

CHURCH AUTONOMY, SEXUAL ORIENTATION, AND EMPLOYMENT POLICY IN BRITAIN: A LEGISLATIVE HISTORY OF THE EMPLOYMENT PROVISIONS OF THE EQUALITY ACT 2010

Abstract

How much autonomy should religious institutions have when they employ paid staff? This paper lays out two contrasting models, *blanket liberalism* and *liberal pluralism*, that come into play in this area. It then examines in some detail how Parliament dealt with the issue as it considered the Equality Act 2010, especially as the law pertained to sexual orientation. Although the Labour government would have liked to have pushed the country more toward *blanket liberalism*, in the end it left the law as it was, which was a victory, for the moment at least, for those churches who wished to retain their present degree of autonomy.

Key words: equality, sexual orientation, employment, church autonomy, United Kingdom

Today, when churches and other religious institutions² engage people in paid positions, they become employers in the eyes of the law. They unavoidably, therefore, enter the world of government policies that regulate employment, one important component of which is anti-discrimination legislation. In societies that prize religious liberty, how much autonomy they should enjoy from the reach of these policies, though, is a subject of much dispute.³ In general, the contrasting positions might be labeled *blanket liberalism* and *liberal pluralism*.⁴ Although both stand firmly in the liberal tradition, the juxtaposition

1 E-Mail: Jerold_Waltman@baylor.edu

2 For shorthand purposes, I will often use the term "church" alone. However, it refers to religious institutions in general.

3 Although it focuses more on establishment, a good philosophical analysis of religious liberty can be found in Adhar Rex and Leigh Ian, *Religious Freedom in the Liberal State*, Oxford University Press, Oxford, 2005. The contemporary situation in the United Kingdom is assessed in McLean Ian and Peterson Scot, Entrenching the Establishment and Free Exercise of Religion in the Written U.K. Constitution, *International Journal of Constitutional Law*, Vol. 9, No. 1, London, 2011, pp. 230-250.

4 The term "blanket liberalism" is mine, but I have borrowed "liberal pluralism" from William Galston. See his *Liberal Pluralism: The*

of the nouns and adjectives indicates the contrast in their philosophical positions. Blanket liberals would like to see the values of the liberal state resonate throughout the society. In the religious employment realm, while few blanket liberals would want to interfere when religious bodies select and set the working conditions of central religious figures such as priests, ministers, rabbis, imams, and similar officials, beyond that they believe the liberal state should enforce its norms. All positions outside the narrow confines of these offices, they insist, should be subject to whatever regulations government might choose to impose, and those regulations should, by their lights, mandate that everyone be treated equally. This would apply with special force to equal opportunity legislation, for the freedom not to be discriminated against when applying for a job is fundamental to a persons' dignity (and, of course, it enables someone to earn a livelihood). Moreover, assuring equal opportunity in employment is an important element of social inclusion. In short, the right of each individual to be treated equally is the assumed position in employment policy throughout the economy, and churches can only claim an exemption for a handful of directly religious personages. Liberal pluralists, on the other hand, begin with a preference for religious liberty. They would argue that religious liberty is a central value of the liberal state, and that, as communities are essential aspects of many religious faiths, individuals must have the right to form religious associations and order their internal affairs as they wish, free from the regulatory reach of the state except in such minimal areas as public health and safety. From this view, if religious bodies are to remain true to the teachings of their faith, and to remain vibrant in their witness to the world around them, they must have the option of restricting employment, in whatever capacity, to people who share their faith. Consequently, churches should largely be insulated from the strictures of employment law, even antidiscrimination legislation.

In its employment policies, the United Kingdom has tilted for many years more toward the blanket liberalism end of the spectrum. All non-religious positions, such as cleaners and finance personnel, have long been covered by antidiscrimination regulations of various sorts (including bars on religious discrimination and discrimination because of sexual orientation).⁵ As for people whose roles were clearly ministerial, there was a general exception in the law, but when it came to quasi-clerical positions, such as youth workers, the law was more hazy.

Implications of Value Pluralism for Political Theory and Practice, Cambridge University Press, Cambridge, 2002. The philosophical base for the "blanket pluralism" model can be found in Barry Brian, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Harvard University Press, Cambridge, MA USA, 2001. A survey of the British debate over multiculturalism and how it relates to constitutional issues can be found in McCrudden Christopher, *Multiculturalism, Freedom of Religion, Equality and the British Constitution: The JFS Case Considered*, *International Journal of Constitutional Law*, Vol. 9, No. 1, London, 2011, 200-229.

5 Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003.

In 2010, the Labour government brought forth a new, comprehensive Equality Bill, which would have pushed the country even more decidedly towards blanket liberalism.⁶ Several provisions of the proposed law touched religious liberty, but the employment sections, chiefly because they banned discrimination on the grounds of sexual orientation,⁷ generated the most controversy.⁸ There were basically two bones of contention. One section of the new law would have altered the definition of “minister.” The churches argued that the revised wording would substantially, and unjustifiably, narrow the coverage of who could be categorized as a minister. Equally controversially, the government wanted to insert the words “legitimate” and “proportionate” into an important phrase in the section granting churches a limited exception from the regulations regarding sexual orientation.⁹ In the end, the law was left unchanged on both fronts, but not before an intense legislative struggle ensued, a struggle whose outcome ended up depending more on the vagaries of political timing, as discussed below, than any genuine reconsideration on the part of the Labour Party’s leadership.

Background

The beginning point for any analysis of religious liberty in the U.K. is Article 9 of the European Convention of Human Rights (ECHR), made applicable within the U.K. by the Human Rights Act 1998 (HRA).¹⁰ The Article reads:

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

6 The scope of the bill was immense. It incorporated the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003, and the Employment Equality (Age) Regulations 2006.

7 An analysis of the British churches’ position on homosexuality can be found in Hunt Stephen, *The Rhetoric of Rights in the UK Christian Churches Regarding Non-Heterosexual Citizenship*, *Politics and Religion Journal*, Vol. 4, No. 2, Belgrade, 2010, pp. 183-200.

8 Other sections that stirred controversy related to the provision of goods and services by religious organizations, to the performance of civil partnership ceremonies, and to discrimination by secular employers on the basis of religion.

9 How “proportionality” has developed in European law and applied in the U.K. is explored in Cohn Magrit, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review in the Administration in the United Kingdom*, *American Journal of Comparative Law*, Vol. 58, No. 3, Storrs, Connecticut USA, 2010, pp. 583-628.

10 An analysis of the HRA and its impact on the British legal system is Masterman Roger, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, Cambridge University Press, Cambridge, 2011, especially chap. 2. Coverage of the act’s impact beyond the legal system can be found in Equality and Human Rights Commission, *Human Rights in Britain since the Human Rights Act 1998: A Critical Review*, Report No. 28, London, June 2009.

2. Freedom to manifest one's religion or belief 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 protection of public order, health or morals, or for the protection of the rights and freedoms of others.

At the time of the passage of the HRA, several (but by no means all) British churches, led by the Church of England, expressed concern about how the European Court of Human Rights (ECtHR), the transnational body charged with interpreting the ECHR, might read religious rights. Thus, they convinced the government to insert Section 13 into the act itself:

If a court's determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

Despite the misgivings of these British churches, the ECtHR has often given a rather wide reading to Article 9, both regarding one's freedom to act in accordance with his or her religion and in recognizing religion's collective aspect. In 1993, it held that "While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions."¹¹ Concerning religious communities, it ruled in 2002 that:

Where the organization of the religious community is at issue, Article 9 must be interpreted in light of Article 11 of the Convention which safeguards associative life against unified state interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary state intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right of freedom of religion by all its active members.¹²

No right surrounding sexual orientation is explicitly mentioned in the

11 *Kokkinakis v. Greece*, 17 Eur. H. R. Rep. 397 (1993).

12 *Hasan v. Bulgaria*, 34 Eur. H. R. Rep. 1339 (2002).

Convention. However, the ECtHR has in recent years interpreted Articles 8 and 12 to ban discrimination based on sexual orientation.¹³

The U.K. is also a member of the European Union,¹⁴ and consequently subject to the Directives that emanate from the Council of that Organization. In 2000, the Council issued Directive 2000/78/EC prohibiting discrimination in employment against anyone on the basis of "religion or belief, disability, age or sexual orientation."¹⁵ Two limited caveats were granted to religious bodies, however. In the introductory paragraphs, it was noted that "In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate."¹⁶ Under the specific rules that would govern, it was decreed that

Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided the objective is legitimate and the requirement is proportionate.¹⁷

In order to implement this Directive, the U.K. promulgated The Employment Equality (Sexual Orientation) Regulations 2003, which set up sweeping bans on employment discrimination based on sexual orientation. However, Section 7(3), which was not in the original draft but added at the urging of the Archbishops' Council of the Church of England, contained an important exception. The prohibitions would not apply if

13 Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with this right except such as is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 reads:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The ECtHR's recent jurisprudence on sexual orientation is covered in Danis Carmelo, *How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in its Nondiscrimination Jurisprudence*, *International Journal of Constitutional Law*, Vol. 9, Nos. 3-4, London, 2011, 793-807, especially pp. 802-806.

14 Britain's relationship with the European Union is explained in Norton Philip, *The British Polity*, Longman, 5th ed., Boston, 2011, chap. 9.

15 Council Directive (EC) 2000/78/EC of 27 November 2000, Recitals, Paragraph 11.

16 Directive 2000/78/EC, Recitals, Paragraph 23.

17 Directive 2000/78/EC, Article 4(1).

- (a) the employment is for purposes of an organized religion;
- (b) the employer applies a requirement related to sexual orientation—
 - (i) so as to comply with the doctrines of the religion [known as the “compliance principle”], or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers [known as the “avoidance of conflict principle”];
- and
- (c) either—
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

This section of the Regulations was immediately challenged in court by a number of trade unions in what became known as the *Amicus* case.¹⁸ The grounds for the challenge were twofold: that the section did not comply with the Directive, in that it was much too broad, and that it violated Articles 8 and 14 of the ECHR.¹⁹ The court, however, dismissed the complaint. The judge argued that Section 7(3) must be read narrowly, and that it was therefore both “legitimate” and “proportionate.” In essence, these two requirements were being read into the regulations despite their absence. For example, the judge held that “for the purposes of organized religion” was a narrower construction than “a religious organization.” Furthermore, he iterated that the two tests of Section 7(3)(b) were objective, and that the burden of proof would be on the body claiming the exception. He quoted with approval the statement of a government minister made during the parliamentary debate over the Regulations:

We believe that Regulation 7(3) is lawful because it pursues a legitimate aim of preventing interference with a religion’s doctrine and teaching and it does so proportionately because of its narrow application to a small number of jobs and the strict criteria it lays down . . . [We have] in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including

18 *R. (on the application of Amicus) v. Secretary of State for Trade and Industry*, [2004] EWHC 860 (Admin). An analysis of this case can be found in Samuels Leslie, *Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights*, *Ecclesiastical Law Journal*, Vol. 8, No. 1, Cambridge, 2005, pp. 74-79.

19 Article 8 is quoted above, note 10. Article 14 reads:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with a national minority, property, birth, or any other status.

those who exist to promote and represent religion. . . [The tests] will be met in very few cases.²⁰

In short, 7(3) was valid, but only if read in light of the demands of the Directive.²¹ Significantly, both the terms “legitimate” and “proportionate” were used by the minister.

However, this was not the end of the matter. From time to time, the EU Commission sends documents called Reasoned Opinions to the governments of the member states. Ordinarily, these are kept confidential between the Commission and the government concerned. In 2007 the Commission sent one of these to London regarding Section 7(3) (along with some other matters). The relevant portions are worth quoting:

[Section 7(3)] is based on Article 4(1) of the Directive, the general provision allowing differences of treatment where a particular characteristic is a genuine and determining occupation [*sic*] requirement of the job in question. The provision contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and requirement proportional. No elements of this test appear in Regulation 7(3) . . .

The Commission has read carefully the arguments of the British authorities, in particular the reference to the judgment of the High Court in the [*Amicus* case].

The Commission maintains that the wording used in Regulation 7(3) . . . is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive.

Embarrassingly for the government, considering what happened later, the Commission added that “The UK Government has informed the Commission that the new Equality Bill currently under discussion before the UK Parliament will amend this aspect of the law and bring UK law into line with the Directive.” Somehow, this Reasoned Opinion was leaked to the public in January of 2010.

Finally, there was the widely publicized case of John Reaney and his application to become a youth worker in the Diocese of Hereford.²² Although

20 Statement of Lord Sainsbury of Turville, Minister of State, House of Lords Hansard, 17 June 2003, cols. 778-780.

21 Sandberg Russell and Doe Norman, Religious Exemptions in Discrimination Law, *Cambridge Law Journal*, Vol. 66, No. 2, Cambridge, 2007, pp. 302-312 analyzes this case. As they point out, despite what the court said, “strongly held religious convictions” and “a significant number of the religion’s followers” are hardly terms that are likely to be able to be objectively measured.

22 *John George Reaney v. Hereford Diocesan Board of Finance*. Cardiff Tribunal, 16 and 17, April 2007. Case No. 1602844/2006. See

currently working in another occupation, Mr. Reaney had previously been an outstanding youth worker with the Church of England for several years. He applied for a similar post with the Diocese of Hereford, and made no attempt to hide the fact that he was a homosexual. Though he had had a partner in the past, he was now living alone and vowed to remain celibate. The interviewing committee voted unanimously that he be employed, but the bishop vetoed their recommendation. Although the court held that Regulation 7(3) did apply to the post, the case turned on whether the bishop had reason to doubt Reaney's assertion of celibacy (the employment tribunal finding that he did not). (See Section 7(3)(c)(ii), quoted above.) Since it involved the sensitive post of youth worker, the case was never very far from anyone's mind as the Equality Bill wound through Parliament. Mr. Reaney, incidentally, won his case and was awarded £47,345 in damages.

Development of the Equality Act 2010

The Equality Act had its genesis in the Labour Party's 2005 manifesto. Near the end, it said that "In the next Parliament we will establish a Commission on Equality and Human Rights to promote equality for all, and tackle discrimination, and introduce a Single Equality Act to modernize and simplify equality legislation."²³ Accordingly, in February 2005 Prime Minister Tony Blair appointed one body to analyze the state of equality in the UK and another to investigate the legal issues involved. This latter body, the Discrimination Law Review, was to consider "the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage while reflecting better regulation principles."²⁴ Overall direction of the government's efforts to draft the new law was given to Harriet Harman, the Minister for Women and Equality. First elected to the Commons in 1982, she had since served in several key posts dealing with women's issues and social welfare policy.

In June 2007, the Discrimination Law Review published a consultation paper and asked for public comment.²⁵ Its introductory notes touched on one of the ambiguities that would become even more evident as the bill progressed through Parliament: Was it to be merely a consolidation and simplifying of existing legislation or was it to be an extension and "improvement" of the law?

the summary in Woolcock Nicola, Youth Worker Wins Gay Job Rights Claim against Bishop, *The Times*, 19 July 2007, London.

23 *Britain Forward Not Back*, Labour Party Manifesto, p. 112.

24 Quoted in Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, Consultation Paper, 12 June 2007, p. 11. The other panel's report is Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review*, 28 February 2007.

25 Discrimination Law Review, *A Framework for Fairness*.

Because the law has developed over more than 40 years, different approaches have been taken at different times, and the law is set out in many different places . . . There is widespread agreement that everyone who needs to understand discrimination law will benefit from having it in a Single Equality Act which simplifies the law as far as this can be done.

Rather than just consolidating the current legislation, we want to take this opportunity to review it, and decide whether we can improve it, to make it fit for the 21st century.²⁶

Most of the consultation paper's 190 pages were devoted to matters such as equal pay, a new public sector duty, and so forth, but the "genuine occupational requirement" exception did get some attention. In general, it was pointed out, "In employment, a genuine occupational requirement test allows direct discrimination by an employer," but that "[t]he genuine occupational requirement test allows employers to differentiate only where the very strict elements of the test are met."²⁷ Further, it observed that "In some cases, the law lists more specific genuine occupational requirement exceptions to provide clarity. For example, the Employment Equality (Sexual Orientation) Regulations explicitly permit differences of treatment on the grounds of sexual orientation in narrowly-defined circumstances where the employment is for the purposes of an organized religion."²⁸ Then, in Annex A, it listed the exceptions it wished to retain in any new statute. The very first one included Regulation 7(3).

The request for comment elicited a heavy response: 597 organizations and 3,629 individuals sent material to the DLR. 2,500 of the individual responses concerned religion (not all of them regarding the employment provisions, though). In its own response to the consultation, the government wavered on the religious exception. It acknowledged that there was strong support for retaining the exception of Regulation 7(3), saying that "Responses from religious stakeholder groups included Christian Action Research and Education [CARE]²⁹ which felt that the genuine occupational requirement test had been very important for the protection of religious ethos," but then it also admitted that "Some lesbian, gay, bisexual and transgender stakeholders commented that there were issues around genuine occupational requirements, particularly between sexual orientation and religious organizations. Comments sug-

26 *Framework for Fairness*, p. 12.

27 *Framework for Fairness*, pp. 44 and 45. The distinction between "direct" and "indirect" discrimination in U.K. employment law is thoroughly discussed in Vickers Lucy, *Religious Freedom, Religious Discrimination, and the Workplace*, Hart Publishing, Oxford, 2008.

28 *Framework for Fairness*, p. 45.

29 CARE is the public policy arm of a coalition of evangelical churches.

gested that case law had defined a very tight interpretation and any change should not weaken this.³⁰ In other words, lesbian and gay groups felt that what *Amicus* implied should be explicitly written into the law. As for what course the government would follow, politics seemed to dictate ambiguity: “We have decided to consider further whether there is a need to introduce more specific genuine requirement tests in some cases to provide clarity.”³¹

The bill was introduced into the House of Commons in April of 2009, and brought up for its Second Reading debate on May 11, 2009. Although Ms. Harman’s introductory statement avoided mentioning religion, she made forceful reference to gay and lesbian interests.

For us, equality matters because it is right as a question of principle, and it is necessary as a matter of practice. It is essential for every individual. Everyone has the right to be treated fairly, and everyone should enjoy the opportunity to fulfil their potential. No one should suffer the indignity of discrimination—to be told “You’re too old, so you’re past it,” to be overlooked because of a disability, to be excluded because of the colour of their skin, to face harassment because they are gay, or to be paid unfairly because they are a woman. . .

The Bill is not about turning back the clock—quite the opposite. It is looking to the future. It is backward societies that are marred by discrimination against lesbians and gay men, where women are expected to know their place and which are bound by rigid hierarchies. It is the modern and open society that can look to the future with confidence.³²

Several important provisions relating to religious employment were contained in the bill.³³ In all of them, the government insisted throughout the debate over the bill that it was merely streamlining the law, not making substantive changes. This was harder to maintain when the Reasoned Opinion became public, as noted above, and few people on either side seemed convinced of this.

In the bill’s initial draft, the wording of both the “compliance principle” and the “avoidance of conflict principle” of Regulation 7(3) was retained. However, the word “proportionate” was inserted into both principles. In other words, a requirement that someone not be gay had now to be a proportionate means of complying with the doctrines of the faith in question, and the nondiscrimi-

30 Government response to Consultation *Framework for Fairness*, pp. 113-114. The most important groups in this area are the National Secular Society and the British Humanist Association.

31 Government response, p. 111.

32 House of Commons *Hansard*, 11 May, 2009, col. 553.

33 Another section that proved contentious covered the ability of organizations with a “religious ethos” (such as religious bookstores or clinics) to practice discrimination.

nation rule could now only be circumvented if it was a proportionate means of avoiding conflict with the strongly held views of a significant number of the faith's followers. Furthermore, the range of posts to which the requirements could be applied was now to be defined as follows:

Employment is for the purposes of an organized religion only if the employment wholly or mainly involves—

(a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or

(b) promoting or explaining the doctrine of the religion whether to followers of the religion or to others.³⁴

This contrasts pointedly with Regulation 7(3), where “for the purposes of an organized religion” was left undefined.

Both these provisions stirred the ire of the churches and other religious groups. When the employment section of the bill was considered by the Public Bills Committee on June 9, 2009, MPs faced a panel of objectors. In addition to protesting that they had not been consulted on these changes, they stressed that the new definitions markedly narrowed the law. Why add the word “proportionate” if there was no intention to change the law? (At this time, the UK government’s response to the EU Directive had not been made public.) Moreover, the new definition of employment “for the purposes of an organized religion” represented, the faith spokespersons said, a decided misunderstanding of how religious institutions operate. Even priests, ministers, rabbis, and imams do not spend the bulk of their time assisting in ritual or promoting or explaining the religion. Further, there are all manner of positions that involve religious duties that are not covered by these stipulations. For example, Richard Korniciki of the Catholic bishop’s conference pointed out that the Explanatory Notes were very narrow. These Notes said

The specific exemption applies to a very narrow range of circumstances. It replaces and harmonises exceptions contained in current discrimination law but makes it clear that the employment in question must be closely related to the religious purposes of the organisation.

Example

This exception would apply to a requirement that a Catholic priest be a man.

³⁴ House of Commons Bill, Schedule 9, Part 1, Section (2)(8).

This exception would not apply to a requirement that a church youth worker or accountant be heterosexual.³⁵

In his view, the youth worker example was seriously in error: “As this is now formulated, it represents a misunderstanding of how religion works. It is not simply an activity that takes place once a week in a particular place; it is about the whole of life. Important functions will be carried out that will be relevant to religious activity that might be more than different from, simply leading liturgical worship.” Speaking for the Church of England, William Fittall seconded this view, stating that for many positions it was vital that the church be able to appoint people whose lives reflect the commitments of the church. “You might believe that some of our rules and disciplines are wrong, but our view is that that is a matter of religious liberty. . . We are not seeking *carte blanche*, but if a religious organization is employing someone in a role for which you have to be a member of that faith, it is reasonable that restrictions—whether they be on marital history or whatever—can be part of the requirements.”³⁶

Regarding the inclusion of “proportionate,” the Solicitor-General, laying out the government’s line, told the Committee the following day that “It is my strong view that there is no narrowing in the definition. . . We are talking about licensing discrimination, and consequently you will all accept that that exception must be as narrow as possible. . . I assume nobody wants a disproportionate way of complying with the doctrines of the religion. Why would you want more licence than merely that which is sufficient to comply with these doctrines?”³⁷

What can be glimpsed here, of course, is the clash between liberal pluralism and blanket liberalism. To the churches, it was a matter of religious liberty, that the right to manifest their religion guaranteed by Article 9 of the ECHR should allow them to control their internal affairs. To the government’s spokespersons, representing at least a faction of the Labour Party, the promotion of equality in all its guises trumps almost all other concerns. As employers, except in directly religious posts, there is no reason churches should be ex-

35 House of Commons Bill, Explanatory Note No. 747.

The place of Explanatory Notes in providing subsequent guidance to the courts was set out by Lord Steyn in *Westminster City Council v. National Asylum Support Service* [2002] UKHL 38:

“The Explanatory Notes do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. . . [T]hey aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and to ease the task of assimilating the law. . .

Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction.”

Thus, the scope and phrasing of these notes is an important facet in whether a law is read broadly or narrowly.

36 Public Bill Committee, Hearing, 9 June 2009.

37 Public Bills Committee Hearing, 10 June 2009.

empt from a generally applicable law. Churches are here seeking an exception to a perfectly valid exercise of public power to promote equality and dignity, not demanding a legitimate right.

As the bill left the committee, the wording remained as it was, but the examples in the Explanatory Notes were altered somewhat. Government drafters were willing to give a slight nod to liberal pluralism. They now read as follows:

This exception would apply to a requirement that a Catholic priest be a man.

This exception is unlikely to permit a requirement that a church youth worker who primarily organizes sporting activities is celibate if they are gay, but may apply if the youth worker mainly teaches Bible classes.

This exception would not apply to a requirement that a church accountant be celibate if they are gay.³⁸

The verbs “would apply,” “is unlikely to permit,” “may apply,” and “would not apply” tell a good bit about the hierarchy of values of the majority on the committee. The statutory wording was next endorsed by the Joint Committee on Human Rights in its scrutiny of the bill in November 2009.³⁹ “We . . . consider that in general the provisions . . . strike the correct balance between the right to equality and non-discrimination and the rights to freedom of religion or belief and association, especially if interpreted in line with the approach set out in *Amicus v Secretary of State for Trade and Industry*, which emphasized the need for such exceptions . . . to be ‘construed strictly’ on the basis that they are ‘a derogation on the principle of equal treatment.’”⁴⁰

The Bill passed the House of Commons in December 2009. As the House of Lords took up the bill, the opposition of churches and faith groups intensified. In a thoughtful monograph published at this time, CARE took special issue with the employment sections of the Act. First, the definition of which posts could be covered drew a sharp response. There were five reasons to oppose it, according to CARE:

First, many church leadership posts—let alone other church ministry or para-church ministry roles—don’t fit these criteria. . .

38 Equality Bill as introduced in the House of Commons 19 November 2009, Paragraph 762.

39 The Joint Committee on Human Rights is a committee of both houses of Parliament created in 2000 both to scrutinize legislation and to promote human rights.

40 Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, Twenty-sixth Report of Session 2008-09, p. 115.

Second, much of church ministry is pastoral and does not involve leading liturgy or the explanation or promotion of doctrine. . .

Third, many church roles are representational and play no part in leading liturgy and ritual or promoting or explaining doctrine. . .

Fourth, there are many roles supporting the post of the vicar or his equivalent that are very much involved in the heart of the ministry: pastors secretaries, who, among other things, represent the pastor and pray with people over the phone, youth leaders, who, among other things lead youth worship, those members of staff who attend team days away to seek God about the future of the ministry.

Fifth, in Evangelical theology, it is also a prerequisite that those involved in welfare service provision—and having nothing to do with teaching or leading worship—are “filled with the spirit.”⁴¹

Second, the insertion of “proportionate” into the law was going to force judges to make rulings on church doctrine, something they are hardly qualified to do, as even the government had admitted during the *Amicus* case.⁴² More broadly, CARE argued that the government’s approach represented a diminution of the concept of religious liberty. A hierarchy of rights was being created, in which sexual orientation was being given preference to religious liberty. As a result, any vestige of liberal pluralism was being swept away.

Meanwhile, other events were sharpening the controversy. It was in January 2010 that the government’s embarrassing assurances to the EU Commission regarding changing policy were made public.⁴³ In addition, preparations were then under way to welcome the pope to Britain for a previously scheduled spring visit. Before he came, though, he used an address to the bishops of England and Wales, who were assembled in Rome for a conference, to sharply criticize the bill.

Your country is well-known for its firm commitment to equality of opportunity for all members of society. Yet, . . . the effect of some of the legislation designed to achieve this goal has been to impose unjust limitations on the freedom of religious communities to act in accordance with their beliefs. In some respects it actually violates the natural law upon which the equality of all human beings is grounded and

41 Bouchard Daniel, *A Little Bit Against Discrimination?* CARE Research Paper, London, 2009, pp. 57–58. CARE, recall, only claims to speak for evangelical churches, although most of the principles for which it argued here are broadly applicable.

42 Bouchard, *Little Bit Against Discrimination?* p. 59.

43 See Hirsch Afua, Equality Bill: Churches and Campaigners Demand Clarity on Religious Exemption, *Guardian*, 25 January 2010, London.

by which it is guaranteed.⁴⁴

When debate opened in the House of Lords, it was obvious that it was going to be contentious. The government continued to insist, albeit with declining credibility, that it was merely clarifying the law, not changing it. A coalition of Lords, led by the Anglican bishops,⁴⁵ challenged both the “promoting and explaining” section and the insertion of the term “proportionate.” Baroness O’Cathain, a peer and active Anglican, became the lead spokesperson for the critics.

It has been said that paragraph 2 [of Schedule 9] is intended to be nothing more than a restatement of existing exemptions for religion. However, the Government have tinkered with the wording. Whereas the phrase “employment for the purposes of an organized religion,” was previously undefined, the Government decided to insert a new definition . . . In addition, whereas previous legislation did not include the qualifying word “proportionate,” that word now appears twice . . . If the Government’s intention was to maintain the status quo, as they have said continuously since April 2009, why not use the same wording? After all, it has been in use without difficulty since 1975, when it was incorporated into the Sex Discrimination Act. By tinkering, they have caused enormous concern among religious groups.⁴⁶

The government appeared on the defensive as it tried to answer this charge, denying, for example, that they had agreed to comply with the EU Directive, saying, improbably most felt, that they were only agreeing to discuss future changes with the Commission. They also tried to argue that since the EU had included the word “proportionate” in its formulation and that the *Amicus* case had held that the compliance and avoidance exceptions were to be narrowly construed, the word “proportionate” was in effect already incorporated into British law.⁴⁷ The opponents remained unconvinced, and in the end won an amendment to the bill which kept the existing language.

A majority of the Joint Committee on Human Rights, dominated by Labour members, felt the Lord’s amendments had reduced clarity (although exactly why was not itself clear) and would put Britain at odds with the EU Directive.⁴⁸ While Labour leaders in the Commons clearly had the votes to over-

44 BBC News Report, Pope Benedict Attacks Government over Equality Bill, 2 February 2010.

45 The 24 bishops and the two archbishops of the Church of England have seats in the House of Lords.

46 House of Lords *Hansard*, 25 January 2010, col. 1212.

47 See the statement by Lord Lester, House of Lords *Hansard*, 25 January 2010, cols. 1224-1225.

48 Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill (Second Report)*, Fourteenth Report of Session 2009-10, 12

ride the Lord's amendments, Harman decided, grudgingly it was reported, that it would be more politic to make a strategic retreat.⁴⁹ Given the intensity of the opposition by the some churches⁵⁰ and the approach of the election (scheduled for May 6, 2010), she did not want to risk a delay that might jeopardize the entire bill. And since Labour seemed almost certain to lose the upcoming election, any chance to pass the bill would be lost for many years. On April 6, therefore, the bill, with the Lord's amendments, cleared the House of Commons and was sent for the Royal Assent.

Conclusion

The clash between the liberal state's attempt to secure equal opportunity and equal dignity for all in the realm of employment and the desire of churches to choose employees who reflect their values and preferred lifestyles stood out in stark relief as the UK considered the Equality Act 2010. Although the United Kingdom already had laws in place that went some distance in reducing the discretion of the churches when selecting their employees, advocates of a strong version of blanket liberalism wished to push the country even a bit further in that direction. This was to be accomplished by tightening the definition of who could be legally be called a minister and inserting the terms "legitimate" and "proportional" into the wording of exception granted churches under the Employment Equality (Sexual Orientation) Regulations 2003. It is uncertain what the exact legal effect would have been had these efforts succeeded, but clearly both proponents and opponents of the changes thought they might well matter a great deal. Furthermore, however the courts might have actually interpreted them, the symbolism of the proposed changes was perhaps of equal importance. Gay and lesbian groups throughout kept saying that the churches were not special and that, consequently, they should not be exempt from the law. The churches countered that they are indeed different and should not be coerced into acting contrary to their faith. In short, it was a contest growing out of the contrasting views of blanket liberalism and liberal pluralism.

For the moment, the churches have won their battle. However, that seems to have resulted almost purely from political happenstance. There is almost certain to be another clash over this issue in the future (although it seems unlikely to occur during the life of the current Conservative/Liberal Democrat

March 2010, p. 3.

49 See Bennett Rosemary and Gledhill Ruth, Harriet Harman Backs Down over Employment Equality for Churches, *The Times*, 3 February 2010, London.

50 It is important to note that several churches had supported the bill: the Unitarians, Quakers, Baptists, Methodists, United Reformed Church, as well as Reformed Jews. See Hunt Stephen Negotiating Equality in the Equality Act 2010 (United Kingdom): Church-State Relations in a Post-Christian Society, *Journal of Church and State*, Waco, Texas, USA, forthcoming.

government, which came to power in May 2010),⁵¹ and the political calculations may well be different next time around. But as determinative as the political coalition in Parliament is likely to be, how political elites decide to come down on the issue of blanket liberalism versus liberal pluralism will be a major factor as well.⁵²

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51 The coalition government has not repealed the act; however, they have negated portions of it and enforced others somewhat hesitatingly. See, for example, the speech announcing several moves regarding the act by Theresa May, the Home Secretary, in House of Commons *Hansard*, 15 May 2012, Cols. 28WS-29WS.

52 Discussions of contemporary trends on the role of religion in British life can be found in Allen Chris, Fear and Loathing: The Political Discourse in Relation to Muslims and Islam in the British Contemporary Setting, *Politics and Religion Journal*, Vol. 4, No. 2, Belgrade, 2010, pp. 221-236; Tomes Laura, Blasphemy and the Negotiation of Religious Pluralism in Britain, *Politics and Religion Journal*, Vol. 4, No. 2, Belgrade, 2010, pp. 237-256; and McLean Iain and Peterson Scot, Secularity and Secularism in the United Kingdom: On the Way to the First Amendment, *Brigham Young University Law Review*, Vol. 2011, Special Issue, Provo, Utah, USA, 2011, pp. 637-656.

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Џеролд Валтман

**ЦРКВЕНА АУТОНОМИЈА, СЕКСУАЛНА ОРИЈЕНТАЦИЈА
И ПОЛИТИКА ЗАПОШЉАВАЊА У БРИТАНИЈИ:
ЗАКОНОДАВНА ИСТОРИЈА ОДРЕДБИ О
ЗАПОШЉАВАЊУ АКТА О ЈЕДНАКОСТИ ИЗ 2010.
ГОДИНЕ**

Резиме

Колики би степен аутономије верске заједнице требало да имају у запошљавању њиховог особља? Овај рад излаже два супротна модела, *бланкет либерализам* и *либерални плурализам*, који припадају овој области. Након тога рад истражује како се Парламент носи са овим питањима у складу са Актом о једнакости из 2010. године, нарочито са тим како се закон односи према сексуалној оријентацији. Иако би Лабуристичка влада волела да гурне земљу ка *бланкет либерализму*, на крају је оставила закон какав је и био, што је била победа, барем у једном тренутку, оних цркава које су желеле да одрже тренутни ниво аутономије.

Кључне речи: једнакост, сексуална оријентација, запошљавање, црквена аутономија, Уједињено краљевство

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