RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2022

FROM *the* EDITOR

Welcome to the June 2022 issue of the *Religious Liberty Law Section Newsletter*.

Religious liberty is an internationally recognized human right. On December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights, Article 18 of which specifically recognizes that everyone has the right to freedom of religion, including the freedom to change one's religion or belief and the freedom to exercise one's religion in teaching, practice, worship and observance. For that reason, I have chosen Articles 18 and 19 of the Universal Declaration of Human Rights as this issue's Great Moments in Religious Liberty History. Ironically, however, many countries – including many Western nations that support the Universal Declaration of Human Rights – are now criminalizing and prosecuting religious expression. A recent example of this alarming development is the case of Dr. Päivi Räsänen, a long-time member of the Finnish Parliament who faces criminal prosecution for expressing her religious beliefs on human sexuality, which the government alleges is criminal "hate speech." Although the District Court acquitted Dr. Räsänen, the government has signaled its hostility toward religious expression by appealing the acquittal in its relentless pursuit of punishing Dr. Räsänen for expressing her religious beliefs.

Relatedly, I want to extend a personal note of thanks to Lorcan Price, the author of this issue's Feature Article addressing the Päivi Räsänen case. Mr. Price served on the legal team representing Dr. Räsänen before the Finnish court, so is well placed to provide insight on this important case, which serves as a warning to us that criminalization of religious speech is increasing around the world.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"At all times, day by day, we have to continue fighting for freedom of religion…"

— Eleanor Roosevelt

IN *this* ISSUE

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FROM *the* CHAIR

Adversarial vs. Contentious: Cooling Down Hot Topics

A well-meaning parent recently told me that her teenage daughter should be an attorney because she liked to argue with everyone. The comment was made in exasperation, and not as a compliment. I am reminded of early impressions I had of our "adversarial" legal system and how my view has changed over the years.

My early vision was of two opposing advocates presenting evidence and law supporting their respective client's position, using the art of persuasion in a spirit of professional congeniality, dignity and mutual respect. After a few years of litigation experience I discovered that far too often the adversary system became hostile with unnecessary and unprofessional approaches and tactics by my opposing counsel. I have appreciated mentors that strengthened my resolve to always respond with kindness and friendliness while still advocating strongly for my client's positions. I haven't been perfect at it, but I have strived to always improve my ability to disagree while not being disagreeable.

Certain topics tend to stir the emotions of hostility and contention more than others. Religious liberty is one of those. Disagreements over how to approach a number of hotly debated social issues involve religious liberty. Abortion, LGBTQ, separation of church and state, and discrimination are just a few. Those with opposing opinions turn too frequently to rhetoric and name calling.

A prominent religious leader, legal scholar and former Utah State Supreme Court Justice, Dallin H. Oaks, said:

> *"In this country we have a history of tolerant diversity—not perfect but mostly effective at allowing persons with competing visions to live together in peace. Most of us want effective ways to resolve differences without anger and with mutual understanding and accommodation. We all lose when an atmosphere of anger or hostility or contention prevails. We all lose when we cannot debate public policies without resorting to epithets, boycotts, firings, and other intimidation of one's adversaries. We need to promote and practice the virtue of civility."*[1]

Is it possible, both in your profession as an attorney and in your personal life, to avoid contention while succeeding at reaching your greatest potential? I personally believe that learning to avoid contention, including the art of diffusing hostility from opposing views, will actually increase your ability to succeed both professionally and personally. I believe it also makes you a better advocate for your client.

Abraham Lincoln wrote the following letter to Captain James M. Cutts, Jr., and I find his advice most enlightening:

> *"Although what I am now to say is to be, in form, a reprimand, it is not intended to add a pang to what you have already suffered upon the subject to which it relates. You have too much of life yet before you, and have shown too much of promise as an officer, for your future to be lightly surrendered. You were convicted of two offences. One of them, not of great enormity, and yet greatly to be avoided, I feel sure you are in no danger of repeating. The other you are not so well assured against. The advice of a father to his son 'Beware of entrance to a quarrel, but being in, bear it that the opposed may beware of thee,' is good, and yet not the best. Quarrel not at all. No man resolved to make the most of himself, can spare time for personal contention. Still less can he afford to take all the consequences, including the vitiating of his temper, and the loss of self-control. Yield larger things to which you can show no more than equal right; and yield lesser ones, though clearly your own. Better give your path to a dog, than be bitten by him in contesting for the right. Even killing the dog would not cure the bite.*
>
> *In the mood indicated deal henceforth with your fellow men, and especially with your brother officers; and even the unpleasant events you are passing from will not have been profitless to you."*[2]

I have strong opinions about religious liberty. I believe deeply in the core of those opinions as a devoted Christian. However, in striving to understand those with opposing views, including some who share my Christian faith but not my opinions on all sensitive social issues, I have developed an appreciation for many of their positions. Though I may disagree, I respect and admire many of those who advocate for positions contrary to my position. I have come to believe that two people who both are intelligent, and both of whom have high moral values, can disagree on hotly contested social issues, such as those that can affect religious liberty, and still be civil and cordial. In fact, they can become good friends.

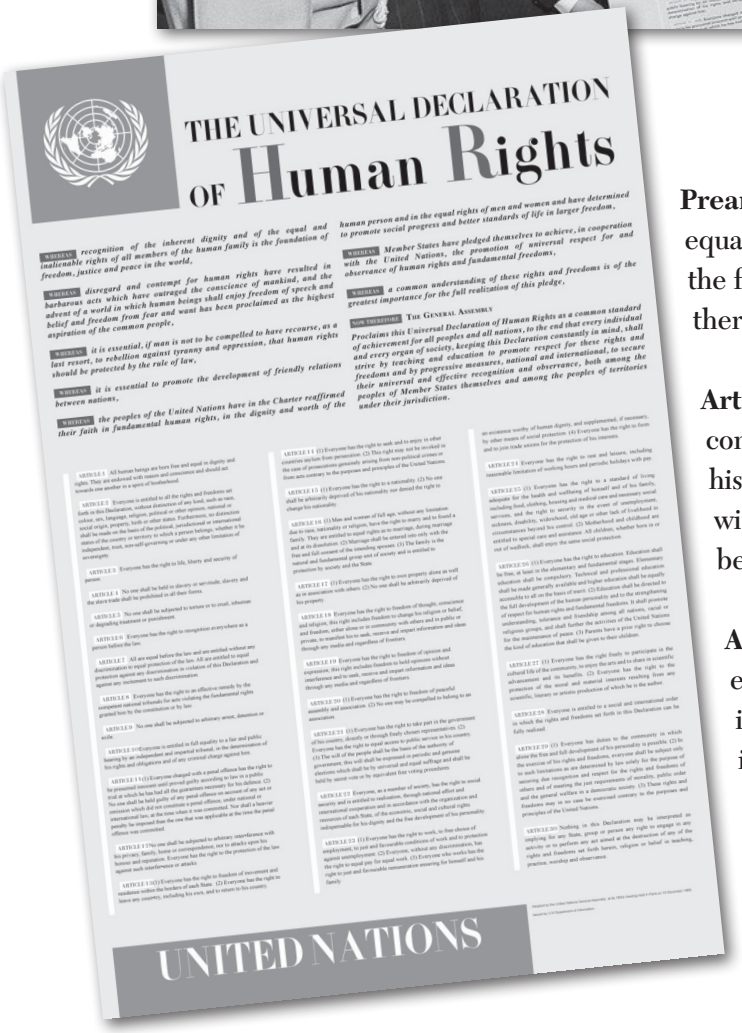
I encourage everyone to reduce contention in their professional practice and in their personal lives.

Mark A. Winsor, Chair

1. Dallin H. Oaks, U.S. Religious Freedom Conference, Dallas/Fort Worth, Texas, Sep. 10, 2016

2. Letter from Abraham Lincoln, Executive Mansion, to Capt. James M. Cutts.Washington, Oct. 26, 1863. Collected Works of Abraham Lincoln. Volume 6

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY



Universal Declaration of Human Rights

Preamble. Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world… Now, therefore, the General Assembly Proclaims…

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion and belief in teaching, practice, worship and observance.

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

SELECTED U.S. CASE LAW *Updates*

CASE 1

Shurtleff, et al. v. City of Boston, et al.

596 U.S. _____ (2022)

THE CITY OF BOSTON VIOLATED THE FIRST AMENDMENT TO THE U.S. CONSTITUTION WHEN IT ALLOWED SECULAR FLAGS TO FLY IN FRONT OF BOSTON CITY HALL BUT DENIED THE FLYING OF A RELIGIOUS FLAG.

In this case, the U.S. Supreme Court unanimously held that the City of Boston violated the First Amendment when, after creating a program that allowed groups to fly flags on a flagpole on the plaza in front of City Hall, the City refused to fly a Christian flag on the pole because the flag was religious and that flying the flag would violate the Establishment Clause.

Justice Breyer, writing for the Court, started out his opinion by writing "When the government encourages diverse expression – say, by creating a forum for debate – the First Amendment prevents it from discriminating against speakers based on their viewpoint."

Factually, the Court noted that the City of Boston had allowed private groups to request the use of a flagpole outside Boston City Hall to raise flags of their choosing, and that over the course of the program the City had approved hundreds of requests to fly dozens of flags. In fact, the Court noted, other than refusing the plaintiff's request to fly the Christian flag, the City had never refused a request to fly a flag. Hence, the Court concluded, "Boston's refusal to let Shurtleff and Camp Constitution raise its flag based on its religious viewpoint 'abridg[ed]' their 'freedom of speech.'"

The Court noted, first, that the City acknowledged that the plaza on which the flagpoles stand is a public forum and that the reason the City refused to allow the plaintiff to fly the flag his organization wanted to fly was because the flag was a Christian flag.

The first question the Court asked was whether Boston's flag raising program constituted government speech? If so, the Court said, Boston could refuse to fly flags based on viewpoint.

In answering this question, the Court turned to a three-part test which considered (1) the history of the expression at issue, (2) the public's likely perception of who (the government or a private person) is speaking, and (3) the extent to which the government has actually shaped or controlled the expression.

In applying this test to the Boston flag flying program, the Court found that the first two factors were inconclusive. However, the third factor was, in the Court's opinion, the most salient, because Boston neither controlled the flag raisings nor shaped the messages the flags sent. The Court

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noted that Boston had no policy as to what flags groups could fly or the messages those flags communicated. As a result, the Court concluded that the flags flown under Boston's flag flying program constituted private, not government, speech.

Having concluded that the flags raised at the Boston City Hall plaza were private speech, the Court turned its attention to determining whether Boston's refusal to allow the plaintiff to fly the Christian flag constituted impermissible viewpoint discrimination.

The Court began and ended its analysis by applying the principle that "When a government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'" That being the case, the Court concluded, "the City's refusal to let Shurtleff and Camp Constitution fly their flag based on religious viewpoint violated the Free Speech Clause of the First Amendment."

Justice Kavanaugh filed a concurring opinion, the essence of which was that the City was in error when it believed that allowing a religious flag to fly outside Boston City Hall would violate the Establishment Clause. In fact, Justice Kavanaugh wrote, "On the contrary, a government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, and speech because of religion from public programs, benefits, facilities and the like… Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second class."

In another concurring opinion, Justice Alito, with whom Justice Thomas and Gorsuch joined, agreed with the Court's conclusion, but disagreed as to the Court's analysis of the case under the government speech doctrine, writing that "courts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine 'as a subterfuge for favoring certain private speakers over others based on viewpoint'… and the government speech doctrine becomes 'susceptible to dangerous misuse.'" Courts must focus on the identity of the speaker, Justice Alito wrote, in order to prevent the government from using the government speech doctrine as a cover for censorship. So, Justice Alito wrote, the appropriate inquiry in government speech cases, such as this, is whether the speech is "the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government" and "the government did not rely on a means that abridges the speech of persons acting in a private capacity." Only if those two qualifications are met would the First Amendment Free Speech Clause have no application. "Analyzed under this framework" – Justice Alito wrote – "the flag displays were clearly private speech within a forum created by the City, not government speech" and "denying Shurtleff's application to use that forum constituted impermissible viewpoint discrimination." Thus, Justice Alito concluded, "excluding religious messages from public forums that are open to other viewpoints is a 'denial of the right of free speech' indicating 'hostility to religion' that would 'undermine the very neutrality the Establishment Clause requires.'"

Justice Gorsuch, with whom Justice Thomas joined, also filed a concurring opinion. Justice Gorsuch asked "How did the city get [this] so wrong?" He blamed the City's error, at least in part, on the Supreme Court's *Lemon v. Kurtzman* decision, which Justice Gorsuch wrote, has "produced only chaos." Justice Gorsuch wrote "While it's easy to see how *Lemon* led to a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it, less clear is why this state of affairs still persists. *Lemon* has long since been exposed as an anomaly and a mistake."

Justice Gosuch suggested two reasons for *Lemon*'s continuing use by governments to suppress religious speech. First, is that *Lemon* serves as a friend to those who are hostile to religion, allowing them to suppress religious speech they dislike. Second, *Lemon* is intellectually easier to apply than doing the work of a proper historical and constitutional analysis, which reveals that "[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment." Indeed, Justice Gorsuch wrote, "until *Lemon*, this Court had never held the display of a religious symbol to constitute the establishment of religion." And "The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to 'roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine.' … Our Constitution was not designed to erase religion from American life; it was designed to ensure 'respect and tolerance.'" For these reasons, Justice Gorsuch wrote that "This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie."

CASE 2

Ramirez v. Collier, Executive Director, Texas Dept. of Criminal Justice

595 U.S. ____ (2022).

UNDER THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT, A PRISONER WAS ENTITLED TO HAVE HIS PASTOR PHYSICALLY PRESENT IN THE EXECUTION CHAMBER TO PRAY FOR AND

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LAY HIS HANDS ON THE PRISONER DURING THE PRISONER'S EXECUTION.

In Chief Justice Roberts' opinion, which was joined by all Justices except Justice Thomas, the Court held that Ramirez, a convicted murderer scheduled for execution, was entitled, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), to have his pastor present in the execution chamber to pray over and lay hands upon Ramirez during the execution.

Ramirez had requested his pastor's participation on the ground that it was part of his faith to have his spiritual advisor lay hands on him anytime he is sick or dying. Texas denied Ramirez's request on the ground that, for security reasons, spiritual advisors were not allowed to audibly pray for or touch an inmate while inside the execution chamber.

After rejecting the State's arguments that Ramirez failed to exhaust his administrative remedies and should have filed his grievance sooner, the Court analyzed Ramirez's RLUIPA claim.

The Court began by concluding that "Ramirez is likely to succeed in proving that his religious requests are sincerely based on a religious belief because praying and the laying on of hands are both traditional forms of religious exercise. And the Court noted that the State did not contest that its refusal to accommodate Ramirez's requests substantially burdened Ramirez's religious beliefs.

Because the State's refusal to accommodate Ramirez's requests substantially burdened Ramirez's religious beliefs, Texas had to prove that its refusal to accommodate Ramirez's religious beliefs (1) served a compelling governmental interest and (2) was the least restrictive means of furthering that compelling governmental interest.

The Court first addressed the issue of Ramirez's request for prayer. In doing so, the Court first noted that "there is a rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation … [and] continu[ing] today." And the Court rejected the State's two asserted compelling governmental interests, the first of which was that absolute silence is necessary in the execution chamber so that the state can monitor the inmate's condition during the execution, and the second of which was that allowing audible prayer could be exploited by the prayer giver to make statements to witnesses and officials rather than the inmate. The Court also found that less restrictive means could be used to serve the government's interests.

With respect to Ramirez's request that his pastor be allowed to lay his hands upon Ramirez, the Court rejected the State's three asserted compelling governmental interests: security in the execution chamber, preventing unnecessary suffering, and avoiding further emotional trauma to the victim's family members. The Court noted that all three concerns could be addressed in a less restrictive manner than unconditionally banning the laying on of hands.

Finally, the Court concluded that Ramirez would suffer irreparable harm if not granted an injunction because "he will be unable to engage in protected religious exercise in the final moments of his life."

Justice Sotomayor filed a concurring opinion, but her concurrence was limited to addressing the issues of the timing of an inmate's request for pastoral presence in the execution chamber and the exhaustion of administrative remedies.

Justice Kavanaugh also filed a concurring opinion, in which he discussed the difficulty of balancing a state's interest in ensuring the safety, security, and solemnity of an execution and the inmate's religious rights under RLUIPA.

Finally, Justice Thomas filed a lengthy dissenting opinion in which he painstakingly set out the long history of Ramirez's attempts to repeatedly delay his execution. Justice Thomas wrote that he would have denied Ramirez's request because it was a "demonstrably abusive and insincere claim filed by a prisoner with an established history of seeking unjustified delay, harming the State and Ramirez's victims in the process."

CASE 3

Carson, as Parent and Next Friend of O.C., et al. v. Makin,

596 U.S. ____ (2022).

A STATE TUITION PROGRAM THAT PROVIDES TUITION ASSISTANCE TO PARENTS WHO SEND THEIR CHILDREN TO PRIVATE SCHOOLS IN THOSE PARTS OF MAINE IN WHICH THERE ARE NO PUBLIC SCHOOLS MAY NOT EXCLUDE PRIVATE RELIGIOUS SCHOOLS FROM THE PROGRAM.

The State of Maine does not operate public schools in areas of Maine with low populations. In those areas, Maine offered parents tuition assistance to send their children to a public or private school of the parent's choice. However, Maine would not provide tuition assistance to a "sectarian school", which the State defined as a school "associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." The parents of two students – one of whom attended high school at Bangor Christian Schools, a ministry of Bangor Baptist Church, and the other of whom attended Temple Academy, a religious school associated with Centerpoint Community Church – challenged the Maine law as a violation of the Free Exercise and Establishment Clauses of the First Amendment.

In analyzing the case, Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, wrote that "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers

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from otherwise available public benefits … [and] We have recently applied these principles in the context of two state efforts to withhold otherwise available public benefits from religious organizations." The first was in *Trinity Lutheran Church of Columbia, Inc. v Comer* (2017), where the State of Missouri excluded Trinity Lutheran Church Child Learning Center from its playground resurfacing program solely because of the religious identify of Trinity Lutheran Church. The second was *Espinoza v. Montana Department of Revenue* (2020) in which the Court struck down as a violation of the Free Exercise Clause a provision of the State of Montana's Constitution that barred government aid to any school "controlled in whole or in part by any church, sect, or denomination," which Montana was relying upon in prohibiting families from using otherwise available scholarship funds at the religious schools of the parents' choosing. The Court stated that "The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case" because like those cases the Maine law disqualified religious schools from its tuition assistance program "solely because of their religious character." "By 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program … effectively penalizes the free exercise' of religion."

The Court explained that "'A law that targets religious conduct for distinctive treatment … will survive strict scrutiny only in rare cases … [and] This is not one of them" because "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." Indeed, the Court stated, "such an interest in separating church and state 'more fiercely' than the Federal Constitution … 'cannot qualify as compelling' in the face of the infringement of free exercise.'"

The Maine law – the Court stated – "pays tuition for certain students at private schools – so long as the schools are not religious. That is discrimination against religion. A State's anti-establishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."

The Court rejected the First Circuit's distinction between programs that are status-based (where programs that are based on the religious status of a recipient are constitutionally prohibited) and programs that are use-based (where programs that prohibit the use of public benefits for religious uses are not constitutionally prohibited). The Court stated that that distinction was rejected in *Espinoza*, and that "Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."

In conclusion, the Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."

Justice Breyer, joined by Justices Kagan and, in part, Sotomayor, filed a dissenting opinion, in which the dissenting Justices contended that, in holding the Maine law unconstitutional, the majority overemphasized the Free Exercise Clause and failed to give sufficient weight to the Establishment Clause. Justice Breyer emphasized his view that the potential for religious strife, in some circumstances, justified government prohibitions on public aid to religious schools. Justice Breyer accepted the First Circuit's status/use distinction that the majority rejected, writing that "Maine … excludes schools from its tuition program not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals" and that "These distinctions are important" because "The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion." For that reason, Justice Breyer wrote, "We have … consistently required public school education to be free from religious affiliation or indoctrination" and that "Maine legislators who endorsed the State's nonsectarian requirement recognized these differences between public and religious education. They did not want Maine taxpayers to finance, through a tuition program designed to ensure the provision of free public education, schools that would use state money for teaching religious practices."

In conclusion, Justice Breyer wrote: "Maine wishes to provide children within the State with a secular, public education. This wish embodies, in significant part, the constitutional need to avoid spending public money to support what is essentially the teaching and practice of religion. That need is reinforced by the fact that we are today a Nation of more than 330 million people who ascribe to over 100 different religions. In that context, state neutrality with respect to religion is particularly important. The Religion Clauses give Maine the right to honor that neutrality by choosing not to fund religious schools as part of its public school tuition program. I believe the majority is wrong to hold the contrary."

Justice Sotomayor filed a separate dissent in which she argued that "Nothing in the Constitution requires today's result." Justice Sotomayor wrote that the *Trinity Lutheran* decision was "error" and has led, "in just a few years" to the Court holding that "'any status-use distinction is immaterial in both 'theory' and 'practice,'" thereby "upend[ing] constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars."

FEATURE ARTICLE

The Bible on Trial

By Lorcán Price

BACKGROUND

Finland is a Nordic country that regularly tops various international "freedom", quality of life and "happiness" indices. Indeed, recently, Helsinki, the quaint Finnish capital on the Baltic sea, was deemed to be the "happiest city in the world".[1]

The Finnish flag flies outside the Parliament Building in Helsinki, Finland

It was during this very period of purported "happiness" and "freedom" in Finland, that the authorities subjected a prominent Christian lawmaker and a Lutheran Bishop to over 10 hours of police interrogation and indictment on criminal charges, culminating in a two day trial for the "crime" of sharing their religious beliefs in public.

How, in this supposedly free, liberal and democratic European country, did a Christian member of parliament and a Lutheran Bishop find themselves under police investigation and then before a court on criminal charges, facing up to two years in jail?

This story begins over 18 years ago when Dr. Päivi Räsänen M.P., wrote a short pamphlet, published by the Luther Institute of Finland titled; *As Man and Woman He Created Them – Homosexual Relationships Challenge the Christian Concept of Humanity.* The pamphlet included scriptural commentary and biblical exegesis as part of Dr. Räsänen's contribution to the theological discussion about the nature of human sexuality and how Christianity should respond to developments in the wider culture and social context around the changing definition of marriage in Finland, as well as growing support within the Finnish Lutheran Church towards same-sex marriage.

Dr. Räsänen is a well-known public figure in Finland. A medical doctor by training, she has served as a Member of the Finnish Parliament since 1995, was chair of the Finnish Christian Democrats Party from 2004-2015, and from 2011-2015 was the Minister of the Interior, serving in the Finnish Government.

Dr. Räsänen is a public speaker on Christian issues, in addition to being a public representative. Her husband is a pastor in the Evangelical Lutheran Church.

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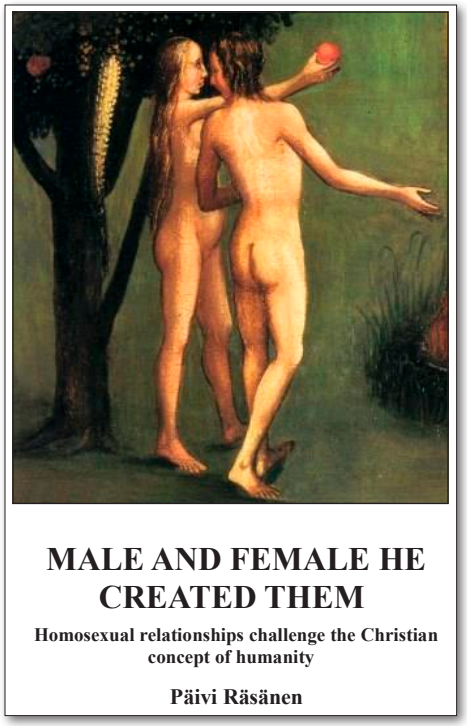
ABOUT THE AUTHOR

LORCÁN PRICE is an Irish Barrister and ADF International Legal Counsel based in Strasbourg, France, the seat of the European Court of Human Rights. He is a graduate of Trinity College Dublin and the University of Oxford. He was part of the legal team representing Dr. Päivi Räsänen in Finland.

Dr. Räsänen's pamphlet, *As Man and Woman He Created Them*, was published by the Finnish Luther Institute in 2004. It was in the library of the Luther Institute that Dr. Räsänen's pamphlet was discovered by an LGBT activist in 2018. This person made a complaint to the Helsinki police, alleging that the pamphlet contained "hate speech" against homosexuals. The text of the pamphlet argued against same-sex marriage, but highlighted the Christian concept of humanity, stating "everyone, regardless of sexual orientation, is equal and of equal value" and "the message of grace belongs to all sinners and all broken people."[2]



Dr. Päivi Räsänen's pamphlet, *As Man and Woman He Created Them*

After a preliminary investigation, in 2019 the police decided not to press charges. However, this was not the end of the matter, as these allegations against Päivi Räsänen were to be resurrected again in short course.

The catalyst for the Prosecution Service of Finland to pursue Dr. Räsänen and press criminal charges against her was a tweet published on 17 June 2019, in which Dr. Räsänen posted the following text on her Twitter account[3] – at the time of writing still available – together with a picture of Romans 1:24-27:[4]

> *"The church [Lutheran Church of Finland] has announced that it is an official partner of Seta Pride 2019. How [does] the doctrine of the Church, the Bible, fit in with that shame and sin [that] shall be raised up in pride?"*

This tweet, as is clear from the text, is aimed at the leadership of the Finnish Lutheran Church and their decision to use church funds to sponsor the gay pride parade in Helsinki. However, her reference to the concepts of 'sin' and 'shame' mentioned in the tweet (and taken directly from the words of Romans 1) elicited a complaint to the police and led to another investigation. As the police investigation proceeded, Finland's Prosecutor General, Raija Toiviainen, who has made 'hate speech' a policing priority,[5] instructed the police to press charges in relation to the tweet, as well as reopen the pamphlet case which was dropped in 2019.

As the media controversy in Finland was brewing over the police investigation into her tweet, in December 2019 Dr. Räsänen was invited on a live radio debate broadcast on YlePuhe (The Finnish Broadcasting Corporation), hosted by Ruben Stiller.

The interview lasted for one hour, during which Mr Stiller, Dr. Räsänen, and a theologically liberal priest debated theology, sexual ethics, and politics. A criminal investigation into this broadcast was launched in 2020, and the police extracted approximately three minutes of the discussion to form the basis for its criminal charges of 'hate speech'.[6]

On 29 April 2021 the Helsinki police, at the direction of the Prosecutor General of Finland, charged Dr. Räsänen with three alleged offences under Chapter 11, Section 10, of the Finnish Penal Code relating to 'ethnic agitation', which can be understood as 'hate speech' in this context, for writing her 2004 pamphlet, her tweet in June 2019 and her radio show remarks in December 2019.

Bishop Dr. Juhana Pohjola was also charged under the same provisions of the criminal code for publishing the pamphlet in 2004 in his capacity as the director of the Finnish Luther Foundation.

"HATE SPEECH"

The ensuing trial of Dr. Räsänen and Bishop Pohjola became known in Finland and around the world as the 'Bible trial'[7]

The assistant state prosecutor assigned to the case, Anu Mantila, attempted unsuccessfully to dismiss claims that the trial was about the Bible, stating in the media:

> *"Mrs. Räsänen's [charges] concern hate speech, which is insulting, degrading and violates dignity of homosexuals. … The Prosecutor General doesn't charge Mrs. Räsänen … for quoting the Bible or explaining its texts. [Paivi Rasanen] has the freedom to express her religious opinions… However, this freedom does not justify speech that can arouse intolerance, contempt and even hatred towards homosexuals or any other minority."*[8]

It is important to note that "speech which can arouse hate" or 'hate speech' is not defined in international law, yet Finland's hate speech laws, like those across Europe, find their origins in domestic national law from various international human rights instruments, in particular interpretations of the provisions of the International Covenant on Civil and Political Rights (ICCPR).[9]

Article 20(2) of the ICCPR 2 provides that national law shall prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

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However, as is the case in Finland, vague "hate speech" laws inspired by the provisions of Art. 20(2) of the ICCPR are employed to silence speech that does not include any call for violence, hostility, or discrimination and where there is no resulting hostile action or violence.

In the Finnish Criminal Code, Chapter 11, Section 10 states that a person "who spreads statements or other information among the public where a certain national, ethnic, racial or religious group… is threatened, defamed or insulted shall be sentenced for ethnic agitation to a fine or to imprisonment…"[10]

Dr. Päivi Räsänen

Thus, the Finnish interpretation of 'hate speech' results in mere 'insult', without any reference to violence, as being tantamount to criminal conduct. How a group is 'defamed' or 'insulted' is not revealed in the law. Such vagueness is a design feature, not a quirk, of hate speech laws. The Council of Europe (parent body to the European Court of Human Rights) concedes that "hate speech" has "no particular definition in international human rights", it can be used to describe "discourse that is extremely negative and constitutes a threat to social peace."[11] Other scholars describe hate speech as a "convenient shorthand way of referring to a broad spectrum of extremely negative discourse".[12]

Article 10 of the European Convention on Human Rights[13] (hereafter "ECHR") protects freedom of expression, with Article 10 (2) providing for limitations on that right as are "prescribed by law and are necessary in a democratic society".

In its leading case on Article 10, the European Court of Human Rights (hereafter "ECtHR") held that "freedom of expression constitutes one of the essential foundations of [a democratic] society… It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[14]

The *Handyside* decision was announced in 1976. However, in the intervening decades, the ECtHR has decisively moved away from an expansive embrace of free expression. In a series of recent decisions it has decided that "hate speech" is not expression worthy of the protection of Article 10.

An example of the ECtHR's refusal to allow the provisions of the European Convention to protect speech deemed as hate speech can be seen in the case of *Lilliendahl v. Iceland*,[15] a case in which Mr Lilliendahl called a radio show and referred to homosexuality as a "sexual deviation" and education on homosexuality in schools as "disgusting". While many would find such speech "shocking" and "offensive", the Court found that his criminal conviction for 'hate speech' in Iceland was not a breach of Mr Lilliendahl's Article 10 rights 'considering the need to protect the rights of those traditionally discriminated against, the nature and severity of the comments'.[16]

Similarly, in *E.S. v. Austria*[17] a public figure in Austria made remarks at a public meeting where she suggested that Mohammed, the Islamic prophet, may have had paedophilic tendencies by virtue of his marriage to a young girl. E.S. was prosecuted for insulting religion under the Austrian equivalent of 'hate speech' laws. The ECtHR dismissed her complaint, holding, *inter alia*, that Article 10 of the Convention did not allow her to make "incriminating statements" designed to insult Islam, and as such her speech exceeded acceptable expression of opinion.

The foregoing illustrate the confused and ambiguous approach of the ECtHR to freedom of expression. The case law lacks a clear leading decision that sets out robust definitions of 'hate speech' or clear guidance on how freedom of expression is to be upheld where the authorities criminalize non-violent speech.

Nevertheless, at the criminal trial of Bishop Pohjola and Päivi Räsänen, the Helsinki District Court relied heavily on the unhelpfully ambiguous Article 10 jurisprudence of the ECtHR in deciding the case. However, the Helsinki District Court paid particular attention to decisions such as *Atamanchuk v. Russia* and *Yefimov v. Russia*,[18] which rely on a more context-based approach to assessing whether certain forms of expression should be criminalized.

THE TRIAL

On two cold days in January and February of this year, the Helsinki District Court heard the prosecutor's case alleging that words such as "sin" and "shame" were insulting and harmful to homosexual people.

In acquitting both Dr. Räsänen and Bishop Pohjola from all criminal charges, the District Court held that the purpose of Dr. Räsänen's writing was "not to defame or offend homosexuals, but to defend the concept of family and marriage

– continued

between a man and a woman… in accordance with her religious beliefs."[19]

In relation to the June 2019 tweet, the District Court held that "the biblical references attached to the verses in the publication support Räsänen's claim that she had intended the meaning of the words 'shame' and 'sin', used in the publication, to come from the Bible. It is not for the District Court to interpret biblical concepts." However, the Court noted in passing that the words also have a "negative connotation in general language", but that "these are value judgments whose truthfulness cannot be ascertained".[20]

In dismissing the Stiller radio show charges, the District Court noted numerous factually incorrect and erroneous allegations in the indictment, which, inter alia, alleges that Dr. Räsänen's religious beliefs "include the idea that homosexuals are not created by God in the same way as heterosexuals…" the Court was clear that "no such claim is made in the radio programme."[21]

This clear and unanimous judgment, dismissing all charges against Dr. Räsänen and Bishop Pohjola, is a significant victory for freedom of speech, in particular for expression of religious beliefs, in Finland.

Notwithstanding her victory, this case should never have been brought before any court. The Helsinki police did not press charges in 2019 because they reached the conclusion that Räsänen had not violated even the vague provisions of the 'hate speech' law. It was the involvement of an ideologically driven state prosecution service, which cherrypicked, manipulated and misrepresented statements made by Dr.Räsänen who insisted this case be brought to trial.

Despite the detailed and unambiguous judgment of the court, on April 1, 2022, the National Prosecution Authority of Finland announced that it intended to appeal the judgment of the Helsinki District Court to the Court of Appeal of Finland. It is anticipated that this appeal will be heard in the autumn of 2022, after which a final appeal by the losing party is highly likely, culminating in a Supreme Court case in 2023 or 2024. Such timelines solely benefit the state prosecutors, operating with significant taxpayer money and benefiting from the 'chilling effect' on free expression that such prosecutions bring. As a result, many will no doubt self-censor for fear they are just one tweet away from a police visit and five-year legal ordeal. This is a deliberate feature of European "hate speech" laws, where so often the process itself is the punishment.

This case attracted significant attention outside Finland as it highlighted the growing threat of 'hate speech' laws to the free expression of religious belief in the public square. The Finnish Court judgment was clear that the fact that others may disagree with (or find offensive) the Christian view of human sexuality cannot, ipso facto, lead to a conclusion that certain minorities have had their dignity attacked or have become the targets of "hate". For the sake of free speech and free religious exercise, it is hoped that the Court of Appeal of Finland will uphold this finding.

ENDNOTES

1. World Happiness Report is a publication of the United Nations Sustainable Development Solutions Network, 2021 Report is available at: https://worldhappiness.report/.
2. A translation of the booklet can be read at the following link: https://www.lhpk.fi/wp-content/uploads/2019/12/Male-and-female-He-created-them.pdf. (pp.13-20).
3. https://twitter.com/PaiviRasanen/status/1140693636176384011?s=20.
4. "Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed forever! Amen. For this reason God gave them up to dishonorable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error." Romans 1:24-27.
5. 'Prosecutor General alarmed by growing hate speech: "Driving victims into a corner"' YLE News, available at: https://yle.fi/news/3-9883791.
6. The show, in Finnish, is available online on the state broadcaster website: https://areena.yle.fi/audio/1-50363169.
7. Päivi Räsänen: Finnish MP in Bible hate speech trial, BBC News, 24 January 2022, available at https://www.bbc.com/news/world-europe-60111140.
8. Comments reported in Christianity today, available at: https://www.christiantoday.com/article/charges.against.christian.politician.are.because.of.hate.speech/136769.htm.
9. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
10. The Criminal Code of Finland, (39/1889, amendments up to 766/2015 included). Published by the Ministry of Justice, Finland available at: https://www.legislationline.org/download/id/6375/file/Finland_CC_1889_am2015_en.pdf.
11. Council of Europe, Guide to Hate Speech, available at: https://www.coe.int/en/web/freedom-expression/hate-speech.
12. McGonagel T. The Council of Europe against online hate speech: Conundrums and challenges, available at: https://rm.coe.int/16800c170f.
13. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
14. *Handyside v. the United Kingdom*, Application no. 5493/72, ECtHR, 7 December 1976, § 49.
15. *Lilliendahl v. Iceland*, Application no. 29297/18, ECtHR 11 June 2020.
16. Ibid. at §48.
17. *E.S. v. Austria*, Application no. 38450/12. ECtHR, 11 Dec 2018.
18. *Atamanchuk v. Russia*, Application no. 4439/11, 11 February 2020 and *Yefimov and Youth Human Rights Group v. Russia*, Application nos. 12385/15 and 51619/15, 11 February 2020.
19. *Prosecutor v. Päivi Räsänen, Juhana Pohjola and the Luther Foundation of Finland* [Case No. R 21/3567] pp.19-21.
20. Ibid. at pp.23-25.

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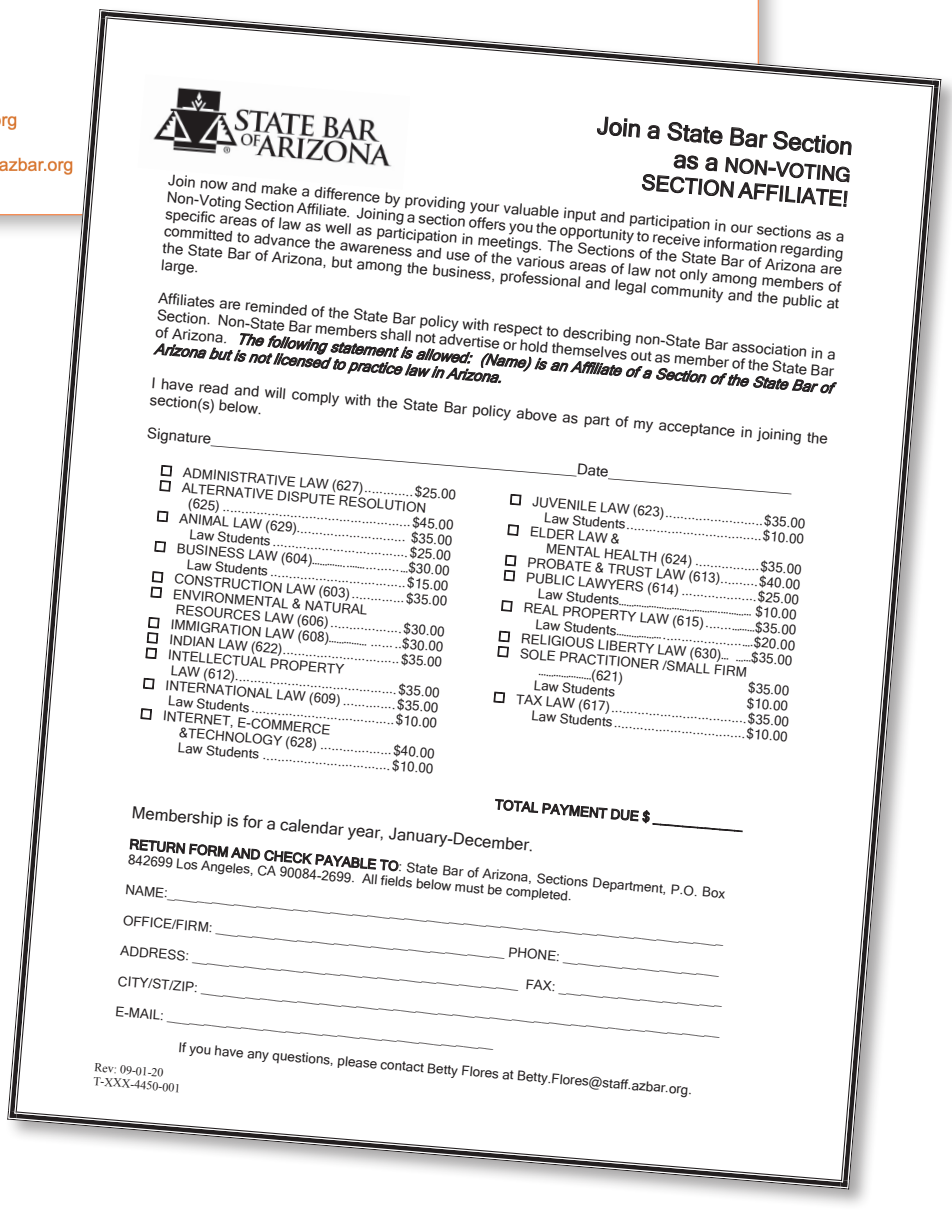

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RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act –
Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

[watch video]

Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Church & Ministry Law Group at Schmitt Schneck Even & Williams PC)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

[watch video]

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