

RELIGIOUS FREEDOM IN THE 21ST CENTURY¹

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Religious freedom is assumed to be a universal value that is safely enshrined in our human rights legislation and political culture. Yet, the precise definition of religious freedom varies depending on historical, economic and political context. In Western Europe, the concept of religious freedom emerged out of domestic conflicts in the eighteenth and nineteenth centuries between different Christian denominations but it also had an international aspect. At home, within the UK, religious freedom guaranteed greater legal and political rights to Catholics, Nonconformists and non-Christian religious minorities such as Jews. Abroad, European missionaries found the concept of religious freedom was useful because it could also be deployed as the crucial mechanism for proselytising amongst Hindus, Sikhs, Muslims and Coptic Christians in newly colonized lands in the Middle East, Africa and India.²

This historical perspective teaches us an important lesson. We need to pay close attention to social, political and economic contexts if we are to safeguard religious freedom as a truly *liberal* value that secures freedom not only for those who are religious but also all citizens.

Here in the UK, debates about religious freedom are intensifying because of a growing number of legal adjudications on the issue. Take the following examples of legal cases lost by Christians in English courts:

1. A Christian registrar of marriages (Ladele, 2009) argued that a requirement to conduct a same sex civil ceremony was a breach of her right to freedom of religion and religious discrimination at work. She won in the first instance in the Industrial Tribunal but she lost in all other courts. Ms Ladele has appealed to the European Court of Human Rights.³

¹ This paper, based on research presented at the AHRC Religion and Society research network on 'Religion, Discrimination and Accommodation', was published as Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17(1) *Res Publica* 21-40

² Saba Mahmood, 'Religious Freedom, Minority Rights and Geopolitics', *The Immanent Frame*, 5 March 2012

³ *Ladele v Islington BC* [2009] EWCA Civ 1357

2. A Christian employee of British Airways (Eweida, 2010) claimed that the dress code of BA (which required personal ornaments to be concealed by the uniform) discriminated against her as a Christian because it did not allow her to wear a cross *that was displayed in public*.⁴ Ms Eweida has appealed to the European Court of Human Rights.

3. Christian hotel owners (the Bulls, 2012) preferred to let their rooms to heterosexual married couples. They were held to have directly discriminated against a same sex couple in a civil partnership.⁵

How should we approach these cases? I will offer a personal view, based upon my study of cases in religion and law, and in the context of ongoing research in this area, including that on the Religion and Society Programme, which I help to oversee. I want to suggest that current framings of the issue in relation to the right to religious freedom, or in terms of equality and non-discrimination, have led us into an impasse. This debate collapses into a clash of rights or a clash of equalities – ‘my right to religious freedom or equality versus your right to equality on the grounds of sexual orientation’. My view is that in these situations, that involve a clash between religious freedom and sexual orientation equality, the principle of tolerance does more useful work.

The speech/conduct distinction is crucial in situations where there is a conflict between religious freedom and rights to equality. Those with strong religious beliefs about women, gays and lesbians can hold or express that view. But they cannot act on their belief in ways that constitute discriminatory harassment (via speech) or discriminatory acts (via conduct). Ms Ladele and Mr and Mrs Bull can believe that same sex civil partnerships are wrong, and they can say so. We should be more openly robust about the right of Christians and others to free speech. However, they cannot act on their beliefs to deny gays and lesbians an important service such as registration of partnerships or access to a bed and breakfast hotel.

It is often argued that there should be ‘accommodation’ of the religious conscience of Ms. Ladele and Mr and Mrs Bull. One way to do this is allow individuals such as Ms Ladele or Mr and Mrs Bull to claim an exemption from equalities law based on their

⁴ *Eweida v British Airways PLC* [2010] EWCA Civ 80

⁵ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83

religion and belief. But the Equality Act 2010 already allows significant exemptions to religious individuals and organized religion to discriminate against gays and lesbians. As a society, we've reached an agreement about the balance between the rights of the religious and equality for women, gays and lesbians. This balance is enshrined in our recent legislation, such as the Equality Act 2010, that provides the common public framework to safeguard the rights of all citizens irrespective of their religion, gender or sexual orientation.

It is also sometimes argued that we can use the concept of reasonable adjustment (from disability discrimination law) to accommodate Ms Ladele and Mr and Mrs Bull. But an individual with a disability can point to objective and stable medical facts. Religion is not like disability. Disability is a characteristic that *is highly relevant* to ensuring equality for an individual, through reasonable adjustments. Race, religion and gender are characteristics that we usually want to *make irrelevant* in decision-making about employment and the provision of goods and services. Race, religion and gender are sometimes relevant if our present structures in the workplace and public life are designed to facilitate one group (whites; men; majority Christians) more than others (Africans; women; Hindus). But in these situations indirect discrimination is sufficient because it balances religion with other interests such as business necessity or health and safety. Crucially, making reasonable adjustments to accommodate disability does not result in the breach of the constitutional or human rights of another person.

Let's return to the case of Ms Ladele. If equality for gays and lesbians, as well as same sex civil partnership, is a constitutional or human right then it follows that Ms Ladele is claiming an exemption from a general constitutional duty. But Parliament has already decided the scope of the exemption that Ms Ladele can claim as a religious person. There has been a legislative determination of this issue that is enshrined in the Equality Act 2010. There should not be a judicial or ad hoc popular renegotiation of exemptions that compromise the constitutional right to equality of gays and lesbians.

Could Ms Ladele argue that Islington Council should find another registrar willing to perform the same sex civil ceremony? But there are problems with this approach even if a gay or lesbian couple, living in Islington, seeking a same sex civil partnership, received exactly the same service. It would be a significant step backward if, having won the fight for the right to same-sex civil partnerships, gay and

lesbian couples could be shunned by the very people charged by us as a society with solemnizing public acts of marriage and civil partnerships. To understand why this would be wrong requires that we not only focus on individual rights but that we also use our 'inner eyes'. Imagine how it would feel if you were that couple. How would you feel if a public official was not willing to offer you a key symbolic public service *because you were gay or lesbian*? This harm would not be restricted to those gay and lesbian individuals who are directly denied marriage or civil partnership services. This harm is likely to also be experienced by the friends and family of the gay or lesbian couple. Indeed, this harm would ripple through the gay and lesbian community at large. Ultimately, allowing an exemption would also undermine the wider public culture of safeguarding our constitutional values, and especially equality and dignity for gays, lesbians and same sex couples.

CONCLUSION

Let me sum up. In situations such as *Eweida* (religious symbols, dress codes or religious holidays) reasonable accommodation of religion does not have any impact on constitutional rights, but it is subject to balancing with other interests. The legal judgment against Ms Eweida that prevents her from wearing her cross may need to be revisited.

But, the decision of the Court of Appeal in *Ladele* is correct. The fact that Ms Ladele was already working as a marriage registrar in Islington before the introduction of the Civil Partnership Act 2004 made this a difficult case to adjudicate. In the Court of Appeal, Lord Neuberger, the Master of the Rolls, noted that Ms Ladele and her employers were faced with a dilemma. Nevertheless, the decision in *Ladele* is correct law and politics. There should be no accommodation for the religious where the exemption is from a key constitutional or human right such as the right to equality. Individuals cannot expect to directly influence public services that are provided to the general public, so that they conform to their personal religious beliefs, where that accommodation constitutes a breach of the constitutional or human right of another citizen.

To return to my point about tolerance. In extremis, tolerance can be enforced through constitutional, human rights and equality law. But it is also a political and ethical virtue and a matter for how we live outside the law. We should, if possible, avoid the

law. Non legal solutions (arbitration, mediation, better training, HR management) should be supported to prevent disputes between religious conscience and sexual orientation equality becoming acrimonious.⁶

And so, back to free speech. There is a joint interest in allowing a dialogue between religious people and gays and lesbians so that both sides can understand, challenge and reconsider what seem to be entrenched viewpoints. Discussions about conflicts between conservative religious people, gays, lesbians and others should be effectively hammered out through debate carried out in the public sphere.⁷

⁶ *Sexual orientation and religion or belief discrimination in the workplace*. Prepared by Ben Savage. (London: ACAS, 2007)

⁷ See: Andrew Koppelman, *Brooklyn Law Review* (2006) 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions', (2006-2007) 72 *Brooklyn L. Rev.* 125; Carl Stychin, 'Faith In the Future: Sexuality, Religion and the Public Sphere', (2009) 29 *Oxford Journal of Legal Studies* 729-755