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Freedom of Religion and Law Schools: Trinity Western University

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A fascinating debate has arisen in the last few weeks that raises important issues of freedom of religion and non-discrimination. The debate illustrates very well the recent tendency of many commentators to blur the meaning of the word ‘discrimination’, to prioritise discrimination principles above other human rights (especially freedom of religion), and the subtle but massive shift of public morality in the West.

The case is that of a Canadian Christian University, Trinity Western, in British Columbia (TWU). The controversy has arisen because TWU is proposing to start offering a law degree. The view that is being pushed by some, especially by academic Elaine Craig in a forthcoming article available online,¹ is that TWU's graduates ought not to be allowed to be admitted as lawyers in Canada by the admitting authorities, the Federation of Law Societies. Why? Because all students who are admitted to TWU, and all faculty members, are asked to sign a Community Covenant that they will abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman”. While of course this would preclude many heterosexual members of the community, the issue that Craig and others find offensive is that this would also preclude those who are homosexual from enrolling at, or being employed by, TWU.²

Actually of course it would not, so long as it was recognised that one could be homosexual by “orientation” and yet choose not to engage in homosexual intercourse. But making a distinction between orientation and activity is clearly not acceptable in current academic thought, as throughout her article Craig asserts regularly that TWU's policy discriminates on the basis of "sexual orientation". Let us accept this view for the purposes of the remaining discussion.

In the end the argument comes down to this: that a Christian University is behaving in a “discriminatory” fashion by imposing an entrance requirement that involves commitment to traditional Christian moral principles; and hence that any lawyers trained by this University would not be fit and proper persons to practice law.

What is all the more surprising about the current furore is that this very University went through an almost identical controversy over a decade ago, which was resolved in favour of it being allowed to require this commitment from students and faculty. The previous issue concerned the training of teachers; the British Columbia College of Teachers tried to say that it would not authorise teachers who had been trained at TWU to teach in the public school system. In Trinity Western University v British Columbia College of Teachers, 2001 SCC 31,

² For a newspaper comment on the case, see http://news.nationalpost.com/2013/01/18/attempts-to-start-canadas-first-christian-law-school-come-under-fire-because-of-b-c-universitys-ban-on-gay-relationships/.

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[2001] 1 SCR 772 ("TWU v BCCT") the Supreme Court of Canada upheld the right of TWU to require these moral commitments of its members. The 8-1 majority decision, written by Iacobucci & Bastarache JJ, held that in balancing the rights of non-discrimination of prospective students and faculty members, the right of the University members to freedom of religion had to be recognised. They said, at [35]:

> While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully...Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.

The result was sensible. While there may have been homosexual persons who wanted to study at TWU (and given its emphasis on traditional Christian moral principles, one suspects there were not many), to allow open entry would be to over-ride the decision of the administrators and others at TWU who took the view that their religious principles would be best expressed by an exclusionary rule.3

How then can the current controversy over TWU’s plan to offer a law degree be distinguished from this previous decision concerning teachers? Craig’s argument in effect is that an institution that chooses students in this way is incapable of teaching law students to behave in ethical ways. In addition she bases her attack on TWU on the grounds of lack of academic freedom: that since staff are required to subscribe to a Biblical worldview, they must be incapable of critical thought.

Much more could be said but these positions, it seems to me, are clearly indefensible. On the question of training in professional ethics, Craig’s view really comes down to this: that a private University is not allowed to admit students, or employ staff, on the basis of the views of those persons on moral issues. If it does so, it shows itself to support "discrimination".

The problem, of course, lies in that seemingly obvious word “discrimination”. In its origins it simply refers to “making a distinction”. Where distinctions are made on irrelevant grounds, and where the law protects those grounds, then to do so is "unlawful discrimination”. Is it unlawful discrimination to refuse entry to a private Christian university on the basis of whether or not students agree with Biblical views on moral behaviour?

That of course is precisely the question here. And the decision of the Supreme Court in TWU v BCCT tells us that it is not. There is what we might call a “formal”

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3 Of course other Christian institutions may well take the view that they would welcome those of differing views to allow a dialogue to take place. But that the TWU rule was based on the religious principles of those who ran the University was not in doubt.

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reason why it is not: because the specific statute governing such matters in
British Columbia allows religious educational institutions to discriminate in
admission policies on the basis of religion. 4 Perhaps the more general reason,
noted by the Supreme Court in TWU v BCCT, is that there is a need to provide
protection for the religious freedom of TWU.

The TWU Covenant concerned clearly bases its requirement that students and
faculty members pledge certain behaviour in Biblical injunctions, and in that
sense the admission policy is based on the religious commitments of TWU.
Presumably that is why Craig, in her article, does not call for TWU to be
prosecuted or penalised for applying their admissions policy.

But what she does say is that this admissions policy makes it impossible for TWU
to teach law students to behave ethically:

it is reasonable to conclude that concepts of justice, equality, nondiscrimination,

inclusivity, and anti-oppression -- foundational tenets of Canada’s legal system--
cannot properly be taught, from whatever pedagogical approach, in a learning
environment created by an institution with policies that are explicitly (and
unapologetically) discriminatory. 5

With respect, it is not reasonable so to conclude! One problem with this
paragraph is that it alleges that TWU’s policy is “discriminatory”. This cannot
mean “contrary to law”, for the reason noted above. The policy is in effect that,
given that TWU is designed to be a teaching institution for the benefit of those
with a Christian worldview, it limits membership to those who share that
worldview. What evidence does Craig produce to suggest that its staff or
graduates will in future unlawfully discriminate against homosexual people? The
formal documents of TWU, which were examined in the previous Supreme Court
decision, refer to the need for its members to avoid discrimination of this sort. To
adapt the language used by the Supreme Court in the previous decision, Craig:

has inferred without any concrete evidence that such views will limit consideration
of social issues by TWU graduates and have a detrimental effect on [their practice of
law]. 6

The Court went on to say in that case that

33 TWU’s Community Standards, which are limited to prescribing
conduct of members while at TWU, are not sufficient to support the conclusion that
the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if
TWU’s Community Standards could be sufficient in themselves to justify denying
accreditation, it is difficult to see how the same logic would not result in the denial
of accreditation to members of a particular church. The diversity of Canadian
society is partly reflected in the multiple religious organizations that mark the
societal landscape and this diversity of views should be respected. The BCCT did
not weigh the various rights involved in its assessment of the alleged
discriminatory practices of TWU by not taking into account the impact of its

4 Human Rights Code, RSBC 1996, c 210, s 41; noted at para [32] of the decision in TWU v BCCT. At
the time of the events in question in the case the relevant statute was the Human Rights Act, SBC 1984,
c 22, s 19: see para [35].
5 Craig, above n 1, at p 13.
6 TWU v BCCT, above, at [32].
decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.

Similarly, Craig’s argument here assumes that a standard designed to regulate personal conduct while studying, will somehow automatically mean that a student will start unlawfully discriminating against homosexual people while engaged in their law practice. Tellingly, the Supreme Court notes that the same logic would mean that anyone known to be a committed adherent to a church espousing Biblical morality should be denied accreditation as a lawyer. This indeed is the direction in which the logic of Craig’s article is leading. In effect it is saying: “Someone who believes that homosexual behaviour is sinful, will not be able to stop themselves unlawfully discriminating against homosexual persons.” Hence anyone committed to Biblical Christianity must be ousted from public life!\(^7\)

But thankfully the Supreme Court of Canada has already provided the answer to this view, in the passage noted previously; to repeat:

Students attending TWU are free to adopt personal rules of conduct based on their
religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. \(^8\)

Perhaps the situation would be different were TWU the only place in Canada where a legal education could be obtained. This is clearly not the case.

Of course it need not be said that if students or staff at TWU engage in unlawful discrimination while studying or teaching, or once they have graduated, then the law will apply to them. But the argument that TWU ought not to be accredited to graduate lawyers boils down in the end to an argument that no-one holding to a Biblical view of sexual morality is fit to hold public office in a Western society today. It is an argument that is not legally sound in Canadian law, and ought to be rejected by anyone who supports a balanced view of human rights, which includes not only anti-discrimination rights, but rights of freedom of religion.

Finally, something ought to be briefly be said about Craig’s other attack on TWU as a place which is unfit to train lawyers: that its faculty members are clearly defective, as they are required to make a commitment to teaching and research from within a Christian worldview. Craig asserts that to set the Bible up as ultimate authority is to preclude “critical thinking”:

To teach that ethical issues must be perceived of, assessed with, and resolved by a
pre-ordained, prescribed, and singularly authoritative religious doctrine is not to
teach the skill of critical thinking about those issues. In fact to limit ethical inquiry
in this manner is hostile to the process of critical thinking. Critical thinking involves

\(^7\) That this is not drawing too long a bow can be seen from p 17-18 of Craig’s article, where she supports her view that TWU is not “capable of developing students’ understanding of the ethical duty not to discriminate” by quoting what she sees as the more offensive of the Biblical passages referring to homosexuality as sinful. The implication is clear: anyone who believed these Biblical texts would be clearly incapable of behaving in a non-discriminatory way.

\(^8\) *TWU v BCCT*, above, at [35].
deliberation, reasoning, reflection and logic in order to decide what to believe or what to do.⁹

It is difficult to know where to start to respond to such a sweeping and biased statement. One assumes that Craig has not actually sat in on any ethics classes at an institution where the Bible is studied, and so believes that complex ethical issues are all resolved by a quick reference to an easy Bible verse! Critical thought is a key component of any tertiary study, not least the study of theology. Texts are often not self-evident, one needs to be compared to another, application to the complexities of modern society need to be made. But in the end perhaps the most obvious flaw in Craig’s observations is that tertiary institutions for many hundreds of years in Western society developed complex theories and philosophies while operating from a Christian worldview! On her view clearly Oxford and Cambridge were never really operating as centres of “critical thought” for the centuries while all scholars in the Western world assumed the truth of Biblical Christianity.

Here again it is a question of evidence. Is there some evidence that members of Faculty at TWU were unduly constrained in their academic research or teaching by the starting point of the Christian worldview? It would be unlikely that any University in a multi-cultural Western society would not teach its students about a range of other philosophies and religions. It could hardly be denied, even by Craig, that every academic has his or her own worldview from which teaching is conducted, but that in the course of doing so a good academic will make students aware what that is, and present in a fair and even-handed way other points of view. That is surely what should be required of TWU, and that is what it says it is committed to; its policy on academic freedom is quoted in TWU v BCCT at [10], and concludes with the words “Truth does not fear honest investigation.”

Hopefully those who are tasked with deciding whether TWU should be able to offer an accredited law degree will conduct such an honest investigation, and not make the discriminatory assumption that those with a Biblical view of the world are incapable of critical thought or even-handed behaviour.

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⁹ Craig, above n 1, at p 23.

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