

Conflicting Fundamental Rights: Same Sex Marriage and Freedom of Religion

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Case Opening

Mr. and Mrs. Bull are devoted Christians. They strongly believe that monogamous heterosexual marriage is the (only acceptable form of romantic/sexual partnership. According to devoted Christians like them, their form of partnership is “uniquely intended for full sexual relations” and sex outside of marriage – whether heterosexual or homosexual – is sinful. Further, Mr. and Mrs. Bull are the owners of a small family hotel in Sennen Cove, Cornwall, the United Kingdom. Because of their religious beliefs, they restricted the use of double-bedded rooms to married couples in their hotel. Single-bedded and twin bedded rooms were available to all. These policies were all clearly communicated on their website.

Mr. Hall and Mr. Preddy are a homosexual couple who have entered into a legal civil partnership/ whose relationship has been legally recognized as a civil partnership , living together for more than twelve years in the city of London. For a weekend breakaway, Mr. Hall and Mr. Preddy planned to do some walking along Cornwall’s beautiful coasts and pay a visit to Land’s End Landmark Monument. On the 4th of September 2008, Mr. Hall booked, by telephone, a double-bedded room at Mr. and Mrs. Bulls’ hotel for the following two nights (5th and 6th of September 2008).

The next day, on arrival at the hotel, Mr. Hall and Mr. Preddy were informed that they could not stay in a double-bedded room because of their relationship status. As a form of compensation, the gay couple was offered two single bedrooms for the two nights. Mr. Hall and Mr. Preddy were highly surprised by the stance taken by Mr. and Mrs. Bull and found this “rejection” “very hurtful”. The men did not accept the offer proposed by the hotel owners and actively protested against the decision of not letting them sleep in a double-bedded room as they felt that they should be treated like any other married couple. When their protest turned out to be ineffective, Mr. Hall and Mr. Preddy left the hotel in search for an alternative accommodation in the Cornwall area for their weekend. This is what the gay emancipation movement was about: Equal treatment of same-sex and mixed sex couples (or marriages) .¹

Fundamental constitutional rights

Most constitutions in liberal western countries provide the following basic rights for all their citizens: (i) freedom of thought/conscience, (ii) the protection of property rights, and (iii) the right to equal treatment. At the heart of the case outlined above are the human rights to freedom of thought, conscience and religion, as article 9 of the European Court of Human Rights reads:

- (a) 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 or belief, in worship, teaching, practice and observance.
- (b) *Freedom to manifest one’s beliefs* shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the

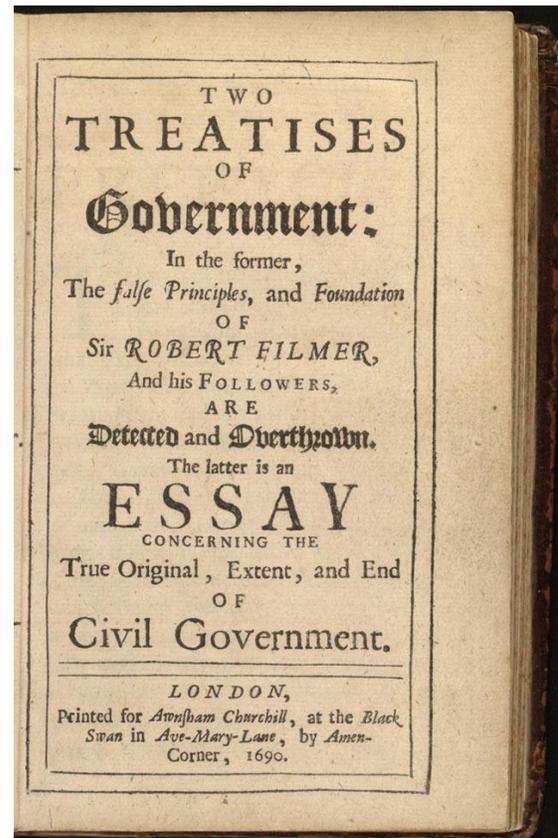
¹ See for more on this case: <https://ukhumanrightsblog.com/2012/02/19/analysis-court-of-appeal-upholds-hotel-gay-discrimination-ruling-marina-wheeler/> as seen 27 October 2020.

protection of public order, health or morals, or for the protection of the rights and freedoms of others.²

There are, however, other considerations to take into account as well. Another question in this case is what the protection of property rights means, especially in relation to private ownership. As Mr. and Mrs. Bull are the owners of the hotel, then to what extent can they truly decide the regulations and conditions for the customers who stay their hotel? In other words, where are the boundaries of the right to own private property?

Before dealing with the conflicting rights in the outlined case, it might be useful to know where our fundamental rights come from and what we should do when some of them come into conflict with each other. To deal with this issue, we turn to two major philosophers who shared deep thoughts on the origins and importance of fundamental (human) rights: The British philosopher John Locke (1632-1704) and the American philosopher John Rawls (1921-2002). The fact that these two men lived in very distinct times and geographical regions may explain the differences in their approach to fundamental rights. Nevertheless, perhaps surprisingly, both philosophers come to quite similar ideas regarding the origins and importance of so-called fundamental, basic, inalienable or human rights.

Let's start discovering the origins and importance of fundamental rights by focusing on the works of John Locke. Locke states that, in order to understand what it is to have a natural right, we have to imagine the way things are before any form of government, before the introduction of law. This state is, according to John Locke, the *state of nature*. In 1689, Locke published his famous essay *Two Treatises of Government*. In the *First Treatise* he attacks patriarchalism, while in the *Second Treatise* Locke outlines his ideas for a more civilized society based on natural rights and his social contract theory. Locke begins by describing what he means by the *state of nature*, which is a much more stable picture than Thomas Hobbes' state of "war of every man against every man".³ Locke starts by arguing that all men are created equal in the state of nature by God. From this starting point, he goes on to explain the hypothetical rise of property and civilization, and that the only legitimate governments are those that have the consent of the people. Therefore, any government that rules without the consent of the people can and should be, in theory, overthrown by the people.



² https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf as seen 27 October 2020.

³ Thomas Hobbes, *Leviathan, or The Matter, Forme & Power of a Common-Wealth Ecclesiasticall and Civil*, 1651. Copyright© Erasmus School of History Culture and Communication; Gijsbert Oonk | Gijs van Campenhout

In the *Second Treatise*, Locke argues that the *state of nature* is a state of liberty. In the *state of nature*, human beings are free and equal to each other; there is no hierarchy. People are not born to be kings, just as people are not born to be servants. However, even in this free and equal *state of nature*, we are not free to do whatever we want. There are certain constraints; these are because we cannot give up the rights that we *naturally* have. As we in the *state of nature* fall under the *law of nature*, we are not free to take someone else's life, liberty or property. Nor are we free to take our own life, liberty or property. As, even though I am free, I am not free to violate the *law of nature*. So we are not free to take our own lives, or to sell ourselves into slavery, or to give to somebody else arbitrary absolute power over us.

But where do these constraints come from? Well, Locke provides us with two answers. First, he argues that "for men, being all the workmanship of one omnipotent (almighty), and infinitely wise maker [namely God], they are his property, whose workmanship they are, made to last during his not one another's pleasure."⁴ Therefore, one of the answers to the question why I cannot give up my natural rights to life, liberty and property is because, strictly speaking, these rights are not yours as, after all, you are a creature of God. According to Locke, God has an overarching property right over all of us, in other words God has a *prior* property right.

Now you might say that 'God' is an unsatisfying and/or an unconvincing answer, especially for those who do not believe in God. What does Locke have to say to them? Well, second, here is where Locke appeals to the *law of reason*. The idea behind focusing on *reason* is that if we properly reflect on what it means to be free, we will come to the same conclusion. This is what Locke means when he says: "The state of nature has a law of nature to govern it which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions."⁵

This leads to a puzzling and paradoxical feature of Locke's account of natural rights; familiar in one sense and strange in another. This is the idea that our natural rights are unalienable. But what does unalienable mean? Locke means we as individuals are not able to separate ourselves from our individual natural rights. We can't give these rights up, give them away, trade them with another or sell them. For example, consider buying an airline ticket. As airline tickets are registered to an individual, they are nontransferable to someone else and, therefore, unalienable. I own these natural rights, but in a limited sense that I cannot get rid of them. So, in one sense, an unalienable right is a non-transferable right which makes it, as something I own, less fully mine as I cannot fully decide on what I want to do with it. Another example is your citizenship rights. You are, for example, born American or Dutch – an aspects of your identity that you cannot get rid of – which (seemingly automatically) gives you certain rights to the citizenship of the respective countries; you possess these citizenship rights but you are not free to do with them whatever you like.

⁴ John Locke, *Two Treatises of Government*. In the Former, *The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government*, Two Treatise, 2, 6. <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf> This part of the description of John Lock is taken from the well known Harvard Philosopher Michael Sandel and his fanous course Justice: <http://justiceharvard.org/lecture-7-this-land-is-your-land/>

⁵ John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: A. Millar et al., 1764). 12/16/2019. Copyright© Erasmus School of History Culture and Communication; Gijsbert Oonk | Gijs van Campenhout

Another aspect of unalienable rights is, especially in the case of the right to life, liberty and property, for a right to be unalienable makes it deeper and more profound right. And that is Locke's sense of unalienable. We can find these unalienable rights in the American Declaration of Independence as Thomas Jefferson drew on Locke's idea of unalienable rights to life, liberty - and here Jefferson amended Locke's idea - the pursuit of happiness.

4th July 1776:

The American Declaration of Independence reads (in line with Lock)

"The unanimous Declaration of the thirteen united States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—(cursive ours).*"

<https://www.archives.gov/founding-docs/declaration-transcript>

(as seen 26/11 2020)

To summarize, for Locke, unalienable rights are (individual) rights that no one can take away from us, not even a king or the majority in a parliament (though Locke himself could not have imagined democracy as we now know it). Although these rights are individual and unalienable, they do not belong to us as individuals as they belong to God or – in another sense – they emerge from (the law of) 'reason'. Therefore, we cannot take away those rights, not even from ourselves.

John Rawls was an American moral and political philosopher in the liberal tradition in the twentieth century. His theory of "justice as fairness" recommends equal basic rights for all, equality of opportunity and promotes the interests of the least advantaged members of society. Rawls's arguments for these principles of social justice are based on a thought experiment which he called the 'veil of ignorance' behind which people are positioned in the 'original position.'

Rawls argues that most people in modern democracies tend to vote mainly in their own interests. In short, if you are rich and entrepreneurial you may vote for more liberal rights and less taxation by the state. Conversely, if you are poor, poorly educated and (relatively) unhealthy you may vote for higher taxation, a redistribution of wealth and subsidization of both the healthcare and educational systems. The current political system will, in the end, reproduce – perhaps even enlarge - the existing inequalities in societies. Rawls asked himself what would happen if we were to create a society based on *fair* principles and regulations for all: what would be the main principles and how should such a fair society look?

By placing people behind the 'veil of ignorance', they cannot know who they will be or anything else about themselves in this new society. So, any choices they make in structuring that society could either

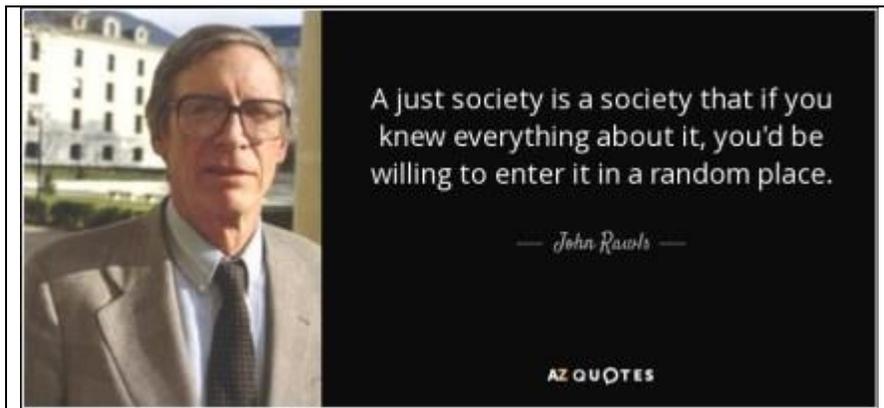
benefit or harm them. Rawls then assumes that behind the veil of ignorance, people will act solely as rational human beings. Thus, for example, if they decide that men will be superior, they face the risk that they will be entering the new society as a woman (or as gender neutral). Or, for example, if they decided that 10% of the population will be slaves to the other 90% of the population, they would need to consider the 10% chance that they could find themselves as a slave. As no one wants to be part of a disadvantaged group, the logical belief is that the 'veil of ignorance' would produce a fair, egalitarian society, this, Rawls calls *justice as fairness*.

In a fair society, according to Rawls, all individuals must possess the following rights:

- Rights and liberties. This includes: the right to vote, the right to hold public office, freedom of speech, freedom of thought, and fair and legal treatment;
- Power and opportunities for all;
- For income and wealth to be distributed sufficiently for good quality of life, not everyone needs to be rich, but everyone must have enough money to live a comfortable life (but what is enough?);
- The conditions necessary for self-respect.

For these conditions to occur, the people behind the 'veil of ignorance' must figure out how to achieve what Rawls regards as the two key components of justice:

- Everyone must have the best possible life which does not cause harm to others.
- Everyone must be able to improve their position, and any inequalities must be present solely if they benefit everyone.



What John Locke and John Rawls would both agree on is:

- The right to life, no slavery nor exploitation of human beings;
- The right to liberty, to choose your own way of life based on your own principles and values (as long as you do not harm others);
- The protection of minority rights and the worst-off in society (as you might be one of them);

- The protection of property rights.

Freedom of religion and same-sex marriage

Let us go back to our 'modern day case' of the religious hotel owners and the gay-couple. Most modern societies have either a constitution or laws that deal with:

- Freedom of religion, thought and conscience;
- The right not to be discriminated against on specific grounds such as sexual orientation, race or age (which varies according to country);
- Protection of property rights;
- And other fundamental human freedoms as long as 'we do not harm others'.

Now, what do we do if some of these principles, freedoms or rights compete or even clash with each other? Obviously, in the described case, there is a tension between the freedom of religion and property rights of the Christian, hotel owners and the right not to be discriminated against on grounds of marital status or sexual orientation of two men whose relationship has been legally recognized as a civil partnership.

Ultimately, this case went to court. The main question was whether Mr. and Mrs. Bull were allowed to refuse a double-bedded room to Mr. Hall and Mr. Preddy. To answer this, the following question needed to be answered: can freedom of religion and the right to same-sex marriage be upheld and defended at the same time? Or should one of those rights override the other?

Author(s)

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Arguments for Mr. and Mrs. Bull's case	Arguments for Mr. Hall and Mr. Preddy's case
<p>Final judgement:</p> <ul style="list-style-type: none">• Whose position would you defend, and why? 300-400 words <p>Explain how you can overcome the differences in the two positions or, if not, why you would rule in favor of one over the other. What could be the major consequences for the immediate future of the position you have chosen? 200-400 words</p>	