The Jesus Candidate: Political religion in a secular age (2017)

www.thejcan.org

2020 UPDATES: more legal cases

TWO CASES OF 'ANTITRANSGENDERISM'

Paul Lusk

> *Last year, a 30-year veteran doctor in Britain was fired from the National Health Service for not calling a 6-foot man with a beard a 'she.' The employment tribunal that heard his case said his belief that God created human beings male and female was 'incompatible with human dignity.'*
>
> \- *Heritage Foundation, 4th February 2020*[1]

Introduction

In two recent legal cases, claimants argued that being against 'transgenderism' is to hold a belief deserving protection under section 10 of the Equality Act 2010. Both claims were unsuccessful. Some prominent Christian voices condemned the courts' decisions. These said that the outcome of the findings is that 'expression of belief in Genesis 1:27 is not permissible', that 'Christianity is not protected by the Equality Act', that a judge is to be compared with Monty Python and that we are no longer a free society.

In this note I will consider whether these findings are justified. I will also consider the wider ramifications of the judge-made doctrine of 'respect in a democratic society' as a test of qualification for this protection.

I start with a brief explanation of the legal context for the protection of religion and belief under section 10, and of transgender people in section 7. I then look at the two cases, of Dr David Mackereth and Ms Maya Forstater. In conclusion, I suggest that the doctrine of 'worthy of respect in democratic society' as a test for section 10 protection should be reviewed.

The legal context

Equality law makes religion a 'protected characteristic', so it is unlawful to discriminate against a person because of their religion (or lack of religion), when it comes to a range of activities including selling services, offering employment and so on. This protection, initially applying in the field of employment, was first introduced into law in Great Britain (but not Northern Ireland) in 2003 in the Employment Equality (Religion or Belief) Regulations[2]. The regulations were worded to forbid discrimination on grounds of 'religion or belief' defined to mean 'any religion, religious belief, or similar philosophical belief.' So a non-religious person – a humanist, for instance – would enjoy the protection only by showing a court that her belief was 'similar' to a religion: not an encouraging start to a claim for relief, if the point of the belief is to live without 'religion.'

---

[1] https://www.heritage.org/gender/commentary/compelled-speech-hitting-close-home. The report cited as its source a FoxNews report which in turn quoted Christian Concern. The Heritage Foundation is a US-based 'conservative research and educational institution.'

[2] UK Statutory Instrument 2003 no 1660

This regulation was incorporated the Equality Act 2006 with protection extended beyond employment to cover all services to the public. Now the reference to 'similarity' to religion was dropped and these definitions adopted:

(a) "religion" means any religion,

(b) "belief" means any religious or philosophical belief,

(c) a reference to religion includes a reference to lack of religion, and

(d) a reference to belief includes a reference to lack of belief.

This left courts to decide what qualified as a 'belief' for the purpose of this law. The ruling currently accepted and applied comes from a case[3] heard in 2009. There was no settled law to define 'belief', but the judge drew on several cases and found help in a speech by Baroness Scotland[4] in the House of Lords debate on the (then) Equality Bill on 13 July 2005. Lady Scotland was dealing with objections to removing the 'similarity' to religion when extending protection of 'belief'. She explained that

> in drafting Part 2, it was felt that the word 'similar' added nothing and was, therefore, redundant. This is because the term 'philosophical belief' will take its meaning from the context in which it appears; that is, as part of the legislation relating to discrimination on the grounds of religion or belief.
>
> Given that context, philosophical beliefs must therefore always be of a similar nature to religious beliefs. It will be for the courts to decide what constitutes a belief for the purposes … of the Bill, but case law suggests that any philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, must be worthy of respect in a democratic society and must not be incompatible with human dignity. Therefore an example of a belief that might meet this description is humanism, and examples of something that might not—I hope I do not give any offence to anyone present in the Chamber—would be support of a political party or a belief in the supreme nature of the Jedi Knights.

The Judge in the 2009 case advanced five tests to be applied to decide if something qualifies as a 'belief':

> (i) The belief must be genuinely held.
> (ii) It must be a belief and not … an opinion or viewpoint based on the present state of information available.
> (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
> (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
> (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

The Equalities Act 2010 repeated, in section 10, the 2006 Act's terms for protecting religion or belief.

Section 7 of the 2010 Act makes 'gender reassignment' a protected characteristic, defined as follows

> A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

---

[3] Grainger plc vs Nicholson, http://www.bailii.org/uk/cases/UKEAT/2009/0219_09_0311.html

[4] House of Lords debates, 13 Jul 2005, Column 1110. At the time of the quoted speech Lady (Patricia) Scotland was a Home Office minister; at the time of the Grainger ruling she was UK Attorney General

Next I turn to the detail of the two cases.

Dr David Mackereth v Department of Work and Pensions (DWP) and Advanced Personnel Management Group (AMP)[5]

David Mackereth is a Christian and a medical doctor. On 29th May 2018 he started training to assess people for work capability for the government's Department of Work and Pensions (DWP). A week later he learnt that he would be expected to use the 'presented gender' to address clients and to refer to them – in other words, in meetings and reports, the doctor would have to call a client according to the gender they claimed to have, rather than (if different) the one they had at birth.

Dr Mackereth felt he could not comply with this because as a Christian he believed that - according to Genesis 1.27 - God allocates gender at birth and this cannot change. Furthermore, he does not believe in 'transgenderism' and has a conscientious objection to it. On 13th June a manager met Dr Mackereth to establish the facts about his position. Dr Mackereth said he was suspended at this meeting. Managers denied that – it was a conversation to establish facts prior to deciding on action, but it did include a warning that termination of employment may be the outcome. Dr Mackereth later said that at this meeting he was asked if he would be ready to describe a six-foot bearded man as 'she' if 'she' so wished. However, the manager denied having asked this, it did not appear in the notes of the meeting, nor did it appear in the various press reports that circulated from July 2018: the court that looked at his case found that the first record of this alleged question appeared in May 2019.

Dr Mackereth came into work for a time on 14th June 2018 but not after that. On 27th June the management wrote to Dr Mackereth accepting his resignation. Dr Mackereth said he had not resigned but had been sacked. With the support of the Christian Legal Centre (CLC – part of Christian Concern) he brought a case for wrongful dismissal. His grounds were that the alleged dismissal was for holding a belief which is a protected characteristic under section 10 of the Equality Act. The court rejected his claim. It held that the DWP was reasonable to require the use of clients' preferred language to describe their own gender, out of respect for clients' wishes and for their mental health. It also found that the DWP was reasonably cautious of the risk of action for discrimination under s.7 of the Equality Act if they complied with Dr Mackereth's reservations. As we saw above, this section extends protection to 'gender reassignment' defined in terms of at least starting on the path of 'physiological or other' alterations towards gender transition. Not all those self-identifying under a gender different from their birth gender would meet this criterion. However, the service provider would not know this without carrying out an enquiry, and this enquiry would be sufficiently intrusive to alert those with the protected characteristic to apparent discrimination and so might lead to the initiation of complaint and possible legal action.

Andrea Williams, who is Chief Executive of Christian Concern, says that the ruling means that 'Christianity is not protected by the Equality Act or the ECHR, unless it is a version of Christianity which recognises transgenderism and rejects a belief in Genesis 1:27. Dr Sharon James, who is Social Policy Analyst of the Christian Institute, says that it means 'expression of belief in Genesis 1:27 is not permissible in the public square.'

---

[5] https://assets.publishing.service.gov.uk/media/5d9b0c8aed915d35cff2225d/Dr_David_Mackereth_v_The_Department_for_Work_and_Pensions___Advanced_Personnel_Management_Group__UK__Ltd_1304602_-_2018_-_Judgment_and_reasons.pdf

These are massive claims that, if true, would signify a landmark change in the law regarding religious freedom and protection from discrimination. Are these fair and reasonable interpretations of what Judge Perry has said?

The particular words in the judgement that give rise to these disturbing claims are from para 197 where the judge concludes:

> belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism in our judgment are incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals.

Does this mean what Ms Williams and Dr James say it does? The judgment records Dr Mackereth's position as follows in paras 5-7:

> Dr Mackereth asserts [ET1/4] that he is a Christian and his religion is a relevant protected characteristic for the purposes of ss. 4 & 10 EqA[6].
> 6. He further relies [ET1/5], cumulatively or alternatively, on the following religious and/or philosophical beliefs:
> a. His belief in the truth of the Bible, and in particular, the truth of Genesis 1:27: 'So God created man in His own image; in the image of God He created him; male and female He created them.' It follows that every person is created by God as either male or female. A person cannot change their sex/gender at will. Any attempt at, or pretence of, doing so, is pointless, self-destructive, and sinful. ('Belief in Genesis 1:27')
> b. Lack of belief (i) that it is possible for a person to change their sex/gender, (ii) that impersonating the opposite sex may be beneficial for an individual's welfare, and/or (iii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex ('lack of belief in Transgenderism')
> c. Belief that it would be irresponsible and dishonest for e.g. a health professional to accommodate and/or encourage a patient's impersonation of the opposite sex ('conscientious objection to Transgenderism)
> 7. Both respondents accept that Christianity is a protected characteristic. They do not accept that is so where Dr Mackereth goes further in seeking to define the beliefs he relays at [ET1/5] as a protected characteristic. The respondents argue that at the heart of those beliefs is intolerance towards transgender people, and that a refusal to respect the dignity of transgender people and their preferred form of address is incompatible with human dignity and conflicts with the fundamental rights of others

In para 194 the judge repeats the words in quotation marks and brackets in paragraph 6 above – 'Belief in Genesis 1:27' - which he says he will use as 'shorthand' for those beliefs in what follows. Then in para 197 we find the words quoted above – that 'all three heads' of Dr Mackereth's position, the first being 'belief in Genesis 1:27', are 'incompatible with human dignity and conflict with the fundamental rights of others'.

So, clearly, when the judge talks of 'belief in Genesis 1.27' <u>he is referring to the text that appears in 6a</u>. The first part of this text is Genesis 1.27: the second part starting 'it follows that' consists of inferences from Genesis 1.27 – that each human being is conclusively either male or female, this cannot be changed 'at will' and any attempt to do so is 'pointless, self-destructive and sinful.' It is this whole set

[6] Short for Equalities Act

that the judge specifies as being a breach of the rights of others. It is not correct to take the first part of paragraph 6a out of this context and suggest that the judge is referring to Genesis 1.27 alone, without the section starting 'it follows that.' Dr Mackereth then goes on in 6b and 6c to present the second and third elements of his three-part belief system. These follow the line of thought from 'it follows that', and amount to practical applications of the deduction in 6a – suggesting that, by rejecting this deduction from the bible text, and accommodating those who present themselves as transgender, social institutions and professionals are exercising a 'transgenderist' belief system which Dr Mackereth then rejects.

Do these deductions follow from Genesis 1.27? The court, with Dr Mackereth's agreement, looked at two documents discussing transgender issues from an evangelical viewpoint – one from the Christian Medical Fellowship (CMF) and the other from Evangelical Alliance UK (EAUK).[7] 'Very rarely a person is born with an intersex condition' according to the CMF. Of course, people with gender dysphoria are *not* usually in this rare category. Gender dysphoria describes an emotional or psychological condition where people find their physical gender does not align with their subjective sense of what they are; intersex a physical one where the gender at birth is difficult to determine. The CMF continues:

> What does seem to emerge from clinical experience is that 'true' gender dysphoria is not 'chosen'. It is isolating and distressing and sometimes the dysphoria may be compounded by hostility from others or by social stigma. With changing societal attitudes towards transgender people those with 'true' dysphoria may be being supplemented by others who are confused or experimental but without more research, it is not possible to be sure … True gender dysphoria is not a wilful choice, not deliberate sin. Very few transgender people are intent on deconstructing meaningful categories of sex and gender.

Regarding the use of pronouns, EAUK (on page 16) advises that:

> Christians disagree on this matter. For some, the balance of grace and truth is struck by using the person's preferred name but not pronouns. For others, courtesy leads them to use the name and preferred pronoun of a transgender person. Finally, integrity means that some find any use of preferred names or pronouns leads to confusion and ultimately results in their participation in, and perpetuation of, deception.

The EAUK continues with the advice that

> If you are in a public role, e.g. a teacher or doctor, you may be in breach of workplace policies or guilty of discrimination if you fail to address a person by their new name.

EAUK does not suggest that conforming to such policies and legal constraints is inappropriate for a Christian.

Dr Mackereth accepted that not all Christians agree with his conclusions. My own observation is that many Christians are ready to use the preferred pronoun when encountering a transgender individual. This is to express love and respect for people whose dissatisfaction with their birth gender, however misguided, is part of a deeper misery.

Does this contradict Genesis 1.27? No, primarily because this text describes the human situation after creation, but *before* sin entered. Sin was the result of humanity's assertion of its own identity and moral

[7] Respectively cmf *file 59 - gender dysphoria* 2016 (this publication does not have page or paragraph numbers) and *Transformed* EAUK 2018

evaluation over that proffered by the creator. Dr Mackereth is entitled to his assessment that neither a medical practitioner nor society more widely is acting in the best interests of a client by going along with his/her confusion over identity. Clearly this issue has some way to go in the contexts of healthcare, social interaction, law and the church. However, to say the judgment means 'expression of belief in Genesis 1:27 is not permissible in the public square' is to take it out of context and make it mean something it does not.

The evangelical umbrella group Affinity quoted Christian Concern's CEO Andrea Williams on the ruling as follows:

> This is the first time in the history of English law that a judge has ruled that free citizens must engage in compelled speech. Here Judge Perry has ruled that Christianity is not protected by the Equality Act or the ECHR, unless it is a version of Christianity which recognises transgenderism and rejects a belief in Genesis 1:27.[8]

The Christian Institute's social policy analyst Dr Sharon James wrote of the case that

> here it was decided that expression of belief in Genesis 1:27 is not permissible in the public square.[9]

The facts of this case do not, in my view, justify these conclusions.

The case was about an employer's right to prescribe language used by staff when dealing professionally, on behalf of that employer, with a service user who believes that they are living with gender dysphoria. 'Compelled speech' occurs when the law requires someone to express a view with which they are entitled not to agree[10]. In the case of Dr Mackereth, the speech is that of the employer. It is quite possible to address someone in one way when speaking in a professional capacity on behalf of an employer in a specific context – as for example in this case, involving providing a service to a potentially vulnerable individual - and in a different way when speaking in a personal capacity. When Dr Mackereth uses the pronoun 'she' in an internal DWP report evaluating a benefit claim from a male client who presents with gender dysphoria, is the Doctor being compelled to affirm that 'she' is indeed and in fact a woman? Or is the doctor basically saying: this client wishes to be regarded as female and in accordance with both DWP policy and the legal protection possibly afforded to this client, I respect that wish? And if the latter, is this reasonably 'compelled speech' in the same category as a student being required to sing a patriotic song? It seems to me that it is not, though there is room for debate about this.

Clearly the court did *not* withdraw legal protection from Christianity, nor did it say anything about expressing belief in Genesis 1.27 on its own. The court confirmed that the Christian religion was protected. Dr Mackereth did not rely on the Christian religion in putting his case for protection. Dr Mackereth presented a 'belief' *additional* and supplementary to his confidence in Genesis, and tried to persuade the court that the 'belief' was one they should accept as qualifying for recognition as a *belief* under section 10. The court found that 'all three' heads of Dr Mackereth's system could not claim the protection afforded by s.10 as they are 'incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals'.

To claim that the ruling means 'Christianity is not protected' and 'belief in Genesis 1.27 is not permissible' is to take a few words out of context and make them mean something they clearly do not. Had Dr Mackereth succeeded in his case, the effect would have been to require employers and service

---

[8] Affinity Social Issues bulletin, November 2019

[9] Evangelical Magazine, March/April 2020, p18

[10] Familiar cases in the US courts include schoolchildren being required to pledge allegiance to the flag and drivers being compelled to carry patriotic slogans on their vehicle number (license) plates.

providers to make accommodation for those not prepared, on grounds of conscience, to use a pronoun or form of address that affirms the transgender status of a client, customer or colleague. The judgment means they are not so required. It makes no difference to the expression of a view in 'the public square'. DWP internal reports on a transgender claimant are not 'public' and it would be a breach of privacy to make them so. If CC and the CI wish to campaign for a legal provision to 'opt out' of transgender forms of address and reference, there is nothing in the ruling to prevent them from making such a proposal (which, as far as I can see, they have not.)

I do not think that Dr Mackereth's case means what Ms Williams and Dr James say it does. Nonetheless the judgment on Dr Mackereth's beliefs as 'incompatible with human dignity and in conflict with the fundamental rights of others' and so 'not worthy of respect in a democratic society' is brutal and easily taken out of context in order to misrepresent the courts, perhaps with political motives[11]. I consider this further in the conclusion, after looking at the other case – that of Maya Forstater.

Maya Forstater v CGD Europe, Centre for Global Development and Masood Ahmed[12]

Dr Mackereth's case has points in common with that of Maya Forstater. She had a consultancy deal as a tax and business adviser with an international charity. Her deal was not renewed on expiry. She thought this non-renewal was due to her strongly stated, public campaigning against transwomen being recognised as female. Her views on this were forthright:

> I have been told that it is offensive to say that 'transwomen are men' or that '"women" means "adult human female"'. However since these statements are true I will continue to say them.

This position attracted complaints from colleagues in the charity. She was a prolific twitterer and conducted disputes on that platform, including disputes with or about people who claimed to be 'gender-fluid'. One of these, identified as Philip/Pips Bunce, is a senior director with an international bank who sometimes presents as female, and reportedly appeared on a *Financial Times* list of the top 100 women in business[13] even though being physically male and father of two children. Another was Gregor Fisher Murray, a Scottish National Party politician and leader in the Scouting movement. Both these people have easily discovered online profiles with photographs to illustrate their stated gender identity as fluid, plural or neutral.

Maya Forstater's position is that gender reassignment is a biological impossibility. Her grounds are not to do with Christianity. She is not a Christian. She says her belief system is scientific materialism, and this leads her to the conviction that no change of gender is possible. A court rejected the claim that this belief system qualifies for protection under antidiscrimination law, finding her belief 'not worthy of respect in a democratic society.' She won a lot of sympathy in the secular press and in the Christian

---

[11] In my book the Jesus Candidate (2017) I describe how cases are distorted in reports in order to promote political claims. As we can see in the quotation at the top of this paper, this pattern recurs in the reporting on Dr Mackereth.

[12] https://assets.publishing.service.gov.uk/media/5e15e7f8e5274a06b555b8b0/Maya_Forstater__vs_CGD_Europe__Centre_for_Global_Development_and_Masood_Ahmed_-_Judgment.pdf

[13] https://www.standard.co.uk/news/uk/gender-fluid-exec-named-on-list-of-top-100-women-in-business-a3942896.html. The headline here is that the list is of the top 100mwomone in business. In fact, the second paragraph of the story says something slightly different:

> Philip Bunce, who is known to sometimes go to work in a wig and women's clothing, was named on the Financial Times & HERoes Champions of Women in Business list, an annual ranking of 100 'company leaders who support women in business.'

world. Rev David Robertson[14] compared the judge in the case to Monty Python and accused him of finding that 'her brave stance ... was not to be permitted.' Dr Dave Landrum, Head of Advocacy for the UK Evangelical Alliance, tweeted that as a result of the ruling 'we will no longer be able to describe ourselves as a free society' and, ominously, finds in the ruling 'a reason for a root and branch reform of the judiciary.' When challenged, Rev Robertson reasserted his view, stating:

> The judge's comments are very clear – it is not permitted to hold in a democratic society the view that one cannot change sex[15].

Ms Forstater explained to the court that she is a feminist who is concerned about protecting female-only spaces and facilities, including sports events. This, the judge found, were 'on a proper analysis' the main reasons for her taking the positions she did, rather than the belief system she put forward. Such protection, he said, was possible without denying the rights available to trans people to be recognised by their presented gender – including the right to be recognised as belonging to the new gender to which they had transitioned. Ms Forstater said that she

> would of course respect anyone's self-definition of their gender identity in any social and professional context

but elsewhere she qualified this:

> I reserve the right to use the pronouns 'he' and 'him' to refer to male people. While I may choose to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe. I think it is important that people are able to refer to the sex of other people accurately and without hesitation, shame or censure. This is important for children to be able to speak up about anything that makes them feel uncomfortable, and for adults to be able to risk assess the difference between a single sex and mixed sex situation.

It was this position that the judge found crossed the line and placed her beliefs into the category of those 'not worthy of respect in a democratic society.' The line of reasoning here, found in paras 84 and 85 of the ruling, is that Ms Forstater does not accept that someone is actually female even though having a Gender Recognition Certificate and so being female in law. She is not 'entitled to ignore' this legal fact by holding it to be a 'fiction.' She is, the judge went on, quite entitled to campaign against the extension of gender recognition to include also people who have not physically transitioned and do not plan to do so; she is also entitled to campaign for reserving some spaces and opportunities just for by-birth females as a 'proportionate means of achieving a legitimate aim'; but she may not have the protection of the Equality Act to argue her right to call a trans woman a 'man'. That transgresses the rights of trans people and so is 'incompatible with human dignity and the rights of others' and thus 'not worthy of respect in a democratic society.'

This case is comparable with that of Dr Mackereth as both concern opposition to 'transgenderism' – i.e. what Judge Tayler (ruling on Forstater) calls an 'absolutist' refusal to accept any transition as legitimate. Dr Mackereth says he would never use someone's preferred pronoun to refer to a trans person. Ms Forstater says she would as a courtesy, but reserves the right not to do so, where necessary for reasons

[14] Rev David Robertson is a former moderator of the Free Church of Scotland and now lives and works in Australia. He blogs as 'the Weeflea' and is part of the editorial team of Christianity Today

[15] In replying to me in a comment on his blog on 21st December 2019, see https://theweeflea.com/2019/12/21/the-end-of-transmania-or-the-end-of-reason/

of female safety. Dr Mackereth refused to follow the policy of his employer in this respect: this change would have risked the employer falling foul of section 7 of the Equality Act. There is no evidence in the court record that Ms Forstater required any change on the part of her employer, nor that her work involved directly representing her employer in relating to clients. Of course it may nonetheless be that this did or could happen, and that there may be an instance where she could have acted on behalf of the charity CGD in a way that suggested CGD itself had a position on gender recognition of trans people, but no such possibility is considered in the court ruling. It seems, from the court ruling, that her loudly expressed views attracted hostile comment from colleagues, and this was the reason for the non-renewal of her contract. Her belief that the gender recognition of trans people, though legal, was a fiction, put it beyond legal protection.

The judge assured Ms Forstater that she could continue to explore routes for trans women to be excluded from certain facilities. So some distinction between born and trans females is permissible and necessary, as long as transgender rights are observed. Ms Forstater says:

> I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender.

But she wanted - she said in a letter to a Member of Parliament -

> space for a broader national conversation about how to reconcile the welfare of people who seek treatment for gender dysphoria and the basic human rights of women and girls.

There is not a huge gap between the judge's position and Ms Forstater's. They agree that trans people have rights, and that these are to be limited to the extent necessary to safeguard women and girls who female by birth. The Equality Act of 2010, the judge says, uses 'outmoded' language. What language might capture the purposes that the court and the claimant agree are reasonable – to protect *both* the 'safe space' of those who are female by birth, *and* the rights of those who have transitioned (or plan to make the transition) from male to female as their recognised gender? It seems that the debate that Ms Forstater wishes to promote is legitimate and timely. Yet the view that Ms Forstater wishes to contribute is not legitimate. Strictly speaking, Rev Robertson is not correct when he says that Ms Forstater's view is 'not permitted.' She is quite free to hold and profess her view. But if the effect is that she becomes unemployable, then it amounts to the same thing.

I do not agree that the judge in the case exemplifies Monty Python; nor that the case should commend a 'root and branch reform of the judiciary.'

That said, there is something worrying about the Forstater ruling. It appears (from what is on the court record) that she is potentially excluded from work for no other reason than this: she holds a strong belief unpopular with some colleagues on a controversial subject about which she has reflected deeply. This is surely appropriate for protection under a law intended to prevent discrimination on grounds of religion or belief. The reason for excluding her appears to come down to this: she disputes an existing law.

Ms Forstater has announced that she intends to appeal the judgment and is currently fundraising[16] for this.

---

[16] https://www.crowdjustice.com/case/lost-job-speaking-out/

Conclusion: rethinking 'respect in a democratic society'

Reflecting on these cases, it seems to me that the court-made doctrine of 'deserving respect in a democratic society' needs review. It is not clear that there is any objective basis for determining what does, and does not, 'deserve respect'. The courts appear to contradict themselves in drawing this boundary.[17] In a liberal democracy, for judges, sitting without a jury, to be determining what 'deserves respect in a democratic society' strikes me as an oxymoron. Isn't the point of liberalism that individuals should decide for themselves what 'deserves' their respect – albeit that does not entitle people to take practical steps to erode the entitlement of others (which, on the analysis available through the court ruling, Ms Forstater has not)? Isn't this what Teresa Bejan, in her book *Mere Civility*[18], identifies as 'latitudinarianism' – the idea that liberty to believe is a matter of keeping inside the boundaries of what society finds an acceptable range of beliefs?

The law has, I think, misled itself by fastening on Baroness Scotland's speech in the Lords, albeit that drew on prior case law. The speech was by a politician trying to satisfy both those who wanted to confine protection to beliefs that are 'similar' to religion and those who objected to reliance on this 'similarity'. What is the point of section 10? Is it to protect groups who may experience prejudiced treatment because of their affiliations to the type of association[19] we call 'religious'? Or is it to protect individuals from prejudice based *only* on opinions or affiliations, whether or not anyone else thinks they 'deserve respect'? It seems to me that the law as it stands confuses these two objectives[20]. The judges are not to be blamed for this confusion – it goes back to the Parliamentary debates over successive iterations of this legislation.

Even disciples of the 'Jedi knights' deserve respect. 'Respect in a democratic society' is – surely - based on a shared humanity, to be limited only to the extent necessary properly and practically to protect the reciprocal rights of others.

I hope in due course the Supreme Court has an opportunity to revisit 'respect in a democratic society' - and to decide that such a problem should not worry the judiciary in future. If this is not a possible route then Parliament may need to review the legislation, and clarify what is intended by prohibiting discrimination against 'belief' in section 10 of the Equality Act.

28 July 2020 rev 06 Aug 2020

---

[17] Judge Tayler finds that one of the problems with Ms Forstater's position is that it is 'absolutist' (paras 84 & 91) and this is one of the reasons for her failure to balance competing rights successfully. In an earlier case, that of Andrew McClintock JP (2007), the judge held that a 'belief' failed to meet the test for protection because it was too nuanced and reliant on evidence rather than doctrine.

[18] Harvard UP, 2017

[19] Cecile Laborde argues that freedom of religion should be considered primarily in terms of freedom of association rather than of 'belief'. See *Liberalism's religion* (Harvard UP, 2017).

[20] For more on the distinction between these objectives, see Khaitan and Norton, *The right to freedom of religion and the right against religious discrimination: Theoretical distinctions,* International Journal of Constitutional Law, Volume 17, Issue 4, October 2019, Pages 1125–1145, https://academic.oup.com/icon/article/17/4/1125/5710828