above in which proportionality was considered, at least some degree of latitude was afforded to legislative or executive decision-makers based on either their democratic legitimacy or their institutional competence and expertise. An example of the former can be seen in *Williamson*, where, given the legislative aim (the prevention of physical and mental harm to children), their Lordships held that Parliament was entitled to take the view that all corporal punishment at school was undesirable and unnecessary.<sup>82</sup> It was therefore to be accorded a ‘considerable degree of latitude’ in this regard.<sup>83</sup> An example of the latter can be seen in *Suryananda*, where a margin of discretion was granted to the Minister (acting on expert veterinary advice) in

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<sup>80</sup> Sandra Fredman, ‘From Deference to Democracy: The Role of Equality under the Human Rights Act 1998’ (2006) 122 *Law Quarterly Review* 53, 56. In *Kebilene* (n 78) Lord Hope said that ‘[i]n some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body ...’ (380–1).

<sup>81</sup> Fredman (n 80); Jeffrey Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity’ [2003] *Public Law* 592. The validity of the justification that deference should be afforded to decision-makers due *solely* to their accountability to an electorate has been called into question. See Hickman (n 61) 697 fn 14 for a useful summary of the authorities. It may be the case, of course, that elected officials could indeed be said to possess ‘greater expertise’ on a particular issue if it pertains to a question of public opinion or public confidence, or how best to tackle a particular social problem.

<sup>82</sup> *Williamson* (n 50) [49]–[50] (Lord Nicholls); [69] (Lord Walker); [86] (Baroness Hale). Lords Bingham and Brown agreed.

<sup>83</sup> *Ibid.*, [51]. It is arguable that this is a case in which latitude was afforded not on the basis of democratic credentials alone, but rather because MPs possessed greater *expertise* on the issue—it being a difficult one of morality and social policy.

respect of the order to slaughter Shambo, so as to prevent the spread of bTB. Thomas LJ commented that:

... as the views held by the Minister's advisers were, on the evidence, in conformity with well recognised veterinary and medical opinion, the views of those experts must be given significant weight when considering the margin of discretion to be accorded to the Minister.

... On the totality of the evidence and according a *significant margin of discretion* to the Minister, I have come therefore to the firm conclusion that the decision to slaughter is justified under Article 9(2) as proportionate in both effect and scope ...<sup>84</sup>

Similarly, in *Begum* their Lordships held that special weight should be given to the decision of the school on the balance to be struck in attempting to secure peace and harmony within the multi-cultural, multi-faith educational environment. According to Lord Bingham:

It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would ... be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.<sup>85</sup>

The judges' adjudicative task, in all of the domestic cases discussed above, was made easier by the fact that the public goods that were being pursued were relatively clear cut (eg protecting the physical and mental integrity of children, preventing the spread of an animal disease which posed a serious threat to the rural economy, and preserving social harmony in a religiously and racially diverse school). Indeed, it is arguable that the harms (or potential harms) being obviated in the cases above were sufficiently clear for the restricting measures to have been justified as proportionate, even

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<sup>84</sup> *Suryananda* (n 69) [79]–[80] (Thomas LJ) (emphasis added).

<sup>85</sup> *Begum* (n 75) [34] (Lord Bingham). See also [63]–[64] (Lord Hoffmann); [84] (Lord Scott); [97] (Baroness Hale).

*without* a significant margin of discretion being afforded by the courts to the respective decision-makers.

As a consequence, it may be that the true difficulties of adjudicating such claims have, at least to some extent, been masked. In the Article 9 cases that have come before the UK courts to date, judges have effectively been ‘let off the hook’ of having to really grapple with the question of the appropriate weight/value to be accorded to religious manifestation and practice.

In some ways the recent case of *Ghai v Newcastle City Council* provides a better illustration of the difficulties that courts encounter in adjudicating religious rights claims.<sup>86</sup> Its specific facts—in particular the unparalleled importance to the individual concerned of the religious right claimed (cremation on an outdoor funeral pyre)—and the relatively trivial harm that was sought to be prevented by its restriction (prevention of offence to those who might be aware that cremations were taking place, without witnessing them directly) mean that the issues discussed above are thrown into especially sharp relief. Our analysis of *Ghai*—and in particular the decision of Cranston J in the Administrative Court, where he dealt with the human rights issues that the Court of Appeal pointedly refrained from examining—will form the basis of the next section.

#### 4. *Ghai v Newcastle City Council*

##### A. The Facts and Decision in *Ghai v Newcastle City Council*

Davender Ghai, an orthodox Hindu, believed that in order to achieve a ‘good death’ and a successful passage to the afterlife his remains needed to be cremated on an outdoor funeral pyre. He believed that fire is the embodiment of the god Agni, and this final sacrifice to him, a *Vedic* rite known as the *anthyesthi samskara*, was vital so that his soul could be ‘propelled on a transcendental journey towards the land of the forefathers and gods’.<sup>87</sup> Anything less would have ‘devastating effects for him in the afterlife’, interrupting his cycle of birth and rebirth, possibly irreparably. However, Newcastle

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<sup>86</sup> *Ghai* (Admin) (n 1) 151.

<sup>87</sup> *Ibid*, [22].

City Council refused his request for permission to be cremated on a funeral pyre, insisting that section 2 of the Cremation Act 1902 (and associated regulations)<sup>88</sup> required that all cremations be carried out in a ‘building’ and, as a consequence, open-air funeral pyres were unlawful. Mr Ghai then sought judicial review, claiming that, if the legislation did indeed render open-air funeral pyres unlawful, this would be a breach of his Article 9 rights. The Secretary of State for Justice, the Minister responsible for cremation law, also made representations as an interested party.<sup>89</sup>

Ultimately the case ended in victory for Mr Ghai. The Court of Appeal established that cremation within a walled enclosure, open to the sunlight, would be in conformity with Ghai’s beliefs and held, as a matter of ordinary statutory interpretation, that such a structure could constitute a ‘building’ for the purposes of the Cremation Act 1902. Consequently, a funeral pyre within such an enclosure would not be unlawful after all.<sup>90</sup> As a result, the Court of Appeal avoided having to engage with issues pertaining to Article 9 and the manifestation of religious belief to any meaningful extent. However, a different approach was taken at first instance by Cranston J, who held that the law prohibited open-air funeral pyres, and considered at length the question of whether this apparent prohibition breached Mr Ghai’s Article 9 rights. Cranston J’s judgment is particularly significant because it clearly highlights the difficulties encountered by the courts in cases involving religious rights.

Adopting the methodology set out in *Williamson*, Cranston J held that *athyesthi samskara* was a manifestation of a genuine belief held in good faith.<sup>91</sup> Although certain ‘minimum thresholds relating to seriousness, coherence and conformity’ had to be satisfied,<sup>92</sup> it was ‘emphatically not for the court to embark on an inquiry as to the validity of a belief by some standard such as a religious text or

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<sup>88</sup> Crematorium (England and Wales) Regulations 2008 (SI 2008/2841).

<sup>89</sup> Indeed, it was the Secretary of State for Justice who put the arguments for the defence. See *Ghai* (Admin) (n 1) [93]–[98]. A Sikh temple and an organisation advocating natural burial methods also made representations.

<sup>90</sup> *R (Ghai) v Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2010] EWCA Civ 59, [2010] 3 WLR 737.

<sup>91</sup> *Ghai* (Admin) (n 1) [101].

<sup>92</sup> *Ibid*, [87].



whether it conforms [to] or differs from that of others professing the same religion'.<sup>93</sup> Furthermore, there had been an interference with the manifestation of the claimant's beliefs, because the Act and Regulations 'stifled his desire to have an open air pyre'.<sup>94</sup>

The judge then proceeded to consider the proportionality of the statutory curbs on open-air cremation. In this regard he accepted that it was necessary to ban open-air funeral pyres, not because they would pose a risk to public safety or the environment, but rather because many people would find it 'abhorrent that human remains were being burned in this manner'.<sup>95</sup> Relying on the European Court's judgment in *Otto Preminger Institute v Austria*,<sup>96</sup> Cranston J held that it was a legitimate aim of the legislation to prevent such offence being caused, and this was the case even though there was little prospect of anyone 'unintentionally' witnessing funeral pyres, for open-air cremations could be held in secluded places out of public sight.<sup>97</sup>

In view of the fact that this was 'difficult and delicate territory', Cranston J held that those who were democratically elected, 'with the legitimacy which election confers', were 'better placed than a court to decide where the balance [lay]'. Moreover, because this was a 'matter where opinions reasonably

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<sup>93</sup> *Ibid*, [88].

<sup>94</sup> *Ibid*, [101].

<sup>95</sup> *Ibid*, [105]. The judge also referred to other factors forming the 'backdrop' to his conclusion that the ban was proportionate: there was no blanket interference with the claimant's rights since he was still permitted to manifest his belief in other ways; the 'vast majority' of UK Hindus did not require outdoor cremation; there was no significant evidence that there had been significant cultural change in relation to the disposal of human remains since the passage of the Cremation Act 1902; and there was an absence of any European consensus on the issue of outdoor cremation. For a detailed analysis and critique of these arguments see Peter Cumper and Tom Lewis, 'Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom' (2010) 12(2) *Ecclesiastical Law Journal* 131.

<sup>96</sup> *Otto Preminger Institute v Austria* (1995) 19 EHRR 34.

<sup>97</sup> *Ghai* (Admin) (n 1) [108].

differ[ed]', the 'balance [to be] struck by elected representatives [was] entitled to be given special weight'.<sup>98</sup> As a result, Cranston J commented that the Minister was entitled to conclude:

... that the present legislative framework [was] consistent with mainstream cultural expectations of persons living in this country and secure[d] in a practical way the avoidance of likely offence and distress. That calculation [was] not one on which a judge c[ould] speak with any great expertise or authority. The resolution of the various competing interests on this difficult and delicate issue by elected representatives [was] not one a court should easily set aside. It [was] within the remit of the Secretary of State to conclude ... that a significant number of people would find both the principle and the reality of cremation by means of open air pyres to be a matter of offence.<sup>99</sup>

Thus, Cranston J held that there was no breach of Article 9 because the (supposed) legislative ban on funeral pyres was a proportionate response to the need to protect the sensibilities of the majority population.

This conclusion, and the deferential stance that led to it, sit uneasily with Cranston J's approach to the claimant's beliefs in the preliminary stages of his analysis. After all, early in his judgment, he expressly acknowledged not just that the performance of the sacrament *anthyesthi samskara* was a bona fide manifestation of the claimant's religious beliefs, but also that Mr Ghai genuinely believed that failure to perform it would have extremely grave consequences for him. Yet when it came to consideration of the proportionality of the prohibition, Cranston J readily deferred to the Government's view that it was necessary to prohibit this ritual so as to avoid possible offence to those who, whilst not personally witnessing such a funeral pyre, might object to it merely taking place. The type of offence being envisaged was thus indirect or secondary in nature since it would be caused not

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<sup>98</sup> *Ibid*, [121]. Cranston J cited *Otto Preminger* (n 96) and *Şahin* (n 77) in support of this point.

<sup>99</sup> *Ibid*, [122].

by direct sensory contact with the activity in question, but rather at the *mere thought* of such activity occurring.<sup>100</sup>

It is this disconnect—between the acknowledged existential import of the religious practice to the individual believer, and the relatively trivial and attenuated nature of the purported ‘harm’ which the supposed ban was attempting to obviate—that is particularly significant in this case. In particular, it throws into clear focus the difficulties that the courts encounter when adjudicating religious rights, and it is to this issue that we now turn.

### B. Talking the Talk, But Not Walking the Walk: ‘What is Going On?’

Writing during the outwash of the *Satanic Verses* affair, Salman Rushdie posed a question which perhaps gets close to the heart of the issue considered above: ‘If we accept that the mystic, the prophet, is sincerely undergoing some sort of transcendent experience, but we cannot believe in a supernatural world, then *what is going on?*’<sup>101</sup> To put this into the context of Davender Ghai’s case, the followers of his ‘strand of orthodox Hinduism’<sup>102</sup> believe that fire is the embodiment of the god Agni, and that their failure to perform a final sacrifice to him, by way of cremation on an outdoor funeral pyre (in strict accordance with the *Vedas*), will interrupt the cycle of birth/rebirth and harm the future course of the soul, perhaps for all eternity.<sup>103</sup> For Mr Ghai, therefore, the matter could not be more serious. Even though, from a purely rationalist perspective, such beliefs might seem at best incomprehensible, and at worst verging on the insane,<sup>104</sup> the court nevertheless accepted that he

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<sup>100</sup> There are serious difficulties of principle in restricting otherwise harmless conduct on the grounds of such secondary offence. See Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (Oxford University Press, 1985) especially 33–35.

<sup>101</sup> Salman Rushdie, ‘In Good Faith’ in Salman Rushdie, *Imaginary Homelands* (Granta, 1991) 408, cited in Bradney (n 46) (emphasis in original).

<sup>102</sup> *Ghai* (Admin) (n 1) [101].

<sup>103</sup> *Ibid.*, [22]–[23].

<sup>104</sup> Of course, such a critique could be levelled at aspects of all religions, though the beliefs do not *seem* so outlandish in those religions—especially Catholicism and Protestantism—that have seen centuries of

sincerely believed that these calamitous consequences would ensue if he were to be denied his funeral pyre: that such a denial would, for him, be *worse* than fatal. Nevertheless, the Administrative Court was still prepared to grant considerable latitude to the Government, accepting, virtually without question, the Minister's assertion that a ban on funeral pyres was necessary to prevent possible offence to the public.<sup>105</sup>

As we grapple with this state of affairs, the Rawlsian doctrine of public reason might offer guidance in helping to explain 'what is going on'. In cases involving restrictions on manifestations of religious belief, any reasons that the court may give for attributing value to a particular religious practice are unlikely to be the *same* as those given by a believer for that practice.<sup>106</sup> For example, the reason why Davender Ghai valued the rite of funeral pyre cremation was because of his belief in the necessity of a final sacrifice to the fire god, so that his soul could progress to the 'afterlife of forefathers and gods'. Yet the court could not use this as a rationale for justifying the practice, by balancing it against the state's arguments for restriction. After all, to have done so would have been to have used reasons drawn from a comprehensive world view, inaccessible and incomprehensible to others, and cutting against that core tenet of public reason: that the courts, as exemplars of public reason, must justify their decisions with publicly accessible reasons which any reasonable person can accept. Perhaps something of the sense of this profound inaccessibility of the reasons why believers value their religious practices is captured by Jürgen Habermas in his observation that the

core [of religious experience] remains as profoundly alien to discursive thought as the hermetic core of aesthetic experience, which likewise can be at best circumscribed, but not penetrated, by philosophical reflection.<sup>107</sup>

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institutionalisation and habituation within Europe. See, generally, Harold J Berman, 'The Influence of Christianity upon the Development of Law' (1959) 12 *Oklahoma Law Review* 86.

<sup>105</sup> *Ghai* (Admin) (n 1) [122].

<sup>106</sup> Bradney (n 46) 30.

<sup>107</sup> Habermas (n 8) 143.

There certainly exist generally accessible reasons that ‘any reasonable person could accept’, on the basis of which the court *might* attribute value to manifestations of religious belief. Indeed, the stock phrase employed by the European Court of Human Rights itself seeks to explain the importance of freedom of religion and belief in terms of public reason:

... freedom of thought, conscience and religion is one of the foundations of ‘democratic society’ ... one of the most vital elements that go to make up the identity of believers and their conception of the good life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries depends upon it.<sup>108</sup>

This passage is suffused with public reason: religion is important because it is a key element in the ‘identity of believers’ and ‘their conception of the good life’; and it is a vital component of the ‘pluralism indissociable from a democratic society’.<sup>109</sup> But whilst these reasons satisfy the requirements of public reason, as understood in the context of a contemporary liberal democracy, the European Court’s rhetoric fails to capture the sense of why certain tenets of religious belief, and their manifestation, are of such great importance to *particular* religious believers themselves.

Similarly, returning to *Ghai*, the Administrative Court could have afforded weight to the religious manifestation in question (balanced against state arguments for restriction), on the basis that there are clear benefits for a democratic society if it nurtures pluralism and fosters tolerance.<sup>110</sup> In addition, it would have been possible for the court to have attributed such value on the basis that human beings, as rational autonomous agents, should be accorded a determinative role in deciding how their remains are to be treated after death.<sup>111</sup> Yet, for Mr Ghai, the problem with these arguments would have been

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<sup>108</sup> *Kokkinakis* (n 59) [31].

<sup>109</sup> *Ibid.*

<sup>110</sup> See Françoise Tulken, ‘The European Convention on Human Rights: Pluralism vs Pluralism’ (2009) 36(6) *Cardozo Law Review* 2575.

<sup>111</sup> The principle of autonomy poses problems for many religious groups and, as Rawls argues, is itself a comprehensive doctrine that cannot fall within the bounds of public reason: Rawls (n 5) xlv.

that, whilst graspable from a public reason point of view, they would not have come close to communicating the immense, existential significance of the rite to *him*.<sup>112</sup> In such cases the only reasons that ‘fit the bill’ in terms of Rawlsian public reason (ie reasons that ‘any reasonable person could accept’) are of a generalised character, which are incapable of conveying the ‘particularity’ of the claimant’s belief and its subjective importance.<sup>113</sup>

By way of contrast it is at least arguable that, in respect of some *other* ECHR rights, there is a much closer correlation between the subjective reasons for them being valued by claimants invoking them, and the public reasons that courts can invoke in support of their protection. For example, it is axiomatic that freedom of political expression, protected by Article 10 of the ECHR, is vital for the maintenance of a democratic society.<sup>114</sup> This is a generally accessible ‘public reason’, which helps to explain why those exercising this right subjectively see it as being of such importance, *as well as* one of the reasons why the courts afford it a high level of protection. Thus, whilst both subjective and objective reasons can be adduced as to why freedom of political expression is unquestionably a public ‘good’, similar considerations tend not to apply to the manifestation of religion or belief.

##### *5. Religion, Belief and Public Reason: What is to be Done?*

Factors such as those discussed above help to explain the almost palpable sense of judicial unease whenever courts have to adjudicate on issues pertaining to manifestations of religious belief.<sup>115</sup> As Benjamin Berger points out, the law ‘displays a kind of anxiety and awkwardness with religion as

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<sup>112</sup> In the event none of these public reason arguments were deployed in *Ghai*.

<sup>113</sup> See Wolterstorff (n 8) 110.

<sup>114</sup> See Alexander Meiklejohn, *Free Speech and its Relation to Self Government* (Harper Brothers, 1948); *Lingens v Austria* (1986) 8 EHRR 407, [42]; *Castells v Spain* (1992) 14 EHRR 445, [42]; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 126 (Lord Steyn); *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4, [70]–[71].

<sup>115</sup> Evidence of this is the fact that the European Court of Human Rights has periodically ‘resisted applicants’ attempts to raise issues under Article 9, by instead dealing with them under other [Convention] provisions’. See Harris *et al* (n 49) 440.

practice’,<sup>116</sup> and an obvious problem associated with religious human rights claims is that the reasons for the importance of religious practices to believers seldom correspond with those that courts are able to take into account. Indeed, the task facing judges in such cases is made even harder by the fact that religious commitment is, as Robert Audi observes, ‘a complex, multi-layered fidelity to a multifarious array of texts, traditions, authoritative directives [and] religious experiences’, rather than just ‘a monolithic position of blind obedience’.<sup>117</sup> Accordingly, in the absence of clear and relevant public reasons which can be balanced against the arguments for restriction, the tendency of courts to adopt a ‘posture ... of deference’ when ruling on religious cases is certainly understandable.<sup>118</sup>

This deferential stance is, however, problematic. For it effectively reduces the level of protection afforded to those manifesting religious belief in comparison to those claiming other rights, where such deference is not traditionally shown.<sup>119</sup> Moreover, this diminution in protection is accentuated by virtue of the disconnect associated with judges saying that they accept the vital importance of faith in the lives of particular individuals, yet, in almost the very next breath, choosing to defer to the state in accepting the necessity of curbs on the manifestation of religion and belief. Of course, this is not to say that, as a general rule, there is necessarily anything wrong with the courts recognising litigants’ strongly held views, and then *not* allowing these subjective views to shape the objective contours of the right in question.<sup>120</sup> But if the discrepancy between judges’ words and actions continues to be

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<sup>116</sup> Benjamin L Berger, ‘Law’s Religion: Rendering Culture’ (2007) 45 *Osgood Hall Law Journal* 277, 303.

<sup>117</sup> Robert Audi, ‘Liberal Democracy and the Place of Religion in Politics’ in Audi and Wolterstorfe (n 8) 53.

<sup>118</sup> The phrase is taken from Frederick Schauer, ‘Judicial Review of the Devices of Democracy’ [1994] *Columbia Law Review* 1326, 1334.

<sup>119</sup> For example, in this regard one thinks of freedom of political expression (n 114 above) and freedom of association: *Moscow Branch of the Salvation Army v Russia* (2006) 44 EHRR 912, [61].

<sup>120</sup> Anti-war campaigners might hold intense subjective views about UK foreign policy, but one would not ordinarily expect this to shape the judicial articulation of the right to protest. See *Ayliffe, Swain & Percy v DPP*

replicated in future Article 9 cases, this may confirm the fears of those who complain that freedom of religion is taken less seriously than other rights that can be more easily justified on the basis of public reason.<sup>121</sup>

With claims that religious belief is under threat from ‘rampant secularism ... of the most intolerant and illiberal sort’,<sup>122</sup> the danger is that many in religious communities will come to regard ‘secular’ human rights laws as offering them little chance of success, with the adjudicative deck of cards essentially stacked against them from the outset. At best this could lead to increasing disenchantment with the legal process—and at worst might even provoke anger in faith communities, ultimately leading to ‘civil unrest’.<sup>123</sup>

In spite of the apparent intractability of this problem, we contend that the solution is deceptively straightforward. It should certainly *not* be for courts to start drawing on reasons from comprehensive doctrines, as perhaps intimated by Lord Carey, which would undermine long held liberal notions of religious freedom. Instead, a preferable way forward would be for the courts, when adjudicating religious rights cases, to afford less deference to Government and Parliament. This would make it possible for judges to engage in a meaningful analysis of the proportionality of the restrictive measure(s) at issue, and enable them to facilitate the ‘striking of a fair balance between the rights of

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[2005] EWHC 684 (Admin), [2005] 3 All ER 330, where anti-Iraq war protestors unsuccessfully claimed that their ‘sincere’ motives should constitute a defence in relation to charges of aggravated trespass.

<sup>121</sup> See eg David Batty, ‘Rowan Williams Raps Government for Treating Religion as a “Problem”’ *The Guardian*, 12 December 2009, [www.guardian.co.uk/uk/2009/dec/12/rowan-williams-government-religion-problem](http://www.guardian.co.uk/uk/2009/dec/12/rowan-williams-government-religion-problem) (accessed 30 June 2011).

<sup>122</sup> Lord Patten, *Hansard* HL col 679 (18 March 2010). See also Sam Jones, John Hooper and Tom, Kingston, ‘Pope Benedict XVI Goes to War with “Atheist Extremism”’ *The Guardian*, 16 September 2010, [www.guardian.co.uk/world/2010/sep/16/pope-benedict-xvi-atheist-extremism](http://www.guardian.co.uk/world/2010/sep/16/pope-benedict-xvi-atheist-extremism) (accessed 30 June 2011).

<sup>123</sup> Such a possibility has been raised by Lord Carey (n 15) [17]. This argument is of course open to the rejoinder that the mere fact that certain interested parties complain more loudly or articulately than others in different spheres of life should not, in itself, mean that they are given special treatment.



the individual and the interests of the community'.<sup>124</sup> Such an approach would make it possible for the *particular* importance of the religious manifestation to the individual concerned to be given weight at this stage rather than (as has hitherto often been the case) being simply acknowledged at an earlier point in the analysis, only to be subsequently discarded.<sup>125</sup> Indeed, the House of Lords in *Huang*, it will be recalled, stressed not only that a proper proportionality requires the 'striking of a fair balance' but also that the 'severity and consequences of the interference will call for careful assessment at this stage'.<sup>126</sup> Clearly some judicial recognition of the subjectively felt impact of the interference—that is to say, some acknowledgement of its 'severity and consequences' at 'this stage' in the analysis—would be facilitated by a diminution of the latitude accorded to other decision-makers.

If this 'less deferential' approach were to be adopted, the state could still legitimately restrict harmful practices based upon religion or belief. In cases where there were strong arguments in favour of the restriction of religious practice, judicial abstinence from the use of deference would (seemingly) make little difference to the outcome. For example, it is unlikely that any diminution in the margin of discretion afforded to decision-makers would have altered the result in *Williamson*, where the religious beliefs of parents and teachers regarding the use corporal punishment were weighed against the rights of pupils to be protected from physical violence.<sup>127</sup> Indeed, a straightforward balancing of the religious rights of Christian parents/teachers against the rights of children to physical and mental integrity could have led to this result without the court having to adopt a deferential stance. Similarly in *Suryananda*—albeit perhaps rather less clearly so, given the possibilities of quarantining the bullock and the claimant's belief that the animal's slaughter would be the equivalent of taking a

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<sup>124</sup> *Huang* (n 65) [19] (Lord Bingham giving the Joint Opinion of the Judicial Committee).

<sup>125</sup> For the debate over the use of judicial deference generally, see TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 *Cambridge Law Journal* 671, 690–2; Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222; TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 *Law Quarterly Review* 96.

<sup>126</sup> *Huang* (n 65) [19].

<sup>127</sup> Which is itself provided for in Arts 3 and 8 ECHR: *Williamson* (n 50) [86] (Baroness Hale).

human life—the need to prevent the spread of bTB in order to protect the important goods of public health, the rural economy and animal welfare could (arguably) have constituted sufficiently powerful grounds to have justified slaughtering the sacred bull without any need for the court to have afforded ‘a significant margin of discretion to the Minister’ concerned.<sup>128</sup>

In *Ghai* the Administrative Court’s deferential approach resulted, as we have seen, in an extremely tenuous state aim—the prevention of offence to those who would not witness funeral pyres directly, but might be aware that they were taking place—being allowed to override the crucial manifestation of the claimant’s deeply held religious belief. In contrast, if the courts were self-consciously to reduce the latitude afforded, this would create space for an assessment of the ‘severity and consequences’ of the interference for the particular believer. This, necessarily, would require some judicial assessment of the subjective importance of the religious manifestation, thereby affording it greater relative weight in the balance at the proportionality stage of the analysis. This approach, we argue, would have at least two advantages. First, it would stop short of the court undermining the principles of public reason, for the court would be neither affirming the truth of, nor resorting to, a comprehensive doctrine. Secondly, for religious litigants such as Davender Ghai, there would be the reassurance that the frequent judicial comments about the sincerity and importance of their beliefs amounted to more than empty rhetoric. Such a development would also be particularly welcome on the basis that it might assuage the fears of the representatives of several religious organisations who have, in recent years, expressed dissatisfaction with the nation’s legal process and its protection of religious belief.<sup>129</sup>

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<sup>128</sup> *Suryananda* (n 69) [80] (Thomas LJ). Indeed the other judges, Pill LJ and Lloyd LJ, did not expressly afford such a margin of discretion.

<sup>129</sup> See eg Riazat Butt, ‘Your Equality Laws are Unjust, Pope Tells UK Before Visit’ *The Guardian*, 2 February 2010, [www.guardian.co.uk/world/2010/feb/02/equality-laws-unjust-pope-uk](http://www.guardian.co.uk/world/2010/feb/02/equality-laws-unjust-pope-uk) (accessed 30 June 2011); Greg Hurst, ‘Catholics Refuse to Accept Gay Adoption Laws’ *The Times*, 23 January 2007, [www.timesonline.co.uk/tol/news/politics/article1295482.ece](http://www.timesonline.co.uk/tol/news/politics/article1295482.ece) (accessed 30 June 2011); ‘Reaction to the Supreme Court’s Ruling on the JFS Case’, Jewish Board of Deputies, 16 December 2009, [www.boardofdeputies.org.uk/page.php/Reaction\\_to\\_the\\_Supreme\\_Court’s\\_Ruling\\_on\\_the\\_JFS\\_Case/331/103/3](http://www.boardofdeputies.org.uk/page.php/Reaction_to_the_Supreme_Court’s_Ruling_on_the_JFS_Case/331/103/3) (accessed 30 June 2011).

## 6. Conclusion

The question as to whether UK law affords proper respect to religious belief provokes widely varying opinions,<sup>130</sup> but what seems beyond dispute is that the challenges facing British judges in this area are immense. The Britain of half a century ago—a largely mono-cultural, white, ‘Christian’ country—has today been transformed into one of the most cosmopolitan and secular societies in Europe.<sup>131</sup> As a result Britain’s judges have the invidious task of ensuring that the law affords proper respect to a variety of faiths and beliefs in what is a culturally and religiously diverse nation. Mindful of such considerations, the aim of this article has been to suggest that if judges are to be seen as taking the human right to freedom of religion and belief seriously, they should refrain from granting an excessive margin of discretion to executive and legislative decision-makers when considering claims submitted under Article 9.

The fact that there has long been an ‘uneasy relationship’ between human rights norms and religious values doubtlessly makes the task of adjudication harder in this most controversial of areas.<sup>132</sup> Indeed, with Britain’s judges having to resolve an increasing number of ever more complex disputes with a religious dimension,<sup>133</sup> this article has only been able to skim the surface of what are very deep waters. In this regard it is perhaps apposite to turn to Jürgen Habermas, who, commenting on the

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<sup>130</sup> For example, one need only compare the campaigns and views of groups such as the National Secular Society ([www.secularism.org.uk](http://www.secularism.org.uk)) and the Christian Institute ([www.christian.org.uk](http://www.christian.org.uk)).

<sup>131</sup> See eg Cole Moreton, *Is God Still an Englishman? How we Lost our Faith (But Found New Soul)* (Little, Brown, 2010).

<sup>132</sup> See Abdullahi An-Na’im *et al* (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (Eerdmans, 1995).

<sup>133</sup> See eg *HH Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group and another* [2010] EWHC 1294 (QB) (17 May 2010), where the Court rejected the submission that allegations by a journalist against a Sikh religious figure constituted libel on the basis that the case raised issues which a secular court did not have the jurisdictional competence to decide.

doctrine of public reason as applied to citizens, provides us with a hint of a compass bearing on these treacherous seas:

... the recognition by secular citizens that they live in a postsecular society that is also *epistemically attuned* to the continued existence of religious communities is a consequence of a change in mentality that is no less cognitively exacting than the adaptation of religious consciousness to the challenges of an environment that is becoming progressively more secular.<sup>134</sup>

Such epistemic tuning, we emphatically reiterate, must not be effected by the courts directly adopting reasons drawn from comprehensive doctrines. But it could be accomplished if judges were to show less deference to the state in religious rights cases, so that applicants find themselves on, and crucially *believe* themselves to be on, a level playing field.

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<sup>134</sup> Habermas (n 8) 139 (emphasis in original).