

LEGAL ESSAY

Battling free speech with public morals and the duty to respect the rights of others: from the regulation of indecent, obscene and blasphemous expression to the control and punishment of diversity-critical speech

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Introduction

The recent battle between free speech belief and the maintenance of diversity and equality in a modern democracy has raised fundamental questions about the nature and extent of free speech and belief, and the validity and proportionality of restrictions on those rights. Should individuals or groups be allowed to hold and disseminate critical views on homosexuality or transgender issues without fear of criminal charges or other repercussions, and how are such rights to be balanced with the state's or employers' duties to promote equality and diversity? In other words, should the right to free speech and belief be regulated and restricted when they conflict with modern ideas of diversity and equality, or must a greater harm be evidenced in order to justify restrictions on those fundamental, human rights? These questions are also more relevant when the comments are made in the context of academic freedom, and academic freedom of expression and belief, and engage the recent conflicts in this area, together with the suspension and rethinking of the Higher Education (Freedom of Speech) Act 2023.

Such questions were, and to an extent still are, raised in the battle between free speech and the regulation of indecent, obscene (and blasphemous) speech; a battle that was fought ferociously in the 1960s and 1970s, but which has decreased because of the development of a more liberal approach to sexual and religious matters, and the use of more appropriate legislation to govern harmful indecent, obscene and blasphemous speech and expression. Regulation of such was defended principally on the ground that restrictions were necessary to protect and preserve public morals (and, to a more limited extent, the rights of others to be free from such offence or corruption, or attacks on their religion). That reasoning shares a common feature of the more recent conflict between speech and belief and maintaining equality and diversity. In both conflicts, the argument is that the right to free speech and belief should not be regulated simply because it causes offence to society – if indeed that is capable of being ascertained or measured – or to the views and respect of individuals or groups, or those responsible for upholding equality and diversity policies.

The purpose of this essay is to highlight the common features of the recent conflict on diversity-critical speech with the (largely) historical battle between free speech and the control of indecent, obscene and blasphemous speech. Despite the presence of public or individual morality in both battles, the essay will also attempt to draw a distinction between the two conflicts, whilst highlighting the similarity of both sides' arguments for the preservation and restriction of free speech and belief rights. It will also attempt to draw some conclusions on the regulation of free speech and belief rights in both cases; using underlying principles of human rights, and Articles 9 and 10 of the European Convention on Human Rights, to test the validity, extent and need for such regulation.

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Regulating and restricting free speech rights in human rights law: articles 9 and 10 of the ECHR

The right to free speech (Article 10) and freedom from thought, conscience and religion (Article 9) are referred to as ‘conditional’ rights; to be enjoyed subject to interferences laid out in the second paragraph of each article. Thus, any interference must be clearly prescribed by law, and necessary in a democratic society to achieve one of the legitimate aims listed in the qualifying provisions of both articles; of most relevance in this context is the aim of defending public morality or the rights of others, which will be explored below.

Two things should be noted at this point. First, that the right to *hold* beliefs under Article 9 is an *absolute* right (to prevent believers being subject to persecution and penalties), but that the right to *manifest* those views, and the right of freedom of expression under Article 10, are *conditional* right. Further, Article 10 states that the right of freedom of expression carries with it duties and responsibilities, before articulating legitimate reasons for its restriction. This is also important with respect to the right to protect one’s beliefs (and speech) from *direct* discrimination under the Equality Act 2010. That Act appeared to offer absolute protection against *direct* discrimination, but allows justification for *indirect* discrimination of such beliefs, where the restrictive rule applies to all groups, but particularly effects a specific group (i.e., those who hold strong religious or other beliefs). This allows a balancing exercise between the enjoyment of the right and the need for its restriction. Hence, the appeal in *Higgs*, discussed below, gains further importance, as it raised the question of whether it permissible for a court or tribunal to justify an act of *direct* discrimination, once it was established that the belief was protected under the Equality Act. Indeed, in February 2025, the Court of Appeal confirmed that acts of direct discrimination could, in rare cases, be excused by the justifications contained in the qualifying provisions of Articles 9 and 10. (*Higgs v Farmor’s School* [2025] EWCA Civ 109).

Second, the European Court of Human Rights has always protected free speech and belief from interference on the ground that the speech or manifestation of the belief simply causes *offence* (*Handyside v United Kingdom*). Therefore, the state has no power to restrict speech or belief simply because it causes offence, shock or outrage, and there appears to be no individual or group right to protection from such harm. To justify interferences with those rights some further harm must be evidenced: discrimination or hatred, or an interference with another’s Convention or legal rights. Yet, despite the protection offered in *Handyside*, the Strasbourg Court has allowed the state a reasonably wide margin of appreciation to protect both public morals and the rights of others, and to impose restrictions on speech and beliefs that serve those wide aims. In our context, therefore, this might allow the state to enforce *proportionate* diversity and equality principles and policies, and for private actors, such as employers or trade regulators, to enforce those policies on individuals in a reasonable and proportionate manner. The decision in *Higgs*, however, makes it clear that employers and others need to provide clear and cogent evidence to justify any interference.

Free Speech versus public morals: the regulation of obscene and indecent expression

The Obscene Publications Act 1959 was intended to liberalise the regulation of obscene material, stressing the need to show that the material was *obscene* and not simply *indecent*. Thus, material had to be likely to have the effect of *depraving and corrupting* the likely readership, rather than simply *being rude, crude or disgusting*, or morally offensive. Further, the Act provided a defence of public good, where it could be shown that despite its obscene character it was in the public interest for it to be published on grounds of literature, art or learning, or other objects of general concern. This would allow the law to take a more liberal approach to the prosecution of new, and indeed existing, literature and other material that was claimed to be morally harmful. This reflected a modern movement towards liberal thinking in the middle of the twentieth century, and, in particular on matters relating to sex.

The acquittal by a jury of Penguin Books for publishing *Lady Chatterley's Lover* appeared to herald a new era of law, public morality and literature (*R v Penguin Books*). Although it was never clear whether the acquittal was because the jury felt that the book was not likely to deprave and corrupt the likely readership, or that it was in the public interest of literature to publish it in any case, the acquittal was seen as a victory for free speech over public morals, and an opportunity for society to adopt a more progressive attitude towards what the law could and could not restrict or prohibit.

Despite this opportunity for change in the enforcement of obscenity laws, two things militated against any real progress in this area. First, the domestic courts took a cautionary approach to the interpretation of the new, liberal aim of the 1959 Act; providing a broad discretion to those responsible for enforcing the Act, and a strict interpretation of the defence of public good, contained in s.4 of the Act. For example, the public good defence could not be used to claim that the material had a therapeutic effect on the readership (*DPP v Jordan*); and the phrase 'learning' in s.4 did not allow the defence to assert that the reader actually learnt something from the publication; 'learning' representing a more scholarly and objective purpose, and not simply gaining knowledge about the otherwise obscene material (*Attorney-General's Reference (No 3 of 1975)*). The courts were not yet prepared to assist in the development of liberal thinking and expression in areas such as pornography and the depiction of violence, or to allow publishers to use the Act to destroy or threaten established ideas of public decency. Equally, the European Court of Human Rights offered a wide margin of appreciation to the state when its law infringed on the right to free speech under Article 10 (*Handyside v United Kingdom*). In *Handyside*, the Court dismissed the action brought by the publisher of the *Little Red Schoolbook*, a pamphlet intended to introduce young readers to progressive thoughts on sexual and other matters, but which had not been prosecuted in the rest of Europe. Importantly, the Court declared that there was no common European consensus on public morality, or on what laws were necessary in a democratic society to preserve it. The United Kingdom was, therefore, entitled to restrict that publication on the grounds that it was necessary to protect those public morals accepted in that society at that time, and to protect the rights of others – to safeguard the right of young people not to be depraved and corrupted by such material. This represented the Court's deferential approach to issues of public morality in any given state (*Muller v Switzerland*), and allowed the state to adopt an individual and, if necessary, a paternalistic approach to the control of obscene and indecent material.

Secondly, the courts developed, or rediscovered, other common law offences that were based on the test of indecency, or which allowed the police to avoid the more liberal approach offered by the 1959 Act and the availability of the public interest defence. Thus, the House of Lords confirmed that two common law offences – the corruption of public morals and outraging public decency – survived the Obscene Publications Act, and could be used to circumvent the Act, which had supposedly been passed to cure the harshness of the previous law of obscenity and indecency (*Shaw v DPP* and *Knulier v DPP*). This allowed the police to seize materials – catalogues that advertised the services of prostitutes (including the services of homosexual prostitutes). In *Shaw* the House of Lords found the decision to feature prostitute adverts in magazines was 'dangerous to the welfare of society' and that it was the courts' duty to protect the morals of public majority, as well as safety and order.

Controversially, this allowed the judiciary to create offences in order to adapt to what they saw as 'changing standards in life and in regard to the values and morals of society'. Of course, the values referred to here represent the established and historical view on public morality; which were under threat by more progressive views, and which the courts were unwilling to abandon by a liberal approach to the 1959 Act. Specifically, the public interest defence was not available in such actions, as the 1959 Act was intended to cover prosecutions based on *obscenity* rather than *indecency*, and did not cover legal actions founded on conspiracy. Further, in *Knulier*, the courts allowed prosecutions under these common law offences, despite homosexuality being legalised in by the Offences Against the Persons Act 1967. Again, the European Court offered a

wide margin of appreciation to the state when such actions were challenged as unnecessary violations of free speech. For example, it found that the prosecution of an art gallery for exhibiting gallery items that were found to have outraged public decency were necessary in order to protect public morals, despite the absence of any public interest defence in the domestic proceedings (*S and G v United Kingdom*).

In addition to the regulation of free speech on grounds of indecency and obscenity, the 1970's and 1980's witnessed a number of high-profile actions brought against publishers in the law of blasphemy, together with their challenge in the courts on human rights' grounds. At the height of the obscenity and free speech actions, above, a private prosecution was brought by Mary Whitehouse against *Gay News* magazine for publishing a poem, which it was claimed constituted a blasphemous libel for vilifying Christ in his life and in his crucifixion. The House of Lords upheld the convictions, as the poem grossly offended the beliefs of Christian followers; also confirming that there was no need to prove a specific intent to cause that harm (*R v Lemon*). Meanwhile, Strasbourg took a cautious approach to challenges under Article 10 of the Convention, offering the State a wide margin of appreciation in maintaining and enforcing domestic blasphemy laws. Thus, the challenge before the European Commission on Human Rights was rejected, as the laws on blasphemous libel fulfilled the necessary requirements for limiting freedom of expression, and for public morality and the rights of other (*Gay News v United Kingdom*). This margin of appreciation was evident in other cases brought against the United Kingdom (*Wingrove v United Kingdom* – upholding the banning of a video by the licensing authorities because of its blasphemous nature – and other states (*Otto-Preminger Institute v Austria* – a film which caused gratuitous offence to religious followers, was found to have lawfully and proportionately restricted free speech rights).

This cautious approach by the Strasbourg Court has been modified in recent years by a number of decisions that have restricted the reach and enforcement of blasphemy laws and their restriction on free speech. Thus, in *Choudhury v United Kingdom*, the European Court held that there was no obligation on the United Kingdom to extend the law of blasphemy to religions or followers beyond the established Church of England, or indeed to accommodate a law of blasphemy in their domestic law: the United Kingdom Parliament eventually repealed the common law offence in 2007). This, of course, leaves certain religious groups and followers with limited legal protection from opinions attacking their religion, or their individual beliefs; although laws prohibiting the incitement of racial and religious hatred under the Public Order Act 1986, and certain public order and harassment laws, can be employed in such circumstances.

This limitation on the protection of religious rights, together with a more liberal interpretation of free speech restrictions to uphold religious views (*Rabczewska v Poland* and *Bouton v France*), and standards of public decency (*Macatè v Lithuania*) has liberalised the Court's approach to freedom of expression and public morals and religion (*Asociación de Abogados Cristianos v Spain*). This, of course, is what free speech proponents were arguing for from the 1960's, but this has also created a potential imbalance in the protection of the rights to free speech, on the one hand, and the right to protect religious morality and the right to practice one's religion on the other. The clearest example of this conflict was seen several years later in the Charlie Hebdo incident, where the 'right' to offend religious objects and views culminated in violent reprisals by religious groups against those who attacked their religion and religious figures.

That conflict, still not resolved legally or politically, has some (though not all) of the characteristics shared with our modern conflict between free speech and belief and the maintenance of equality and diversity, discussed below. In both cases, proponents of free speech and belief claim the right to challenge and criticise (and even to denigrate) the rights and views of others, because such expression and belief causes no greater harm than offence or disagreement with current views and policies on the role of equality and diversity in modern society. Further, arguments based on artistic and other freedom, and more recently academic freedom and academic free speech, were and are used to augment free speech and belief rights.

Yet, as we can see by examining the enforcement, or non-enforcement of blasphemy laws, a lack of balance in the balancing of the various interests is capable of creating harm well beyond ‘offence’ or the disruption of commonly accepted ideals on equality and diversity, or of compelling everyone to hold and express those views, or at least not to manifest them (the compelled speech argument). The limited recognition of religious rights is capable of impinging on the rights (both legal and under human rights law) of religious groups and followers (unless the law offers alternative legal arrangements to recognise and enforce those interests). Equally, the failure of a legal system to recognise that the current debate does indeed engage fundamental issues on rights, and the duty of the state to protect those interests, will encourage claims from the undefended group; whether the interference comes from the state, or from private actors who claim to act with legal impunity.

Free Speech restrictions on diversity critical speech

The conflict of free speech with diversity and equality has dominated public discussion in recent years, particularly, but not exclusively, in the context of academic freedom. It has also witnessed numerous criminal and civil actions, where individuals with diversity-critical views have either faced criminal prosecution or warnings for harassment or other public order offences, or have been dismissed or sanctioned by employers or institutions for holding or manifesting those views. At the risk of over-simplifying the conflict, the expression and beliefs at the heart of the conflict consist of two, broad, assertions: that homosexuality or transsexuality is contrary to nature and religion, and is damaging to traditional relationships and viewpoints in this area; and that the growth of transgender rights cannot hide the fact that a person cannot change their sex. Some, but not all, of these statements are expressed in strong and offensive terms, thus causing distress to that group or to individuals. Are such views protected by the rights of speech and belief, and are they consistent with the aim of securing and maintaining equality and diversity in society, in the workplace, or in academic institutions? Further, how, and in what circumstances, should such views be regulated or punished?

We can take the recent case of *Higgs v Farmor’s School*, as an example. An employee, a devout Christian, was dismissed by her school employer for posting her (and others’) views on recent school policies of teaching sexual diversity in primary schools. Her claim for discrimination on grounds of religion and belief was defended by the school on the grounds that her views, and her refusal to withdraw them at a subsequent meeting with the school, justified the school’s actions in upholding its policies on equality and diversity. The case raised a number of issues regarding the school’s tactics and the severity of the penalty, which the Court of Appeal addressed whilst clarifying the legal and human rights principles underlying cases of this type. On appeal it was held that the dismissal and the suppression of her views amounted to both direct discrimination under the Equality Act 2010 and unfair dismissal; as the nature of the employee’s posts did not justify restriction of her beliefs, or justify her dismissal. In doing so, the Court of Appeal placed freedom of expression and belief as the primary rights in these conflicts, requiring clear and objective evidence to justify any interference with such rights.

Yet this case and many others raise more general and fundamental questions about free speech, and the right to religion and belief on the one hand, and the maintenance of equality and diversity on the other. Many other legal disputes have arisen from this conflict – criminal actions, or threats of prosecution (*Miller v College of Police*; and *Hayden v Doyle*); expulsion from universities and professions (*Ngole*, above and *Page v Lord Chancellor*), in addition to the dismissal of those whose views conflict with diversity and equality. This conflict poses a dilemma for speakers, employers and those bodies responsible for supporting or enforcing diversity and equality (and particularly, those such as universities who must enforce both the policies *and* freedom of expression). It also poses a number of complex legal and human rights questions for law makers and the judiciary: is there a right to free speech or belief when that view conflicts with the state’s duty to promote diversity and equality; has an individual speaker got a personal or professional

duty to refrain from manifesting those views; and what level of harm to the interests of diversity and equality, or to individuals, is necessary before action can be taken against the speaker?

Courts and tribunals have wrestled with those questions in a variety of contexts. After a period of upholding equality values over the right to free speech and beliefs (see, for example, *McClintock v Department of Constitutional Affairs, in the context of refusal to carry out a contractual duty to secure equality*), those dilemmas are now tackled by the adoption of a more flexible approach; taking into account both arguments and rights, and seeking to find a proportionate response to the individual circumstances in the case. Thus, critical views of homosexuality and transgender rights voiced by employees and others are not necessarily grounds for dismissal or punishment (*Ngole v Sheffield University; Forstater v GDP Europe and others*). Further, courts and tribunals have insisted that all the circumstances surrounding the dissemination of that view must be taken into account, with employers and others offering the speaker an opportunity to explain their position and confirm their willingness to carry out equality and diversity policies irrespective of their personal views (*Ngole*, above). There has also been an attempt to distinguish between permissible, democratic views, and impermissible hate speech that is unprotected by Articles 9 and 10 of the European Convention; or possibly excluded from protection because of Article 17 of the Convention, because they involve the exclusion of the rights of others (*Thomas v Borders Partnership NHS Trust, Miller v University of Bristol*, but unsuccessfully argued in *Phoenix v Open University* and *Miller v College of Policing*). Thus, whilst racially offensive speech is unprotected, in a recent case the High Court held that posts placed by a person on Twitter/X that included pseudo-images of the transgender claimant as a pig, it was found that the comments were very far removed from anything reasonable, but did not amount to a course of conduct that was *oppressive* (*Hayden v Doyle*, 2025). The decision of the Court of Appeal in *Higgs*, adopts this approach and indeed strengthens the standing of speech and belief in many of these conflicts; but does not provide a clear resolution in all disputes as justification for punishment or action is still possible, albeit more difficult to prove.

Similarities and distinctions in both disputes

Many of those issues and developments will be explored in the next section, but for the moment, I would like to make some initial comments on comparisons and differences between this conflict and the one concerning the regulation of free speech and belief on grounds of public morals and decency. In both cases, the speaker is seeking to exercise their rights under Articles 9 and 10 of the European Convention, the Equality Act 2010, and the Human Rights Act 1998. In both cases, the conflict *appears* to raise a similar question: can free speech and belief be restricted and penalised because the speech or belief is unpopular, too liberal/illiberal, and out of line with modern thinking in those areas, or that it might offend those who believe strongly in religion or public decency, or equality and diversity? However, as we will see later, the two battles have very different histories and contexts, and it would be naïve to suggest that pro-diversity views are simply representative of the morality and feelings of those who seek to maintain and promote equality, and that they simply impose a duty to respect the views of others.

The examination of speech and belief restriction in both the protection of public morals on the one hand, and the more recent protection and preservation of equality and diversity on the other, reveals a number of general similarities with respect to the restriction of free speech and beliefs; see above.

First, as with views on public (and religious) morality in the 1960s and 70's, opposing opinions on the recent equality and diversity dilemma are clearly entrenched; with neither side willing to accept each other's stance, or rights, or to compromise their position in the debate. Those who were seeking to uphold standards of public morality (on sexual matters or religion), saw those aims as central to their view on how public decency should shape mores in society, and, thus, their views on the legal control of indecent, obscene and blasphemous expression. Such supporters, and in general the judiciary, were not persuaded by arguments of free speech and

independent thought on issues central to how individuals should behave and express themselves in a 'decent' and moral society; or in compromising those standards by expressing alternative views; including encouraging others to adopt these new views. Similarly, in the recent conflict, pro-diversity groups are not prepared to relax their stance on diversity and equality by allowing counter or alternative stances to such policies, feeling that diversity-critical views are damaging to those fundamental aims, and that free speech and thought (even in an academic environment) should not excuse active discrimination, or even discriminatory views that obstruct the fight for equality and diversity.

Second, as with the free speech and public morality debate in the past, the damage created by the speaker is often difficult to identify and quantify. In the earlier battle, free speech proponents argued that the concept of public morality was nebulous – how does a court, or anyone, seek to define and quantify *public* morality – and, if that is possible, what harm can be shown to have occurred by speech or opinion that seeks to attack or question a state's morality. Such questions were addressed by the Williams' Report in 1979 (HO 265/9), concluding that most obscenity and indecency laws lacked a legitimate reason for their enforcement: the desire to uphold public morality being insufficient on its own to interfere with rights to speech and private life. This is evident in the modern conflict over diversity-critical speech and belief – those who hold such views arguing that there is no duty on private actors to agree with diversity and equality views, or to generally promote such policies by abstaining from expressing counter views. Further, by failing to abide by or agree with such policies, there is no evidence of any identifiable harm; there being no *right* for other people to agree with your opinion, or to abstain from expressing views or beliefs that others will find distasteful or even shocking. Third, following from the second factor, whilst the speaker or belief holder in both cases can claim a *human right* to hold and express that view, those seeking to restrict such speech or opinion are merely seeking to rely on a (legitimate) *reason to restrict* a fundamental right. Free speech proponents in both cases thus seek to claim the upper hand in the public and legal debate by asserting a predominant human rights claim. This, in their view, reduces the importance of public morality or equality and diversity when both rights and interests are in conflict and have to be balanced. The right to free speech and belief are, in fact, mentioned specifically in ss. 12 and 13 of the Human Rights Act 1998; although it is now established that neither section gives those rights a higher order than other rights (*Cream Holdings v Banjaree*; *Begum v Denbigh High School*). Nevertheless, the Court of Appeal in *Higgs* appears to give speech and belief a 'head start' or presumption of success in such conflicts.

Accepting that the above represent the common features of both debates, I will now attempt to identify some important distinctions between the two conflicts, which might assist in achieving a satisfactory and proportionate solution, both in the law and more generally in resolving the public conflict.

The first distinction relates to the absence in the earlier conflict of a process to achieve a satisfactory balance between upholding fundamental rights on the one hand, and justifying their restrictions on grounds that are acceptable in human rights law. Domestic laws of indecency, obscenity and blasphemy were created and interpreted largely free from any challenge on human rights grounds; there being no formal Bill of Rights or any judicial obligation to take into account the European Convention or the case law of the European Court of Human Rights. True, there was, since 1966, the right to petition the Strasbourg Court claiming a breach of Convention rights to speech and belief, but in general that Court gave a very wide margin of appreciation to the State in matters related to indecency, obscenity and blasphemy, making it difficult to challenge the passing and enforcement of such laws at the domestic level. In contrast, the current conflict is regulated by equality and diversity laws, which are then both augmented and circumscribed via the Human Rights Act 1998, to ensure that such laws and their impact are necessary and proportionate in safeguarding Convention rights such as speech and belief. Further, the Strasbourg Court now takes a very different approach to review of interferences with such rights for reasons related to public morality. The Court now takes a less deferential approach to the

challenge of such law, requiring clear and cogent evidence to justify any interference, and carefully examining all relevant factors in ensuring a necessary and proportionate balance. Specifically, the Court has also offered guidance on how the enforcement equality laws can be balanced and reconciled with religious and other views that conflict with anti-discrimination laws (*Chaplin v United Kingdom* and *Eiweda v United Kingdom*). The Court of Appeal in *Higgs* has used the case law of the Strasbourg Court in interpreting and applying domestic law, but it is argued, has provided greater protection to speech and belief.

The second distinction relates to the level and nature of harm caused by diversity-critical speech or opinion, as opposed to the earlier conflict between free speech and public morality. Save in the case of blasphemy, where a person or groups' enjoyment of religious rights (Article 9) might be endangered by critical speech or opinion, most cases enforcing public morals involved the protection of that concept alone – *public morality* – rather than the human or fundamental rights of those to whom the speech was directed. It is also worth mentioning that the feminist argument against indecent and obscene speech – that such expression demeaned women – was largely ignored as a legal argument for suppressing pornography; and in that sense the feelings of women and feminist beliefs were disregarded when justifying interference with free speech. So too, without sensible qualification of the right to speech and belief, the feelings of those promoting diversity and equality are in danger of being ignored in our present dispute.

Although free speech proponents in the recent debate might argue that there is no *right* to be free from criticism or offence, diversity-critical speech does, directly or indirectly, impact on the legal and human rights of those promoting or benefitting from equality and diversity. This is certainly the case where diversity-critical speech could impact on how employers or customers, or society at large, treat such groups because of the dissemination of diversity-critical speech. In such cases, what is labelled at most as merely 'offensive' disagreement can in fact impact on those rights (including the right to private life and freedom from discrimination), and indeed the rights/duties of employers and other agencies to enforce their diversity and equality policies. In any case, the concept of public morality could be employed to justify the recognition and (reasonable) enforcement of such policies, as it can be argued that they promote principles of fairness and equality in both society and the workplace.

Those ideals are not simply political and transient in nature, but form the basis of human rights law, nationally and internationally. Further, the state has a positive obligation to ensure that the Convention rights of minority groups are not violated by private actors. That means actions or speech which impact on the enjoyment of their human right to private and family life (Article 8), and there is much recent case law where other Council of Europe states have found to be in violation of that right, for failing to provide an effective remedy to those affected by a failure to prosecute or compensate for such treatment (see *Vejdeland v Sweden*; *Lilliendahl v Iceland*). This must, of course, be qualified to ensure a fair distribution of the state's obligation to secure the rights of both parties affected by diversity-critical speech. Any interference with free speech or belief rights must be relevant and proportionate: individual actors should not be wholly responsible for the state or employer's duty to protect those rights. For example, such liability should only apply where the private actor has some sort of responsibility (under their contract or occupation, or the general law) to follow diversity and equality policies; much depending on the nature of their employment or other duties, and the context of the dissemination of such views; including, perhaps, the factor of academic freedom. Equally, criminal and other law must attempt to make a distinction between disagreeing with such policies, or causing mere offence to others, and disseminating views that display hatred, or possibly contempt, of the rights of others. Domestic case law has generally used that distinction in both criminal law (see *Miller*, and *Hayden*, above) and the adjudication of employment disputes (*Higgs v Farmor's School*). Further clarification has been provided by *Higgs* in establishing a framework for maintaining the distinction between permissible and impermissible speech and opinion, but without formal acceptance of the need for restricting diversity-critical speech.

Such difference hopefully show that this is not simply a battle between free speech and belief on the one hand, and the ‘right’ to get others to agree with the recognition and enforcement of diversity and equality policies on the other. This is important with respect to resolving the current debate on diversity-critical speech. Provided the speaker refrains from discrimination and/or using ‘impermissible’ expression and beliefs, then both parties in the dispute appear to hold protected *rights*; much more so perhaps than those involved in the earlier dispute about public morality and free speech. It is then a question of devising an acceptable and appropriate method of resolving that dilemma and distinguishing between permissible and impermissible speech and belief and its dissemination.

In drawing comparisons between the two conflicts, we must equally be aware of the differences between them in terms of rights and any justification for interference. The battle between speech and public morality was ultimately resolved by the gradual erosion and replacement of traditional views with a more liberal approach to sex, violence and religion, and not by any ground-breaking approach taken by Parliament or the courts towards liberalising those laws. The law regarding equality and diversity is already informed by laws and judgments seeking to promote equality and diversity in society; the feminist argument of harm being generally rejected in the former dispute. The current approach is unlikely to be altered by any pronouncement that views of diversity and equality are outdated or no longer justify any, or most, interferences with free speech and belief. Equality and diversity are here to stay as a hallmark of modern democratic societies, as too is the right to question such policies using free speech and belief, both as a vehicle for such views and to persuade others. Equality and diversity have a long legal history, witnessing a number of challenges at the domestic and international level to outdated and unfair laws which permitted discrimination on grounds of sexual and gender orientation (See *Smith and Grady v United Kingdom*; and *Goodwin v United Kingdom* and legislation remedying that discrimination). To argue that free speech is simply in conflict with a duty to *respect* others’ views and the ‘right’ not to be offended, ignores that history, and the importance of those values in upholding human rights and freedom from discrimination. It also reduces the importance of recognising equality and diversity as a hallmark of democratic and fair societies, and of protecting others from the stigma of discrimination and negative profiling.

Those factors must be considered in the debate, as too should the fact that much of this discussion is taking place within academic institutions. This also needs to be considered when discussing the recent postponement by the government of legislation to further protect free speech at universities. Such a measure has been seen as a withdrawal from the fundamental aims of the legislation: to promote free discussion at universities, and to halt what was seen as a current trend on encouraging and excusing a ‘cancel culture’ at such institutions. The outcome of recent judicial review of that decision will answer most of the legal and constitutional questions about that decision (*Free Speech Union v Secretary of State for Education*). However, that decision, and the legislation itself, will not directly tackle the current dilemma we have over balancing free speech with equality and diversity.

As Professor Soutphommasane, the Chief Diversity Officer at Oxford University has stated recently:

(My) ‘work does have its challenges because it’s about cultural change. Sometimes people will need to think about things differently – and do things differently. Equality and diversity also touch on issues about which people have strong views. There’s an important challenge here: How can we have civil conversations when people may disagree? How can we nurture the right kind of institutional culture? These are some of the questions that will accompany the work I’ll be doing.

So speech matters...because it enables people to express their individuality. Which is why, in any debate, we should be prepared not just to hear from those whose voice is louder or stronger. Then again, part of the problem might be that we are so often fixated on the idea of a debate... What if freedom of speech isn’t reduced to an

attempt to win an argument? What if we saw in the exchange of views also an exercise from which we can understand and learn from others? For those of us who believe both in free speech and equality, diversity and inclusion, that is one prospect towards which we should be prepared to work. (Freedom of speech and Equality, Diversity & Inclusion rights)

Those reflections need to be addressed by the law, judges and those responsible for enforcing diversity and equality, instead of adopting an approach which either advocates unconditional rights to free speech and belief, or the unconditional agreement and adoption of diversity and equality rights and feelings by everyone. The Court of Appeal has attempted to provide a clear and robust framework for upholding the right of speakers and believers to air diversity-critical views, but perhaps has not embraced all the arguments for promoting equality and diversity and protecting it from attacks that damage its progress and success.

Conclusions

Both conflicts, above, provide the opportunity for the state and society to regulate and discuss matters of free speech, belief and the maintenance of a common idea of decency, equality and diversity. In both cases, either side see their stance and view of paramount importance, reluctant to compromise their position. Free speech and belief are of no consequence if one is pressurised or penalised for not sharing ‘accepted’ views and policies on public morals or diversity and equality. Equally, the pursuit of public morals or diversity and equality are so central to human rights and maintaining a democratic and fair society that individual free speech rights might, in some cases, have to come second best to that central objective.

As opposed to the era of speech regulation on grounds of public morals, in the 1960’s and thereafter, domestic law is now in a stronger position to achieve a necessary and proportionate balance between free speech and belief and religion and equality and diversity, and in other areas of free speech conflict. The Human Rights Act forces law makers, and public bodies (including the courts) to consider both sides and all rights claims, and to achieve a just result in accommodating both arguments. Hopefully *Higgs* will assist the law and its enforcement in resolving this modern conflict in a more proportionate manner; despite the battle between both parties remaining as strong or entrenched as ever. Yet it is argued that the judgment achieves a great deal for free speech and opinion, without fully embracing the legal and moral arguments for achieving equality and diversity.

To argue that free speech is simply in conflict with a duty to respect others’ views and the ‘right’ not to be offended ignores the history and rationale for equality and diversity, and the importance of those values in upholding human rights and freedom from discrimination. This, of course, is an ongoing conflict, and the importance of promoting diversity and equality should not be lost in the anti-woke campaign; as it is most recently being threatened by the new Trump administration in the USA. On the other hand, legal developments in this area, including court judgments, might assist us in taking a different approach to how we *balance* the respective rights of speech and belief with equality, diversity and freedom from discrimination. That may create greater consistency of our law with the European Convention and the case law of the European Court of Human Rights in this area. Less likely, it may also assist in both sides accepting the legitimacy and reasonableness of opposing views and stances; and might at least inspire a duty to respect, or at least *recognise*, the rights and claims of their opponents. The aim is to find a solution that avoids free speech and belief rights being compromised by any duty not to offend, whilst recognising that free speech rights in Article 10 of the Convention carry with them duties and responsibilities to exercise that right in a manner that does not frustrate the legitimate aims contained in the qualifying provisions of that article. In that sense the judgment in *Higgs*, strengthens the right to free speech and opinion, but leaves the protection of diversity and equality (and the employers’ tactics on enforcing it) lacking certainty.