

“Tensions and Synergies between Religious and Other Human Rights”

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This is a lightly revised version of my speaking note prepared for the translators. A more scholarly paper dealing particularly with the Strasbourg / Luxembourg dynamic will be submitted for publication in the BYU Law Journal

Inspired by two keynote addresses on Sunday evening from Malcolm Evans and Justice Tulkens, and by energetic conversations during yesterday's sessions, I propose to tackle some of the questions set for this panel discussion. I can't cover everything so I limit my observations to four particular matters as follows:

1. The greatest area of tension between religious and other human rights concern human sexuality;
2. This tension is exacerbated by the clash between the twin objectives of 'liberty' on the one hand and 'equality' on the other;
3. Neither 'respect' nor the European Court of Human Rights (ECtHR) holds the answer. I predict a gradual migration from Strasbourg to the Luxembourg where the European Court of Justice is to be found;
4. The real answer lies in keeping these cases out of court in the first place – reasonable accommodation through extra-judicial means.

(1) Religious Liberty and Human Sexuality

First a little background: despite its 60 years history, cases in the ECtHR concerning religious liberty have only recently begun to develop into a cohesive jurisprudence. Hitherto, another Article was generally also engaged – freedom of association and freedom of expression – and having found a violation in that regard, the Court has deemed it unnecessary to consider the separate and parallel violation of Article 9.

There are obvious synergies between associational rights and freedom of expression and religious liberty, since faith is lived out in community with others and by outward manifestations. But the more complex – and more tendentious – clash is with the right of family life. The understanding of 'family' is now very different from when the court was established 60 years ago. As a matter of law (the ECHR being a 'living instrument') a same-sex relationship is now considered a 'family' – even though many religious groups find this concept doctrinally unacceptable.

An example of the conflict between faith and human sexuality arose recently in the UK: Lilian Ladele was a devout Christian. She was employed by Islington Borough Council as a registrar of marriages. She did this job conscientiously for many years. Then the law changed in the UK. Civil partnerships were introduced and these were to be registered by marriage registrars. For a while Islington arranged its rosters so that Lilian only registered marriages. Many other councils made similar arrangements. However, after persistent lobbying from gay colleagues, Islington changed its policy and required all its registrars to register both marriages and civil partnerships.

Lilian in conscience could not register civil partnerships. She resigned her job and brought a claim against Islington for constructive dismissal. She lost. She ought to have won. Islington could and should have accommodated her beliefs. Sadly, she also lost in the ECtHR. The court applied the 'margin of appreciation' deferring the value judgment to the legislature and judiciary of the member state: a form of moral subsidiarity.

But in the linked appeal of Eweida (heard at the same time), there was no such restraint by the ECtHR: it micro-managed the contractual terms of engagement concerning a private company (British Airways) and one of its employees (a Coptic Christian). In a single judgment, the ECtHR both over-reached itself and abrogated its duty to secure human rights protection under the ECHR.

(2) Liberty and Equality

Lilian's religious conscience was sacrificed at the altar of non-discrimination. The Equality Act (implementing a European Directive) outlaws discrimination on the grounds of what are called 'protected characteristics': sex, race, age, disability, sexual orientation (etc). Islington council would breach its equality duty if it discriminated on the ground of sexual orientation.

But where was the greater harm? No gay couple was denied civil partnership status. Islington could still provide the service in the borough. But Lilian was rendered unemployed. In pursuing a non-discrimination agenda, the court was complicit in a 'race to the bottom': secularism triumphing over pluralism.

A better (though perhaps inconsistent) view of equality shows how the goal of religious liberty can more easily be secured in countries where there is a favoured or privileged religion: for example the Church of England in part of the UK or other Christian denominations in Scandinavia. To the extent that rights or privileges are afforded to one church, the prohibition on discrimination requires that similar rights and privileges should be afforded to ALL churches. This promotes a healthy pluralism, and acts as a bastion against secularism. To adopt a nautical image, the rising tide lifts all the boats.

(3) Strasbourg – Luxembourg

Article 21 of the EU Charter states that: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation, shall be prohibited'. For the following reasons, litigants are more likely to secure relief in the ECJ (Luxembourg), rather than the ECtHR (Strasbourg). This is explored more fully in my written paper to be published as part of the Symposium proceedings. What follows is an extract setting out some reasons for favouring ECJ in Luxembourg:

Exhaustion of domestic remedies: It is a requirement of the ECHR and the procedural rules of the ECtHR that any potential applicants exhaust their domestic remedies before they claim relief in the supra-national court. This means that many years can be taken up in domestic first instance and appellate courts before an application is filed in the ECtHR. Referrals to the ECJ can be made at any time and declarations are generally given more speedily in respect of interpretative decisions on EU Directives.

Delay: The backlog of cases in the ECHR (at the end of 2011 it exceeded 152,000) means that many years will elapse between the incident complained about and the determination of the ECtHR. The caseload at the ECJ is growing but it does not have such a long backlog of cases.

Margin of appreciation: The ECtHR consistently defers to national legislators in relation to political, social, cultural and other considerations. Whilst the ECJ openly acknowledges and applies the principle of subsidiarity, no such elasticity is afforded the ECJ in the enforcement of EU Directives.

Political considerations: Some critics have commented on a lack of clarity and inconsistency of decision making within the ECtHR. Others have pointed to the ideological and political underpinning of its case law. The ECJ, though not immune to political pressures, is not required to make the same type of sensitive value judgments of this type.

Parties: In the ECtHR, proceedings can only be brought against Member States and the Government of that Member State is the Respondent.

(4) Extra-judicial mediated settlements

We have unrealistic expectations of our judiciary. Judges hate religious disputes and are ill-equipped to deal with them. They lack the knowledge, as there is a profound religious illiteracy within the government, the executive and the judiciary. A small improvement is that the recent Equality Act has introduced a new provision allowing a judge to appoint an expert to advise him or her with respect to the protected characteristic (eg race, disability or religion).

But litigants (by nature of the adversarial nature of proceedings) often have no respect for the opposite party. Article 6 of the ECHR gives a right to a fair trial: but there ought to be a corresponding duty to refrain from engaging in unedifying litigation. Far better than taking matter to court, a culture of civility should encourage individuals to resolve matters in the workplace, the school, the university. Sensible people can come to workable compromises. In Oman, for examples, Catholic take their day of rest on a Friday and conduct their Sunday worship accordingly.

For centuries religions have led the world in humanitarian work, in education, healthcare and the relief of poverty. Let them now be judged by their deeds not their words and show their value to society through mediation: “By their fruits shall you know them.”