

Human Rights, Law & Religion: Flashpoints Centre For Conflict, Rights & Justice

‘Freedom of Worship’ and Sexual Identity

The topic of my presentation is the current jurisprudential intersection between freedom of religion with sexual orientation and gender re-assignment as relates to the Equality Act 2010.

The first premise we must address is that freedom of religion enjoys multi-layered protection in our domestic legislation. Article 9 of the European Convention on Human Rights, as transposed into domestic law vis-à-vis the Human Rights Act, protects freedom of thought, conscience and religion. It has been defined broadly by the European Court of Human Rights.

Article 9 stands alone in that it is the only fundamental right which recognizes the relationship between the individual and the transcendent. It therefore protects the most profound and deeply held conscience and faith based beliefs.

It considers that freedom of religion is one of the foundations of a democratic society. The European Court, in the *Manoussakis and Others v. Greece* judgment, has also ruled that any interference with freedom to manifest one’s religion must be reviewed with a strict scrutiny standard.

Article 9 protects the *forum externum*, on the basis that “bearing witness in words and deeds is bound up with the existence of religious convictions.” It is this nexus between words and deeds and beliefs that gives Article 9 its meaning.

However, what we have seen from our courts, particularly employment tribunals, is the whittling down of Article 9 to protect only freedom of worship. This limiting view suggests that freedom of religion is all well and good so long as it is kept in the private sphere and within a church setting, but that acts motivated by faith are not protected in the public square.

This definition does tremendous violence to freedom of religious expression. It also ignores my second premise; that is, that the intention of parliament when legislating the Equality Act was not to create a hierarchy among the protected characteristics. Precisely stated, the artificial hierarchy being built by non-precedent setting cases in relation to the outworking of the Equality Act and its overwhelming preference to protect sexual orientation and gender identity over religion or belief runs contrary to both the spirit and the plain meaning of the Act.

The ECHR has remedied this slightly with the *Eweida* judgment, three of the four cases of which originated with Christian Concern. That ruling held that a fair balance must be struck between freedom of religion and other rights, rather than just giving *carte blanche* to sexual orientation. Despite this, the courts in the United Kingdom have been slow, and even sometimes obstinate, in applying the *Eweida* standard.

One of the central themes of my paper will be that including sexual orientation or gender reassignment among the considerations on the basis of which it is illegal to discriminate can easily lead to regarding homosexuality as a positive source of human rights.

I want to take a moment to discuss the legal uncertainty behind the definition of sexual orientation and gender identity.

The Yogyakarta Principles, for example, define sexual orientation as:

Each person's capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

It defines gender identity as:

Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.

This definition of sexual orientation is dangerous because it equalizes all sexual relationships, divorcing sexuality from its biological purpose (which is procreation) and social responsibility. It also does not draw the important distinction, on the one hand, between discrimination of someone because of the sexual orientation they identify as or on the other hand, moral opposition to sexual practice or promoting same-sex relationships through direct or indirect solemnization of a same-sex relationship.

We have seen this confusion recently in the growing number of cases against wedding cake bakers, florists, wedding photographers and other Christian service providers. I think several important principles are at play here.

First, we oversimplify the question of refusing a specific service by typically making two arguments. The first is that anyone going into business should not be able to refuse providing a service to a prospective client on moral or other grounds. And second, such refusal is akin to racism or similar heinous acts of prejudice.

To start with the first argument. It is important to remember that just because someone decides to run a business or provide a certain service that they do not, as a result, give up their civil, social, or human rights. While a customer does have a legal right not to be discriminated against, so too does a service provider enjoy a legal right to freedom of thought, conscience, and religion.

To put this into perspective, even the most secular among us knows the feeling of guilt when we act contrary to what we know in our hearts to be right. Even more so, in our lifetime there is the inevitability that each of us commit a grave violation of our conscience by doing something we knew was particularly wrong. And in such cases, that regret can be life altering. As such, knowing that human experience, we can appreciate the weight of what acting according to our conscience means by knowing what that awful feeling of guilt is like.

Each of us holds certain internal feelings at the core of who we are. These feelings may be, for example, love of country or love of one's children. So too, for the Christian service providers of the world, does their love of Jesus Christ and adherence to what they believe Christian sexual morality entails hold tremendous and life changing meaning. For this very reason, in our gut, we should know why it is wrong for the state to compel any Christian service provider to offend his conscience on such a matter of intimate concern.

In each and every one of the cases I am aware of, the service provider did not refuse the service being asked of them because of the sexual orientation of the client (in fact, many of them had provided services to them in the past in matters which did not promote an ideological message that offended the service providers religious beliefs. It was therefore participation, which means complicity with, the message behind the service that was being objected to and not the sexual orientation of the clients.

This leads us to argument 2; that refusing services to someone in relation to promoting same-sex weddings or homosexual behaviour in general is akin to racism or something of the same ilk. I think this argument to be a red herring, and let me tell you why. Let's take two scenarios.

The first is that of a person of colour being refused services by a printer. Our instinct is to impute a motivation of racism onto the service provider.

However, let's take the same scenario with the same person of colour and the same printer but add that the printer is Jewish, and the client is wanting him to publish virulently anti-Semitic literature. My guess is that very few people in this room would want the State to compel that printer to publish the offending material; nor would we impute racism as his motivation for denying services.

Now even if that printer had never personally suffered an anti-Semitic act in his life, he nonetheless would likely have an abhorrence to anti-Semitism bound up in his very existence. In a similar vein, so too does the Christian service provider hold deeply held feelings and beliefs about being forced to provide certain services that have nothing to do with the sexual orientation of the client, but have everything to do with honouring His God.

While my paper will go into far greater detail about Christian Concern's cases in this area, let me just highlight some of our more well-known cases where Christians are being punished in relation to sexual orientation laws.

Barry Trayhorn, an ordained Pentecostal Minister, was pushed out of his job at a prison literally for quoting 1 Corinthians 6 during a voluntary prison ministry. The complaining prisoner was an individual who had sexually assaulted very young boys. How far astray have we run when an ordained minister is being persecuted for preaching sexual purity to sexual offenders in prison.

Mike Overd, a street preacher, has been arrested and jailed numerous times for his preaching. His crime? Speaking the Word of God on sensitive issues like sexual immorality and Islam.

While some disagree with Mike's preaching methods, what is very important about his cases is that he has not only tested the robustness of free speech protections and exceptions to the Public Order Act, we have won in his cases 100 % of the time.

Only once was he actually convicted by a magistrate's court before that decision was overturned. I mention that conviction to highlight how anti-Christian our courts have become. The Prosecutor in that Bristol magistrate's court case, Ian Jackson, boldly told the court that just because the words being preached are from the Bible, it does not mean that they are incapable of amounting to a violation of a public order offense today. Officers of our courts are now going as far as calling the Bible "hate speech".

And we have had many many cases where clients, just for speaking their opinions, have suffered immeasurably. Richard Page, a magistrate in the family division, was sacked for saying that a child does better with a mum and dad. The comment, supported by social science, was made in a closed-door session and should have been privileged.

Eunice and Owen Johns were forbidden from fostering children because their views on homosexual behaviour. The Equality Commission filed a brief in the case claiming that foster carers like the Johns ran the risk of “infecting” children with Christianity.

And Gary McFarlane was a relationship counsellor who was sacked simply for requesting not to have to counsel same-sex couples in relation to sexual activity. Gary is a Deacon in his church and a devout Christian. He never actually discriminated against anyone; he merely asked for a reasonable accommodation. Despite the fact that referrals to other counsellors is commonplace in therapy, Gary was fired for gross misconduct.

Let's not move onto the issue of gender ideology.

The prevailing definition of gender identity, as I defined a few minutes ago, is enormously flawed because it is completely subjective, ignoring the basic objective biological reality that people are born a certain gender.

From the moment of conception our sex is determined by our chromosomes. That is whether an x or y chromosome implants into the egg.

Up to 6500 genes in any given tissue in our bodies is sex differentiated. That means for example, in a female breast tissue, the cells would be differentiated specifically to a female's physiology, allowing for lactation and breast feeding. We find genetic sex differentiation amongst our tissue to be highest in the reproductive organs, but it is also present in brain tissue, muscle tissue, and fat just to give some examples.

The issue of transgender ideology and Christian parents in schools has recently come to the fore. Credible studies from Johns Hopkins Medical School experts, as well as others, have stated that in up to 98 out of 100 children who suffer gender confusion, will settle into their biological sex at puberty. Despite this, schools are aggressively promoting gender ideology in children as young as 6.

Nigel and Sally Rowe are Christian parents who hold, and wish to instil in their children, a Biblically centred belief in gender. Beliefs that would include Genesis 1:27, where Scripture says, “So God created man in his own image, in the image of God he created him; male and female he created them.”; or Matthew 19:4, where Christ says, “Have you not read that He who created them from the beginning made them male and female...”

In seeking to raise their children according to their Christian beliefs, they sent their two sons to a Church of England school on the Isle of Wight. Within two school years, both of their children, ages 6 and 8, found themselves in classes with boys who, under their parents and the school's direction, were to be identified as girls.

Because of the confusion and discomfort suffered by their older son, he was removed from the school and home educated since last year. Nigel and Sally attempted to work the matter out with the school in relation to their youngest son.

In a response to a letter they sent the school asking about anti-bullying measures and their own parental rights, the school responded by suggesting that anyone who could not believe that these children were girls or refused to use female pronouns would be viewed by the school as being transphobic. The school also announced their intention to educate parents and students alike in accordance with this gender ideology.

The result has been that Nigel and Sally have now removed their youngest son and litigation over the matter will commence imminently.

Similarly, Christian Concern is supporting Joshua Suttcliffe, a maths teacher indefinitely suspended for simply ‘misgendering’ a student. Precisely stated, he used a female pronoun for a student biologically female but who wished to be identified as a boy. For this, Joshua, a devout Christian, who did not even intend to cause offense, has been pushed out of his job.

To conclude, I will just say that it is too early, and with too little binding jurisprudence, to determine how the Equality Act will ultimately determine the balance between freedom of religion, sexual orientation, and gender identity. What is clear is that if freedom of religion is to mean anything in today’s England, it will have to be rescued of this notion of freedom of worship. The courts will also have to, with much more clarity, define sexual orientation and gender identity, and their limits.

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