In the High Court of Justice CO/9067/2006

THE QUEEN

on the application of

DAVENDER KUMAR GHAI

Claimant

-and-

RAMGARHIA GURDWARA, HITCHIN

Intervener

-and-

NEWCASTLE CITY COUNCIL

Defendant

-and-

SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS

Interested Party

The Logic of Cremation 2:

An Addendum

by

Roger Ballard M.A., Ph.D., F.R.A.I.

Consultant Anthropologist

Centre for Applied South Asian Studies
Red Croft,
Howard Street,
Stalybridge, SK15 3 ER
Phone/Fax 0161-303-1709

email roger@casas.org.uk
9th February 2008

Table of Contents

My instructions

1. This report is prepared upon instructions from Charles Beton of J. M. Wilson Solicitors, inviting me to expand upon arguments in the main report ('The Logic of Cremation in the Hindu Context') in the light of further developments:

    a. The receipt of further documents, including:

        - Crematoria reforms proposed by Mr. Anil Bhanot, Secretary General of the Hindu Council UK in a letter to Ms Carol Aplin dated 20th October 2008.

        - A statement on the Vedic theology of Hindu Cremation, prepared by Dr. R.P. Sharma

    b. A request to further expand my analysis of the relationship between 'religion' and 'culture' (considered in pp 27 – 30 of the main report), in the light of the prospect that this may well be a focus of detailed debate and discussion when the matter comes to trial

HINDU COUNCIL UK PROPOSALS

Background

2. The Hindu Council UK is one of several different organisations seeking to articulate a common representative voice of Britain's Hindu population. Whilst it claims to represent a large number of local organisations, similar claims would also be true of other prominent Hindu organisations joining in support of the Claimant.

3. I have read Ms Aplin's letter dated 23rd September 2008, which appears to be the pre-cursor to the Hindu Council UK's proposed reforms. The letter refers to an intense debate on the issue. No further details of the debate or its intensity are offered other than *"polarity of some of the opinions in which was extreme."* One infers from the fifth paragraph of said letter that the task of preparing the proposed reforms ultimately fell to two Executive members, Dr Raj Pandit Sharma and Mr Anant M Vyas. The preferred 'Think Tank' approach is defended on the grounds that, *"people are usually not informed fully"* and "*a lot of emotion which becomes the mainstay of ticking boxes in a survey."*

4. Whilst the seriousness of the Hindu Council Executive's proposals cannot be doubted, the wide variety of opinions which were held even within the Council's Executive itself is of

considerable significance. I understand that the proposals were only drafted after extensive debate, even within the Executive Committee. There are good reasons to suppose that this would also have been the case if the Hindu Council had put the issue to its full membership. I also understand that significant parties in this arena, such as the Claimant, the Anglo-Asian Friendship Society and the National Council of Hindu Priests were not party to discussions or consultations about the underlying issues.

5. From the documents before it seems reasonable to infer that the Hindu Council proposals were drawn up by the two named Executive members, and represents their assessments of a realistic compromise. However their opinions, no matter how carefully formulated, are not necessarily a representation of British Hindu population at large. Those views are very varied, and by no means necessarily well informed about the nature and potential consequences of the issues raised by the claimant.

6. Nevertheless I would in no way suggest that the Hindu Council's proposals should be discarded: in my view they represent a useful contribution to what is gradually becoming a better informed public debate. It also suggests that a significant proportion of wider Hindu sentiment supports the Claimant's proposition that existing cremation regulations do not sufficiently address their religious needs (a proposition which has long been actively articulated by the Claimant). Evidently, some participants to the Hindu Council debate – which itself ostensibly "*remains against the idea of open air cremation in fields*[1]*"* – nonetheless maintain that their official recommendations did not go far enough.

Actual proposals

7. In broad terms, the Hindu Council position appears actively to support the Claimant's case: namely that the provisions of the 1902 Act, as currently interpreted, are incompatible with Hindu religious expectations. Four specific changes to crematory practice are recommended:

    a. Lid-less coffins to be permissible in the crematorium

---

[1] In my experience much of the current public debate – such as it is – is constructed around an assumption that only two starkly differing options are available: that either the Cremation Act and its Regulations should be left as they are, or that followers of Indic Religions should be exempt from any kind of regulation, such that they could perform 'open air cremations in the fields, wherever and whenever they liked. The result has been a markedly polarised and ill-informed debate, in which no thought has been given to the prospect of identifying a negotiated compromise somewhere in between.

b. Full provisions for families and priests to accompany coffins into the retort area, offer prayers and light a small sacred fire within the coffin

c. Thereafter the open coffin, with fire burning inside, is moved into the retort

d. Thorough cleaning of the retort (before and after cremations) and supervision and collection of ashes, by employees or family members (if they so choose)

8. So far as I can see there is no way in which these proposals could readily be implemented given the current regulatory regime, and/or the way in which the provisions of that regime are currently interpreted in UK crematoriums.

Dr Raj Pandit Sharma's report

9. Dr Sharma is particularly well placed to address the issues in these proceedings. Besides being exceptionally well qualified in academic terms (he holds a D.Phil. from the University of Oxford), he is a practicing Pandit, President of the UK Hindu Priests Association and also a member of the Hindu Council executive. Illuminatingly, his report not only sets out the theological, and indeed sacramental, foundations of the *anthyeshti samskara*, but also provides a detailed argument as to why mechanised cremation is incompatible with the premises of this sacrament.

10. With respect to the theological issues he argues as follows:

> The Vedas are the most authoritative scriptures and ritual texts of Hindu Sanatan Dharma. The Riga- Veda in particular, confirms that ritual cremation in the open air is the theologically prescribed form of Hindu last rites. Open air cremation entails spiritual revivification and sacrificial transformation (*vide Riga- Veda X 16.1*) by which the atman is ritually "untied" and detached from the physical world (*Riga-Veda X.16.5*).
>
> The corporeal body comprises of the five elements (air, water, fire, earth and ether) which must be offered during cremation as a 'final oblation' (*anty + eshti = antyeshti*) to the divine fire Agni. Agni is entrusted with safely reuniting these elemental forces and invoked by Vedic recitals and ritual offerings into the funeral flame itself.
>
> The five constituent elements of the corporeal body must all be present at the time of cremation, permitting absorption directly into the corresponding elements of the surrounding environment. (*Atharva Veda Ch.18.2,Ashvalayan Grihya Sutras 4.3.27*) The cremation site (*smashaan*) must be ritually purified to avert negativity and spiritual contamination. Cremations should be performed on land exposed to natural light from the sun, fertile ground surrounded by trees with running water and away from dwellings. (*Shatpath Brahmana XIII 8.1* and *Ashvalayana-Grihya-Sutra IV. 1-2*).
>
> The *antyeshti* (cremation) must be performed meticulously in accordance with proper ritualistic procedures to ensure the well-being of the *atman* (deceased's spiritual entity). To progress in the hereafter (attain *sadgati*) it is essential to adhere to

cremation ritual requirements, lest the departed soul suffer considerable distress (*Garuda Purana 11.9.47*).

11. Following through from these theological prescriptions, he argues that

> All offerings in Hindu fire rituals (*Havan/Homam*) are made into the burning sacred fire. The Veda clearly likens oblations offered without consecrated fire to casting seeds on barren land. In UK crematoria this ritual necessity is not possible. Instead offerings are placed on the deceased's body prior to cremation, severely compromising the dissipation of the constituent elements.
>
> Retort fire is functional and unremittingly ferocious, far from the gently enveloping sacred flames of the funeral pyre described in the Vedic texts.
>
> Cremation fires must be ignited from the head first.
>
> Circumambulation of the deceased with water and fire immediately prior to cremation (to dispel malevolent spiritual entities) is not possible. Restrictive regulations in the UK reduce this most profound and significant ritual to walking around the deceased with clusters of burning incense sticks, severely compromising the rite.
>
> The *kapaal kriya* rite releases various vital airs (*svaashas*) captured within bodily cavities post-mortem - but is not executable in an enclosed retort
>
> Crematoria protocol and retort processes cannot guarantee the deceased's ashes are returned whole or unadulterated.

Although Dr. Sharma's commentary is far more theologically learned than my own, his conclusions with respect to both these issues appears to be wholly congruent with the arguments and conclusions with respect to these matters which I set out in my initial report.

12. Yet more illuminatingly still he also sets out a commentary on the challenges and dilemmas which Hindu settlers in the UK have encountered as they have set about recreating their ancestral religious institutions, together with all their accompanying behavioural and ritual procedures, in what was for them an alien context, at least in the first instance.

> Many first-generation migrant Hindus remain deeply insecure in their British host country and fear that open-air funerals could cause discord, and even reprisals, if negatively construed by the media or public. No doubt many took this position with a heavy heart and only forsook the illustrious heritage of their forefathers in honest attempts to assimilate.
>
> I know some felt culpability for not having highlighted essential Hindu cremation issues sooner. It should also be noted that the vast majority of national UK Hindu organisations comprise of laypeople who are not conversant nor qualified in such specialised areas, albeit they remain sincerely committed to the Hindu Faith.

> There was also considerable concern that, lest this issue was broached very sensitively, many British Hindu families would feel extremely alarmed and distressed when belatedly advised that their deceased loved ones were not cremated according to religious requirements. Political realities also restricted many Hindu Priests from emphasising the essence of the scriptural requirements, for fear of causing conflict with their affiliated temple management committees.
>
> Alongside these sentiments, a significant proportion of the younger members very much welcomed the opportunity of open air cremation, and in general express a more confident and inquisitive approach to matters of Faith. These younger Hindus consider Britain as their motherland and wish to practice their faith freely without recourse to the arduous journey to India, in order to fulfil their loved one's final wishes.
>
> I fully respect the Executive's official position but, as this highly specialised field requires precise scriptural knowledge and rigorous practical training, I feel it incumbent upon the Hindu Clergy to promote an informed and unambiguous public understanding. Especially in light of ostensibly plausible (but ill-informed) press statements and media debates, this Paper humbly hopes to assist both the Court's understanding and wider public awareness.

13. As an anthropologist I am wholly in sympathy with Dr Sharma's comments on this score. Members of the early waves of South Asian settlement had to fend for themselves in a strange land, and were acutely aware that doing anything 'out of the ordinary' was likely to provoke, and indeed to intensify, popular hostility towards them. Hence their general policy was to keep their heads down, and to avoid rocking the boat. Nevertheless whenever there was an opportunity to bend established conventions to suit their own distinctive interests, they invariably took the opportunity to do so. Hence many years have passed since Hindu and Sikh mourners established the convention that a small party of mourners should be allowed to go 'round the back' after the proceeding in the chapel were complete, and to press the button which initiated the crematorial process.

14. Much has now passed since those early days. As Dr. Sharma describes, communities have grown larger and more self-confident; not only have priests and scholars arrived from India, but many members of the younger British-born generation have become increasingly interested in these matters – not least because the performance of funeral rites for their own parents has become an increasingly commonplace experience. Hence as 'younger members of the community have begun to express a more confident and inquisitive approach to matters of faith' (to quote Dr. Sharma) it was in my view only to be expected that issues of this kind should become a matter of increasingly serious public debate.

15. From that perspective I would argue that this case is best viewed as part and parcel of a much wider debate: namely how can public policy makers best respond to the steadily increasing degree of pluralisation of the socio-cultural order which has been precipitated by non-European immigration over the course of the past half century[2].

THE DISTINCTION BETWEEN 'RELIGION' AND 'CULTURE'

Preliminaries

16. As I have set about preparing reports on this case in response to my instructions, I have become increasingly aware that just as in vernacular discourse, legal discourse displays a distinct lack of clarity in its use of, and understanding of the precise meaning of a series of potentially overlapping terms, which can be placed along a broad spectrum running from 'religion', and 'culture' to 'ethnicity' and 'race' and finally to 'racial group'. Many of these terms appear in recent legislation, sometimes – but not always – with an *ad hoc* definition attached. In consequence Judges have had to find some means of resolving the result contradictions, which they, too, have often found themselves doing on an *ad hoc* basis. Sometimes anthropologists can be lured into just the same trap themselves.

17. An example of this can be found in my initial report, in which I prefaced my remarks in paragraph 28, in which I made reference to Arden's LJ's remarks in Arden LJ in Khan v Khan [2007] EWCA Civ 399, with the heading *Issues in Religious, Ethnic and Cultural Plurality*. But although she makes frequent reference to pluralism in the text I quoted, she makes no explicit reference to religion, ethnicity or culture within it. Instead she talks of communities, and the differing traditions, practices and attitudes followed within such groups, to which she insists that the court must pay appropriate regard. But although she consequently struck a welcome blow as far as the advocates of respect for plurality are concerned, it could also be argued that she was yet further muddying the waters by yet further elaborating the *ad hoc* terminology used in this area.

18. But if that is so I must also plead guilty to the same crime, since my formulation assumed that readers of my report would accept (or at least fail to notice) the elision from her

---

[2] See the arguments which I have set out in "Living with difference: a forgotten art in urgent need of revival?**"** in Hinnells, J (ed) *Religious Reconstruction in the South Asian Diasporas: From one generation to another* London: Palgrave Macmillan (2007)

wording back to my own favoured terminology, which was carefully embedded in the heading.

19. However I must also confess that in an earlier draft of my report I had addressed these matters in greater detail, but was advised to excise my remarks on the grounds that they were not immediately relevant to the issues at stake in the proceedings. However as the case has progressed it has become increasingly clear that issues of this kind are likely to play a much more salient part in the proceedings, with the result that such 'commonsense' shortcuts are much more likely to confuse than to advance our understanding of the issues at stake in these proceedings.

Conceptual issues

20. One of the central themes which I sought to advance in my original report was the importance of acknowledging the distinction between events and procedures which are essentially ritual and hence religious in character, and those which are not. Hence my remark in paragraph 80 of my initial report to the effect that

> *"No matter how secular members of the indigenous majority may profess to be, a funeral is by definition a rite of passage.* ***Hence the proceedings are inescapably a ritual, and hence in the broadest sense a religious, event.****"*

But although I would hold by that formulation, I could equally well have held – albeit on slightly differing grounds – that any given set of ritual proceedings can simultaneously be seen as a *culturally* and/or an *ethnically* distinctive event. And although at first blush these perspectives may seem anonymous, anthropologists would immediately insist that some crucial distinctions are inevitably by-passed when they are subject to such elision: there are in my opinion good reasons for suggesting that this is also the case at Law. Although I would in no way wish to attempt to teach lawyers their business, attention to anthropological analyses of the conundrums which they find themselves facing in this field might well help them to elucidate the underlying issues.

Anthropological Perspectives on Religion, Culture and Ethnicity

21. The Anthropology of Religion is a major sub-specialism within Social and Cultural Anthropology. Amidst voluminous empirical and theoretical literature and debate, anthropologists of religion do agree on one critical point: ritual (and hence religious) practices are a universal cultural phenomenon which is found in all known human

societies, regardless of the scriptural literacy of those who perform such rituals, and/or of their ability to rationalise the beliefs which underlie these practices with respect to the precepts laid down in sacred texts. Much follows from this: in the first place religion is as much a matter of *performance* as it is of belief; and secondly that efforts to gain an understanding of the significance of such performances is at least in the first instance best directed at the performers themselves, rather than at the sacred texts to which they may well point in an effort to legitimise their performances. It follows that such performers are not mere dummies who follow the prescriptions (which on close inspection often turn out to contain very mixed messages) set out in the text with greater or lesser degrees of accuracy. Instead a better view is that as with all kinds of linguistically and culturally inspired performances, religious performances are best regarded as an articulation of the interests and concerns *of the performers* themselves. To be sure those performances may well be more or less powerfully influenced by prescriptions laid down in sacred texts and/or by priestly interpretations of their significance. But it is idle to assume that everyday religious beliefs and practices in any given community are *determined* by such prescriptions: at the end of the day it is the performers themselves who set their own agendas.

22. Such a formulation also has further consequences: namely that human contexts culture, religion and language are best understood as phenomena which are so closely akin to one another in character that one is true in principle of any one of them is most likely also true of the others. It consequently follows that no sharp boundaries can be drawn between them: each merges seamlessly into the other. But if hierarchies are to be drawn, culture is best regarded as the overarching concept, of which the spheres or religion and language are subordinate dimensions.

What is culture?

23. Innumerable scholars, both anthropologists and non-anthropologists, have offered definitions of culture: an attempt to review them all would be inappropriate here. Instead I have taken the opportunity to set forth a definition of my own, not least because it is one which I have developed over the years in an effort to overcome the problems of definition which I myself have encountered in generating a form of words which is just as applicable in the midst of a society which is as complex and radically plural as our own as it is in the context of those set in the midst of remote tropical jungles. With such

considerations in mind the definition which I regularly put before my students runs as follows:

> Cultures are best understood as cognitive structures. the set of ideas, values and understandings which people deploy within a specific network of social relationships as a means of ordering their inter-personal interactions, and hence to generate and maintain ties of reciprocity between themselves; as such culture provides the principal basis on which human beings give meaning and purpose to their lives. [3]

What is religion?

24. The study of culture is at least an anthropological speciality: and whilst anthropologists have long taken an interest in the study of religion, they most certainly do not enjoy any kind of monopoly of the subject. Hence the debate about the nature of the phenomenon of religion, from what perspective it is best investigated and by whom remains intense. Moreover since I began to research the ways in which South Asian settlers had set about reconstructing their religious traditions in Britain, and hence to address the issue of how these developments could best be understood in analytical terms, I have found myself drawn ever more actively into this debate. In doing so I found myself becoming increasingly critical of the established vision of the nature of religion promoted by scholars in the field of Religious Studies was far too scripture-oriented to cope with the 'bottom-up' vision of actual practice generated by first-hand ethnographic observation. Hence I conclude that although such a scriptural-oriented vision of religion had become firmly embedded in vernacular discourse, it was nevertheless a serious obstacle to analytical clarity, most particularly when it came to gaining an understanding of religious developments in our increasingly pluralistic society.

25. I began to spell out my arguments in a series of papers[4] – including *'Panth, Kismet, Dharm te Qaum*: *four dimensions in Punjabi Religion'* and *'Popular Islam in Northern Pakistan and its Reconstruction in Urban Britain'*[5] – in which I sought to develop as set of analytical categories which were less Euro-centric character, and which also left space for the consideration of a more processual, participant/believer oriented perspective on religious activities. I recently developed my analytical schema yet further in a paper

---

3 I have discussed these issues at length in a Chapter entitled "Race, Culture and Ethnicity" in Holborn, M. (ed) *New Developments in Sociology*, The Causeway Press. 2002

4 In Singh, Pritam and Thandi, Shinder (eds.) *Punjabi Identity in a Global Context* pages 7-37, Delhi: Oxford University Press, 2000

5 In Hinnells, J. R. and Malik J (eds.) *Sufism in the West* pages 160-186, London: Routledge: 2006

entitled *Problems with 'religion' as phenomenon and as an analytical category: a non-Eurocentric perspective* which I presented at a workshop on *Global Families and Religious Practice* organized by the Anthropology Department at the University of Copenhagen, and held at the Danish Institute in Damascus. A polished-up version of my paper will appear in a book which will be published by the Danish Institute towards the end of next year.

Religion: a combined anthropological & religious studies perspective

26. Introducing professional anthropological insights into the scholarly domains of religious studies, I found the traditional scope of analyses to be highly focused on formal theological principles – irrespectively of whether carefully delineated premises were evinced in reality. This theological perspective paid no attention to, and indeed lacked the capacity to comprehend what can best be described 'practical religion': that which manifests itself in the ideas and practices routinely deployed by laymen and women in quotidian contexts, regardless as to whether or not those ideas are legitimised by priestly interpretations of scriptural sources. Such a focus on 'practical religion' in this sense provides analysts with an invaluable framework within which to appreciate the logic of popular belief and practices, even when these are dismissed as 'mistaken' and 'superstitious' by the defenders of established 'orthodoxy'.

27. Ethnographic 'bottom up' approaches do not necessarily out-trump formally articulated theologies: any serious attempt to understand religion must of necessity consider *both* perspectives. Nor in my view should religion be regarded as coterminous with the much wider phenomenon of culture: rather I would argue the former is better understood as a highly significant *dimension* of the latter.

28. With such considerations in mind I would argue that from an anthropological perspective religion is best understood as *that dimension of the phenomenon of culture which enables its users to attribute metaphysical legitimacy to their norms of everyday behaviour, and to the structure of social order within which their preferred forms of personal behaviour are set*.

29. The adoption of such a perspective also has further significance: the 'religious' character of any given item of practice or behaviour is ultimately dependant on its functional purpose – not in the abstract, put rather in *the eyes of the actors themselves*. If so, it

follows that it is virtually impossible to draw a hard-and-fast boundary between those beliefs and practices which are merely cultural, and those which are specifically religious: the two fade into one-another.

'Religion': a working definition

30. In light of this, I would argue that 'religion' is best understood as a:

    i. conceptual system setting out a culturally-grounded vision of a cosmic order,
    ii. which provides believers with a metaphysical context within which to comprehend the meaning and purpose of life,
    iii. hence giving conceptual/philosophical legitimacy to the norms in terms of which they order of everyday behaviour.

31. Religious traditions (and their many internal sectarian variations) are consequently best regarded as:

    i. *Cultural* phenomena which are devised and sustained by its users.
    ii. Explanatory, legitimizing conceptual frameworks – whose presence is also invariably to be found even within nominally 'atheist' social and cultural systems.

ETHNICITY

32. All too often the term ethnicity is deployed as a euphemism for race. This practice is supremely unhelpful, since it elides (essentially fictitious) ascriptive judgements about social status and the mental capabilities of groups of people on the basis of the biologically determined appearance with groupings which arise as a result of groups of people who have aggregated together in a purposeful and self-chosen basis on the grounds of their cultural commonality. To be sure it is often the case that an empirical level racial disjunction and ethnic disjunctions will be more or less congruent with one another: however that does not mean that they are the same. Racial disjunctions are the outcome of the attribution of social significance to differences in physical appearance, most usually by bodies of people seeking to protect their positions of power and privilege by subjecting those whom they deem to be their inferiors to exclusionary practices of one kind or another. By contrast ethnicity is best understood as a phenomenon which is the outcome of self-chosen strategies of mutual collaboration, grounded in a sense of cultural, religious and/or linguistic commonality amongst those who come together to form ethnic groups – most usually in competition with members of other groups who have come together on similar basis.

33. It follows that whilst ethnicity has its roots in cultural commonalities – or at least in an assumption amongst those who gather together that such commonalities do indeed exist – the concepts of ethnicity and culture are not coterminous, for the simple reason that the mere existence of such cultural commonalities by no means necessarily results in the emergence off ethnic aggregations. Hence ethnicity can best be defined (in the words of David Parkin, currently Professor of Anthropology at the University of Oxford) as

    a. The articulation of cultural distinctiveness
    b. In situations of political conflict or competition.

34. In terms of this definition an ethnic group simply consists of the totality of those persons who have come together – or are at least willing to come together – on this basis.

LEGAL CONSTRUCTIONS

35. With the best will in the world I have to confess that English Law – and most especially in terms of the statutory formulations set out in the Race Relations Act and the Equality Act – appears to have made something of a dog's breakfast of these issues. However those instructing me have drawn my attention to two South African judgements (***Lawrence et al v. The State*** and ***Kwazulu-Natal, School Liaison Officer and others v. Pillay***) which appear, at least in my opinion, to have explored these matters with considerably more clarity than has been achieved elsewhere. Hence even though these judgement stem from a foreign jurisdiction, I trust that the court will find it helpful to consider their import in this context.

Lawrence

36. In the South African context *Lawrence* was in many ways a revolutionary judgment, not least because it marked the end of the *apartheid* era, in which White Christians were formally allocated a position of privilege over all other South Africans. The issues before the court were consequently constitutional in character. Chaskalon P led the batting by quoting a dicta from Dickson CJC in the *Big M Drug Mart* case, which turned on the interpretation of involved the Canadian Lord's Day Act:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

He promptly went on to comment that he could offer no better definition of the main attributes of freedom of religion than this.

37. In his judgment O'Reagan J took up the constitutional issues:

> [116] I shall commence by considering the purpose and meaning of section 14 in our Constitution. Unlike the Constitution of the United States, our Constitution contains no establishment clause prohibiting the "establishment" of a religion by the state. Nevertheless, the interim Constitution contains a range of provisions protecting religious freedom. In section 8, the interim Constitution prohibits "unfair discrimination" on grounds of religion. In section 32(c), every person is given the right
>
> > "to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."
>
> And, of course, section 14 protects the freedom of religion. It is not possible to read this array of constitutional protections without realising that our Constitution recognises that adherence to religion is an important and valued aspect of the lives of many South Africans and that the Constitution seeks to protect, in several ways, the rights of South Africans to freedom of religion.
>
> [117] The provisions of section 14 themselves are instructive as to the manner in which the right should be developed in our law. Section 14(1) protects the right to freedom of religion and conscience. Section 14(2) then provides that religious observances may be conducted at state or state-aided institutions provided that they are conducted on an equitable basis and attendance at them is free and voluntary. And section 14(3) permits legislation recognising systems of personal and family law shared by members of a religion.

38. Finally Sachs J picks up all issues raised by his colleagues, but take them a great deal further:

> [148] To my mind, read in the context of all of the above provisions and of the Constitution as a whole, section 14 was intended at least to uphold the following principles and values: South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view.
>
> The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require

conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

39. He then goes on to note that the situation was quite different in the pre-constitutional period since

> [152] The marginalisation of communities of Hindu and Muslim persuasion flowed from and reinforced a tendency for the norms of "Christian civilisation" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other". Any echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected.
>
> Indeed, the concern expressed by O'Connor J about the message sent by state endorsement of religion to non-adherents to the effect that they are outsiders and not full members of the political community, has special resonance in South Africa. Religious marginalisation in the past coincided strongly in our country with racial discrimination, social exclusion and political dis-empowerment. Similar although not identical observations may be made about anti-semitism, which targeted members of the Jewish community for disadvantageous treatment in the public as well as the private sphere.
>
> Thus, any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.

40. Having remarked *en passant* that

> [157] It is not always easy to distinguish between observances and practices that are purely sectarian, those that are completely secular and those that combine elements of both.

thereby making a key point in the issues at stake in the current case, Sachs returns once again to the political issues which underlie all these arguments:

> [160] … The functional impact of the law may be marginal, and its symbolic effect muted, yet the communication it makes cannot be disregarded. Even if there is clear scope for the application of the de minimis rule to the question of some ancillary economic costs resulting from being true to one's faith, it should be used with extreme caution when it comes to deciding such sensitive and not easily measurable questions as freedom of conscience, religion and belief.
>
> One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the state is.

> The objective of section 14 is to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must.

41. Of course the UK does not have a formal Constitution of the kind which South Africa has recently given itself: nevertheless much recent legislation – from the Race Relations Act through to the Equalities Act – appears to have very similar social and political objectives to those with which section 14 of the South African Constitution is concerned. However a further notable feature of this case is that although its ostensible focus was on matters of religion (and most particularly whether the Christian religion should continue to enjoy the position of intuitionalised privilege which it had hitherto occupied, many parts of this judgment – and most especially the contribution made by Sachs J – was concerned to spell out the legal implications of the explicitly pluralistic premises enshrined in South Africa's newly minted Constitution.

Pillay

42. The case of *Kwazulu-Natal, School Liaison Officer and others v. Pillay* came before the Supreme Court nearly a decade after *Lawrence,* by when the Constitution was much more firmly bedded down; it is also case with which I am already familiar since I referred to extensively in the process of preparing a report for use in the recent case of *Sarika Watkins-Singh v The Governing Body of Aberdare Girls' High School*, as did Silber J in his judgement. I can only presume that *Pillay* will also appear on the agenda of the current proceedings, since this case the Supreme Court went on to explore matters of religion and culture much more explicitly than it did in *Lawrence*.

43. The core issue in *Pillay* was whether or not a school was acting on a discriminatory basis by excluding a female Tamil Hindu pupil wearing a nose-stud, on the grounds that it was contrary to the school uniform regulations. As the court observed, for the application to succeed it would need to show

> …. that S's religious or cultural beliefs or practices had been impaired. The nose stud was not a mandatory tenet of S's religion or culture but a voluntary expression of South Indian Tamil Hindu culture, which was intimately intertwined with Hindu religion, and S regarded it as such. Thus the nose stud was an expression of both religion and culture. Religious and cultural practices were protected by the 2000 Act and the Constitution, being central to human identity and hence to human dignity, which in turn was central to equality.
>
> Whether a religious or cultural practice was voluntary or mandatory was irrelevant at the threshold stage of determining whether it qualified for protection but the centrality

of the practice, which might be affected by its voluntary nature, was a relevant question in determining the fairness of the discrimination.

44. Having made these observations it went on to conclude that

> S was discriminated against on the basis of both religion and culture in terms of the 2000 Act.
>
> Unfair discrimination, by both the state and private parties, including on the grounds of both religion and culture, was specifically prohibited by s 9 of the Constitution and the 2000 Act gave further content to the prohibition on unfair discrimination.
>
> A society which valued dignity, equality and freedom required people to act positively to accommodate diversity. Reasonable accommodation was an exercise in proportionality that depended intimately on the facts; it would always be an important factor in the determination of the fairness of discrimination, although it would be wrong to reduce the test for fairness to a test for reasonable accommodation. Reasonable accommodation was most appropriate where discrimination arose from a rule or practice that was neutral on its face and was designed to serve a valuable purpose, but which nevertheless had a marginalising effect on certain portions of society.
>
> The principle was particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests might more easily be struck. The instant case bore both those characteristics and therefore fairness required a reasonable accommodation.
>
> A reasonable accommodation would have been achieved by allowing S to wear the nose stud. The admirable purposes that uniforms served were not undermined by granting religious and cultural exemptions. Allowing the stud would not have imposed an undue burden on the school.
>
> Accordingly a declaration was granted that the decision of the school to refuse S an exemption from its code, to allow her to wear a nose stud, discriminated unfairly against her. In addition, the school was ordered to amend its code of conduct to provide for the reasonable accommodation of deviations from the code on religious or cultural grounds and to establish a procedure according to which such exemptions from the code could be sought and granted

45. Nevertheless O'Reagan J recorded a dissenting opinion on parts of this judgement. His analysis bears close examination, not least because he argues that a clear distinction should and must be drawn between religion and culture:

> The Constitution recognised that culture was not the same as religion and should not always be treated as if it was.
>
> By associating religion with belief and conscience, which involved an individual's state of mind, religion was understood in an individualist sense: a set of beliefs that an individual might hold regardless of the beliefs of others.
>
> Culture was different. By and large culture, as conceived in the Constitution, involved associative practices and not individual beliefs. However, where one was dealing

with associative practices it seemed that religion and culture should be treated similarly.

If a sincere religious belief was established, a court would not investigate the belief further. A religious belief was personal, and did not need to be rational, nor did it need to be shared by others.

A cultural practice, on the other hand, was not about a personal belief but ab practices: the rights could not be exercised in a manner inconsistent with other provisions of the Bill of Rights. The need to investigate whether a particular asserted practice was shared within the broader community, or portion of it, and therefore properly understood as a cultural practice rather than a personal habit or preference, was central to determining whether a cultural claim had been established. An approach to cultural rights based predominantly on subjective perceptions of cultural practices might undervalue the need for solidarity between different communities in society.

The constitutional approach to the rights to culture emphasised the following:

> (i) cultural rights were associative practices, protected because of the meaning that shared practices gave to individuals--to succeed in a claim relating to a cultural practice a litigant needed to establish its associative quality;
>
> (ii) an approach to cultural rights under the Constitution had to be based on the value of human dignity--cultural practices were valued because they afforded individuals the possibility and choice to live a meaningful life;
>
> (iii) cultural rights were protected under the Constitution in the light of a clear constitutional purpose to establish unity and solidarity among all who lived in the diverse society and
>
> (iv) solidarity was not best achieved by simple toleration arising from a subjectively asserted practice but needed to be built through institutionally enabled dialogue.

The 2000 Act prohibited unfair discrimination on the ground of culture. To determine whether an applicant had established discrimination on that ground, she or he would need to show that the practice related to one that was shared in a broader community of which he or she was a member and from which he or she drew meaning.

S had established that the wearing of the nose stud was a matter of associative cultural significance, which was a matter of personal choice for S, but that it was not necessary to wear the stud as part of her religious beliefs. The correct comparator was those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who were denied exemption. Those learners who were not afforded an exemption suffered a burden in that they were not permitted to pursue their cultural or religious practices, while those who were afforded an exemption could do so.

S had established that the school discriminated against her in failing to grant her an exemption to wear the nose stud in circumstances where other learners were afforded exemptions to pursue their cultural practices. Given that the school had

> previously granted exemptions from rules for cultural practices, it had not established that it acted fairly in refusing an exemption to S on the ground that she had not established that the practice constituted a mandatory requirement of her religion. The unfairness lay in the school's failure to be consistent with regard to the grant of exemptions.

The judgment of Silber J in ***[2008] EWHC 1865 (Admin)***

46. Although O'Reagan J was expressing a minority opinion, it nevertheless addresses precisely the issue on which I have been instructed to comment. More significantly still I have not managed to identify any judicial opinion which expresses the opposite view. Hence, for example, whilst Silber J quotes the judgment in *Pillay* with approval in his judgment of *Sarika Singh*, it is striking that he makes no mention of O'Reagan's dissenting opinion. Instead the learned judge appears to have taken care to hedge his bets by means of a careful elision.

47. Having noted that the South African Supreme Court had held that "a rule preventing a Tamil-Hindu girl from wearing a nose stud which was central to her cultural and religious identity was discriminatory on *religious and cultural* grounds", he went on to say that "I agree with Miss Mountfield that a similar approach should be adopted in this case, and that the comparators to the claimant should be those pupils whose *religious beliefs or racial beliefs* are not compromised …."(my italics in both cases). Having done so he continues to bracket religion and race in this way through the remainder of his judgement, despite noting that Sarita herself had indicated that she felt "a sense of [religious] duty to wear the Kara …as well as an expression of my race and *culture"* (my italics once again).

48. As I indicated earlier, from anthropological perspective this kind of an elision of race, religion, culture and ethnicity, such that these terms are routinely deployed as synonyms in vernacular speech, can only be regarded as deeply unhelpful, in the sense that it precludes accurate analysis of the roots and consequences of the differing dimensions of behaviour to which these terms point. I suspect that this may well also be the case in legal contexts. If so, the matter is in urgent need of clarification.

THE 'RELIGION' AND 'CULTURE' IN ENGLISH LAW

49. Issues of Race and Ethnicity are not do not appear to be explicitly at stake in these proceedings, and I have in any event provided an analytical account of the way in which these terms are best used in earlier sections of this report. Hence in the remainder of this report I shall focus on how the issues of religion and culture have been dealt with in what

I have been instructed are the current leading cases in English Law, before going on to consider how far, and in what way, the arguments set out in all these cases serve to illuminate the matters at issue in these proceedings.

R (Williamson) v Secretary of State for Education and Employment ***[2005] UKHL15***

50. It goes without saying that even when judges seek to express themselves in the most generalised terms, they necessarily do so with respect to the issues which were thrown up in the context of the specific case before them. Hence whilst *Williams* may have set out some important markers as to the way in which Article 9 issues should be approach, the core issue before it was just how much latitude should be allowed in the case of those who insisted that their Christian belief in, and practice of, corporal punishment for children, given the rights freedom of religion set out in the ECHR. Amongst other things this led their Lordships to consider whether the beliefs and practices in question could properly be identified as 'religious', and if they were, whether their claim was justified in the light of the caveats set out in clause two of Article 9. Whilst both of these issues are undoubtedly of significance in this context, it is nevertheless worth noting that *Williamson* focused on issues which had arisen with respect to issues within a Christian community: issues of plurality played no significant part in the proceedings.

51. Nevertheless the definitional section of Lord Nicholls' judgement – which I have reproduced below – sits quite comfortably with contemporary anthropological understandings of the phenomenon of religion, not least in terms of his emphasis on the extent which it is ultimately an individual phenomenon, and even at that level it is by no means necessarily fixed and static.

> Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. … The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection.
>
> The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem….The belief must also be coherent in the sense of being intelligible and capable of being understood. …
>
> Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject

> matter, individuals cannot always be expected to express themselves with cogency or precision.
>
> Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.....
>
> Most religions require or encourage communal acts of worship of various sorts, preaching, public professions of faith and practices and observances of various sorts (including habits of dress and diet). There will usually be a central core of required belief and observance and relatively peripheral matters observed by only the most devout. These can all be called manifestations of a religious belief.

52. Nevertheless two specific features of his formulation are worth noting. Firstly his implicit assumption that behaviour, and most especially religious behaviour, is primarily a consequence of 'belief': a long-standing premise of Christian, and above all of Protestant, theology; and secondly that the form of words he deploys would appear to be just as applicable to the phenomenon of culture as it is to ostensible subject of religion. But although this further reinforces my anthropological point about the way in which these two phenomena slide seamless into one another, many theologians, and especially those of a traditional protestant bent, take a very different view. Hence on the grounds that some beliefs are legitimate whilst others are erroneous, mistaken or even the work of the devil, they readily distinguish between religion and mere 'superstition', a term which still lives on in this sense in vernacular discourse.

53. This was, of course, a vision which the Dutch Reformed Church in South Africa embraced with enthusiasm, as I have little doubt that the Judges in the cases I have cited would have been very well aware. This was an issue on which Lord Walker touched upon in his speech, not so much in terms of such negative judgements being made about the premises on which other religions were founded, but rather within Christianity itself:

> … it is not in dispute that Christianity is a religion, and that the appellants are sincere, practising Christians. Those who profess the Christian religion are divided among many different churches and sects, sometimes hostile to each other, which is a cause of both sadness and scandal…
>
> … the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines. Anyone who feels in any doubt about that might refer to the hundreds of pages of the law reports devoted to 16 years of litigation, in mid-Victorian times, as to the allegedly "Romish" beliefs and devotions of the incumbent of St Alban's, Holborn (the litigation, entitled *Martin v Mackonochie*, starts with (1866) LR 2 A & E 116 (Court of

> Arches) and terminates at (1882) 7 PD 94 (Privy Council sitting with ecclesiastical assessors)).
>
> Moreover, the requirement that an opinion should be "worthy of respect in a 'democratic society' " begs too many questions. As Mr Diamond (following Mr Dingemans) pointed out, in matters of human rights the court should not show liberal tolerance only to tolerant liberals.

54. It is nevertheless worth noting that Lord Walker's historical reference is also of immediate contemporary relevance, not least with respect to the issues which may well lurk in the undergrowth of the present proceedings. During the late nineteenth century the great majority of those who followed "Romish" interpretations of the Christian tradition were immigrants from Ireland, and patterns of ethnic polarisation, together with allegations that their presence was part and parcel of an elaborate program polarisation were just as vigorous as they are today – even though the contemporary threat is envisaged as emanating from more distant shores.

55. From this perspective I would suggest that in political terms there are not only strong parallels between the symbolic issues which lurk in the background both of this case and the nineteenth century cited above, but also that these issues were played out in spades as the South African courts struggled to come to terms with the collapse of the *apartheid* regime. I would suggest that it is precisely for these reasons that it is worth playing close attention to the reasoning of the judges in the two South African cases cited above.

Conceptual issues

56. Whilst South Africa tackled its historically generated issues of institutionalised racial, ethnic, cultural and religious inequality in Article 14 of its Constitution, efforts to address these issues can be traced back to the Race Relations Act of 1976. However the drafters of the UK legislation approached the issue on a markedly different basis from their South African counterparts. Hence whilst Article 14 of the South African constitution is explicit about the various dimensions of the patterns of inequality so generated, and consequently addresses them in sub-clauses of Article 14, the Race Relations Act sought to wrap them all up under a singe heading. Hence the Race Relations Act in creating a new series of offences identified racial discrimination as an action

> which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons

and went on to define those who find themselves disadvantaged in this way as ‘a racial group’. It followed that the first step of all those wishing to seek protection under the premises of the new legislation had to establish that they did indeed belong to such a ‘racial group’.

57. This issue was tested to breaking point in the case of **Mandla v Dowell Lee [1982] 3 WLR**, a case with which I am very familiar since I gave evidence in person when the matter was initially tried in the Birmingham County Court. I argued that whilst the Sikhs no sense formed a nation, let alone a race, they were nevertheless a classic example of an ethnic *group*. However the judge dismissed the action, on the grounds that there that there had been no discrimination contrary to section 1 (1) (*b*) of the Act as Sikhs were not a racial group.

58. The Court of Appeal supported the trial judge’s conclusion, on the grounds that

> that any discrimination against the plaintiffs could only be contrary to section 1 (1) (*b*) of the Race Relations Act 1976 if they were members of a "racial group" as defined by section 3 (1) of the Act; that "ethnic … origins" in the context of that definition meant a group distinguished by birth as having by common descent characteristics pertaining or peculiar to race; and that, although the majority of Sikhs had an Indian sub-continent ancestry, Sikhs formed a religious group to which individuals were free to join or leave and, in those circumstances, they were not a group with a common ethnic origin and, therefore, discrimination against them was not contrary to the Act

However it is quite clear in that in reaching this decision the court had considerable degree of sympathy for the appellant, but nevertheless concluded that they were bound by the letter of the law. Having decided (quite rightly, in my view) that the Sikhs did not share a common ‘ethnic origin’ their fate was sealed. As Kerr LJ put it

> However, these issues have to be decided by reference to groups of persons "defined by reference to ethnic or national origins," since it is contended that Sikhs fall within this part of the definition of a "racial group"; in particular on the basis of the word "ethnic." Parliament must accept responsibility for the difficulties which this word has created for the courts.

59. But on appeal to the House of Lords this decision was overturned on what can only be described as pragmatic grounds.

> that "ethnic … origins" in the context of that provision meant a group which was a segment of the population distinguished from others by a sufficient

> combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms was a common racial stock, in that it was that combination which gave them an historically determined social identity in their own eyes and in those outside the group; that Sikhs were n that sense a racial group defined by reference to ethnic origins for the purpose of the Act, although they were not biologically distinguishable from the other peoples of the Punjab

60. However their Lordships' *ad hoc* decision with respect to the Sikhs has proved to be the end of the line for this kind of concept-stretching. Hence whilst the Sikhs remain a 'racial group' as far as English Law is concerned, efforts by Muslims, Hindus and Jains to place themselves under the same umbrella. Once can only have sympathy with Kerr LJ's comment that it is Parliament which has been responsible for this dog's breakfast. Nor have matters improved with the passage of further legislation. Although the Equality Act of 2006 sought to bring all forms of discrimination under the same roof, Parliament chose to leave the definition of racial discrimination unchanged, and makes no attempt to redefine or elaborate on the term 'ethnic origin', which in any event only appears twice in a 90 page text. The term culture does not appear at all.

61. Nevertheless there is one sphere in which the Equality Act does break new ground, since it explicitly brings discrimination on grounds of religion and belief within the purview of the law. However just as with the concept of 'racial groups', the Parliamentary draftsmen have deployed what can best be described as a blunderbuss approach, given the definition of terms which they put forward. Hence as far as the Act is concerned

> (a) "religion" means any religion,
> (b) "belief" means any religious or philosophical belief,
> (c) a reference to religion includes a reference to lack of religion, and
> (d) a reference to belief includes a reference to lack of belief.

Not only does such a formulation lack any kind of precision, but it focuses once again, in true Protestant style, on belief rather than practice. Meanwhile the next clause in the Act defines religious discrimination thus:

> (1) A person ("A") discriminates against another ("B") for the purposes of this Part if on grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).

In other words 'religion' is effectively treated as a parallel phenomenon to 'race'.

62. At least from an anthropological perspective there are in my mind good grounds for suggesting that the Parliamentary draftsmen may well have adopted a somewhat unadventurous, and perhaps even a myopic approach to the underlying issues at hand. Although the Equality Act was widely represented as a response to the critical findings of the McPherson report on the circumstances of the death of Stephen Lawrence, the wording deployed in the Act made no effort to draw upon Sir William's powerful, and above all *operationally implementable* approach to the issues at hand when he defined of institutional racism as

> The collective failure of an Organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amounts to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people.

63. To be sure McPherson continues to utilise the term 'ethnic origin', and also makes no explicit reference to religion – although it can readily be argued that this was subsumed under his welcome introduction of the all-important term culture into public discourse in this field. However his intervention was highly significant in two senses: firstly the breadth of his vision, and secondly his acute awareness that that the issues he was seeking to were the outcome of *processes,* 'attitudes and behaviour which.... disadvantage minority ethnic people'. In so arguing his perspective appears to be closely congruent with that developed by the South African Constitutional Court, and as such at least arguably provides a much more coherent conceptual framework within which to explore the increasingly pressing policy issues precipitated by the increasing salience of racial, ethnic and religious plurality in so many contemporary jurisdictions.

64. Whilst McPherson's formulation has no legal force, it is nevertheless also worth noting that Newcastle City Council's Crematorium policy would appear – at least at first blush – to be a classic example of he unacceptable consequences of 'institutional racism', although it is equally self-evident that underlying issues have nothing whatsoever to do with race in biological terms.

Article 8 issues

65. However salient the issues religion and culture may be in these proceedings, it should not be forgotten that rites of passage, and especially those which mark out and celebrate an individual's passage through various stages of life from the cradle to the grave are also

intensely familial affairs, not least because family members are the principal celebrants of these rituals. But whilst this is undoubtedly as true of funerals as it is of marriages and birthdays, there is one highly distinctive feature of funeral rites: the person on whose behalf the rite is celebrated not capable of playing any active part in his or her last rites, since these mark, by definition, the final closure of all worldly activity. However its exceptional condition serves to underline a salient feature of all such rituals: they are performed at least as much for the benefit of other members of the family as they are for that of the person whose achievements are the nominal focus of the whole exercise.

66. This point is particularly strongly marked when a 'good death' occurs in the context of a Hindu or Sikh corporate family. A 'good death' marks the completion of a full life: one in which the deceased person has brought up his or her children to adulthood, arranged all their marriages, and witnessed the birth of grandchildren – thereby fulfilling all their personal and familial purposes in life. That is why the end of a fulfilled life is actively celebrated with balloons and bunting, and even with a brass band – as was more or less achieved in the funeral of Dr. Anand's father. However there yet more to it than this, especially in the case of the death of an elderly patriarch, since his departure also marks a transfer of power between the generations, for the funeral rites also celebrate a legal succession, in which the deceased patriarch's eldest son steps into his father's shoes. Hence the eldest son of the deceased not only plays a religious role in lighting his father's (and mother's) funeral pyre, but one of the first rituals which is performed when he returns home is the *pagri* ritual, in which a new turban is tied on his head celebrating the fact that he has now succeeded to the role of head of the corporate family. It follows that depriving the eldest son – and indeed all the other remaining members of the corporate extended family – from engaging in the symbolic rituals which serve to hold the family together will of necessity undermine the integrity of a crucial component of their corporate life.

67. The same issues also appear to be imminent in the case of the claimant himself, given his poor state of health, as well as his eldest son’s wish to implement his conventionally assigned role as and when his father passes away.

ISSUES OF RELIGION AND CULTURE IN THE CURRENT PROCEEDINGS

Religion and Superstition

68. By common consent there are few overt differences in the way in which Hindus, Sikhs and Jains organise their cremation rituals: besides using just the same *ghat*s (burning grounds) the physical dimensions of the cremation process are remarkably similar in each case: it is only when one pays close attention to the *mantras* which accompany the performance that significant differences begin to manifest themselves. These invariably turn out to be wider still if one begins to explore the multiplicity of smaller and more intimate ritual procedures which precede and follow the main event. It some circumstances the significance of such differences can become a focus of heated debate. When this occurs arguments regularly break out about the legitimacy about the legitimacy or otherwise of specific beliefs and practices, hence precipitating all manner of arcane arguments about how one should differentiate between those beliefs and practices are truly religious, those which are merely cultural, and those which can be dismissed out of hand as 'superstition'.

69. Such arguments regularly break out in every formally constituted religious tradition, in which there is invariably a substantial disjunction between the beliefs and practices which priests and scholars (who may well be in dispute with one another) identify as 'correct' and 'orthodox', and those which are actually deployed in practice by lay adherents. In historical terms northern European protestant theologians were particularly concerned about this state of affairs, not least because they feared that the presence of such beliefs and practices was evidence of a tendency superstitious, 'Romish' and indeed devilishly-inspired deviance amongst their flock.

70. Whilst the dynamics of such disputes are of great interest to historians as well anthropologists, not least because they are invariably at least as much driven by political as by theological interests and concerns. However for precisely those reasons it seems clear that lawyers would be well advised to avoid giving too much weight to such arguments, and above all should avoid being drawn into them, not least in the light of Walker LJ warning in *Williamson* to the effect that "…the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines."

71. To clarify the issues here I should emphasise that as far as my own perspective as anthropologist is concerned, one of the central reasons why arguments about such matters

become so vigorous is that those who engage in them are characteristically using their own preferred theological premises both to legitimate their own beliefs and practices, and to damn the beliefs and practices of those who differ – most usually for political purposes of some sort. Hence whilst anthropologists continue to regard 'religion' as a significant analytical category, they take care to define the phenomenon on a functional basis which consequently stands above and beyond any specific theological position. The definition I offer in paragraph 25 above fits directly with those criteria. Once the term is deployed in this way the category 'superstition' simply evaporates – other than as a term of political and/or theological abuse.

Religion and Culture

72. In every formally constituted religious tradition there considerable disjunction can invariably be observed as between the beliefs and practices which priests and scholars (who may well be in dispute with one another) identify as being 'correct' and 'orthodox', and those which are actually deployed in practice by lay adherents of any given tradition.

73. In historical terms South Asian theologians have long been a good deal more relaxed about such deviations from 'orthodox' propositions than were their Western European counterparts, mainly because the huge variety of sectarian variations found within each of their traditions. However one of the central consequences of European Empire, and especially of the role played by Christian missionaries in implementing the 'civilising processes' by means of which the imperial powers sought to legitimate their expansionary agendas, 'religion' (in the Western European sense) soon began a political battlefield. As a result religious movements of religious reform – in which members of the indigenous population sought to defend themselves against an onslaught of missionary criticism – emerged alongside, and indeed frequently preceded, national liberation movements. But whilst such reformists frequently argued that all that they were doing was stripping out superstitious accretions which had crept into the historical purity of their religion, close inspection frequently shows that their reforms were mainly directed at distancing themselves from the 'superstitious' practices of which their evangelical opponents were so bitterly critical. Hence the 'invention of tradition' in this sense often provided a route by which protestant philosophical and conceptual perspectives were introduced via the back door, which was in turn frequently re-labelled 'modernisation' in contexts such as this. Nevertheless deviancy from the reformist orthodoxy still remained widespread amongst the population at large, as their European critics never hesitated to point out. In

these circumstances all popular practices for which formal justification tended to be partitioned off as 'cultural', and hence as nothing to do with religion at all.

Religion, Culture and 'Superstition' in the Sikh tradition

74. As it happens all these processes can readily be observed within the context of the Sikh tradition – whose echoes have precipitated several otherwise puzzling echoes in Gulzar Singh's intervention on behalf of the Hitchin Gurudwara.

75. In keeping with many other contemporary religions traditions, the Sikhs currently look to two main sources of religious authority. Firstly to a religious text, in their case to the *Guru Granth Sahib*, a large collection of mystically-oriented poems whose assembly was by Guru Arjun Dev in 1604. The greater part of the Granth Sahib is made up of poems composed by the founder of the Sikh tradition, Guru Nanak (1649 – 1539). Secondly, and much more contemporaneously Sikhs look to an institutional body, the Shromani Gurudwara Prabhandak Committee, which is amongst other things responsible for the organisation and management of all the historic Gurudwaras in India. However the SGPC is of comparatively recent origin, since its roots can be traced back to the efforts of a late nineteenth century revivalist movement called the Singh Sabha, whose central objective was to purge popular Sikh practice of what its members judged to be inappropriate and illegitimate accretions.

76. Arguments about these matters came to a head during the early 1920s, when it was argued that the ascetic Udasi Mahants in charge of the Punjab's major Gurudwaras were Hindus rather than Sikhs. The British Imperial authorities came to the defence of the Mahants, and as a result the pro-Singh Sabha Sikhs staged a show of mass civil disobedience. In the end the authorities backed down, and under the terms of the Gurudwara Act of 1925 the Mahants were ousted from their offices, and control of the Gurudwaras was handed to an elected body, the SGPC, which continues in the role to this day.

77. Other than its administrative duties, one of the first tasks undertaken by the SGPC was to prepare a new and authoritative *Rahit Maryada* or code of conduct for Sikhs. This turned out to be a far from easy task, and it was not until 1951 that an agreed upon form of words was finally published. A striking feature of the text is that it not only specifies what Sikhs should do, but also those activities that they should abjure. Hence clause (d) in Article XVI specifies that being a Sikh entails:

> Not believing in caste or descent untouchabililty, Magic spells, incantation, omens, auspicious times, days and occasions, influence of stars, horoscopic dispositions, *Shradh* (ritual serving of food to priests for the salvation of ancestor on appointed days as per the lunar calendar), Ancestor worship, *khiah* (ritual serving of food to priests - Brahmins - on the lunar anniversaries of death of an ancestor) …
>
> *pind* (offering of funeral barley cakes to the deceased's relatives), *patal* (ritual donating of food in the belief that that would satisfy the hunger of a departed soul), *diva* (the ceremony of keeping an oil lamp lit for 360 days after the death, in the belief that that lights the path of the deceased), ritual funeral acts. *hom* (lighting of ritual fire and pouring intermittently clarified butter, food grains etc. into it for propitiating gods for the fulfilment of a purpose), *jag* (religious ceremony involving presentation of oblations), *tarpan* (libation), *sikha-sut* (keeping a tuft of hair on the head and wearing thread), bhadan (shaving of head on the death of a parent), fasting on new or full moon or other days, wearing of frontal marks on forehead, wearing of thread, wearing of a necklace of the pieces of *tulsi* stalk, veneration of any graves, of monuments erected to honour the memory of a deceased person or of cremation sites, idolatry and such like superstitious observances
>
> Not believing in or according any authority to Muslim seers, Brahmins' holiness, soothsayers, clairvoyants, oracles, promise of an offering on the fulfillment of a wish, offering of sweet loaves or rice pudding at graves

78. One does not have to look far to identify why the SGPC took this position. As Hindu religious reformers began to clash with Sikh religious reformers in the face of increasingly vigorous criticism from evangelistic Christian missionaries, the Sikhs sought replace a fuzzy disjunction with a clearly demarcated behavioural and theological boundary between themselves and the Hindus. Hence the new Rehat Maryada went out of its way to declare that whole series of popular practices, mostly broadly Hindu, other Islamic, and yet more which were dismissed as superstitious, as *ultra vires* for those who identified themselves as Sikh. However the making of such formal declarations is one thing, and making them stick in terms of popular practice is quite another. Hence whilst there has indeed been a move towards a greater degree of different between Punjabi Sikhs and their Hindu counterparts during the past century, the fuzziness about which the reformers were so concerned have as yet by no means been eliminated.

79. Nor is this just the outcome of pig-headed ignorance. Even though the compilers of the current Rehat Maryada argue that the text simply articulates the implications of the teachings of Guru Nanak, it is in fact also heavily influence by the teachings of Guru Gobind Singh, the tenth and last of Nanak’s successors, and articulator of the rules of the

Khalsa, the source of the characteristic Sikh dress of uncut hair and beard topped with a turban. But whilst there can be little doubt that Gobind Singh's Khalsa comprehensively overturned many aspects of Nanak's teachings, reformist ideologues routinely dismiss the force of these criticisms. On the grounds that the flame of Nanak's teachings were passed down an unbroken line of successors to the tenth and last Guru, they argue that Gobind spoke with Nanak's voice, such that it can be safely concluded that Gobind's teaching *are* by definition Nanak's teachings.

80. However by no means all the followers of Nanak accept this conclusion, and hence prefer to rely on the *Guru Granth Sahib* itself. The text is far from inaccessible, in any event insisted that those who followed him should listen to his poetic words and implant them in the heart of their experiential beings: in his view priests and scholarly nit-pickers invariably obscured, rather than illuminated the Truth. In other words there are excellent theological reasons for setting the rules laid down in the SGPC's Rehat Maryada quietly to one side. Hence a widely recalled Janamsakhi holds that when Guru Nanak passed away there was a squabble amongst his followers as to how his earthly remains should be disposed of: those of Hindu inclination held that the body of their Guru should be cremated, whilst those of Muslim inclination insisted that he should be buried. Whilst the dispute raged Nanak's body was covered with a shroud. But when the shroud was lifted all that was found beneath it was some flowers.

Gulzar Singh's intervention

81. Since Nanak passed away the vast majority of his followers have in fact been cremated rather than buried. Nevertheless there have been extensive disputes about just how such cremations should be performed, as Gulzar Singh Sahota emphasises when he makes a careful distinction which makes between Sikh orthodoxy ('religious doctrine') and actual Sikh practice ('religious observance') in his statement in support of the Claimant. However his only reveals the tip of an iceberg, for there was in fact a huge debate about the proper form Sikh rites of passage at the beginning of the twentieth century, largely as a result of Singh Sabha efforts to devise a distinctively Sikh (as opposed to Hindu) format for rituals celebrating the key incidents of birth, marriage and death, which at that time were normally performed by Brahmin *purohit*s. Whilst this was manifestly unacceptable to the reformers in the *Singh Sabha*, the challenge they faced was substantial: to devise an alternative set of *samskara*s, for the issue was just as pressing with respect to marriage as it was to funerary rituals. Whilst it was easy enough to replace Hindu Brahmins with Sikh

Gyanis, and Hindu prayers with recitations from the Granth Sahib, *actions* proved much more difficult. In the case of marriage the circumambulation of the sacred fire was replaced by circumambulation of the Guru Granth Sahib; but that kind of replacement made no sense in the context of a cremation, since the disposal of the body of the deceased required that it should be places on a sacred fire. Hence in funerary contexts the physical symbolism of the *anthyeshti samskara* was retained, but all the remaining 'Hindu' aspects of the procedure were rejected.

82. Hence the ritual was renamed as *antam samskar*, whilst Article XIX of the Rehat Maryada which defines how the ritual should be performed puts as much emphasis on what Sikhs should *not* do as on that which they should:

a) The body of a dying or dead person, if it is on a cot, must not be taken off the cot and put on the floor. Nor must a lit lamp be placed beside, or a cow got bestowed in donation by, him/her or for his/her good or any other ceremony, contrary to Guru's way, performed. Only Gurbani should be recited or "Waheguru, Waheguru" repeated by his/her side.

b) When some one shuffles the mortal coil, the survivors must not grieve or raise a hue and cry or indulge in breast beating. To induce a mood of resignation to God's will, it is desirable to recite Gurbani or repeat "Waheguru".

c) However young the deceased may be, the body should be cremated. However, where arrangements for cremation cannot be made, there should be no qualm about the body being immersed in flowing water or disposed of in any other manner.

d) As to the time of cremation, no consideration as to whether it should take place during day or night should weigh.

e) The dead body should be bathed and clothed in clean clothes. While that is done, the Sikh symbols-*comb, kachha, karha, kirpan*-should not be taken off. Thereafter putting the body on a plank, *Ardas* about its being taken away for disposal be offered. The hearse should then be lifted and taken to the cremation ground. While the body is being carried to the cremation ground, hymns that induce feelings of detachment should be recited.

   On reaching the cremation ground, the pyre should be laid. Then the *Ardas* for consigning the body to fire be offered. The dead body should then be placed on the pyre and the son or any other relation or friend of the deceased should set fire to it. The accompanying congregation should sit at a reasonable distance and listen to *kirtan* or carry on collective singing of hymns or recitation of detachment-inducing hymns. When the pyre is fully aflame, the *Kirtan Sohila* be recited and the Ardas offered.

   Piercing the Skull half an hour or so after the pyre has been burning with a rod or something else in the belief that will secure the release of the soul- kapal kriya-is contrary to the Guru's tenets.

   Coming back home, a reading of the Guru Granth Sahib should be commenced at home or in a nearby Gurudwara, and after reciting the six stanzas of the *Anand Sahib*, the *Ardas*, offered and *Karhah prashad* distributed. The reading of the Guru Granth Sahib should be completed on the tenth day…. The reading of the Guru

> Granth Sahib should be carried out by the members of the household of the deceased and relatives in cooperation. If possible, *Kirtan* may be held every night. No funeral ceremony remains to be performed after the "tenth day."
>
> f) When the pyre is burnt out, the whole bulk of the ashes, including the burnt bones, should be gathered up and immersed in flowing water or buried at that very place and the ground levelled. Raising a monument to the memory of the deceased at the place where his dead body is cremated is taboo.
>
> g) *Adh Marg* (the ceremony of breaking the pot used for bathing the dead body amid doleful cries half way towards the cremation ground), organised lamentation by women, *foorh*i (sitting on a straw mat in mourning for a certain period), diva (keeping an oil lamp lit for 360 days after the death in the belief that that will light the path of the deceased), *Pind* (ritual donating of lumps of rice flour, oat flour, or solidified milk for ten days after death), *kirya* (concluding the funeral proceedings ritualistically, serving meals and making offerings by way of *Shradh, Budha marna* (waving of whisk, over the hearse of an old person's dead body and decorating the hearse with festoons), etc. are contrary to the approved code.
>
> So too is the picking of the burnt bones from the ashes of the pyre for immersing in the Ganga, at Patalpuri (Kiratpur), at Kartarpur Sahib or at any other such place.

But as Gulzar Singh's comments suggest, it would be unwise to assume that the SGPC's slimmed down prescriptions for the *antam samskar* necessarily provide an accurate guide to the organisation of contemporary Sikh funerals. Amongst the Sikhs no less than the followers of all other faiths, it is the participants themselves who ultimately determine precisely how any given set of rituals is to be performed. So whilst the prescriptions set down in the *Rehat Maryada* do indeed provide a basic guide to the ritual practices observed at Sikh cremations, a significant number of the rituals which it actively proscribes are still widely performed to this day.

83. Nevertheless there is a yet deeper set of arguments lying behind all this, given that the SGPC and its committees in no way the sole sense of religious authority as far as the followers of Guru Nanak are concerned. Many purist Sikhs argue that the SGPC is essentially a *political* institution, and that it consequently has no spiritual authority whatsoever: instead they argue on theological grounds that only the Guru Granth Sahib can fulfil that role. From this position they go on to argue that a core element of the Nanak's teaching is that external rituals *of all kinds* are as meaningless as they are worthless, and hence best regarded as no more than a public show: the Truth, Nanak insistently argued, was to be found within one's heart. Hence it was on the ineffable Truth within, than on the transient feature of the external world, on which his Sikhs should focus their spiritual attention.

84. With such considerations in mind it becomes easier to comprehend what Gulzar Singh has in mind in draws between ‘doctrine and dogma’ on the one hand and ‘custom and practice’ on the other:

> the Sikh Code of Conduct is quite clear in stating that although there is a clear preference for is for a cremation of the dead body, where this is not possible, it can be disposed of in any other practicable manner. This, however, only makes a distinction between dogma and doctrine on the one hand, and custom and practice on the other.
>
> As a matter of theology the Sikhs are not enjoined to have open-air funerals. It is not difficult to see why Sikhism has a different religious doctrine to Hinduism in this respect. Sikhism was founded in the sixteenth century to attack "*caste, institutionalized religion, priesthood, and the worship of icons*" and its teachers "*taught in the local vernacular and encouraged women to join their gatherings*."
>
> Its founder, Guru Nanak, (rather like Christianity after the Reformation) "t*aught that God was personally knowable to every man, woman and child. All that was needed was personal devotion to a personal God*." To communicate this message, he spoke in the ordinary language of the day and rejected the idea of a select priesthood and the ritual recital of a sacred text in Sanskrit (the ancient unspoken Indian classical language) and of rituals and sacrifices. IJ In this way, Sikhism set out to "*to simplify and democratise religion*".

In so arguing Gulzar is effectively adopting a purist position which suggests that (in sharp contrast to the Hindu perspective) ritual practices such as the *samskara*s have no spiritual significance, for they bind those perform them ever more tightly into the transient cycle of birth and rebirth, and hence are of no assistance whatsoever in the achievement of *sahaj*. Hence in the light of Nanak’s teachings they are best understood as little more than harmless cultural practices; if pressed on this point the authors of the *Rehat Maryada* might well agree with the basic argument – before going on to insist that they can only be ‘harmless’ in this sense if care is taken to excise all unacceptably superstitious practices which have crept into and contaminated popular culture are carefully expunged.

85. But if all this serves to illuminate Gulzar Singh’s closing statement that

> Our claim is not based on doctrine. It is based on the practice of Sikhs as a particular faith community.

it nevertheless opens up a potential can of worms for lawyers, especially if they are unwise enough to assume that suggestion that religion (in the sense of ‘doctrine’) a different kind of phenomenon altogether from culture (which Gulzar Singh identifies here on doctrinal grounds as ‘the practice of a particular faith community’ can and should be imported directly into law.

86. But before proceeding further also worth noting just where, in historical terms, this particular conceptual distinction came from. In a Punjabi context it can be traced to the (at that stage largely ideological) religious battles which erupted in response to the evangelical activities of Christian Missionaries, during the course of which reform movements emerged amongst all three of Punjab's major religious traditions: the Arya Samaj as champions of the Hindu cause, the Singh Sabha for the Sikhs, and the Ahmadiyyas amongst the Muslims. However the conflict soon became internecine, with the result that all three became just as critical of each other's traditions as they were of the Christian evangelists.

87. From this perspective Gulzar Singh's line of argument is instantly familiar to scholars of the late nineteenth century *Singh Sabha* revivalist movement. By maintaining that there were (or at least should in principle be) sharp categorical boundaries between Sikhs and 'idolatrous' and ritualistically-minded Hindus, the Sikh reformists were able to depict essence of their faith in terms which were largely congruent the missionaries' Protestant assumption of what a 'proper' (or in other words non-idolatrous and non-superstitious) religion should look like, whilst also providing themselves with and ideological with which to keep the perceived threat of Hindu Brahminical hegemony firmly at bay.

88. However the arguments played out in the Punjabi context were by no means unprecedented: during the course of Europe's – and indeed of England's – long wars of religion Protestant reformists had similarly gone out of their way to restore their own understanding of the purity of doctrine, not least by expunging all traces of idolatry, ritualism and superstition from amongst their flocks, whilst castigating the 'priest-ridden' Catholics of actively supporting all these un-Christian and irreligious practices. With such considerations in mind it is clear that conceptual tropes developed during the ideological battles of the Reformation – in which the Protestant emphasis on religious and doctrinal 'rationality' held to be infinitely superior to superstitious ritualism of their 'Papist' opponents – have informed virtually every subsequent attempt to delineate a religious/cultural distinction. I would also suggest that this kind of analytically myopic perspective on religious phenomena continues to pervade vernacular discourse in most contemporary Protestant – or more accurately post-Protestant – societies to this day. As I indicated earlier, my own published contributions in the field of the anthropology of religion have largely been directed towards replacing this myopic perspective with a more enlightened conceptual vocabulary.

CONCLUDING REMARKS

89. As in my initial report, the arguments and analyses in this addendum have ranged far and wide: however in bringing my analysis to a conclusion, I would like to return to the core issues in this case.

The significance of plurality

90. In the context of a plural society, all arguments about social, cultural and religious policy can be expected to have a plurality of sides. Moreover in appreciating the logic of the arguments so developed, it is worth remembering that they are best (and indeed most equitably) understood if they are conceived of as arising not so much because of the members of minority groups follow different (and to be yet more specific 'non-normal') socio-cultural conventions, but rather because all the various components of such a plural society *differ* in terms of the social, cultural and religious conventions in terms of which members of each group prefer to order their lives. If so it follows that the quotidian behaviours of members of the indigenous majority are just as comprehensively socially, culturally and religiously conditioned as those deployed by the minorities.

91. With such considerations in mind it is worth returning to the commentary set out by Brian Patterson of the Ministry of Justice Coroner's Unit, in his witness statement dated 30th May 2007:

> **Purpose of the legislation**
>
> 14.Prior to the legislation in 1902, the legality of burning (as opposed to burying) a dead body was considered in the case of R v Price ([18841, 12 QBD 247). In this case, the conclusion reached was that the burning of a dead body was not of itself a criminal act, but that it would be unlawful if its consequence was that *a public nuisance* was created or that a coroner was prevented from holding an inquest.
>
> The present legislation (from 1902 and 1930) was prompted by the decision in Price. Prior to 1902 there were no legislative provisions relating to cremation of human remains and the first cremation authorities regulated themselves. The Department continues to take the view that *an open pyre would be a public nuisance as, in the light of the information below, it would offend against decency.*
>
> 15. Under the legislation, the purpose of requiring that a cremation may only take place at a properly established crematorium is necessary to ensure *suitable standards of propriety and decency*. The Department is concerned that an open air funeral pyre will offend against this as *people seeing the body being burnt on the pyre, or simply the burning pyre itself, may suffer emotionally or be traumatised by what they see*. For the same reasons, it is

> *highly undesirable for a cremation to be visible to people other than the mourners, such as passers-by or local inhabitants* …..
>
> 17. Although a small number of Dr Firth's respondents favoured open pyres on grounds of tradition it was recognised that there were a number of adverse factors weighing against pyres.
>
> The Department shares the concerns noted at the foot of page 25 of Dr Firth's report, namely, *the emotional effect on mourners, the body moving or not being properly burnt, the ceremony turning into a spectacle, the disposal of burnt bones in a river and also the danger of the bereaved throwing themselves on the fire.* The Department considers that anyone observing the pyre is likely to find the proceedings upsetting and disturbing.
>
> Even if the procedure is partly hidden from view there is *the inevitable risk that the pyre will be seen by the curious or the casual passer-by, including children.* Great Britain is a crowded country and it would be very difficult to find a location which could not be overseen by someone, whether a resident, worker or person engaging in a leisure activity (for example, the right to roam now enjoyed throughout Britain).
>
> 18. The 1930 Regulations were based on the rules and regulations of the Cremation Society of Great Britain's first crematorium at Woking in Surrey. These were designed to ensure that cremation takes place with decorum and decency under careful supervision by trained professionals. The Department's understanding (is that the cremation industry makes every effort to ensure that religious and cultural requirements are met and believes that mainstream Hindu opinion acknowledges that position.
>
> 19. The purpose of imposing procedural requirements to be complied with before a cremation may take place is a matter of significant importance, and is to guard against a body being destroyed by fire in circumstances when foul play might be suspected. The case of Harold Shipman, (Dr Shipman made false statements on the forms that he completed in respect of the persons he killed; the medical practitioners examining the forms completed by him failed to make adequate checks) provides a striking example of both the importance of the procedural requirements and, the dangers that can arise if those requirements are not properly observed and enforced. In the Departrnent's view, those procedures should not be relaxed in any way.
>
> The requirement for two medical practitioners to certify the cause of death, and for the medical referee to be satisfied that the inquiry made by the medical practitioners was adequate, is necessary to ensure that evidence of a homicide is not destroyed.

92. So far as I can see the issues raised by Mr. Patterson in paragraph 19 of his statement can be put to one side in this context, for as far as I am aware that the claimant's concerns in this case do not engage in any way with the matter of death certificates. If his plea was granted, those responsible for organising his cremation would (and indeed *should*) still be required to follow the normal bureaucratic procedures before proceeding to cremation.

93. In my view a similar argument can also be put with respect to the arguments developed in paragraph 18 of his statement. Having looked at the photographs of the cremation of Rajpal Mehat conducted by Mr. Ghai in 2006, it seems to me that whilst Mr. Ghai may well have performed the circumambulation, chanting of *mantras,* lighting the pyre and so forth on a conventional basis, the pyre itself appeared to have been constructed on a wholly do-it-yourself using lengths of sawn timber stacked more or less vertically, tepee-style, in a manner wholly unlike the procedures deployed in South Asia, where specialist attendants not only supervise the construction of the pyre (on which logs are arranged horizontally, rather than vertically), but also tend the burning process after the pyre has been lit, to ensure that they body of the deceased is entirely consumed.

94. It follows that if more ethnosensitive forms of cremation practice were to become permissible in the UK, there is every reason to suppose that specialist undertakers capable of handling cremations for Hindu, Sikh and Jain clients would rapidly emerge, in just the same way as specialist undertakers have emerged to meet the Muslim demand to fly suitably embalmed bodies back to Pakistan, India and Bangladesh for burial.

An offence against propriety and decency?

95. The remaining paragraphs of Mr. Patterson's statement raise issues of quite a different order. The phrases which I have picked out in italics all point in much the same direction: namely that an open pyre cremation along the lines envisaged by the claimant would be would be a public nuisance, and that it would also offend against public decency. Bringing all the points raised by Mr. Patterson together, it would seem that the Department of Justice is ultimately opposed to this claim because

> open air funeral pyres will offend established standards of propriety and decency, on the grounds that participants, as well as passers-by or local inhabitants might suffer emotionally or be traumatised by experience of seeing the body being burnt on the pyre, or simply the burning pyre itself.

Mr Patterson also extends on Dr. Firth's remarks in such a way as to suggest that

> the curious, casual passers-by and children could be emotionally traumatised by the sight of the body moving or not being properly burnt, the ceremony turning into a spectacle, the disposal of burnt bones in a river and also the danger of the bereaved throwing themselves on the fire.

96. In responding to these arguments I would suggest that Mr. Patterson is grossly over-egging his pudding. As far as the mourners are concerned, the sacrament of *anthyeshti sanskar* is in no way a 'public spectacle' of the kind which he envisages. To be sure

emotions may run high in the course of the procedure – but with feelings of grief and bereavement, not of ecstasy. In my view his comment about the prospect of the bereaved throwing themselves into the fire is in my view seriously misplaced. It is not unknown – although extremely rare – for a bereaved spouse to throw him or herself into the grave after the coffin has been lowered into it. However so far as I am aware no-one has seriously suggested that mourners should be barred from standing around the grave when burial takes place. It follows that Mr. Patterson appears to have ordered his remarks in such a way as to present a scandalised and deliberately exoticised vision of 'alien' practices of which he seems to be unlikely to have any direct knowledge and experience.

97. With such considerations in mind I am of the opinion that the burden of Mr. Patterson's remarks in this section highlight a far more fundamental issue: namely that contemporary indigenous socio-cultural conventions regard casting one's eyes on a corpse as a matter of taboo, so much so that – precisely as Mr. Patterson suggests – the very prospect of having sight of corpse is popularly perceived as something which is likely to offend established standards of propriety and decency, and to have a traumatic effect on children. This is manifestly a culturally grounded taboo, which is in no way universally subscribed to.

98. This does not mean, however, that those who do not subscribe to this taboo treat the bodies of the deceased with disrespect, as Mr. Patterson seems to imagine will inevitably be the case. Quite the contrary: in all the Indic traditions the bodies of the deceased are treated with immense respect: it is simply that that religio-cultural codes in terms of which they express that respect do not include the provision that the body of the deceased should be whisked away to the mortuary, from which it only emerges in an inscrutably boxed-up format. For religious no less than cultural reasons mourners in the Indic tradition expect to continue to focus their attention of the body of the deceased right up to the point when it is finally – and solemnly – consumed in the flames of Agni.

The Implications of the Race Relations Act of 2000 and of the Equality Act of 2006

99. In a recent judgment **[2008] EWHC 1865 (Admin)** Silber J conveniently outlined the criteria which needed to be borne in mind to establish whether or not an instance of indirect discrimination had occurred:

> 37. It is common ground that in considering the claimant's case on grounds of indirect discrimination whether under the RRA or the EA, it is necessary to go through the following steps, which are:

a) to identify the relevant "provision, criterion or practice" which is applicable;
b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and
(d) whether this policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim.

Whilst I am no lawyer, it would appear that criteria a) and b) can readily be met in these proceedings, with the result the core issues around which this case is likely to revolve are twofold. Firstly the extent of the disadvantage which the claimant (and others like him) will suffer if the current regulations (and their underlying framework in the Cremation Act) remain unchanged, and secondly whether the claimant's proposals (or some variant of them) can be regarded as a proportionate means of achieving a legitimate aim, namely his right to express his religion in conformity with the principles laid out in Article 9 ECHR.

100. With respect to the first issue Silber J argued that

51. I am unable to accept the contention that there will *only* be "*a particular disadvantage"* or "*detriment"* where a member of the group is prevented from wearing something which he or she is *required* by his or her religion to wear. In my view, this threshold is too high for five reasons…

Two of those reasons appear to be of particular significance in this context

53. The second reason why I do not consider that there will *only* be "*a particular disadvantage"* or " *detriment"* where a member of the group is prevented from wearing something which he or she is *required* by his or her religion or race to wear is that such an interpretation would mean rewriting the legislative provisions so that after each of the words "*a particular disadvantage"* or "*detriment",* it would be necessary to insert the words *"in the form of not being able to comply with a requirement of his or her race/* religion" . This is not a permissible step for a court to take.

54. Third, the words "*a particular disadvantage"* and "*detriment"* have to be construed in the light of, and not be inconsistent with, the approach in the recent decision of the Grand Chamber of the European Court of Human Rights in **DH & others v Czech Republic** [2008] ELR in which it was stated that :

> *"181.. in Chapman,… the court also observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community". and*

> *"186... the court has noted in previous cases that applicants may have difficulties in proving discriminatory treatment. In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination."*

However it goes without saying that I am in no position to assess how far Silber J's arguments might engage with the issues in this case.

101. Subsequently Silber J went on to discuss the equally important issues of proportionality and justification:

> 52. It is common ground between counsel that the operative test for justification was explained by Balcombe LJ in **Hampson v Department of Education and Science** [1989] ICR 179 at 191 F in a judgment (with which Nourse and Parker LJ agreed at pages 196H and 207D) when he said that:
>
> *73. "in my judgment "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".*
>
> 74. It is settled law that the onus is on the person, who is alleged to have discriminated to justify the discriminatory treatment, and as Mummery LJ recently explained (with my emphasis added in a judgment with which Arden and Longmore LJJ agreed) that:
>
> 75. *"the standard of justification in race discrimination is the more exacting EC test of proportionality... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not enough that [the party discriminating] could reasonably consider the means chosen as suitable for attaining that aim"* (**R (Elias) v Secretary of State for Defence** [2006] 1WLR 3213 at 3249 [151]).
>
> 76. The reason for these requirements is not difficult to ascertain because both the domestic and the Strasbourg courts have drawn attention to the exceptionally serious effects for society as a whole and the psychological well-being of the individuals of race discrimination and segregation in the educational context. The reasons are, for example, set out by Arden LJ in **Elias** (supra) where she explains very persuasively why the adverse effect of unlawful discrimination are manifold at pages 3267-8 [269 – 270] and in **DH** (Supra). Lord Hoffmann explained in **R (Carson) v Secretary of State for Work and Pensions** [2006] 1AC 173 at 182- 183 [16] in respect of characteristics such as race, cast, noble birth (with my emphasis added) that:
>
> *"..the courts as guardians of the right of the individual to equal respect, will <u>carefully</u> examine the reasons offered for any discrimination."*
>
> 77. The burden of justification on the defendant means in the words of Munby J in the **JFS case** (supra) (but with references omitted) that: the defendant must show:

> *"164…that the measure in question corresponds to a "real need" and that the means adopted must be "appropriate" and "necessary" to achieving that objective. There must be a "real match" between the end and the means. The court must "weigh the justification against its discriminatory effect" with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage to those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification"*

101 Once again I am not in a position to adjudge how far either of these learned judges arguments apply in the very different circumstances of this case, other than to note that there appears to be a consensus that is for the *respondent* to demonstrate that his decision to overlook any detriment suffered by the applicant as a result of the any decision on this front the respondent might make.

102 It is also worth noting that Silber J extends this argument still further later in his judgement, when he discusses the duties of public bodies Authorities under Section 71 of the RRA:

> 75. To understand this issue, it is necessary now to stress the clear purpose of section 71 of the RRA, which is to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. As Arden LJ explained in **Secretary of State for Defence v Elias** [2006] EWCA Civ 1293 at paragraph 274;
>
> > *"it is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation…"*
>
> 76. The duties under section 71 must be fulfilled whenever a decision is taken which may have an impact on matters contained in it. Compliance should not be treated as a *"rearguard action following a concluded decision", but as an "essential preliminary to such decision, inattention to which is both unlawful and bad government".* (**R (BAPIO Action Ltd) v Secretary of State for the Home Department** [2007] EWCA Civ 1139 per Sedley LJ [3]).

A South African perspective

103 Nevertheless there is still a strong sense in which none of these judgements never really get to grips with the core issue of social policy which has been thrown up in these proceedings: namely the extent to which public policy should take explicit cognisance of the increasing salience of ethnic and religious plurality in the contemporary British social

order. With such considerations in mind it is worth returning to the arguments set out by Sachs J in ***Lawrence et al v. The State***, which I discussed in Paragraph 40 above. To my mind the key points in his argument are as follows:

> [148] To my mind, read in the context of all of the above provisions and of the Constitution as a whole, section 14 was intended at least to uphold the following principles and values: South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view.
>
> The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.
>
> [152] The marginalisation of communities of Hindu and Muslim persuasion flowed from and reinforced a tendency for the norms of "Christian civilisation" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other". Any echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected.
>
> … any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.
>
> [157] It is not always easy to distinguish between observances and practices that are purely sectarian, those that are completely secular and those that combine elements of both.
>
> [160] … The functional impact of the law may be marginal, and its symbolic effect muted, yet the communication it makes cannot be disregarded. Even if there is clear scope for the application of the *de minimis* rule to the question of some ancillary economic costs resulting from being true to one's faith, it should be used with extreme caution when it comes to deciding such sensitive and not easily measurable questions as freedom of conscience, religion and belief.
>
> The objective of section 14 is to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must.

104 Whilst I do not know how far the English courts will wish to follow the South African Constitutional Court in this matter, it would certainly appear that arguments of the kind adumbrated by Justice Sachs are of great significance with respect to the issues at stake in these proceedings, especially if I am right in thinking that the indigenous view that the exposure of dead bodies to public view (and hence their comprehensive enclosure in mortuaries, closed coffins and so forth) is best regarded as the product of an established socio-cultural and religious taboo.

105 It is worth taking cognisance of the etymology of the term in this context. Derived from the Tongan term *tabu*, (which can conveniently be glossed as set apart, forbidden) the Oxford English Dictionary defines its current usage as 'a social or religious custom placing prohibition or restriction on a particular thing or person.'

106 In all known cultural traditions human bodies occupying the liminal state between that person's death and their final disposal (whether by burial, cremation, disposal at sea or whatever) are treated as *tabu* in the broadest sense, and as such treated with immense respect by the living, the social, cultural and behavioural consequences of bodies being allocated to this liminal status are infinitely varied, as are the ritual processes of disposal which finally remove all physical traces of that person's existence from this world.

107 Amongst the native English, contemporary understandings of that condition of *tabu* suggest that the bereaved should have as little as possible to do with the corpse of the deceased following his or her death. The body is normally removed to the mortuary as soon as possible after death has occurred, leaving mortuary staff and undertakers to prepare both the coffin and the body for the funeral. The embalmed body is normally placed in an unlidded coffin in a chapel of rest for a while prior to the funeral, where mourners have an opportunity to visit to pay their last respects to the deceased in private. I understand that the number of mourners who take advantage of this opportunity is relatively small. The coffin is lidded up prior to being transferred to the hearse, and the coffin normally remains closed through any subsequent services right through to its eventually disposal either by burial or cremation.

108 South Asians also regard human bodies in this luminal state as *tabu*, but they interpret its significance in a very different way. Far from distancing themselves from the body whilst it is in this liminal state, their notions respect insist that they should take close and direct cognisance of it. Hence close kin (whether Hindu, Sikh or Muslim) expect to wash and purify the body, and to prepare it for its eventual disposal, whether that is by

cremation for the Hindus and Sikhs, or burial for the Moslems. Moreover in the immediate run-up to that process of disposal, all those with any connection with the deceased are not only expected to attend the proceedings, but also to pay their last respects to the deceased *on a face to face basis*. Hence in a UK context the coffin is invariably opened at some convenient place – often the home of the deceased – so that all the mourners can do just this. Throughout all this the body remains *tabu*, with the result that all concerned take a wash – and preferably a bath – to remove the negative sacredness to which they have thereby been necessarily been exposed. Only then do they resume their normal business. The contrast between these practices and those currently practiced by the indigenous English could hardly be more stark.

109 With this in mind it is worth returning to the arguments of Justice Sachs, and most especially to his remarks to the effect that

> The marginalisation of communities of Hindu and Muslim persuasion flowed from and reinforced a tendency for the norms of "Christian civilisation" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other". Any echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected.

110 To be sure the United Kingdom never suffered from an *apartheid* regime; however the very fact that the UK authorities took the opportunity to introduce a Race Relations Act, and to steadily reinforce its provisions over the years is evidence enough that Britain suffered (and suffers) from similar problems, even if they are not so deeply and formally intuitionalised as they were in South Africa during what the judges now politely describe as its 'pre-Constitutional' era.

111 In view of all this I would respectfully suggest that one of the central issues which the court will need to consider is how far his remarks to the effect that 'The marginalisation of communities of Hindu and Muslim persuasion flowed from, and reinforced, a tendency for the norms of "Christian civilisation" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other"' map directly on to the issues at stake in these proceedings.