

OSCE HDIM 2011  
Warsaw

**EUROPEAN HUMANIST FEDERATION**

**SIDE-MEETING - 26 September 2011 - 6.00 pm**

## **How can Freedom of Religion and Belief be reconciled with Equality & Non-Discrimination in Democratic Societies?**

(Talk by David Pollock, EHF President)

From the time of Constantine the dominant church in any country in Europe was commonly identified with the state. Even after state and church ceased imposing a single religion on everyone, with scant regard for any conflicting conscientious beliefs, the implicit assumption was that the state should accommodate the dominant church and that civil law should bow before religious law.

Today with much less homogeneous communities the situation has changed. In particular, the previously dominant churches are having to come to terms with being players among many others in democratic societies.

Devout believers are finding that their conscientious manifestation of a religion or belief may infringe others' rights to equality and non-discrimination. And when religious organisations exercise the collective right of their members to manifest their beliefs, the effect on others can be substantial.

Conflicts can and do arise in many contexts: at work, in schools, in the public space, in the exercise of public office, in the delivery of public services, in the application of family law and so on. How can these clashing rights and freedoms be reconciled? Are there clear rules of priority? If not, how can freedom to manifest a religion or belief be maximised without undue impact on the rights and freedoms of others? What should be the position in law of religious organisations? Many of these questions are being raised in legal cases - in Britain an evangelical Christian organisation, the Christian Legal Centre, has initiated many cases, and it is taking four of them to the European Court of Human Rights in Strasbourg. I will refer to these cases later.

Let us start from the premise that it is no longer viable to hold that the state should support the beliefs and principles of a single dominant religion. Often of course there is no such dominant faith, or if there is then it is internally divided in its social attitudes.

Of course, the Roman Catholic claims that its own doctrines are self-evidently correct - this is its doctrine of natural law, which the Vatican sees as vindicating its attempts to force the whole world to live according to its own peculiar ideas. But 'natural law' is a theological concept from beginning to end and cannot be so used.

An alternative governing principle is required. I propose as the starting point for answers to today's problems that the law should above all safeguard individual human rights - notably freedom of religion or belief and freedom of expression and the principle of equality and hence non-discrimination. This principle of equality maintains that every human being should command in law equal worth and dignity and value and protection.

Now the Pope sees these as incompatible principles and he has denounced Britain's equality laws for impinging on freedom of religion or belief. He has a point: at the margin there can be clashes. It is these that are the subject of our meeting tonight.

Let us start by examining the concept of freedom of religion or belief.

Freedom to hold a religion or belief is absolute. This is laid down in all human rights treaties and conventions. The forum internum is to be inviolate. No-one should be compelled against their will to believe - or pretend a belief or conform in their behaviour to a belief.

Not only that, but treaties cover the forum externum too with guarantees of the right to manifest religion or belief - to behave in conformity with it, to worship, take part in activities, to organise for those purposes, to teach and proselytise, to obtain legal personality for such organisations, and so on.

But human rights law also recognises that the right to manifest is "subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

In particular it is conditional on this protection of the rights and freedoms of others - which might without too much difficulty anyway be interpreted to imply "public safety, . . . public order, health [and] morals".

One person's human rights stop where another's begin. It is that difficult boundary that we need to examine.

I shall pass by one problem that presents difficulties in practice rather than in theory - I refer to the question whether manifestations of a type that would certainly be protected in the case of a recognisable religious community should equally be protected if they are purely personal. If I say "my personal god requires me to shout 'hallelujah' every five minutes", should libraries allow me this eccentricity because it is with me an item of faith?

In real life the problem arises with personal or eccentric interpretations of Christian duty. The risk in law is that it opens the way for hypocritical exploitation by charlatans and chancers.

I shall also pass by another problem: the claim by some that religious institutions have rights that are greater than the collective rights of the individuals they comprise. It seems to me manifest that they do not. Article 9 of the European Convention on Human Rights

guarantees rights to individuals “alone or in community with others“. It gives no rights to organisations, and so religious organisations can claim no rights in their own capacity, only the individual rights that their members wish them to organise on their collective behalf.

Instead, I wish to concentrate on the rights of an individual to manifest in speech or behaviour his or her religion or belief. In liberal democracies, of course, the problems do not arise with the core religious activities of gathering for worship and prayer but only when there is some form of encounter with other people or with laws that safeguard their rights.

This usually involves devout believers who claim - doubtless quite truthfully - that their whole lives and personalities are governed by their religion. Religion, they say, is not a private matter: it has to be lived out every minute of the day.

Those who take this attitude are usually fervent evangelists, but their motive is irrelevant. The point is that they give overriding importance to often seemingly trivial aspects of their religion. That is their right. But when they want to behave in ways that affects other people we need to confront their claim that because freedom of religion or belief is a human right their wishes must prevail.

The answer to their claims is that no one has only a single identity. Even the most devout believer is always also a parent, a neighbour, an employer, or is engaged in some civil transaction or is at least a citizen or resident and subject to law. Simply having a religion or belief does not exempt you from the obligations entailed by these other identities.

And if society through the law seeks to regulate people’s behaviour so as to provide fairness, equality and non-discrimination, then simply having a religion or belief cannot be allowed to become a free pass for ignoring or breaking the law.

That said, even if freedom of religion or belief is not the overriding fundamental value, it is still a fundamental value and it should not lightly be set aside. Rather, it should be accommodated whenever this is possible, subject (as the human rights convention says) to the rights and freedoms of other people.

Let me make a distinction that will often be relevant. This is the distinction of my role at the time of the contentious manifestation of my religion or belief. It is a simple point: if I am acting as an individual, a private citizen, there is no problem. But if I am acting as an employee, as a representative of some body or group to whom I owe some duty, then some limitation on my individual rights may follow.

This should be relatively uncontentious. I normally have the right to go out and play football, to sing out loud or to have a siesta. But if I am at work, being paid so many Euros an hour, I may do none of these things without my employer’s agreement.

So the question is whether my freedom to manifest my religion or belief is similarly limited when I am at work. This is the question in one of the British cases going to the Strasbourg court. It concerns the claim by a British Airways check-in clerk that she should be allowed to wear a large cross outside her uniform. BA argues that when she is wearing its uniform it

has the right to limit her very determined evangelism and to say her cross should be worn inside the uniform.

Whatever the rights and wrongs of the particular case - and it is notable that even the BA Christian Fellowship did not back her case - it is surely unarguable that I should not be allowed to hi-jack a representative or official role to make personal statements, whether about religion or politics or any other controversial matter.

When I am representing an employer or in any analogous representative position, I am not acting in *propria persona* but as an agent for that employer or other body. What if it was not a cross but a political badge in question - one for nuclear disarmament or for a right-wing party?

Whether it is wise of an employer to enforce such a rule is another matter: the case of a check-in clerk may be very different, for example, from that of a key public relations spokesperson or a police inspector, and in general one would hope for some agreement to be worked out - as in this case BA evidently tried hard to do. But at the end of the day the employer must decide.

Another of the two UK cases going to Strasbourg raises another issue that can be quickly dealt with, at least in principle. A nurse is appealing against a hospital rule that her necklace, incidentally carrying a cross, was a health and safety hazard.

Her case depends on the detailed facts of her situation, but there can scarcely be any argument that an employer can make rules about dress, hair and so on designed to secure the health or safety of employees or others.

Similarly indeed with rules designed to promote efficiency: another recent case was lost by a teacher who wished to cover her face when teaching young children to speak and read: the court held that this made it much more difficult for her pupils and she could rightly be required to let them see her face.

So let me leave aside these cases of health and safety, efficiency and inappropriate manifestation of a religion or belief when in a non-personal role as an employee or office-holder.

I will remark *en passant* that such cases plainly raise different issues from outright bans on wearing particular types of clothing or symbols in public in one's personal capacity. Opinion in the secularist movement is not completely united but few see any justification for bans on wearing the hijab at school, the burka in the street, or symbols of any religion whatever except in the special circumstances just mentioned.

What one wears can make a statement and is surely covered by freedom of expression as well as by freedom of religion or belief. The French league of freethinkers, by the way, has been consistently opposed to the French ban on the burka.

So, how else can my manifestation of religion or belief affect your rights?

There are two types of prejudicial effect I want to concentrate on - one is that of you suffering some general harm as a result of my manifestation of my religion or belief; and the other is the specific case of your freedom of religion or belief being affected by my manifestation of my own freedom of religion or belief.

Let me deal first with the latter, and first of all with a special case of it: hate speech. If my manifestation of my religion or belief takes the form of preaching against another religion or belief and its followers, that may have a serious effect on them.

So, a traditional ranting anti-Semitic Christian sermon might not be protected as a manifestation of religion or belief, however closely it was based on biblical sources. If it stirred up hatred against Jewish people, then their rights to be protected should properly prevail.

This may seem a far-fetched example, but it is important to establish that there are boundaries to freedom of religion or belief. In the same way freedom of expression is limited by laws on libel or on incitement of racial hatred or violence.

There are more interesting examples. It is established that freedom of religion or belief includes freedom from religion. But it is not only the non-religious who have a right to be protected from unwanted religion: the right to freedom from religion includes the right of one set of believers to be free from interference by another set.

In other words, freedom from religion is part of the freedom to manifest one's own beliefs without external limitations (save those permitted in the Convention). It includes freedom from any compulsion to practise or take part in manifestations of beliefs one does not share.

Catholics are no longer to be forced by law to attend Anglican communion; Jews are no longer to be required to convert to Christianity - and likewise atheists are not to be compelled to take part in or attend religious performances. So, for example, your freedom of religion or belief includes not having your place of worship picketed or interrupted by my rival cult saying prayers for your salvation.

It also includes the freedom - not always guaranteed in real life - of non-religious people not to have religion inflicted on them in ways they cannot avoid: being required to attend prayers or confessional religious instruction classes in schools or being harassed by evangelists.

There is a balance to be struck, therefore, with the right to preach and evangelise: at some point - a point that will have to be defined case by case in the courts - my attempt to convert you becomes a denial of your right to freedom of religion or belief.

These are surely valid restrictions on religion or belief in that they are plainly aimed at preserving and striking a balance with the freedom of religion or belief of other people.

Before moving on, I will note in passing that my right to live without religion should also be

a constraint on the state identifying itself with and acting through religious groups - a constraint, perhaps, rather than a complete bar: but if the state chooses to deliver fundamental public services by engaging religious organisations under contract to do the work and does not require them to act in non-discriminatory ways and to refrain from evangelisation in such a context, then for sure their exercise of unconstrained freedom of religion or belief will surely be an abuse of the freedom of religion or belief not only of the non-religious but also of members of other religions.

The freedom of religion or belief of Muslims is abused if they can only gain access to statutory public services - health, employment etc - by going to a Christian church. This is something that (among others) the UK government has failed to face up to in its determined disengagement from delivery of public services by people employed in the public service for the purpose.

Let me turn to the second type of prejudicial effect my manifestation of my religion or belief may have on you. This is where my exercise of my freedom of religion or belief is directly harmful to you. There are two cases of this type that are going from the UK to the European Court of Human Rights.

The European Union directive on employment equality outlaws discrimination on grounds of religion or belief as well as gender, sexual orientation, age, race and disability. But it recognises the need for exceptions where having one of these protected characteristics constitutes a “genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”, a provision that (for example) allows the Roman Catholic church to require their priests to be men and unmarried.

And there is a further exception for organisations with an ethos based on religion or belief. This applies when “a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos”. This allows, for example, Christian charities to restrict key posts to Christians so as to preserve their ethos.

But - vitally - the directive specifies that this exception “should not justify discrimination on another ground”. Religion or belief is not to provide a total exemption from the law. This exception suggests the line that should be taken by any new directive dealing with provision of goods, facilities and services, such as is at present under negotiation. For is it not a reasonable compromise?

The purpose of these rules is to provide equal treatment for all people regardless of race, sex, religion and so on. Every exception therefore allows someone or some group to be unfairly and unequally treated. That is a high price to pay, and it should only be paid in return for safeguarding a substantial aspect of freedom of religion or belief.

The two cases of this nature that are going from Britain to Strasbourg both involve Christians whose antipathy to homosexuality has got them into trouble. In one case a local authority registrar refused to register same sex civil partnerships, in another a relationship counsellor refused to advise same-sex couples. Both claim religious justification.

The British courts ruled against them. In effect, in going to Strasbourg they are claiming that because their refusal to engage with same-sex couples is founded on their Christian belief they should be exempt from the separate law forbidding discrimination based on sexuality. They claim that their religious scruples should be given greater weight than the rights of the couples involved to equal and dignified treatment - their rights not to suffer discrimination and prejudice.

It is not clear why one person's freedom to manifest a relative detail of his religion or belief should be superior in power to the freedom of others not to suffer discrimination on the basis of characteristics that go to the core of their identity, such as sexuality or gender.

Consider an exactly comparable case. What should we expect the courts to say if asked to allow racial discrimination on grounds of religion or belief? Such a case might easily arise: after all, the Dutch Reformed Church in apartheid South Africa routinely practised racial discrimination and sometimes gave it a religious justification.

If discrimination on grounds of race could be justified by religious pleading, then we should invite all the racists in Europe to plead some spurious religious reason to justify their racist behaviour.

That must be unacceptable, even though it involves an interference with the racists' freedom of religion or belief. But if this is to be ruled out, why should discrimination against homosexual people be treated differently just because it is given a religious colour?

Now of course most Christians almost certainly agree with me. They understand that living in a plural society entails a loss of their previous pre-eminent position, the privileges and power that went with their past domination.

We are dealing instead with those whose noses are stuck so far into their bibles and prayer books that they have yet to come to terms with a changed world where human rights are basic to our laws and behaviour towards our fellow humans. Some of them seem determined to be persecuted. We assure them in vain that we do not question the rights of religious believers to enter that famous metaphorical public square and to preach their beliefs and make their opinions known.

We demonstrate to them that there is considerable goodwill in society that will see employers, for example, seeking as best possible to accommodate the religious requests of their employees - though this is not always possible, and when the law is involved the rights and freedoms of others count equally with their own.

We assure them that living in a liberal democratic society founded on human rights has considerable attractions. They have freedoms greater by far than were conceded by the religious regimes of European history. In a secular liberal democracy:

- If oppose blood transfusions, they do not have to have them.
- If they dislike homosexuals, they do not have to consort with them.
- If they oppose abortions, they do not have to have them.
- If they do not want an assisted death when in the final throes of terminal cancer,

noone is seeking to force them to have one.

- If they oppose embryonic stem cell research, they do not have to accept medical treatments based on it.

The problems arise when they seek to impose their views on others, to deny to others the liberties that are guaranteed by human rights conventions, and to make themselves out as latter-day martyrs.

That was what a former Archbishop of Canterbury tried to do when one of the four British Strasbourg cases reached the Appeal Court. In a witness statement he deplored the judgements that a series of judges had made and asked the Lord Chief Justice:

to establish a specialist Panel of Judges designated to hear cases engaging religious rights. Such Judges should have a proven sensitivity and understanding of religious issues . . .

He was firmly rebuked by the Appeal Court judge, Mr Justice Laws, himself incidentally a well regarded Christian theologian. Let me read you an extensive quotation from his judgement, because it is so powerfully argued.

In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content.

The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.

. . . the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion.

The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without

option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.

So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.

What we are faced with is, I think, the unwillingness of a section of religious believers to accept the validity of disagreement. The same dogmatic mind-set can occur in other fields - in politics, for example. These are people - in Europe found mainly in orthodox Catholicism and evangelical Christianity - whose religion is firmly a religion of belief in propositions, whereas for many others it is a matter of practice, a way of life. And they are so convinced of the truth of their religious propositions that they are unable to distinguish them from ordinary propositions based on experience and evidence.

They therefore see those who disagree with them as perverse and their positions as illegitimate, and they try to force their own certainties on everyone. Thus it is with the Observatory for Christianophobia, which responded to a carefully and moderately argued paper by the EHF with abuse and distortion. Thus also with the Roman Catholic church and its theological doctrine of natural law which it uses justify enforcing its own moral views on the whole world.

For these people, there will always be a risk of conflict with the values of a liberal, democratic society based on human rights. But for most believers human rights carry no such threat, and they recognise that the litigious organisations behind many of the legal cases, including those now going to Strasbourg, are a militant and untypical fringe.

Let me quote, for example, Jonathan Bartley of the UK's Christian think tank Ekklesia. He has said, specifically in relation to one of the British cases being taken to Strasbourg:

People should be aware that behind many such cases there are groups whose interests are served by stirring up feelings of discrimination, of marginalisation amongst Christians. What can appear to be a case of discrimination at first glance is often nothing of the sort. It is often more about Christians attempting to gain special privileges and exemptions.

After all, even the UK's evangelical Christian Institute has admitted, in a booklet on Religious Liberty in the Workplace:

The Gospel is offensive and as Christians if we are going to share the Gospel we must anticipate that we will cause offence.

Offence is acceptable if unwelcome - no-one is entitled to be protected from offence to his feelings.

But interference with the human rights of others by an exaggerated interpretation of one's own rights is not acceptable.

There needs to be a willingness to give and take. There has already been a lot of taking by the religious - in their inherited positions of influence and power, in their receipt of huge public subsidies, in the exceptional provisions in the laws on equality and non-discrimination protecting their positions.

It is time that they recognised the need to give a little.

25 September 2011