

EXTENDING THE EQUALITY DUTY TO RELIGION, CONSCIENCE, AND BELIEF : PROCEED WITH CAUTION

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Law makers should proceed with great caution when dealing with religion and belief (and lack of belief). The relationship between religion and the secular state is highly controversial, especially when there are increasingly insistent demands from religious groups that their belief systems be given a more influential place in the public sphere. In the recent past, Government and Parliament has been faced with calls for religious organisations to be exempt from the Human Rights Act 1998, even when carrying out public functions. High profile demands from religious public figures for Sharia law to be accommodated within the law of the land have recently provoked outrage in the tabloid media, yet have been welcomed by some as appropriate and necessary within a multi-faith society.

The religious lobby, drawn from the three Abrahamic religions, has exerted powerful pressure and successfully influenced the outcome of proposed law reforms on the termination of pregnancies, medically-assisted suicide and human fertilisation. The secular lobby would argue that law making in these areas should be based on evidence and the wider public interest, not on religious ideology and dogma. They regret the concessions made to faith groups in the recent past.

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Parliament needs to address the competing, often irreconcilable, demands not only from different religious groups, but also from atheists and agnostics. Debates on the wearing of the *hijab or niqab* require attention to be given not only to the religious freedoms of employees, but also the right of employers to maintain a workplace free from religion and to promote gender equality. Legislators have to grapple with difficult problems about how to reconcile the rights and interests of adherents to religions which deplore homosexuality and those of the victims of sexual orientation discrimination who have the right to be treated equally with heterosexual men and women.

Law makers must also balance demands from religious groups to be free from offence against the fundamental importance of maintaining freedom of expression. The failure of successive Governments to introduce legislation to abolish the common law offence of blasphemy meant that it was left to the courts to protect the right to freedom of artistic expression against the intolerance of religious fundamentalists seeking to suppress or punish the BBC for televising 'Jerry Springer: The Opera'.

These are among the difficult issues which will face the Government when designing and enacting its new single Equality Bill. Anti-discrimination legislation is intended to tackle entrenched patterns of unfair and unjustifiable discrimination, not to determine the extent and limits of the influence of religion over public bodies or public policy, nor to mediate conflicts between different religious creeds, or the views of righteous believers and the ungodly.

If the Government, in its new Bill, makes the mistake of treating religious discrimination, harassment and disadvantage in exactly the same way as the other strands covered, the passage of the Bill will be

dominated by divisive arguments about religious beliefs and will impose unacceptable burdens on public authorities.

There is a pressing need to turn the present tangled mess of inconsistent and opaque anti-discrimination legislation into a user-friendly, accessible, and workable statute based on consistent principles. But there are more pressing reasons to treat the different grounds differently where this is appropriate. The problems of discrimination and disadvantage associated with religion and belief raise complex political, ethical and legal issues different in kind from the issues arising in tackling discrimination and disadvantage associated, for example, with gender or ethnicity or disability. Their particular characteristics make it unwise to include religion and belief in the new Equality Bill on exactly the same basis as the other grounds.

What is so special about religion and belief? In law as elsewhere, context is everything. We live in a secular plural democratic society even though we have an established Church of England. Our British political and legal system seeks to promote equality before the law and the equal protection of the law. Like the European Convention on Human Rights and the written constitutions of other European and Commonwealth countries, our system protects freedom of religion, conscience and belief, as well as freedom of expression and personal privacy. Where there is a harmful or unnecessary discriminatory advantage in favour of Christianity (as was the case with the archaic crime of blasphemy) it is (or should be) removed, or is outlawed by operation of the law against direct or indirect religious discrimination.

Unlike the other characteristics which are protected under British anti-discrimination legislation, religion is not an essential, immutable element of the individual's birthright and identity. Acts of

discrimination against a person of a certain religion do not of themselves amount to a personal attack on an individual's very being and humanity, but an attack on individual beliefs, practices and choices. Less favourable treatment of a Christian registrar who refused to carry out civil partnership ceremonies was based not on who she is, but on what she believes. Religion and belief are important to one's personal identity and the law should and does forbid direct and indirect discrimination based on religious identity. The centrality of beliefs to identity does not and should not justify legislation which goes beyond this.

The individual's religion or belief is closely linked to a set of ideas and values. In this way, it is similar to political belief and ideology. Religious and political beliefs give rise to policies and practices which may be passionately contested by their opponents. There is an important distinction between disadvantage imposed directly on someone because of religion or belief and perceived disadvantage suffered because of discriminatory treatment of the ideas, opinions, practices and institutions related to that person's religion. Some religious groups may have felt aggrieved at the repeal of a law which prohibited the promotion of homosexuality,³ but, viewed through the prism of human rights law and practice, this is not comparable to the prejudice and discrimination suffered by gay pupils in schools as a result of that provision.

³ Section 28 of the Local Government Act 1988 amended the Local Government Act 1986 to insert section 2A providing that:

(1) A local authority shall not—

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

Unlike other protected groups, religions and beliefs systems seek to recruit new followers. Adherents to some religions consider themselves bound by their faith to spread the Word, convince others to join their faith, or to change their behaviour. They are specifically motivated by their faith to seek publication and endorsement of their views, as when a Channel 4 documentary was alleged to have misrepresented the Shia version of Islam.

The link between religion and belief and ideas and opinions means that any law regulating religious discrimination must be careful not to undermine the fundamental right to freedom of speech. For good reason, Parliament has recently drawn a distinction between the way the criminal law tackles religious hate speech and racial hate speech,⁴ and has excluded the concept of religious harassment from the Equality Act 2006 to avoid the legal uncertainty of what is meant by a right to “human dignity” and the risk of misconceived and divisive claims brought by thin-skinned or bigoted alleged victims – the Jewish tenant who objects to a “Jews for Jesus” poster in his landlord’s corridor; the Christian landlady who objects to the display of *mezzuzah* on the doorposts of her Jewish tenant’s flat.

“Religion” is a broad and undefined ground and the Equality Act 2006 forbids discrimination not only on religious grounds but also on the ground of someone’s belief or lack of belief.⁵ In applying the law, courts and tribunals must determine which belief systems are merely cults and which should gain the protection of legislation. A wide range of belief systems and philosophies can claim the protection of this legislation. That can give rise to competing and, more importantly, sometimes *irreconcilable* demands, not only as between different

⁴ See, in particular section 29J of the Racial and Religious Hatred Act 2006 and Part III of the Public Order Act 1986.

⁵ See section 44.

religious groups, but between religious believers and those who believe in a secular society. One person's religious belief is another person's blasphemy. For Christians the Messiah has come through Jesus Christ their Lord; for Jews, Jesus was not the son of God and the coming of the Messiah is to be prayed for. While promotion of the interests of one religion would be to deny equality of treatment to other religions, equally favourable treatment of all religions would constitute less favourable treatment of the non-religious.

Some patriarchal and intolerant religions and belief systems advocate views in direct conflict with equal treatment in relation to other grounds. Policy makers are forced to reach legislative compromise which guarantees religious freedom without undermining the dignity of gay people or women. They have already had to do so in the Equality Act 2006, but, as we explain below, the extension of the equality duty to religion, conscience and belief (and non-belief) would be fraught with difficulty.

Religious and other beliefs are highly personal matters and, unlike someone's gender, race and age, a person's religion or beliefs are (largely) invisible. Religion and belief therefore have implications for personal privacy which are not relevant to other grounds (though similar considerations apply to sexual orientation). While it is appropriate to gather statistics to identify and then tackle discrimination and disadvantage in relation to race and gender, to ask employees for details of their religious beliefs would be highly intrusive of personal privacy.

Religious differences and the use of religion for political ends have resulted in persecution, discrimination, segregation, terrorism and war. One recalls the tragic troubles which beset the two communities in

Northern Ireland. Demands by religious leaders of a particular faith for special treatment - for example, separate provision of services or the accommodation of religious dress - may engender social divisiveness and entrench prejudice rather than promoting mutual respect and tolerance.

This is the context in which the Government recently announced its intention to bring the existing public sector duties in relation to race, disability and gender together into a single duty in the Bill and to extend that duty to cover age, sexual orientation, and religion and belief.⁶ The Government acknowledged that its proposal to bring religion and belief within the scope of the duty had raised concerns among respondents to its consultation. It indicated that it would undertake “further discussions with stakeholders” in order to “fully understand the possible risk of unintended consequences”.⁷

The Government is right to be cautious about treating religion and belief in the same way that it treats other grounds, especially when it comes to imposing positive duties on public authorities to tackle inequality. Indeed, in our view, it would be divisive and unworkable to treat religion and belief (including disbelief and non-belief) in the same way as the other strands.

The new duty would oblige public authorities, in carrying out their functions, to have due regard to the need to eliminate unlawful discrimination and harassment, advance equality of opportunity and advance good relations between different groups. The duty would explain that the advancement of opportunity involves addressing disadvantage where it exists; encouraging a culture which ensures that

⁶ Government Equalities Office, *The Equality Bill – Government Response to the Consultation* (Cm 7454, July 2008), para. 2.59.

⁷ *Ibid.*, para. 2.60.

individuals' differences are accepted and do not hold them back; meeting different needs; and encouraging participation and inclusion.

There is a pressing need for a general public sector duty, but the duty should not be framed in the same way when dealing with religion. We would welcome an obligation to eliminate unlawful religious discrimination. Neither do we object to a duty to promote good relations. In the current climate of tension and strained relations between different religious and non-religious groups, public authorities should be required to take into account the impact of their policies on community cohesion. But a duty to advance equality of opportunity in relation to religion and belief will inspire and entrench resentment, rather than dispel it, will embroil over-stretched public authorities in matters which should not concern them and, in any event, is unnecessary.

There is a real risk that a positive duty of the type proposed will blur the distinction between less favourable treatment of a person because of his religion and the less favourable treatment of an individual's religious doctrine. A negative prohibition of discrimination against an individual on grounds of religion and belief is wholly consistent with liberty of conscience. But duty which required public authorities to become involved in sponsoring or endorsing particular religious ideas or institutions would be divisive and discriminatory, exceeding the legitimate exercise of the powers of the State.

Many of the views and opinions dictated by religious doctrine relate directly to areas of public policy. Some religious groups hold strong views about alcohol and gambling licensing rules and the teaching of sex education in schools. We should not encourage, still

less require, public authorities to accommodate these different views in the policies which affect us all. Neither should we promote the separate provision of certain services. As the history of Northern Ireland illustrates, increasing delivery of services according to religious sensibilities reduces interaction, shared experiences and understanding and increases ignorance, mistrust and division. Parallel service provision is also highly inefficient and would lead to discrepancies in the quality of service provided to different groups,⁸ and even *de facto* segregation.

Religious organisations, funded by public authorities, are heavily involved in the provision of public services. Public funds channelled into these service providers will inevitably contribute to the spread of their religious messages. A duty to promote equality of opportunity among believers and non-believers might cause central or local government or statutory quangos to provide equal funding to all religious service providers, thus increasing the areas of life touched by religion, or to withdraw funding from all religious organisations. Neither outcome is desirable.

The Government may be right when it insists that a duty to promote equality of opportunity would not require public authorities to treat all religions equally⁹ or to cancel Christmas celebrations. But the real concern of law makers should not only be what the law says, but how it is likely to be interpreted and applied. Overcautious or overzealous local authorities, if faced with a new duty to promote “equality of opportunity” among religions, may well take such undesirable, though well intentioned steps.

⁸ British Humanist Association, *Quality and Equality: Human Rights, Public Services and Religious Organisations*, 2007, p.30.

⁹ Note 6 *supra*, at para. 2.60.

A general duty to promote equality would require public authorities to collect data in relation to the protected characteristics of those they serve in order to identify disadvantage and discrimination. Application of the duty to promote equality to religion and belief would therefore require public authorities to negotiate a minefield of potential conflicts with the fundamental right to respect for personal privacy.

Leaving aside the practical difficulties of implementing a duty to promote equality of opportunity, it is not clear that the duty is necessary. Statistics may show that followers of a particular religion experience socio-economic disadvantage, but this has historically been linked more to race and origin than religion and should be addressed on that basis. Attributing disadvantage to religion and taking measures to benefit certain religious groups would be likely to increase resentment between religious communities and to be harmful to community relations.

The Government, in seeking to justify past proposals to extend the scope of religious discrimination legislation, has repeatedly relied upon the need to close the gap between the situation of Jews and Sikhs, who are protected under the Race Relations Act 1976 against discrimination on “racial grounds” and that of other religious (and non-religious) groups, which are not. The decision of the House of Lords which treated Sikhs as an ethnic group was, in our respectful view, mistaken.¹⁰

More broadly, the suggestion that Jews are given a special and unfair form of legal protection is based upon a fundamental misunderstanding. There is religious anti-Semitism and there is racial

¹⁰ *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548.

anti-Semitism. Before the 19th century, anti-Semitism was primarily religious in nature, directed at the religion itself, and so usually did not affect those of Jewish ancestry who have converted to another religion. Racial anti-Semitism, a xenophobia rooted in ideas of race, became the dominant form of anti-Semitism from the late 19th century until today. It replaced the belief that the religion of Judaism was to be hated with the idea that the Jews themselves were a racially distinct group, regardless of their religious practice. Jews are not protected under the Race Relations Act because they have a shared religion but because of their shared ethnicity – real or as perceived by discriminators. Muslims and Christians would also be protected as such if they had or were perceived to have a common ethnic identity. There is then, no anomaly in the protection afforded to different religious groups and this should no longer be used as a justification for treating religion in the same way as race.

In developing the new Equality Bill, the Government should take careful account of the particular aspects of religion and belief which set it apart as a protected ground. Anti-discrimination legislation is intended to provide effective remedies for victims as a matter of simple justice; it is also intended to improve community cohesion, to ensure that the protected grounds do not determine life chances, and to allow people to live out their identity. If the concepts of religion and belief are not treated appropriately, legislation will be likely to undermine all of these objectives. Public authorities should be in the lead in working to eliminate unlawful discrimination on the grounds (amongst others) of religion and belief, but should not be subject to onerous and costly obligations, nor involved in making difficult decisions as to how to reconcile competing demands from adherents of different religions.