

Connected Communities

Philosophy of Religion and Religious Communities

Defining Beliefs and Symbols

Daniel Whistler and Daniel J. Hill



Background

Executive Summary

- This scoping study addresses the question 'when, if ever, is it acceptable to prohibit the use of religious symbols?'.
- The present discussion paper summarizes the key findings of our final report, which itself stems from an extensive review of the literature in the fields of philosophy, religion, and the case law of the highest court of appeal in the UK, the European Court (and Commission) of Human Rights.
- The paper also reports the anxieties and recommendations of religious and legal practitioners concerning research in this area.
- The study advances two substantive proposals in the legal field: (a) that the jurisprudence of the European Court of Human Rights has recently exhibited what we call 'a practical turn', and (b) that the suggestion by certain leading legal scholars that actions count as manifestations of beliefs only if they pass the so-called 'necessity test' is nothing short of a myth.
- In partnership with the practitioners involved in the project, we make a number of suggestions concerning future avenues of research.

Researchers and Project Partners

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A list of informal partners follows in Appendix 1.

Key words

Discrimination
Symbolism
Practice
Manifestation
Secularisation
Religion

Philosophy of Religion and Religious Communities

Introduction and Rationale

The scoping study, *Philosophy of Religion and Religious Communities: Defining Beliefs and Symbols*, based in the Department of Philosophy at the University of Liverpool, consists in a review of the possible contributions philosophy of religion can make to debates surrounding religious discrimination. The project took place between February and October 2012.

The question 'when is it acceptable to prohibit the use of religious symbols?' has recently become an extremely pertinent one for communities of all faiths in the UK. Indeed, in the past few years, there have been several high-profile cases in the UK alleging discrimination against the wearing of religious symbols. These cases have aroused strong passions and much media interest. We maintain that a painstaking philosophical analysis, informed by the actual views held in faith communities themselves, would help the debate immensely. Therefore, we have investigated the conceptual status of specific religious symbols, such as crucifixes and crosses (*Eweida v British Airways*; *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*), niqabs (*Azmi v Kirklees MBC*), karas (*Watkins-Singh v Aberdare Girls' High School Governors*) and chastity rings (*Playfoot v Millais School Governing Body*). The theoretical questions at stake are: are these symbols a mandatory means of manifesting core beliefs or merely a personal choice? And what possibilities are there in between these two? What might it mean for symbols to be 'intimately linked' to underlying beliefs or of 'exceptional importance' to the religious believer? The Scoping Study considered, in particular, the role played by Article 9 of the

European Convention of Human Rights in protecting freedom of religion and belief.

Methodology and Research Activities

The study consisted of six elements: a review of the relevant cases in UK and European law; a survey of the pertinent literature in law, religious studies and philosophy; a collaborative workshop involving religious and legal practitioners; further opportunities for practitioner input; a fact-finding trip to observe the oral argument in the cases of *Ladele*, *McFarlane*, *Eweida* and *Chaplin* at the European Court of Human Rights; and a final report presenting our findings.

The case review formed the backbone of our project. We considered 80 cases pertaining to Article 9 of the European Convention of Human Rights as well as domestic religious-discrimination legislation, the most relevant of which are listed in Appendix 2. We also kept abreast of the academic commentary on these cases and discussed them with the religious and legal practitioners involved. In particular, we spoke to the two applicants in the cases most directly related to the report's scope (the religious-symbolism cases of *Eweida* and *Chaplin*) as well as their legal representatives. This afforded us an overview of the developments and trends in the Strasbourg and UK jurisprudence on these issues.

At the same time, we also surveyed the recent academic debates surrounding religious discrimination and particularly the place of symbolism therein. Our main focus was of course the philosophical literature both directly and indirectly concerned with cases alleging the unjustified restriction of the use of religious

symbols. However, to ensure our study was not parochial in nature, we also considered significant contributions from other traditions and disciplines, such as legal theory and religious studies. The list of references below cites the most significant literature from this perspective.

This two-stage preliminary scoping bore fruit in a 15, 000 word report that was circulated in draft to all those who were invited to the workshop. This draft report laid out questions for consideration at the May collaborative workshop and also provided a narrative situating discussion in the framework of the broader philosophical and legal areas outlined above.

Such interdisciplinarity was reinforced by the participation in our collaborative workshop of leading scholars from the aforementioned fields. The two-day workshop's role was to bring together academics, legal practitioners and faith leaders as a means of facilitating dialogue and awareness of differing perspectives. In terms of furthering the scoping study itself, the workshop also served the purpose of allowing these groups of research users to contribute interactively through discussion of the draft report. The list of participants and programme are provided respectively in appendices 1 and 3 at the end of this paper.

Contributions both from those practitioners who were able to attend the workshop and from some who had not been so able were then incorporated into a final report. The number of recipients of the report exceeded 125 in total, including members of Parliament and national media. Contributions to the final report were also solicited through accessible posts detailing our progress on the departmental blog (philosophyinthecity.info).

As part of the final stages of our research, we undertook a fact-finding trip to observe the oral argument in the cases of *Ladele*, *McFarlane*, *Eweida* and *Chaplin* at the European Court of Human Rights. It afforded us the unique opportunity to hear first-hand from the applicants their own views on the importance of their religious symbols to them and to discuss with their legal representatives the legal issues surrounding the cases.

The major output of the scoping study was therefore an 80-page report (Whistler and Hill 2012) detailing possible philosophical understandings of the jurisprudence of the European Court and the UK concerning religious discrimination. We hope that this report stands as an example of the kind of contribution philosophers of religion can make to debates in this area.

Key Findings of our Report: Emerging Trends

The following trends summarised here are fully developed with supporting documentation in Whistler and Hill 2012. In particular, we have focused on cases brought to the European Court of Human Rights alleging violation of Article 9, and we identify in our thorough examination of the literature two major features of the European Court's treatment of cases of religious discrimination:

1. We contend that since the case of *Leyla Şahin v Turkey* (1995, 1997), Strasbourg jurisprudence has displayed what we call 'the practical turn'. This we analyse as the turn away from seeing actions *solely* in the light of the antecedent beliefs that they manifest to seeing actions and the practices that they compose in their own right *alongside* beliefs. We see such a turn

manifest in *Dogru* (2009), *Jakóbski* (2010) and *Kovačkovs* (2012). Our work here goes further than the leading interpretation of this material in legal theory by Mark Hill and Russell Sandberg, who identify a general shift in jurisprudence without putting their finger on the precise catalyst for change (Hill and Sandberg 2007; Hill, Sandberg and Doe 2011; Sandberg 2011). We discuss three ways of articulating this catalyst:

- i) First, we draw attention to the Government's 'Observations' (Foreign and Commonwealth Office 2012) on the *Ladele*, *McFarlane*, *Eweida* and *Chaplin* cases which is, we suggest, the first document to reconsider (however partially) questions of religious symbolism in the light of this practical turn. The Government argues that the notion of the 'generally recognised form' of practices should take centre stage in order to make actions as important as beliefs in considerations of Article 9. This use of 'generally recognised form' has a curious history in Strasbourg jurisprudence: it was not until 2001 in *Zaoui v Switzerland* that the European Court of Human Rights employs it itself for the first time. Moreover, there are a number of problems with giving this concept such prominence in deliberation on Article 9, including the protection of emerging and lesser-known religions.
- ii) Secondly, we bring to bear philosophical literature on the concept of the symbol in order to narrate the development of a theory of symbolism that pays attention to uses of the symbol in their own right as well as to how they refer to beliefs. In particular, we survey the work of

Paul Ricoeur (1974), Tzvetan Todorov (1982, 1983), Paul Tillich (1987) and Karl Rahner (1996) to provide a multifaceted understanding of the symbol which can account for the theoretical underpinnings of the practical turn. We contextualise this understanding in terms of the history of the development of the symbol, paying especial attention to German theorists of the *Goethezeit* such as Kant, Schelling and Goethe himself.

- iii) A third possible understanding of the practical turn would be to see it as a move away from looking at actions as they relate to high-level theoretical belief systems, (such as religions) in favour of looking at them as expressions of individual, low-level practical beliefs (such as the belief that one ought to, or it would be good to, wear a religious symbol of a particular kind). Such is the beginning of a philosophical analysis of the inescapable relation between use of symbol and belief latent in the text of Article 9 itself. We believe that this is another example of what philosophy has to offer to the study of contemporary religious practice.
2. We also consider the much-vaunted 'necessity test' that Carolyn Evans (2001) and other legal theorists (Cumper 2001, Martinez-Torrón 2001) have argued governs Strasbourg jurisprudence: an action counts as a manifestation of a belief if and only if its performance is obligated by that belief. We have found that *pace* Evans no Strasbourg case supports her understanding of the necessity test (not even *X v United Kingdom* (1974), *X v Austria* (1981), *D v France* (1983) or *Khan v United Kingdom* (1986)) and some recent

cases seem to go against it (*Şahin* (1995, 1997), *Jakóbski* (2010), *Kovačkovs* (2012)). Therefore, when it comes to the issue of manifestation we maintain that the necessity test is a myth; it is employed only as a test for interference. This is a key finding that is not to be found in any of the existing literature.

Practitioner Concerns: Gaps in Current Research

In our collaboration with religious practitioners and legal practitioners, we together identified a number of areas around which there was widespread anxiety:

1. First, it was felt that judges and the public at large lack the religious literacy necessary to understand the role of symbols in faith; in particular, it was a common worry that religious symbols were understood as merely optional and secondary ways of displaying what one wanted to believe.
2. A further anxiety concerned the position of religious employees. That is, the presumption seemed to be, it was argued, that the employer could restrict religious symbols at will, putting the onus on the employee to make a case for special exemption.
3. Another worry debated at length at the workshop was whether many of these cases concerning conflict over religious symbolism could have been better solved outside the law through non-legal arbitration and appeals to common sense.
4. The creation of a hierarchy of rights was also central to much discussion. Some religious groups fear that religion is

constantly being trumped by other rights, whereas the National Secular Society and other non-religious groups fear, by contrast, that religion is gradually emerging at the top of such a hierarchy.

5. Finally, there was some concern expressed over the public ownership of legal judgments in this area. That is, it was felt that the *European Convention of Human Rights* and the UK *Equality Act* might have been leading to overcomplicated judgments that excluded the general public who therefore felt alienated from them.

A key result of the scoping study was that practitioners – both religious and legal – were adamant that it was on these kinds of issues that research in the area needed to be focused – and that despite the significant investment of the research councils in the *Religion and Society* research programme and the investment of the *Equality and Human Rights Commission* in this area (particularly Donald *et al* 2012) further focused work was needed.

Recommendations for Future Research

In accordance with the findings our study makes, the gaps in current research it identifies and the practitioner voices it has transmitted, we recommend that research be urgently extended in the following directions:

1. While the report stemming from this study offers a thorough and comprehensive analysis of Strasbourg jurisprudence in relation to the manifestation test when it comes to symbols, there is scope for extending this to:
 - i) Judgments of the domestic courts at various levels

- ii) Other domestic legislation complementary to the Human Rights Act and the European Convention of Human Rights, such as anti-discrimination legislation
 - iii) The manifestation relation with respect to religious rights more generally
2. There is also a felt need for a detailed examination of the question of interference and the specific-situation rule (that is, whether one's ability to get another job, go to another school etc means that one's religious freedom remains inviolate).
 3. The practical turn has meant that more emphasis has been placed on Article 9.2 and questions concerning justification; therefore, further work is required on this topic, which in view of the rhetoric of competing rights is of great public significance.
 4. It might also be illuminating to compare Strasbourg jurisprudence with human rights jurisprudence more generally, such as that of the United Nations and of other jurisdictions (especially the United States, Canada, and South Africa).
 5. More specific attention is required to the contributions and challenges of the practices of specific religious traditions, such as the various strands of Islam and Buddhism, to work on religious discrimination.

References and external links

Final report stemming from the study

Whistler, Daniel and Daniel J. Hill. *Religious Discrimination and Symbolism: A Philosophical Perspective*. Liverpool Research Archive, 2012. <http://research-archive.liv.ac.uk/8053/>

Other literature consulted

For a full list of literature consulted, see the bibliography to Hill and Whistler 2012. What follows is the literature cited in this discussion paper:

Cumper, Peter. 'The Public Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century.' In Richard O'Dair and Andrew Lewis (eds), *Law and Religion*. Oxford: Oxford University Press, 2001. 311-28.

Donald, Alice et al. *Religion or Belief, Equalities and Human Rights in England and Wales*. Equality and Human Rights Commission Research Report 84. www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf

Evans, Carolyn. *Freedom of Religion under the European Convention of Human Rights*. Oxford: Oxford University Press, 2001.

Foreign and Commonwealth Office. 'Observations on *Eweida, Chaplin, McFarlane and Ladele*.' 14/10/2011.

Hill, Mark and Russell Sandberg. 'Is Nothing Sacred? Clashing Symbols in a Secular World.' *Public Law* (2007, Aut): 488-506.

Hill, Mark, Russell Sandberg and Norman Doe. *Religion and Law in the United Kingdom*. Alphen: Kluwer, 2011.

Martinez-Torron, Javier. 'The European Court of Human Rights and Religion.' In Richard O'Dair and Andrew Lewis (eds), *Law and Religion*. Oxford: Oxford University Press, 2001. 185-203.

Rahner, Karl. 'The Theology of the Symbol.' In *Theological Investigations* vol. 4, translated by Kevin Smyth. London: Darton, 1966. 221-52.

Ricoeur, Paul. *The Conflict of Interpretations*. Translated by Don Ihde. Evanston: Northwestern University Press, 1974.

Tillich, Paul. 'The Religious Symbol.' In *Main Works* vol. 4, edited by John Clayton. New York: De Gruyter, 1987. 253-69.

Todorov, Tzvetan. *Theories of the Symbol*. Translated by Catherine Porter. Ithaca: Cornell University Press, 1982.

Todorov, Tzvetan. *Symbol and Interpretation*. Translated by Catherine Porter. London: Routledge, 1983.

Appendices

Appendix 1: List of Partners Consulted

Groups

Christian Concern; Edge Lane Hindu Temple; Education Islam; Evangelical Alliance; Faith Express, University of Liverpool; Liverpool Muslim Society; National Secular Society; Premier Christian Radio; Roman-Catholic Cathedral, Liverpool; Zoroastrians of the North-West.

Individuals

Adel Ahmed; Burjor Avari; Zarin Avari; Christopher Baker; Andrew Brower Latz; Jenny Bunker; Harry Bunting; Clare Carlisle; Rebecca Catto; Shirley Chaplin; Stephen Clark; Charles Clarke; Frank Cramner; Andrew Crompton; Sarah Egan; Richard Gaskin; Matthew Gibson; Elaine Graham; Simon Hailwood; James Harding; Paul Helm; Chris Hewson; Mark Hill; Gillian Howie; Patrick Kelly; Christina Kennedy; Peter Kennedy; Ram Krishan; John Langlois; Iain Leigh; Harry Lesser; Gary McFarlane; Dominic McGoldrick; David McIlroy; Stephen McLeod; Ian McParland; Katharine Sarah Moody; Michael Nazir-Ali; Eleanor Nesbitt; David Perfect; John Pugh; Julian Rivers; Abdul B Shaikh; N. Sharma; Elizabeth Staunton; Thomas Staunton; Kaushar Tai; Roger Trigg; Lucy Vickers; Thomas Ward; Anne Marie Waters; Daniel Webster; Paul Weller; Johannes Zachhuber.

Appendix 2: Significant Cases

For a full list of significant cases, see the appendix to Hill and Whistler 2012. The following cases are referred to in this discussion paper:

X v United Kingdom [1974] App. 5442/72.

Arrowsmith v United Kingdom [1981] 3 E.H.R.R. 218.

X v Austria [1981] App. 8652/79.

D v France [1983] App. 10180/82.

A v United Kingdom [1984] 6 E.H.R.R. CD558.

Khan v United Kingdom [1986] App. 111579/85.

Zaoui v Switzerland [2001] App. 41615/98.

Şahin v Turkey [2005] 44 E.H.R.R. 5.

R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15.

Playfoot v Millais School Governing Body [2007] H.R.L.R. 34.

R (on the application of X) v Headteachers and Governors of Y School [2007] EWHC 298.

Şahin v Turkey [2007] 44 E.H.R.R. 5, 120.

Eweida v British Airways plc [2008] WL 4975445.

Watkins-Singh v Aberdare Girls' High School Governors [2008] E.W.H.C. 1865.

Dogru v France [2009] 49 E.H.R.R. 8.

Chaplin v Royal Devon and Exeter NHS Foundation Trust [2010] ET1702886/2009.

Eweida v British Airways plc [2010] EWCA Civ 80.

Jakóbski v Poland [2010] 30 BHRC 417.

Kovaļkova v Latvia [2012] App. 35021/05.

Appendix 3: Collaborative Workshop Programme

Friday 25th May

- 16.30** Dr Daniel Whistler and Dr Daniel J. Hill (Lecturers in Philosophy, University of Liverpool)
- 16.45** The Rt Rev. Michael Nazir-Ali (Director, OXTRAD; former Bishop of Rochester)
- 17.40** Prof. Roger Trigg (Director, Centre for the Study of Religion in Public Life; Senior Research Fellow, Kellogg College, Oxford; Emeritus Professor, University of Warwick)
- 18.25** The Rt Hon. Prof. Charles Clarke (Visiting Professor, University of East Anglia and University of Lancaster; former Home Secretary and Secretary of State for Education)
- 13.30** Prof. Dominic McGoldrick (Professor of International Human Rights Law, University of Nottingham) and Matthew Gibson (CSET Lecturer, Liverpool Law School)
- 14.15** The Most Rev. Patrick Kelly, KC*HS (Roman-Catholic Archbishop of Liverpool)
- 14.35** Anne Marie Waters (National Secular Society)

Saturday 26th May

- 10.00** Prof. Mark Hill, QC (Honorary Professor of Law, Centre for Law and Religion, Cardiff University; Recorder, Midland Circuit; Queen's Counsel, Francis Taylor Building; Chancellor, Diocese of Europe; Chancellor, Diocese of Chichester; President, European Consortium for Church and State Research; Editor, *Ecclesiastical Law Journal*)
- 10.45** Prof. Paul Weller (Professor of Inter-Religious Relations, University of Derby)
- 12.00** Prof. Eleanor Nesbitt (Professor Emerita, Religion and Education Research Unit, University of Warwick)
- 15.30** Harry Lesser (Honorary Research Fellow in Philosophy, University of Manchester; Representative for the University of Manchester on the Greater-Manchester Jewish Representative Council.)
- 15.50** Dr Adel Ahmed (Senior Lecturer in Islamic Finance, Liverpool Hope University; President, Liverpool Muslim Society)
- 16.10** Pandit N.P. Sharma (Priest, Shri Radha Krishna Temple, Liverpool)
- 16.30** Burjor Avari MBE (Visiting lecturer, Department of History and Economic History, Manchester Metropolitan University; Member of the Zoroastrians of the North-West)



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