difference. For nearly two millennia, the Western tradition has included polygamy among the crimes that are inherently wrong. Not just because polygamy is unbiblical, unusual, unsafe or unsavoury; but also because polygamy routinises patriarchy, jeopardises consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous because it will make some churches and mosques a law unto themselves. Again, some religious communities and their members might well thrive with the freedom to practise polygamy. But inevitably closed repressive regimes such as the Texas ranch compound will also emerge – with under-aged girls duped or coerced into sex and marriages with older men; and with women and children trapped in sectarian communities with no realistic access to help or protection from the state and no real legal recourse against a church or mosque that is just following its own rules. We prize liberty, equality and consent in America too highly to court such a risk.

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Underrating Human Rights: *Gallagher v Church of Jesus Christ of Latter-day Saints*

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The Human Rights Act 1998 has led to an increase in domestic litigation concerning Article 9 of the European Convention on Human Rights (ECHR).[2] Most such cases have been unsuccessful,[3] particularly at higher

1 I am grateful to my colleagues at the Centre for Law and Religion, especially Professor Norman Doe, Professor Mark Hill and Frank Cranmer for their invaluable guidance.

2 Such an increase was foreseen by commentators: see, for example, M Hill 'A new dawn for freedom of religion' in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff, 2002), p 13 and A Bradney, 'Faced by faith' in P Oliver, S Douglas-Scott and V Tadros (eds), *Faith in Law* (Oxford, 2000), p 104.

3 *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15; *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

level.[4] Moreover, such claims have increasingly failed due to lack of interference under Article 9(1) rather than on grounds of justification under Article 9(2).[5] This has meant that litigants in religious dress cases are now arguing anything but Article 9: the most recent case, concerning the wearing of the Sikh Kara in Aberdare,[6] was successful because, while the school saw the issue as one concerning Article 9, the claimant's legal team relied instead on race and religious discrimination laws.[7] It is not surprising, therefore, that the House of Lords rejected the most recent argument made on grounds of Articles 9 and 14. It is the merits of that argument and the haste displayed in its rejection that are the focus of this brief comment.

THE DECISION OF THE HOUSE OF LORDS

Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints[8] concerned a group of buildings in Chorley, Lancashire, which had been held not to be entitled to the exemption for non-domestic rates pursuant to paragraph 11 of Schedule 5 to the Local Government Finance Act 1988, as amended. This provides an exemption for 'a place of public religious worship' and 'a church hall, chapel building or similar building used in connection with a place of public religious worship'. The valuation officer, who had accepted that the stake centre, with its chapel, associated hall and ancillary rooms, was a 'place of public religious worship', concluded that the temple was not, on the grounds that it was open only to a particular class of Mormons ('Patrons') who have a 'recommend' from the bishop after demonstrating belief in Mormon doctrine, an appropriate way of life and payment of the required contribution to church funds.

The House of Lords agreed, dismissing the claim. There was no reason to depart from the judgment of the House in *Church of Jesus Christ of Latter-day Saints v Henning (Valuation Officer)*,[9] which had held that the words 'place of public religious worship' could not apply to a place from which the public was excluded. Moreover, the temple was not entitled to exemption as being 'a church hall, chapel building or similar building used in connection' with a

4 Compare the decision of the High Court in *R (on the Application of Swami Suryananda) v Welsh Ministers* [2007] EWHC (Admin) 1736 with that of the Court of Appeal: [2007] EWCA Civ 893. Also compare the House of Lords decision in *Begum* with that of the Court of Appeal: [2004] EWHC 1389.

5 For analysis, see M Hill and R Sandberg 'Is nothing sacred? Clashing symbols in a secular world', (2007) *Public Law* 488–506 and R Sandberg 'Controversial recent claims to religious liberty', (2008) 124 *Law Quarterly Review* 213–217.

6 *R (on the application of Watkins-Singh) v The Governing Body of Aberdare Girls' High School* [2008] EWHC (Admin) 1865.

7 See para 3 of Silber J's judgment.

8 [2008] UKHL 56.

9 [1964] AC 420.

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place of public religious worship. *Henning* was also fatal to this claim, since it had settled that the use of the temple was not ancillary to the use of the stake centre but separate and independent. As Lord Hoffmann remarked, to decide otherwise 'would be having the tail wag the dog'.[10]

While a human-rights-based argument had not been made at lower levels,[11] the appeal to the House of Lords included the claim that section 3 of the Human Rights Act 1998 required the exemption in the 1988 Act to 'be read and given effect in a way which is compatible with the Convention rights'. It was submitted that the lack of 'public' access was a manifestation of the Mormon faith and so to deny the exemption on that ground was to discriminate against them on grounds of religion, contrary to Articles 9 and 14 of the ECHR. Lord Hoffmann, Lord Hope of Craighead and Lord Scott of Foscote considered but rejected this argument. While Lords Hoffmann and Hope concluded that the claim fell at the first hurdle, in that there had been no interference with or discrimination against the appellant's human rights, Lord Scott held that there had been an element of such discrimination but that this was justified. These two different approaches, though reaching the same conclusion, merit separate consideration.

NO INTERFERENCE OR DISCRIMINATION

Lords Hoffmann and Hope held that there was no interference with Articles 9 and 14. Lord Hoffmann deemed that, in order to constitute discrimination on grounds of religion, the alleged discrimination must fall 'within the ambit' of Article 9. He held that this had not been met: the liability of the temple to a non-domestic rate did not of itself prevent Mormons from manifesting their religion. The church was not being taxed on account of religion: rather, it was the Mormon religion that prevented them from providing the public benefit necessary to secure that particular tax advantage.[12] This meant that their loss 'was too remote from the interference with the right in question': he reasoned that the Mormons' loss was akin to that of a Sabbatarian who could not complain that he was discriminated against because he earned less money as a result of being unable, on religious grounds, to provide services on the Sabbath.[13]

Lord Hope agreed, and seemed to go further than Lord Hoffmann in not even recognising that there was any trace of indirect discrimination: for Lord Hope, it was definitive that the legislation was 'not directed at Mormons because of what they believe in' and that it 'applies generally to all whose religious beliefs and

10 [2008] UKHL 56, para 16.
11 *Gallagher v Church of Jesus Christ of Latter-day Saints* [2006] EWCA Civ 1598. These arguments were first raised in the petition for leave to appeal to the House of Lords.
12 [2008] UKHL 56, para 13.
13 Ibid, para 14.

practices prevent them from participating in public religious worship'.[14] Lord Hoffmann, by contrast, saw the claim as potentially being one of indirect discrimination under Article 14 but held that the case had not been made:[15] he briefly noted that, even if there was such indirect discrimination, it would be justified because Parliament must have a wide discretion in the area of exemption to taxation.[16]

This reasoning seems to misunderstand Article 14. Although Article 14 only forbids discrimination in regard to 'the rights and freedoms set forth' in the Convention,[17] this does not mean that a 'violation of a substantive Article need to be established at all in cases involving discrimination' under Article 14.[18] Lord Hoffmann incorrectly sees the test that the alleged discrimination must fall 'within the ambit' of Article 9 as requiring an actual violation of Article 9. Yet, as the European Court of Human Rights has confirmed:

> a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.[19]

There will be discrimination 'if the distinction has no objective and reasonable justification'.[20] Such infringement of Article 14 will only be justified if it pursues a 'legitimate aim' and if there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[21]

Thus, to focus entirely on whether there would have been a violation of Article 9 is erroneous.[22] The Strasbourg decision in *Thlimmenos v Greece*,[23] a case alleging breach of Articles 9 and 14 (albeit in the different context of holding a criminal record for refusing, on grounds of religion or conscience, to wear military

14 Ibid, para 31.
15 Ibid, para 12.
16 Ibid, para 15.
17 Article 1 of Protocol 12 extends this to 'any right set forth by law' but this has not been ratified in the UK. See R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005), p 109.
18 PM Taylor, *Freedom of Religion* (Cambridge, 2005), pp 182–183.
19 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1979–80) 1 EHRR 252 at 282.
20 Ibid: 'A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.' See also *Igleisa Bautista and Ortegra Moratilla v Spain* (1992) 72 DR 256, para 2.
21 *Darby v Sweden* (1991) 13 EHRR 774, para 31.
22 It could be argued that the analysis of Article 9 here is also flawed. In a series of judgments, the Strasbourg Court has held that 'the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning': *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (2008), application no 40825/98, 31 July, para 62.
23 (2001) 31 EHRR 15.

uniform) may be instructive, especially since Lord Hoffmann referred to it in the course of his judgment.[24] In that case, Strasbourg simply accepted that the 'set of facts' complained of fell 'within the ambit' of Article 9 since it was 'prompted' by the claimant's religion or belief.[25] The Court did 'not find it necessary' to examine whether the facts 'amounted to interference with his rights under Article 9(1)' but focused instead on Article 14,[26] holding that there would be discrimination, inter alia, where 'States treat differently persons in analogous situations without providing an objective and reasonable justification'.[27] The focus and approach of Lords Hoffmann and Hope thus seems deficient.[28]

DISCRIMINATION BUT JUSTIFIED

The approach of Lord Scott of Foscote is therefore preferable, since he noted that the absence of 'an actual breach of the substantive article' is not required for an allegedly discriminatory act said to be in breach of Article 14.[29] Having stated briefly that 'levying of taxation on a place of religious worship ... would be capable in particular circumstances of constituting a breach of Article 9', he preferred to focus upon the question of whether such discrimination was justified.[30] However, his very brief consideration of the question of justification is problematic.

Lord Scott concluded 'unhesitatingly' that such discrimination was justifiable and within the margin of appreciation available to signatory states since states may recognise that 'although religion may be beneficial both to individuals and to the community, it is also capable of being divisive, and, sometimes, of being dangerously so'.[31] There was 'every reason' why a state should adopt a general policy where fiscal relief for premises used for religious worship was available where the premises were open to the general public and withheld when they were not, since 'secrecy in religious matters provides the soil in which suspicions and unfounded prejudices can take root and flow; openness in religious practices, on the other hand can dispel suspicions and contradict prejudices'.[32] It is questionable whether Lord Scott's abstract and detached

24 See [2008] UKHL 56, para 12.
25 (2001) 31 EHRR 15, para 42.
26 Ibid, para 43.
27 Ibid, para 44. The Court also recognised that there would be a violation where 'States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (ibid). For a discussion of this, see Taylor, *Freedom of Religion*, pp 189–190.
28 Their approach also seems to contradict the guarantees of s 13 of the Human Rights Act 1998 but this may simply be seen as indicative of the shallowness of that provision: see Hill and Sandberg, 'Is nothing sacred?', pp 492–493.
29 (2001) 31 EHRR 15, para 49.
30 Ibid, paras 49–50.
31 Ibid, para 51.
32 Ibid.

consideration of the issue of justification meets the Strasbourg requirements of proportionality: it seems difficult to maintain that such discrimination against Mormons on the basis of their exclusion of members of the public is discriminatory but can be justified by an obtuse assertion that states prefer religious bodies not to be secretive.

CONCLUSIONS

To an extent, the appellants' failure in *Gallagher* can be summed up in one word: *Henning*. However, despite the importance of this precedent, the lack of sophistication with which the human rights argument was treated is also noteworthy and disappointing. The judgments of Lords Hoffmann and Hope are simply the latest in a significant line that has 'filtered out' the human rights claim on the basis of interference under Article 9(1), albeit with a light obiter discussion of justification under Article 9(2). Such an approach is even more insufficient in the present case, where the claim was made under both Articles 9 and 14. While Lord Scott's correct understanding of Article 14 is welcome and preferable to that of his fellow law lords, his approach to justification seems wanting.

Exemption from taxation for religious purposes is a privilege and it is surely right that the legal mechanisms regulating that privilege are rigorously applied. However, it is also vital – especially in an age of religious pluralism and diversity – that such mechanisms do not indirectly prejudice minority religious groups. The attitude of both the Court of Appeal and the House of Lords in *Gallagher* is perhaps best summed up in the comments of Neuberger LJ in the Court of Appeal, in which he stated that the perspective of the court had to 'be external, objective and analytical, not internal, subjective or holistic' since the 'exercise we are carrying out is concerned with a topic which cannot be characterised as remotely religious, namely rating legislation'.[33] Given the enactment of the Human Rights Act 1998 and the new law on religious discrimination, this attitude seems outmoded:[34] the judiciary needs to recognise that the letter of English law now clearly affords protection for believers who are inadvertently disadvantaged, but disadvantaged nonetheless, because of their religion or belief. The reasoning of, if not the actual decision reached by, the House of Lords in *Gallagher* should thus be a matter of concern, especially within the context of the curtailment of the freestanding Article 9 guarantees in other cases.

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33 [2006] EWCA Civ 1598 at para 31.
34 In fairness to Neuberger LJ, the human rights points had not been argued before him, and first appeared in the petition to the House of Lords for leave to appeal.