

The Right to Freedom of Thought in the United Kingdom

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Abstract

The United Kingdom is bound by international obligations to uphold “the right to freedom of thought, conscience and religion” and domestic legislation reflects those obligations. The courts have held that to be protected, a belief must genuine, must not be a mere opinion, must attain a certain level of cogency, seriousness and importance and must be “worthy of respect in a democratic society”. How this plays out, however, in areas such as education, children's rights and employment is highly sensitive to the specific facts of each case – which are often inconsistent, as the article explains. Much of the article examines the decisions of the courts in individual cases. It concludes with a discussion of the possible trajectory of domestic political debate at a time when there have been repeated calls for a “British Bill of Rights” and the Westminster Government is questioning more generally the constitutional role of the judiciary.

Keywords

freedom of thought – freedom of religion – belief – Equality Act 2010

1 Introduction: “Thought, “Conscience” and “Religion”¹

All three of the principal international human rights instruments by which the United Kingdom is currently bound guarantee “the right to freedom of thought, conscience and religion” within the UN Universal Declaration of Human Rights in Article 18, the European Convention on Human Rights in Article 9² and the International Covenant on Civil and Political Rights in Article 18.³ The traditional stance of the courts of England and Wales, however, has been one of “freedom under the law” rather than positive rights. Lord Donaldson MR encapsulated that position in *Attorney General v. Guardian Newspapers Ltd (No.2)* when he stated that “every citizen has a right to do what he likes, unless restrained by the common law ... or by statute”⁴ – and, historically, that principle probably held true equally for Northern Ireland and Scotland.

The ECHR entered into force on 3 September 1953, but the Court was not established until a sufficient number of states parties had agreed to accept its jurisdiction. It came into being on 21 January 1959, sat for the first time on 23 February and delivered its first judgment in November 1960⁵ – but the UK did not accept its jurisdiction until 1966.⁶ At the same time, the UK accepted the right of individual petition.⁷ As a result of the growing significance of human rights instruments in general and of the ECHR in particular, the last thirty years have seen a gradual shift away from what might be termed a negative, non-interference approach towards a positive, rights-based one.

Further, the coupling in all three instruments of “freedom of thought” with “freedom of conscience” and “freedom of religion” reflects the reality that the day-to-day issues that come before the courts are about manifestation – the

1 My thanks to Professor Peter Edge, Professor Russell Sandberg and Dr Jessica Giles for their helpful comments on this article in draft, but they bear no responsibility for the final result.

2 For a recent summary of the Strasbourg jurisprudence on Article 9, see Council of Europe. 2019. *Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion*. Council of Europe. 2019.

3 Under the terms of the European Union (Withdrawal Agreement) Act 2020, the UK ceased to be bound by the EU Charter of Fundamental Rights – which guarantees the right in Article 10 – on ‘implementation period completion day’: 31 December 2020 at 11.00 pm GMT.

4 [1990] 1 AC 109 at 178.

5 *Lawless v. Ireland* [1960] ECHR 1, (1979) 1 EHRR 1.

6 That said, Italy did not accept the jurisdiction of the Court until 1973 and France until 1981.

7 Initially, to the European Commission of Human Rights, a body which sifted applications to the Court: it was abolished in 1998 by Protocol 11 to the Convention. For a typology of the ECHR’s approach to religion, see I. D. Leigh, ‘The European Court of Human Rights and religious neutrality’, in G. Da Costa et al (eds) *Religion in a Liberal State* (Cambridge: CUP 2013) 38.

forum externum – rather than about what goes on inside people's heads. As Chief Justice Bryan of the Court of Common Pleas famously declared in 1477, "It is common learning that the thought of man is not triable, for the Devil knows not the thought of man"⁸ – but the behaviour resulting from those thoughts may manifest itself as a religious claim or a claim of conscience as well as a purely philosophical one.

The Equality and Human Rights Commission points out, very properly, that "There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief",⁹ and issues of manifestation may engage freedom of expression under Article 10 ECHR as much as the right to manifest under Article 9. But rolling up "thought" with "conscience" and "religion" brings its own problems. Not every religious claim is based on "thought" or even on "conscience". In *Sharpe*,¹⁰ for example, the point at issue was not the theological views of the claimant but whether, as rector of a Church of England parish, he could be regarded as an "employee" or "worker" within the terms of s.230 of the Employment Rights Act 1996 and the extended definition in s.43K(1) for the purpose of "whistle-blowing" claims¹¹ and whether, therefore, his resignation had in reality constituted constructive dismissal. The case undoubtedly engaged "religion", but not "thought" or "conscience" – at least in the Article 9 sense.

Equally, not every claim involving "thought", or even "conscience", is based on religion. It is self-evident that adherence to a religion cannot be a necessary prerequisite either for holding a particular philosophical belief or for maintaining a particular moral stance. The obvious examples are abortion and assisted dying, on which it is equally possible for an atheist and a religious believer to hold strong views, *whether in favour or against*.¹² It is no doubt for that reason that s.4 of the Abortion Act 1967 provides that "no person shall be under any duty [...] to participate in any treatment authorised by this Act to which he has a conscientious objection", *with no mention of religion whatsoever*. As Lord

8 *Year Book* 17 Ed. IV 2: 'Comen erudition est l'entent d'un home ne sert trie, car le Diable n'ad conusance de l'entent de l'home', quoted in R. J. Schoeck, 'The two laws in Thomas More: a preliminary reading of the canon and common laws in his career and writings' *The Catholic Lawyer* 16 (4) (1970) 277 at 277.

9 Equality and Human Rights Commission, *Employment Statutory Code of Practice* (London, Equality and Human Rights Commission, 2011) 2.61.

10 *Sharpe v. Bishop of Worcester* [2015] EWCA Civ 399.

11 *ibid.* para 3.

12 See, for example, G. Chipeur and R. Clarke, 'The Art of Living with Ourselves: What Does the Law have to do with Conscience?', in: J. Adenitire (ed) *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Oxford: Hart Publishing, 2019) 157.

Nicholls put in *Williamson*,¹³ which held that the statutory ban on corporal punishment in schools prevented parents who believed as Christians in “spare the rod, spoil the child”¹⁴ from allowing their children’s teachers to beat them:

“In the present case it does not matter whether the claimants’ beliefs regarding the corporal punishment of children are categorised as religious. Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom.”¹⁵

The Grand Chamber of the European Court of Human Rights made much the same point in *Bayatyan*,¹⁶ a judgment about the legality of obligatory military service:

“The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of 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 on it.”¹⁷

So, as we shall see, some of the philosophical issues that have come before the courts, especially where they have involved employment claims, have had no overt relationship with “religion” whatsoever. That said, however, though much of what follows is an attempt to explore the development of the rights-based approach to freedom of *thought*, issues of conscience and religion frequently intrude.

13 *R (Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

14 Proverbs 13:24: ‘He that spareth his rod hateth his son: But he who loves him chasteneth him betimes’.

15 *ibid.* para 24.

16 *Bayatyan v. Armenia* [2011] ECHR 1095.

17 *ibid.* para 118 (emphasis added).

2 Domestic Legislation on Human Rights and Discrimination

In 1997, the newly-elected Labour Government declared in a White Paper that “the time has come to enable people to enforce their Convention rights against the State in the British [*sic*] courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights”.¹⁸ It also argued that such a move would benefit Strasbourg jurisprudence by helping to influence “the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom” and would lead to “closer scrutiny of the human rights implications of new legislation and new policies” by “British courts”.¹⁹

The Long Title of the resulting Human Rights Act 1998 describes it as “An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights...” and it does so in various ways. S.1 enumerates the rights under the Convention, and the Articles themselves are set out in Schedule 1 to the Act. S.2 obliges courts or tribunals “determining a question which has arisen in connection with a Convention right” to “take into account” any relevant Strasbourg jurisprudence.²⁰ S.3 requires that “primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. Under the terms of s.4, a superior court²¹ may make a “declaration of incompatibility” if it is satisfied that a statutory provision is incompatible with a Convention right. Finally, s.6(1) makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right” – though with some reservations in relation to acts of public authorities carried out in pursuance of primary legislation.

As to religion and belief specifically, the Fair Employment and Treatment (Northern Ireland) Order 1998, as amended by the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003, had made direct and indirect discrimination and victimisation on the grounds of religious belief *or of political opinion* unlawful in that jurisdiction. In Great Britain, however, there was no specific protection against discrimination in

18 Secretary of State for the Home Department, *Cm 3782: Rights Brought Home: The Human Rights Bill* (London: The Stationery Office, 1977) 1.18.

19 *ibid.*

20 In line with the assertion in *Rights Brought Home* at 2.4 that ‘It is our intention that people or organisations should be able to argue that their Convention rights have been infringed by a public authority in our courts at any level.

21 (n 18) 1.18.

the workplace on grounds of religion or belief until the EU Equal Treatment Directive²² was transposed into English and Scots law by the Employment Equality (Religion or Belief) Regulations 2003. The provisions of the 2003 Regulations were subsequently revoked and re-enacted in the Equality Act 2010.²³ S.4 of that Act enumerates a series of “protected characteristics” and Chapter 2, broadly speaking, prohibits discrimination against a person who possesses one of those characteristics. One of the categories protected under s.4 is “religion or belief”, and s.10 expands those terms: “a reference to religion includes a reference to a lack of religion”²⁴ and “belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief”.²⁵

How the protections under the Human Rights Act and the Equality Act operate in practice is highly sensitive to the facts of the individual case – and it is to the recent case-law that we now turn.

3 Some Current Issues on Freedom of Thought

3.1 *Education and “Gillick Competence”*

Education is a particularly difficult area to analyse in terms of freedom of thought because it is the sphere *par excellence* in which freedom of thought impinges on freedom of conscience and freedom of religion. Furthermore, the views of parents and the views of their children may not always coincide.

The wider issue of a child's right to make important personal choices without parental interference came before the House of Lords in 1985 in *Gillick*.²⁶ The point at issue was whether or not a girl under the age of 16 had the right to seek contraception without parental permission. Their Lordships held that a girl under 16 had legal capacity to consent to medical examination and treatment – including the provision of contraception – without the permission of her parents, always provided she had sufficient maturity and intelligence to understand its nature and implications. Lord Fraser of Tullybelton went so far as to say that he was “not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice

22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

23 In Schedule 27. Except for three minor exceptions, the Act does not extend to Northern Ireland: see s.217.

24 Equality Act 2010 s.10(1).

25 *ibid.* s.10(2).

26 *Gillick v. West Norfolk & Wisbech Area Health Authority* [1986] AC 112, [1985] UKHL 7.

or treatment merely on account of her age". In short, that judgment defined what has come to be called "*Gillick* competence" – and has had considerable influence on subsequent discussions about the capacity of under-16s to have their views on other issues taken into account.

Gillick notwithstanding, however, much of the case-law about choices in education, both in the UK and at Strasbourg, has been about the rights of *parents* rather than the rights of *children*.²⁷ So, for example, there have been several cases on the religious education curriculum for state schools,²⁸ – but it remains the case that in England and, for the moment, in Wales,²⁹ all local authority maintained schools must hold daily collective worship for pupils. In schools that are not of "a religious character", daily collective worship must be wholly or mainly of a "broadly Christian" character and the local Standing Advisory Council on Religious Education ("SACRE") advises the local authority on matters relating to it. Exceptionally, however, where the headteacher and governing body feel that a "broadly Christian" act of worship is not suitable, they can apply to the local SACRE to have that requirement lifted. Collective worship in foundation schools with a religious character and in voluntary aided or voluntary controlled schools – such as those operated by the Church of England or the Roman Catholic Church – will be in accordance with the school's trust deed.

Parents have the right to withdraw their children from all or part of attendance at worship and are not obliged to give a reason, while sixth-formers have the right to withdraw themselves from collective worship – *but not from religious education classes*. In reality, only very few parents exercise the right to withdraw their children, not least because of a concern that it might make

27 See, for example, *Kjeldsen, Busk Madsen and Pedersen v. Denmark* [1976] ECHR 6, (1976) 1 EHRR 711, *Folgerø and Others v. Norway* [2007] ECHR 546, *Hasan and Eylem Zengin v. Turkey* [2007] ECHR 787, (2008) 46 EHRR 44, *Grzelak v. Poland* [2010] ECHR 904, *Willi, Anna and David Dojan v. Germany* [2011] ECHR 1420.

28 For a fairly recent example, see *R (Fox & Ors) v. Secretary of State for Education* [2015] EWHC 3404 (Admin).

29 In 2019, the Welsh Government consulted on the wider issue of reform of religious education and relationships and sexuality: see Welsh Government, *Consultation Document: Consultation on proposals to ensure access to the full curriculum for all learners*, WG39139 (Cardiff: Welsh Government, 2019). As to collective school worship, however, on 7 January 2020 at a hearing of the Assembly's Petitions Committee on Petition P-05-757, 'Remove the Obligation on Schools to Hold Acts of Religious Worship', the Minister for Education and Skills, Kirsty Williams AM, said that the Welsh Government would not be seeking to amend the law on compulsory collective worship during the current Assembly term, due to end by 6 May 2021. Her priority was to establish a new curriculum for Wales, and because any change to collective school worship would require public consultation and primary legislation, it was not a current policy priority.

them feel “different” and isolated from their peers;³⁰ but I would suggest that there is an issue here for human rights and freedom of thought so far as the children themselves are concerned.³¹

The issue of freedom of thought may also intrude into disputes over school uniform. Most are concerned with religious dress, but in *G*,³² for example, it was held that an Afro-Caribbean boy who, in accordance with family tradition, kept his hair in “cornrows” or braids and who, in consequence, had not been allowed to take up his place at the respondent school, had suffered unjustified indirect racial discrimination. The court accepted that he perceived his hairstyle as part of his cultural identity. In *Playfoot*,³³ on the other hand, the claimant’s desire to manifest her Christian belief in sexual abstinence before marriage by wearing a “purity ring”, contrary to her school’s uniform policy, was held not to be a protected manifestation even though motivated by her Christianity. Unfortunately for the present discussion, what does not appear to have been argued was whether her “purity ring” could have been the manifestation of a protected *philosophical* belief. It is, after all, perfectly possible to argue against pre-marital sex for entirely secular, public health reasons such as avoiding STDs and unwanted pregnancies.

In 2006, the Joint Committee on Human Rights observed in relation to the Education and Inspections Bill that children *also* have the right to freedom of thought, conscience and religion under Article 9 ECHR and Article 14 of the UN Convention on the Rights of the Child.³⁴ Moreover, Article 12 of the UN Convention requires that states parties “shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

The Joint Committee concluded that refusing to guarantee a *Gillick*-competent child the right to withdraw *both* from collective worship *and* from compulsory religious education was incompatible with the UK’s human rights obligations.

30 A. Mawhinney et al, *Opting Out of Religious Education: The Views of Young People from Minority Belief Backgrounds* (Belfast: Queen’s University, 2010) at 7.

31 In Scotland, where the vast majority of schools are either non-denominational local authority schools or provided by the Roman Catholic Church, the provision of ‘religious observance’ is governed by the Education (Scotland) Act 1980. S.9 gives parents the right to withdraw their children from participation in religious observance but it does not confer any such right on children.

32 *G v. St Gregory’s Catholic Science College* [2011] EWHC 1452 (Admin).

33 *R (Playfoot) v. Governing Body of Millais School* [2007] EWHC 1698.

34 Joint Committee on Human Rights, Twenty-eighth Report of Session 2005–06 HL 247, HC 1626, *Legislative Scrutiny: Fourteenth Progress Report, Drawing special attention to: Companies Bill & Education and Inspections Bill* (London: The Stationery Office, 2006).

At paragraphs 2.3 and 2.4 of the Report, it recommended that, as a minimum, 16- and 17-year-olds should be able to withdraw from religious education as well as from collective worship but that, preferably, *all Gillick-competent children* should have the same right. But that was not conceded by the Government: the current position in England is governed by s.55 Education and Inspections Act 2006 and the relevant parts of *DfE Circular 1/94: Religious Education and Collective Worship*,³⁵ *DfE Guidance: Religious education in English schools: non-statutory guidance 2010*³⁶ and *DfE Guidance: Religious education (RE) and collective worship in academies and free schools*.³⁷

In October 2015, the UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, called on UN members “to respect religious practices by children and their families and support families in fulfilling their role in providing an enabling environment for the realisation of the rights of the child.”³⁸ He concluded, *inter alia*, that parental direction in matters of religion or belief should be consistent with the child’s own understanding, “so as to facilitate an increasingly active role for the child in exercising his or her freedom of religion or belief and respect for the child as a rights holder from early on”,³⁹ that “states parties and other stakeholders, including religious communities and families, should recognise the status of the child as a rights holder”,⁴⁰ and that member states “should ensure “low-threshold options” for the child and his or her parents to be exempted from religious instruction in school”.⁴¹

In 2016, the UN Committee on the Rights of the Child published its observations on the fifth periodic report on the state of children’s rights in the UK.⁴² On compulsory religious worship in state schools it found as follows:

35 Department for Education. 1994. Retrieved 2 October 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/281929/Collective_worship_in_schools.pdf.

36 Department for Education. 2010, updated 2019. Retrieved 2 October 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/190260/DCSF-00114-2010.pdf.

37 Department for Education, 2012. Retrieved 2 October 2020. <https://www.gov.uk/government/publications/re-and-collective-worship-in-academies-and-free-schools/religious-education-re-and-collective-worship-in-academies-and-free-schools>.

38 UN General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief* A/70/286 (New York: United Nations, 2015).

39 *ibid.* para 75.

40 *ibid.* para 79a.

41 *ibid.* para 79h.

42 UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* CRC/C/GBR/CO/5 (New York: United Nations, 2016).

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35. The Committee is concerned that pupils are required by law to take part in a daily religious worship which is “wholly or mainly of a broadly Christian character” in publicly funded schools in England and Wales, and that children do not have the right to withdraw from such worship without parental permission before entering the sixth form. In Northern Ireland and Scotland, children do not have [*the*] right to withdraw from collective worship without parental permission.

36. The Committee recommends that the State party repeal legal provisions for compulsory attendance at collective worship in publicly funded schools and ensure that children can independently exercise the right to withdraw from religious worship at school.”

Successive Westminster Governments have steadfastly ignored that recommendation.

3.2 Employment Law

Perhaps the area in which problems with regard to freedom of thought arise most often is in disputes about employment and dismissal. The classic case, which laid down the principles that have since been followed in such cases, is *Grainger*.⁴³ Mr Nicholson claimed unfair dismissal and discrimination, contrary to the Employment Equality (Religion or Belief) Regulations 2003, because of his asserted philosophical belief that “mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations and to persuade others to do the same”.⁴⁴ In response, his employers claimed that Mr Nicholson had been made redundant.

Dismissing *Grainger plc*’s appeal, Burton J set out the limits to be placed upon the definition of “philosophical belief” for the purpose of the 2003 Regulations as follows:

- “(i) The belief must be genuinely held.
- (ii) It must be a belief and not ... an opinion or viewpoint based on the present state of information available.
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

⁴³ *Grainger Plc & Ors v. Nicholson* [2009] UKEAT 0219/09/0311, [2010] IRLR 4.

⁴⁴ *ibid.* para 12.

- (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others...”⁴⁵

In doing so, he drew on *Campbell and Cosans*,⁴⁶ in which the ECtHR held that corporal punishment in Scottish state schools violated Article 2 of Protocol 1 ECHR (Right to education) because it offended the philosophical convictions of the claimant parents – which, the Court concluded, attained the necessary level of “cogency, seriousness, cohesion and importance” to be protected.⁴⁷ And, as we shall see, the judgment in *Grainger* established the criteria against which subsequent claims would be measured.⁴⁸

3.3 *Public Broadcasting as a Mission?*

In *Maistry*,⁴⁹ a BBC journalist latterly employed on the BBC Asian Network, was dismissed on 1 October 2010, with effect from 1 July 2011, on grounds of alleged poor performance. He contended that the real reason for his dismissal was his age and/or that he believed “that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion” which, he argued, constituted a philosophical belief protected by the Employment Equality (Religion or Belief) Regulations 2003.⁵⁰ At first instance, Employment Judge Hughes, following *Grainger*, had concluded that Mr Maistry’s views about public service broadcasting fell within the scope of the Regulations as having “a similar status or cogency to a religious belief” and rejected the BBC’s submission that they amounted to no more than a mission statement.⁵¹ Nevertheless, she dismissed the claim on the grounds that the individual responsible for the act in question had not been aware of Mr Maistry’s belief and could not, therefore, have been in any way motivated by it. Further, even if there had been evidence to that effect and the burden of proof were reversed, the reason for

45 *ibid.* para 24.

46 *Campbell and Cosans v. United Kingdom* [1982] 4 EHRR 293, [1982] ECHR 1.

47 *ibid.* para 36.

48 For a recent example of the protection of a purely philosophical belief, see *Mr Samuel Jackson v. Lidl Great Britain Ltd* [2020] UKET 2302259/2019/V, in which Employment Judge Cheetham held that Mr Jackson’s adherence to Stoicism (which included his adherence to the principle that “*The realisation that the consequence of what I say would cause offence would not stop me from saying it*” para 11) satisfied the five tests in *Grainger* and came within the statutory definition under s.10 of the Equality Act 2010. That was the case even if his colleagues found the manifestation of his belief annoying or upsetting, since “There is no fundamental right not to be offended” para 21.

49 *Maistry v. BBC* [2014] EWCA Civ 1116.

50 *ibid.* para 2.

51 *ibid.* para 3.

his dismissal had been his performance, not his belief.⁵² Having failed in the Employment Appeal Tribunal, he applied for leave to the Court of Appeal.

Leave to appeal was refused. Underhill LJ held that Tribunal Judge Hughes had correctly concluded that if Mr Maistry's superiors had not been aware that he held a philosophical belief about "BBC values", that fact could not have motivated their actions, nor could they or the BBC be guilty of discrimination. A generalised assumption that senior management would subscribe to BBC values could not be equated with the knowledge that a particular employee would have a philosophical belief in those values.⁵³ Moreover, Judge Hughes's finding was *not* "a finding that subscribing to those values would be a philosophical belief in every case".⁵⁴

3.4 *Financial Prudence as a Philosophical Principle*

In *Harron*,⁵⁵ the claimant, who worked for the Dorset Police, believed that "public service was improperly wasteful of money" – and felt compelled to express those views. He claimed that, as a result, he had suffered discrimination on the ground of his philosophical belief. An employment tribunal accepted that his belief was genuine and was worthy of respect in a democratic society but did *not* accept that it met the other three criteria in *Grainger* and concluded that it was not a protected philosophical belief.

Langstaff J rejected that conclusion on appeal. He warned that the threshold requirements should not be set too high⁵⁶ and said that the remarks of the first instance tribunal in respect of the third and fourth of the *Grainger* criteria – that in order to be protected, a belief had to relate to a weighty and substantial aspect of human life and behaviour and must attain "a certain level of cogency, seriousness, cohesion and importance" had been "insufficient".⁵⁷ He remitted the case to the judge below for a fresh decision,⁵⁸ but Mr Harron subsequently withdrew his claim.⁵⁹

3.5 *The Sanctity of Personal Copyright*

In *Gray*,⁶⁰ the claimant, a writer and filmmaker who worked for a company producing luxury goods, refused to sign a contract of employment and a

⁵² *ibid.* para 3.

⁵³ *ibid.* para 12 & 13.

⁵⁴ *ibid.* para 14.

⁵⁵ *Harron v. Dorset Police* [2016] UKEAT 0234/15/1201.

⁵⁶ *ibid.* para 34.

⁵⁷ *ibid.* para 35.

⁵⁸ *ibid.* para 41.

⁵⁹ *Mr M Harron v. Chief Constable of Dorset Police* [2017] UKET 3101466/2013.

⁶⁰ *Gray v. Mulberry Company (Design) Ltd* [2019] EWCA Civ 1720.

Confidentiality and Copyright Form that would have assigned to the company “any discovery or invention or improvement to an existing invention, design or process, improvements, designs or inventions, whether capable of registration or not, made by you during the course of your employment with the Company”.⁶¹ One reason for her refusal was that she believed that the Copyright Agreement could extend to her artistic activities away from work,⁶² though Mulberry Ltd disclaimed any interest in what she did in her own time.⁶³ She was sacked; and because she had not been employed long enough to claim “ordinary” unfair dismissal, she was given permission to amend her claim to one of direct and indirect discrimination on the grounds of belief. The belief that she asserted was in “the statutory human or moral right to own the copyright and moral rights of her own creative works and output”⁶⁴ and, before the Employment Appeal Tribunal, she had referred to “the importance of writing in her life, which, she claimed, amounted to a *“spiritual practice”*”.⁶⁵

Neither Choudhury J in the EAT nor the Court of Appeal was persuaded that Ms Gray had established that her belief passed the *Grainger* test of “cogency, seriousness, cohesion and importance”,⁶⁶ and the Court of Appeal concluded that a debate or dispute about the wording or interpretation of an agreement could not be a philosophical belief within the meaning of s.10 of the Equality Act and that the appeal must therefore fail.⁶⁷

3.6 Sex and Gender

In *Forstater*,⁶⁸ the claimant was sacked because, she alleged, she had expressed “gender-critical” opinions about proposed changes to the Gender Recognition Act 2004. In outline, she believed that sex was immutable, regardless of a person’s stated gender identity or gender expression. She further contended that her gender-critical views were a protected philosophical belief and that she had suffered direct discrimination or, alternatively, indirect sex discrimination because her views were more likely to be held by women than by men.⁶⁹ She also relied on her *lack of belief* in the proposition that an individual’s perception of his or her “inner gender” effectively overrode biological sex, so that “trans

61 *ibid.* para 3.

62 *ibid.* para 5.

63 *ibid.* para 6.

64 *ibid.* para 15.

65 *Gray v. Mulberry Company (Design) Ltd* [2018] UKEAT 0040/17/1807 para 40 (emphasis in original).

66 *Gray v. Mulberry Company (Design) Ltd* [2019] EWCA Civ 1720 para 24.

67 *ibid.* para 29.

68 *Ms M Forstater v. CGD Europe & Ors* [2019] UKET 2200909/2019.

69 *ibid.* para 3.

men are men” and “trans women are women”.⁷⁰ In her witness statement, she stated, *inter alia*, that she did not believe that there was any incompatibility between her views on the immutability of biological sex and “protecting the human rights of people who identify as transgender” and said that “I believe that there are only two sexes in human beings (and indeed in all mammals): male and female. This is fundamentally linked to reproductive biology”.⁷¹ She avowed that her belief was not religious or metaphysical, but scientific.⁷²

Employment Judge Tayler accepted that Ms Forstater’s belief that sex was biological and immutable was genuinely held, that for her it was “more than an opinion or viewpoint based on the present state of information available” and that it related to substantial aspects of human life and behaviour.⁷³ Nor, on balance, did it fail the test of cogency, seriousness, cohesion and importance, “even though there is significant scientific evidence that it is wrong”.⁷⁴ However, the absolutist nature of her views was incompatible with human dignity and the fundamental rights of others. To deny the right of someone with a Gender Recognition Certificate to be the sex to which he or she had transitioned went against the Act, which states that a change of sex applies *for all purposes*: “Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate, that person is legally a woman. *That is not something that the Claimant is entitled to ignore*”.⁷⁵ She was entitled to campaign against revising the Gender Recognition Act to take greater account of self-identification and to argue that there should be some spaces limited to “women assigned female at birth” where it was a proportionate means of achieving a legitimate aim. But that did not mean that her absolutist views were protected by the Equality Act or worthy of respect in a democratic society.⁷⁶ Finally, as to the “lack of belief” argument – her denial of the proposition that everyone has a gender that might be different from their sex at birth and which effectively trumps their sex – though it did not face the same issue of incompatibility with human dignity and the fundamental rights of others, it failed to meet the *Grainger* criteria.⁷⁷ Her claim therefore failed.

⁷⁰ *ibid.* para 5.

⁷¹ *ibid.* para 39.

⁷² *ibid.* para 83.

⁷³ *ibid.* para 82.

⁷⁴ *ibid.* para 83.

⁷⁵ *ibid.* para 84 (emphasis added).

⁷⁶ *ibid.* para 86 & 90.

⁷⁷ *ibid.* para 92.

3.7 *Vegans, Vegetarians and Animal Rights*

In 2011, in *Hashman*,⁷⁸ Orchard Park Garden Centre dismissed the claimant, a gardener, allegedly because the majority shareholders had discovered that he opposed hunting. An Employment Tribunal held at a preliminary hearing that his veganism and his views on animal rights constituted a protected philosophical belief. The issue resurfaced very recently in two cases on vegetarianism and veganism – both decided at the Norwich Employment Tribunal by Employment Judge Postle – with contrasting results.

In *Conisbee*,⁷⁹ the claim was for harassment and discrimination on grounds of religion and belief. There was no dispute that Mr Conisbee's belief in his vegetarianism was genuine – but the Respondents argued that simply being a vegetarian could not be a protected characteristic.⁸⁰ It was submitted on his behalf that a finding that his vegetarianism was not a protected characteristic would not defeat his claim because harassment merely needed to “relate” to a protected characteristic (together with the other components of s.26 of the 2010 Act) and a victim of harassment did not have to possess the protected characteristic in order to succeed.⁸¹ Further, the Explanatory Notes to the Act stated that “philosophical belief” was a broad definition in line with Convention rights and Lord Walker had stated in *Williamson*⁸² that “Pacifism and vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which fall within Article 9”.

The Respondents countered that vegetarianism failed the “weighty and substantial aspect of human life” test in *Grainger* because it was not about human life and behaviour but about preserving the life of animals and fish. Further, because there was no single, overarching reason for being a vegetarian, it was a far less serious life-stance than veganism and failed the “cogency or seriousness” test.⁸³ Finally, Parliament had not intended to make vegetarianism a protected characteristic: the Government Equalities Office, while conceding that interpretation was a matter for the Courts, had said that “*the Government did not share the view that climate change or veganism were religious beliefs*”⁸⁴ – and it should be noted that the Equalities Office referred specifically to veganism rather than vegetarianism.

78 *Mr J Hashman v. Milton Park (Dorset) Ltd t/a Orchard Park* [2011] ET 3105555/2009.

79 *Mr G Conisbee v. Crossley Farms Ltd & Ors* [2019] ET 3335357/2018.

80 *ibid.* para 2.

81 *ibid.* para 14.

82 *R (Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 para 55.

83 *Mr G Conisbee v. Crossley Farms Ltd & Ors* [2019] ET 3335357/2018 para 28 to 31.

84 *ibid.* para 33.

Employment Judge Postle dismissed the claim. Vegetarianism did not attain the necessary level of “cogency, seriousness, cohesion and importance” because – unlike veganism – vegetarians themselves had greatly-differing reasons for their vegetarianism.⁸⁵ Though vegetarianism was worthy of respect in a democratic society, that was not *of itself* enough to give it a similar status or cogency to a religious belief.⁸⁶

Subsequently in *Casamitjana*,⁸⁷ a former employee of the League Against Cruel Sports claimed unfair dismissal after he had disclosed that the League invested pension funds in businesses involved in animal testing. At a preliminary hearing dealing solely with the issue of the status of ethical veganism as a protected philosophical belief, Employment Judge Postle ruled that there was “overwhelming evidence ... that ethical veganism is capable of being a philosophical belief and thus a protected characteristic under the Equality Act 2010”.⁸⁸

The preliminary ruling in *Casamitjana* is unsurprising; the conclusions in *Conisbee* are more questionable, and Employment Judge Postle’s contrast between what he saw as the cogency of veganism and the varying reasons for adopting vegetarianism is far from conclusive.⁸⁹ It is perfectly possible for the followers of a philosophical or religious belief that *does* pass the test in *Grainger* to disagree among themselves both on precisely what those beliefs are and how to practise it: witness the multiplicity of Christian denominations. Furthermore, “seriousness” is to at least some extent in the eye of the beholder. Though the Supreme Court was surely right to hold in *Hodkin*⁹⁰ that Scientology was a religion for the purpose of registering its chapels under the Places of Worship Registration Act 1855, one cannot but suspect that to most non-Scientologists the core doctrines of Scientology do not appear to be “serious” at all. Nor does the judgment in *Conisbee* take any account of the recent report of the Intergovernmental Panel on Climate Change,⁹¹ which highlights the part that livestock production plays in N₂O emissions and suggests that a move to diets based less on animal products would help mitigate

85 *ibid.* para 41.

86 *ibid.* para 44.

87 *Casamitjana v. The League Against Cruel Sports* [2020] UKET 3331129/2018.

88 *ibid.* para 39.

89 For a detailed analysis, see F. Cranmer and R. Sandberg, ‘A critique of the decision in *Conisbee* that vegetarianism is not “a belief”’ *Ecclesiastical Law Journal* 22(1) (2020) 36.

90 *R (Hodkin & Anor) v. Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77.

91 International Panel on Climate Change, *Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse gas fluxes in Terrestrial Ecosystems* (in press: 2019).

global warming – and which might provide a moral basis for both vegans *and* vegetarians. Further, Peter Edge has pointed out that Employment Judge Postle’s monolithic view of veganism is hardly borne out by the facts:

“While some research suggests that a very substantial number of vegans, perhaps a majority, are either atheists or non-religious, some adherents of a range of religions see their veganism as a consistent manifestation of their religious beliefs rather than an entirely separate set of decisions. So there are atheist vegans and Buddhist vegans, for instance – both are vegans, but the atheist vegan probably would not understand their veganism on the basis of the Buddhist teachings around *dukkha* and *samsara* that a Buddhist vegan might.”⁹²

3.8 *Political Opinions*

On the narrower issue of the protection of political opinions, the protections are far fewer. In *Redfearn*,⁹³ the claimant was a bus driver with Serco Ltd in Bradford,

“responsible for transporting children and adults with physical and/or mental disabilities within the Bradford area. The majority of his passengers were Asian in origin. There had been no complaints about his work or his conduct at work and his supervisor, who was of Asian origin, had nominated him for the award of “first-class employee.”⁹⁴

However, when he was elected in June 2004 as a local councillor for the British National Party, Serco dismissed him, citing, *inter alia*, potential health and safety risks, alleging that continuing to employ him would cause “considerable anxiety among passengers and their carers” and might put at risk its contract with Bradford City Council.⁹⁵ Mr Redfearn claimed unlawful racial discrimination when compared with Serco’s passengers and employees who were of Asian origin. He further argued that because the BNP was a “whites-only” party, his dismissal constituted indirect racial discrimination.⁹⁶ After a chequered history in the domestic courts, the case came before the ECtHR, which

92 P. Edge, 2019. ‘Vegetarianism as a protected characteristic: another view on *Conisbee*.’ Law & Religion UK, 21 September. Retrieved 2 October 2020, <http://www.lawandreligionuk.com/2019/09/23/vegetarianism-as-a-protected-characteristic-another-view-on-conisbee/>.

93 *Redfearn v. The United Kingdom* [2012] ECHR 1878, (2013) 57 EHRR 2.

94 *ibid.* para 7.

95 *ibid.* para 11.

96 *ibid.* para 13.

held by four votes to three that there had been a violation of Article 11, though there had been no violation of Article 9. In finding for Mr Redfearn, what the ECtHR did *not* do was to decide whether or not a belief in the policies of the BNP was a protected philosophical belief.⁹⁷ It *did*, however, invite the UK Government to create a free-standing claim of unlawful discrimination on the grounds of political opinion or political affiliation⁹⁸ – an invitation that has never been taken up.

Similarly, in *Henderson*,⁹⁹ the claimant, a Regional Organiser for the GMB, maintained that the Union had sacked him because of his political views, described as “left-wing democratic socialist beliefs”, and that he had therefore suffered unlawful indirect discrimination and harassment. The result was again inconclusive; the Employment Appeal Tribunal left open the extent to which political beliefs attracted the protection of s.10 of the Equality Act 2010 because the conclusion of the lower tribunal that “left-wing democratic socialism is a protected belief for the purposes of the Equality Act 2010 [was] not challenged on this appeal”.¹⁰⁰

In *Olivier*,¹⁰¹ the claimant, a civil servant and member of the Labour Party, was elected to Cornwall County Council; he also had a letter published in *The Cornishman* in which he was critical of the effects of the Government’s policies on benefits and tax.¹⁰² He was dismissed for “gross misconduct”, principally because he had failed to apply in writing for permission to engage in political activity, contrary to the Standards of Behaviour governing political activity by civil servants, and because his letter had criticised Government policy.¹⁰³ He argued, *inter alia*, that the Labour Party was not merely an organisation, but enshrined a core set of protected beliefs which he described as “democratic socialism” – a description used on Labour Party membership cards.¹⁰⁴ At a preliminary hearing to determine whether his claim should be struck out, Employment Judge Roper concluded that, though the claim had little reasonable prospect of success,¹⁰⁵ a belief in “democratic socialism” satisfied the

97 It also observed at para 47] that it was not called ‘to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP at the relevant time (the BNP is, in any case, not a party to these proceedings), but solely to determine whether the applicant’s rights under Article 11 were breached in the particular circumstances of the instant case’.

98 *Redfearn* 57.

99 *General Municipal and Boilermakers Union v. Henderson* [2015] UKEAT 0073/14/1303.

100 *ibid.* para 62.

101 *Mr C Olivier v. Department of Work and Pensions* [2013] UKET 1701407/2013.

102 *ibid.* para 7.

103 *ibid.* para 8.

104 *ibid.* para 13.

105 *ibid.* para 42.

Grainger criteria and could amount to a philosophical belief for the purposes of s.10 of the Equality Act 2010.¹⁰⁶

In *McEleny*,¹⁰⁷ the claimant was the SNP group leader on Inverclyde Council and an electrician at a Ministry of Defence (MoD) plant in North Ayrshire. He sought election as his party's Deputy Leader and after the leadership hustings began the MoD revoked his security clearance and suspended him. The MoD's security officers then questioned him on his suitability for clearance; he alleged that they had raised a number of political issues, including his anti-Trident position, his social media activity and a speech that he had given at the SNP conference in 2012. Though his security clearance was subsequently restored, he resigned and sued the MoD for direct discrimination contrary to s.13 of the Equality Act 2010. He argued that he had been treated less favourably by the MoD because of his philosophical belief in Scottish independence and the social democratic values of the SNP, citing the SNP constitution in support of his claim.

For the MoD, it was contended that political opinion was not a "protected characteristic" under the Equality Act.¹⁰⁸ Further, the MoD submitted that Mr McEleny's belief in Scottish independence would be "susceptible to change if challenged by empirical evidence that shows independence would, for example, be detrimental to the economy of Scotland"¹⁰⁹ – implying, in short, that his views were not a matter of principle. It also put forward the rather curious argument that, because the issues of Scottish independence and the democratic values of the SNP were of no interest to anyone *outside the UK*, they failed the *Grainger* criterion of being "worthy of respect in a democratic society".¹¹⁰ Mr McEleny's riposte was that the SNP was the party of Scottish independence, guided by the social democratic values contained in its constitution. He was not claiming to believe that independence could necessarily improve people's lives and the Scottish economy, but that decisions regarding Scotland should be made by the people of Scotland – regardless of the outcome.¹¹¹

Employment Judge Eccles concluded that the tests in *Grainger* were satisfied. Though support for or active membership of a political party did not of itself amount to a protected philosophical belief, it did not follow that a belief based on a political theory could not be a philosophical belief.¹¹² There was no dispute that belief in Scottish independence was worthy of respect in

¹⁰⁶ *ibid.* para 34.

¹⁰⁷ *Mr C McEleny v. Ministry of Defence* [2018] UKET S/4105347/2017.

¹⁰⁸ *ibid.* para 14.

¹⁰⁹ *ibid.* para 32.

¹¹⁰ *ibid.* para 19.

¹¹¹ *ibid.* at [10].

¹¹² *ibid.* at t [27 & 28].

a democratic society and compatible with human dignity and the fundamental rights of others. Nor was she persuaded that Mr McEleny was obliged to demonstrate that his belief in Scottish independence was a matter of concern to people living in other democratic societies.¹¹³ She was satisfied that he held a philosophical belief for the purposes of s.10(3) of the Equality Act 2010 that could be relied on as a protected characteristic for the purposes of claiming direct discrimination under s.13.¹¹⁴ At a subsequent hearing on 14 January 2019, she was asked to reconsider her judgment “on the ground that the claimant’s view of Scottish Independence cannot possibly be shared by the 1.5 million of the Scottish electorate who voted in favour of independence”. Though she agreed to amend the reference in her substantive judgment to “constructive dismissal”, she refused to reconsider her finding on Mr McEleny’s philosophical belief in Scottish independence.

4 Conclusion

If one can draw any overall conclusion from the foregoing whatsoever, it is this: that whether or not any particular manifestation of freedom of thought is protected is highly sensitive to the facts and it is impossible to extract any underlying principles from the decided cases. To say so is, of course, a truism, but the apparent randomness in this particular area of law is nevertheless a cause for concern. These cases illustrate that at present, for example, veganism is a protected philosophical position while vegetarianism is not. A belief in climate change (which many of us would in any case regard as settled science rather than a matter of opinion or belief) is protected, while a belief in the immutability of biological sex – as opposed to gender identity – is not. And the intellectual underpinning for those positions is far from transparent.

Commenting on the decision in *Forstater*, Lord Sumption, until recently a Justice of the Supreme Court, suggests that at least part of the more general problem is

“those weasel words “worthy of respect in a democratic society”. The European Court of Human Rights constantly uses them as a shorthand for certain values that it believes ought to be universal. But this gets us into difficulty in complex areas like this. A belief may count as a philosophical

¹¹³ *ibid.* at [35].

¹¹⁴ *ibid.* at [36].

belief, although no one agrees with it [...] In a democratic society we have to live with each other. That includes living with each other's beliefs."¹¹⁵

As to political opinions, the situation is even less clear. No UK Government has yet taken up the ECtHR's proposal in *Redfearn* that it should legislate to make discrimination on the grounds of political opinion or political affiliation unlawful in Great Britain, and that is unlikely to change in the near future. Given its history, Northern Ireland is probably best regarded as a special case; Great Britain, however, has a long tradition of avoiding any special treatment for political parties. Not only is party political activity not recognised as a charitable purpose either in England and Wales or in Scotland,¹¹⁶ the issue of how far a charity may conduct even a non-partisan political campaign remains a controversial issue, with charities complaining that the current rules fetter their ability to promote the interests of their beneficiaries.¹¹⁷

And what is a "political opinion" anyway? While the refusal of the proprietors of *Ashers Baking*¹¹⁸ to bake a cake bearing the slogan "Support Gay Marriage" was undoubtedly made on religious grounds, was Mr Lee's order for the cake a manifestation of his philosophical belief, or was it placed out of political conviction, given that there was no provision for same-sex marriage in Northern Ireland at the material time?

As to education, when one starts to unpick the broad issues of religious education and human rights one can begin to see at least the potential for clashes between parents' rights under Protocol 1 Article 2 ECHR to have their children educated in accordance with their beliefs and the rights of *Gillick*-competent children under Article 9 ECHR and Article 14 UNCRC to respect for their own views on matters of faith, or lack of it, especially if they think differently from their parents. Human rights, education and freedom of thought are somewhat paradoxical: the "education" is done to the children but, in practice, the "rights" inhere largely in the parents.

There have certainly been exceptions to the general reluctance to allow self-determination to children in matters of thought, conscience and religion,

¹¹⁵ Jonathan Sumption, 2020. 'Should thinking the law is wrong count as a philosophical belief?' *The Times*, 9 January.

¹¹⁶ S.3(1) Charities Act 2011, s.7(2), Charities and Trustee Investment (Scotland) Act 2005 – and similarly in Northern Ireland: s.2(2) Charities Act (Northern Ireland) 2008.

¹¹⁷ For the current position, see, for example, Charity Commission for England & Wales, *Campaigning and political activity guidance for charities (CC9)* (London: Charity Commission, 2008) and Kevin Winters, 2019. 'Can charities campaign on political issues? The Scottish position' Lexology, 4 November. Retrieved 3 October 2020, <https://www.lexology.com/library/detail.aspx?g=08ff702e-cfda-4390-94cf-4af4b0f6d967>.

¹¹⁸ *Lee v. Ashers Baking Company Ltd & Ors (Northern Ireland)* [2018] UKSC 49.

but they are rare. In *C (A Child)*,¹¹⁹ for example, a ten-year-old Jewish girl of divorced Jewish parents wished to follow her father in converting to Christianity and being baptised, against the wishes of her mother.¹²⁰ Her mother had been granted a prohibited steps order forbidding the father from baptizing, confirming, or dedicating either the girl or her younger brother into the Christian faith.¹²¹ In the County Court, however, HHJ Platt concluded that C had made her wishes and feelings known clearly and consistently in a way that he considered entirely age-appropriate. She was “a very bright and intelligent child a year ahead of her biological age in terms of academic achievement” and her wishes and feelings were entitled to due consideration.¹²² He decided that C’s wish to be baptised as a Christian had to be respected and that she should be allowed to attend church every Sunday and begin a baptism course.¹²³

But the general rule of compulsion in school worship and religious education in England and, for the moment, in Wales still stands. Why should that be? Are intelligent fourteen- or fifteen-year-olds *really* incapable of making an informed and rational choice about matters of moral principle that are important to them? Surely, as Heiner Bielefeldt pointed out in the passage quoted above, the bottom line should be that *children are rights-holders as well*.

5 Afterword: So Where Next?

In their introductory article, O’Callaghan and Shiner remind us that “freedom of thought is what we might call a *foundational value* in European human rights law or an integral part of its general spirit” and that the ECtHR has consistently emphasised that a democratic society is not possible without “pluralism, tolerance and broadmindedness”.¹²⁴ The extent to which that foundational value will continue to be protected within the UK is not to be taken for granted, however, given the current Government’s repeated commitment either to amend the Human Rights Act, to opt out of certain provisions of the ECHR,¹²⁵ or to withdraw the UK from the Council of Europe altogether.

¹¹⁹ *C (A Child), Re* [2012] EW Misc 15 (CC).

¹²⁰ *ibid.* at [1–3].

¹²¹ *ibid.* at [4].

¹²² *ibid.* at [51].

¹²³ *ibid.* at [79].

¹²⁴ P. O’Callaghan and B. Shiner ‘The Right to Freedom of Thought in the European Convention of Human Rights’ *European Journal of Comparative Law and Governance* 112–145 in this issue.

¹²⁵ Owen Bowcott, 2020. ‘UK government plans to remove key human rights protections’ *The Guardian*, 13 September.

The last five years or so have seen increasing signs of distrust by politicians – especially, though not exclusively, from the political Right – both of human rights in general and of the Strasbourg court in particular. The 2015 Conservative Party general election manifesto included a commitment to “reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society”.¹²⁶ Theresa May appeared to have dropped that commitment when, during the Conservative leadership contest in June 2016, she said that she would not campaign to leave the ECHR.¹²⁷ Later in 2016, however, the then Secretary of State for Justice, Elizabeth Truss, appeared to finesse that position when she told the Commons Justice Committee that, though the Government intended to remain a signatory to the ECHR, it had not abandoned its plan to repeal the Human Rights Act.¹²⁸ Nor did she rule out ending the right to plead the Convention before the UK courts.¹²⁹ As it turned out, the 2017 Conservative Manifesto said that a Conservative Government would not seek to repeal or replace the Human Rights Act while the process of leaving the EU was under way and “We will remain signatories to the European Convention on Human Rights for the duration of the next parliament”¹³⁰ – but added that the legal framework of human rights would be considered further once Brexit had been concluded.

Since then, an eleven-judge panel of the Supreme Court has held – unanimously – in *Miller and Cherry*¹³¹ that Boris Johnson’s Prime Ministerial advice to Her Majesty that Parliament should be prorogued from no later than 12 September to 14 October 2019 was unlawful and, therefore, “It follows that Parliament has not been prorogued and that this court should make declarations to that effect”.¹³² It was – perhaps – because of that judgment that the subsequent 2019 Conservative Manifesto declared that “After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the

¹²⁶ Conservative Party, *Strong Leadership – A Clearer Economic Plan – A Brighter, More Secure Future* (London: Alan Mabbutt on behalf of the Conservative Party, 2015) 37.

¹²⁷ J. Elgot and R. Mason, 2016. ‘Theresa May launches Tory leadership bid with pledge to unite country.’ *The Guardian*, 30 June.

¹²⁸ House of Commons Justice Committee. *Oral evidence: ‘The work of the Secretary of State’* (London: The Stationery Office, 2016) HC 620 QQ 81–82.

¹²⁹ *ibid.* Q 85.

¹³⁰ Conservative and Unionist Party, *Forward, Together – Our Plan for a Stronger Britain and a Prosperous Future* (London: Alan Mabbutt on behalf of the Conservative Party, 2017) 37.

¹³¹ *R (Miller) v. The Prime Minister* [2019] UKSC 41, to which was joined *Cherry v. Advocate General for Scotland*.

¹³² *ibid.* para 70.

Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people".¹³³

The Conservatives having won the December 2019 election, the ensuing Queen's Speech included an announcement that "A Constitution, Democracy and Rights Commission will be established"¹³⁴ which, said the accompanying briefing, will "consider the relationship between Government, Parliament and the courts and to explore whether the checks and balances in our constitution are working for everyone".¹³⁵ Shortly afterwards, a former Conservative Leader, Lord Howard of Lympne QC, opined in a radio interview that there had been "a significant increase in the power of the judges at the expense of Parliament and, indeed, government" and attributed the alleged increase partly to the expansion of judicial review and partly to the impact of the Human Rights Act 1998. He also criticised the Supreme Court's decision in *Miller*, suggesting that "judges have increasingly substituted their own view of what is right for the view of Parliament and of ministers".¹³⁶

From which readers may draw their own conclusions – but, clearly, "the checks and balances in our constitution" are not working for Lord Howard.¹³⁷ As to his criticism of the Supreme Court, however, one might reasonably point out that it was unanimous in *Miller* and *Cherry* and that it is moderately unlikely that all eleven Justices began their analyses from identical political premises. Or as Lady Hale PSC put it at the ceremony in the Supreme Court on 18 December 2019 to mark her retirement as President:

"We go into our post-hearing deliberations not knowing what the others are going to say. Well, sometimes. We do not know one another's political opinions – although occasionally we may have a good guess – and long may that remain so. Judges have not been appointed for party-political reasons in this country since at least the Second World War. We do not want to turn into the Supreme Court of the United States, whether in powers or in process of appointment. On the other hand, we do have an

¹³³ Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential* (Alan Mabbutt on behalf of the Conservative Party, 2019) 48.

¹³⁴ HC Deb (2019–21) 19 December 2019 c32.

¹³⁵ Prime Minister's Office, *The Queen's Speech 2019* (London: The Stationery Office, 2019) 13.

¹³⁶ BBC 2019. 'Michael Howard: Judges sometimes "distort" the law to reach result they want', 28 December. Retrieved 2 October 2020, <https://www.bbc.co.uk/news/uk-politics-50933535>.

¹³⁷ For my own view, for what it's worth, of the importance of the ECHR – much more trenchantly expressed than in this article – see F. Cranmer, 'The European Convention on Human Rights: A living leading work' in R. Sandberg (ed), *Law and Religion – Leading Works* (Abingdon-on-Thames: Routledge, 2019).

idea of one another's approach to judging and to the law. But we are often surprised: everyone is persuadable."¹³⁸

On 31 January 2020, the United Kingdom left the European Union and, at the end of the transitional period of eleven months on 31 December, the rights contained in the European Charter of Fundamental Rights ceased to apply. At the time of writing, post-Brexit negotiations were still in train; only after their conclusion will it be possible to establish the extent to which, if at all, the UK will remain bound by decisions of the Court of Justice of the European Union on fundamental rights.

One might reasonably expect that, with the end of post-Brexit negotiations with the European Union, the Westminster Government will turn its attention more towards domestic issues. As to human rights, in an exchange on 16 January 2020, the then Attorney General assured the House of Commons of the Government's continuing commitment to the ECHR: "One mark of our standing for those values will be our continued vigorous participation in the Council of Europe and our subscription to the Convention" though that subscription "should not mean that we do not turn a critical eye to elements of the human rights structures in our country, and we will look at those in the time to come".¹³⁹

One can only accept his assurances at face value – but what that "critical eye" might mean in practice, only time will tell.

¹³⁸ There is no published transcript of her speech, but there is a video of the ceremony on the Supreme Court website at <https://www.supremecourt.uk/watch/valedictory/lady-hale.html>, retrieved 3 October 2020. The quoted remarks begin at 46:10.

¹³⁹ HC Deb (2019–21) 16 January 2020 cc1142–3.