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# Law, Religion and Gender Equality

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*This article traces the recent development of gender equality law, understood broadly to embrace sex, transsexual and sexual orientation discrimination. Against this background it considers the ‘problem’ of religion from two perspectives. First, religion is seen as representing a problematic obstacle to the pursuit of a modern gender equality programme, and this results in judicial tendencies to criticise religion and constrain its significance. Second, religions and religious bodies themselves have difficulties with the new ethic underlying recent legal changes. The tension between religious ethics and the new law has resulted in a series of exceptions for religious bodies. However, these are rather narrow, and can be viewed as the minimum necessary to satisfy international and European human rights standards. The article then considers the enigma of equality and the question-begging nature of much of the law made in its name. It concludes that modern problems are better seen not as a clash between religious liberty and gender equality, but as a shift in conceptions of equality. At the same time, this shift has been accompanied by a significant juridification of what for a long time have been social spaces virtually immune from secular legal regulation. Ironically, a new establishment is being created which barely tolerates dissenters.*

The concepts of ‘sex’ and ‘gender’ are often interchanged, but, strictly speaking, gender is the human construct that establishes the moral and social implications of sexual differentiation. Human beings are male and female, but the implications of that fact for role and behaviour vary from society to society. An important element of gender is the regulation of sexual conduct, the types of sexual behaviour that are socially encouraged, tolerated or prohibited. So there is a very close connection between questions of sexual identity, gender role, marital status, sexual orientation and sexual behaviour.

Recent legislative changes have sought to pursue a programme of gender equality understood in this broad sense. Some aspects of this programme have provoked considerable concern among churches and other religious bodies. While the legislation is not yet complete,<sup>2</sup> there is sufficient new

- 1 This article is based on papers given at the Ecclesiastical Law Society’s annual conference, ‘Law, Gender and Religious Belief’, held on 1 April 2006, and at a related symposium sponsored by the Society under the title ‘Same-Sex Unions and the Churches: problems and responses in a European perspective’, on 31 March 2006. I am grateful to the participants for stimulating and fruitful discussion. I am also grateful to my colleague Dr Tonia Novitz for helpful comments on an earlier draft. The usual disclaimers apply.
- 2 At the time of writing, it remains to be seen what religious exceptions will be included in the Sexual Orientation Regulations to be adopted under the Equality Act 2006.

material to warrant a critical review of the developments and their impact on religious bodies to date. This article seeks:

- i. To give a brief overview of the development of anti-discrimination law in respect of gender;
- ii. To chart the way in which religions have problems – and are seen as problematic – in the context of this development;
- iii. To consider the exceptions which have been included in recent legislation to accommodate religious dissent;
- iv. To reflect on the enigmatic nature of equality; and
- v. Briefly to consider the significance of developments for the nature and scope of religious liberty in English law.

#### ANTI-DISCRIMINATION LAW IN RESPECT OF GENDER

The use of law to bring about a greater degree of equality between men and women in the United Kingdom stretches back at least into the nineteenth century, but the rise of anti-discrimination law, with its distinctive concepts of direct and indirect discrimination, derives from the attempts to secure race equality, first in the wake of the American civil rights movement, and then in the British Race Relations Act 1965. The law relating to sex discrimination is now substantial and complex, whereas the law relating to transsexual and homosexual discrimination is more recent.

The Equal Pay Act 1970 introduced the basic principle that the terms and conditions of employment should not be less favourable for one sex than the other. There is to be equal pay for work of equal value. This was supplemented by a much more comprehensive scheme in the Sex Discrimination Act 1975, which outlawed direct discrimination, indirect discrimination and victimisation on the grounds of sex or marital status in the field of employment, including contract workers, partnerships, by trades unions, professional qualifying bodies and employment agencies, and in vocational training. Sex discrimination was also outlawed in education, the provision of goods, facilities and services, and the disposal and management of premises. Various exceptions covered charities and voluntary bodies and areas such as sport, insurance and communal accommodation. The Act also established the Equal Opportunities Commission.

On 1 January 1973 the United Kingdom joined the European Community. The Treaty of Rome contained from the start provisions requiring equal treatment of men and women at work and in the labour market, and establishing the principle of equal pay. In time, this gave rise to a substantial body of legislation, case law and policy in the field of equal pay, and equal treatment in employment

and social security.<sup>3</sup> Thereafter, the law in the United Kingdom developed in tandem with European Community law through a complex body of primary and secondary legislation and judicial interpretation. Certain matters – one thinks of equal treatment in pensions law – gave rise to immense complexity on account of their spanning of different competences, coupled with a slow process of social change. The general tendency was to amend the Sex Discrimination Act 1975; thus the Sex Discrimination Act 1986 reduced a number of exceptions originally included, such as that covering private households and small undertakings, replacing it with a more narrowly tailored, genuine occupational qualification in relation to posts requiring a high degree of physical or social contact with a person of one sex. That Act also abolished certain longstanding restrictions on the working hours and conditions of women. Another recent example of legislative change with relevance for the legal position of ministers of religion has been the extension of the Act to office-holders.<sup>4</sup>

For most practical purposes, anti-discrimination law was limited to race and sex discrimination, but the closing years of the twentieth century saw the addition of other grounds, starting with the enactment of the Disability Discrimination Act 1995. In 1999, the amendments contained in the Treaty of Amsterdam came into force, including a new article 13 of the EC Treaty, granting competence to the Community institutions to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In the same year, the Centre for Public Law and the Judge Institute of Management Studies at the University of Cambridge engaged in their wide-ranging and subsequently influential *Independent Review of the Enforcement of UK Anti-Discrimination Legislation*.<sup>5</sup> Its recommendations ranged from broad policy objectives to detailed analyses of discrepancies between domestic and European anti-discrimination regimes. Of particular note were its recommendations that there should be a single Equality Act and Equality Commission; that the prohibited grounds of discrimination should be race, colour, ethnic or national origin, sex, gender reassignment, marital status, family status, sexual orientation, religion or belief, disability, age, or other status; that there should be a new tort of harassment and bullying at work; that public authorities should be under a duty to combat discrimination and promote equality; and that there should be a series of measures designed to promote internal review

3 Overview and further literature in P Craig and G de Búrca, *EU Law: text, cases and materials* (third edition, Oxford, 2003). See, in particular, M Bell, *Anti-Discrimination Law and the European Union* (Oxford, 2001).

4 Sex Discrimination Act 1975, ss 10A, 10B (added by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467).

5 R Hepple QC, M Coussey and T Choudhury, *Equality: a new framework* (Oxford, 2000).

within organisations. One should note the broader notion of gender implicit in the *Independent Review's* grouping of criteria of discrimination ('sex, gender reassignment, marital status, family status, sexual orientation').

In the context of discrimination on grounds of religion or belief, the Review also recommended that:

[t]here should be specific exception for employment for the purposes of an organised religion (1) as a cleric or minister of that religion, or (2) in any other occupation where the essential functions of the job require it to be done by a person holding or not holding a particular religion or belief, or (3) where employment is limited to one sex or to persons of a particular sexual orientation, or who are not undergoing or have not undergone gender reassignment, if the limitation is imposed to avoid offending the religious susceptibilities of a significant number of its followers.<sup>6</sup>

With hindsight, 1999 was the year in which the broader idea of gender equality started to have anything more than a minimal impact in English law. This can be seen in the development of legal change in respect of transsexualism and homosexuality.

Transsexualism is the condition in which a person's experienced or psychological sex differs from that indicated by physiological features (chromosomal, hormonal, genital and gonadal).<sup>7</sup> It is normally distinguished sharply from intersex conditions in which a child is born with indeterminate physiological indicators of sex. However, recent research indicates that the psychological experience of gender may be rooted in brain structure, which, if borne out, would mean that transsexualism is caused by a mismatch of physiological indicators as well.<sup>8</sup> Modern medical technology is such that all the physical appearances of sex can be reversed.

As early as 1980 the European Commission of Human Rights found Belgium to be in violation of Articles 8 and 12 of the European Convention on Human Rights (ECHR) in its refusal to amend the birth certificate of a post-operative transsexual person.<sup>9</sup> However, in *Rees v United Kingdom*<sup>10</sup> (1986) the European Court of Human Rights found the refusal to amend a birth certificate not to amount to a violation given that there was at the time little common

6 *Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Recommendation 21; see paras 2.77–2.82.

7 Note that the word 'gender' is often used in the context of transsexualism to refer to physical characteristics of sexual identity, as in 'gender reassignment'.

8 Noted in passing by Lord Nicholls in *Bellinger v Bellinger* [2003] 2 AC 467 at 472, [2003] 2 All ER 593 at 597, HL.

9 *Van Oosterwijk v Belgium* (1981) 3 EHRR 557, E Ct HR. The Court found that the applicant had failed to exhaust domestic remedies.

10 *Rees v United Kingdom* (1987) 9 EHRR 56, E Ct HR.

ground between the states party to the Convention on when and how to regulate changes to personal status. At the same time, the United Kingdom was encouraged to keep the law under review. This approach became a theme in a series of cases in which the failure of English law to accommodate transsexual people came under scrutiny. Thus, the law of marriage, which depended on sexual classification at birth,<sup>11</sup> the refusal to register a female to male transsexual as the father of a girl conceived by his long-term partner by AID,<sup>12</sup> and a whole series of social difficulties attendant on transsexualism<sup>13</sup> survived challenge, albeit with increasing calls for legislative reform and some powerful judicial dissents.<sup>14</sup> At the same time, in 1992 France was found to be in violation by its failure to allow the amendment of birth certificates to record new gender-specific names, the difference being that, as in many other continental European countries, the birth certificate is used as an ongoing means of identity.<sup>15</sup> Finally, in 2002, the Court lost patience with the United Kingdom government and unanimously found violations of Articles 8 (privacy) and 12 (right to marry) in the absence of any legal regime to recognise the new sexual identity of post-operative transsexuals.<sup>16</sup> The Court particularly drew attention to the illogicality of providing public funding through the National Health Service for the requisite treatment but then failing to recognise the legal implications.<sup>17</sup> In *Bellinger v Bellinger*, the House of Lords upheld the position that the law of marriage required sexual identity to be determined at birth, but issued a declaration of incompatibility under section 4 of the Human Rights Act 1998.<sup>18</sup>

In 1989 the European Parliament had called for the comprehensive recognition of transsexual identity,<sup>19</sup> but European law did not clearly require the extension of non-discrimination requirements to transsexual people until the judgment of the European Court of Justice in *P v S and Cornwall County Council*.<sup>20</sup> Although there was some dispute about the factual background, it was accepted that the claimant had been dismissed because she proposed to undergo gender-reassignment treatment. Tesauro AG and the Court accepted that this failed to secure equal treatment for men and women contrary to

11 *Cossey v United Kingdom* (1991) 13 EHRR 622, E Ct HR.

12 *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, E Ct HR.

13 *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163, E Ct HR.

14 See the dissenting opinion of Judge Martens in *Cossey v United Kingdom* (1991) 13 EHRR 622 at 644, E Ct HR.

15 *B v France* (1993) 16 EHRR 1, E Ct HR.

16 *Goodwin v United Kingdom* (2002) 35 EHRR 18, E Ct HR.

17 Most recently, in *Grant v United Kingdom*, Appl. No. 32570/03 (23 May 2006), the Court has clarified that the violation dates from the judgment in *Goodwin v United Kingdom* (5 September 2002), since the reasoning rested in part expressly on the changed circumstances of widespread European acceptance of the rights of transsexual persons.

18 *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, [2003] 2 All ER 593, HL.

19 [1989] OJ C 2561/33.

20 Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

Directive 76/207/EEC. The local authority argued that there was no sex discrimination, since a female-to-male transsexual would have been treated in exactly the same way. However, as Tesauro AG argued:

what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries; the irrelevance of a person's sex with regard to the rules regulating relations in society.<sup>21</sup>

The Court reasoned that, where a person is dismissed in circumstances of this kind,

he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment... [T]o tolerate such discrimination would be tantamount... to a failure to respect the dignity and freedom to which he or she is entitled.<sup>22</sup>

The United Kingdom government responded to this judgment by enacting the Sex Discrimination (Gender Reassignment) Regulations 1999,<sup>23</sup> which extend the Sex Discrimination Act 1975 to cover discrimination against transsexual people. Gender reassignment is defined as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process',<sup>24</sup> and the Regulations outlaw any less favourable treatment of a person in the field of employment and vocational training on the grounds that they intend to undergo, are undergoing, or have undergone gender reassignment.<sup>25</sup> The regulations did not extend to pension arrangements; in effect they addressed the problem of discrimination against transsexuals as individuals, but not any matter relating to partnership or marriage. However, the United Kingdom was again found in breach of European sex equality law in a case in which a transsexual partner was unable to benefit from a survivor's pension otherwise available to a surviving spouse.<sup>26</sup> Most recently, the failure to allow a male-to-female transsexual person to benefit from the earlier retirement age for women has also been found unlawful.<sup>27</sup>

21 Opinion of Tesauro AG at para 24.

22 At paras 21–22.

23 Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102.

24 Sex Discrimination Act 1975, s 82, as amended.

25 See *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] UKHL 21, [2004] 3 All ER 145, [2004] 2 WLR 1209, HL.

26 Case C-117/01 *KB v National Health Service Pensions Agency* [2004] ECR I-541.

27 Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] 2 CMLR 49.

The government was therefore under considerable pressure, both from European Human Rights law and European Community law, to introduce the comprehensive regime that can be found in the Gender Recognition Act 2004. The Act makes provision for the granting of a gender recognition certificate by a Panel on the grounds that the applicant is living in the other gender, has or has had gender dysphoria, has lived in the other gender for at least two years, and intends to live in the acquired gender until death.<sup>28</sup> Applications must be supported by expert medical evidence including details of any relevant treatment,<sup>29</sup> and certificates are only granted on an interim basis until any subsisting marriage or civil partnership has come to an end.<sup>30</sup> The general principle is that a person's gender becomes for all purposes the acquired gender,<sup>31</sup> but this does not affect the person's status as the father or mother of a child,<sup>32</sup> it does not prevent sporting bodies from regulating participation in gender-specific sports,<sup>33</sup> nor does it prevent the commission of any gender-specific offence.<sup>34</sup> The Registrar General keeps a Gender Recognition Register, which in broad terms operates as a parallel birth register in the acquired gender.<sup>35</sup> The issuing of an interim gender recognition certificate makes a subsisting marriage voidable, and marriage with a person whose gender is acquired is also voidable.<sup>36</sup> Provision is also made in respect of rights of succession, state benefits and pensions.

At an early stage, the European Court of Human Rights held that the criminalisation of private homosexual acts between adults amounted to a violation of Article 8 rights to respect for private life.<sup>37</sup> The maintenance of such offences on statute books is also a violation, even if in practice the law is not enforced.<sup>38</sup> More recently, the Court has also held that it is a violation of Article 8 to criminalise the possession of private video-footage of men engaged in group sexual activity<sup>39</sup> in the absence of any sado-masochistic element.<sup>40</sup> The complete ban on homosexual personnel in the British armed forces was also found to violate Article 8.<sup>41</sup> The decision of the Court in *Salgueiro da Silva Mouta v Portugal* in 1999 marked a new development.<sup>42</sup> In that case, the Court held that to deny

28 Gender Recognition Act 2004, ss 1, 2.

29 *Ibid*, s 3.

30 *Ibid*, s 4(3).

31 *Ibid*, s 9.

32 *Ibid*, s 12.

33 *Ibid*, s 19.

34 *Ibid*, s 20.

35 *Ibid*, s 10, Sch 3.

36 Matrimonial Causes Act 1973, s 12(g), (h), respectively.

37 *Dudgeon v United Kingdom* (1982) 4 EHRR 149, E Ct HR.

38 *Norris v Ireland* (1991) 13 EHRR 186, E Ct HR; *Modinos v Cyprus* (1993) 16 EHRR 485, E Ct HR.

39 *ADT v United Kingdom* (2001) 31 EHRR 33, E Ct HR.

40 *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, E Ct HR.

41 *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, E Ct HR; *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548, E Ct HR.

42 *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47, E Ct HR.

a divorced father custody of his child solely on grounds of his sexual orientation and desire to live with another man amounted to a violation of Article 8 taken in conjunction with Article 14: in other words, it amounted to discrimination in the ambit of private and family life. The use of equality arguments has since extended the intervention of the Court, and very weighty reasons have to be put forward before a difference based on sexual orientation can be justified.<sup>43</sup> Thus, the criminalisation of homosexual acts with adolescents of an age at which heterosexual activity would not be criminalised has been found to be in violation of the Convention,<sup>44</sup> as has the refusal to extend the concept of 'life companion' to a homosexual partner for the purposes of succession to a tenancy.<sup>45</sup> However, in *Fretté v France*,<sup>46</sup> the Court found no violation in France's refusal to allow a single homosexual man to adopt a child in the light of considerable scientific controversy about the impact on children of being brought up by homosexual people. It also noted that Belgium is the only European country to allow full marriage and adoption rights to homosexual partners.<sup>47</sup>

In *Grant v South-West Trains Ltd*, the European Court of Justice refused to follow the expansive logic of its judgment in *P v S and Cornwall County Council* and denied that the refusal to extend benefits available to heterosexual partners to homosexual partners amounted to sex discrimination.<sup>48</sup> In reaching this judgment it relied both on the fact that national laws within the Community did not generally regard stable same-sex relationships as equivalent to marriage or stable opposite-sex relationships outside marriage,<sup>49</sup> and on the imminent mandate of the European institutions under Article 13 of the EC Treaty as amended.<sup>50</sup> This was affirmed a few years later in *D v EU Council*.<sup>51</sup> As has already been noted, Article 13 of the EC Treaty as amended by the Treaty of Amsterdam 1997 empowers the institutions of the European Community to take 'appropriate action to combat discrimination based on . . . sexual orientation'. It should also be noted that the Charter of Fundamental Rights of the European Union expressly refers to sexual orientation in its general prohibition

43 *Karner v Austria* (2004) 38 EHRR 24, E Ct HR, at para 37.

44 *L and V v Austria* (2003) 36 EHRR 55, E Ct HR; *S L v Austria* (2003) 37 EHRR 39, E Ct HR. See also *Sutherland v United Kingdom*, *The Times*, 13 April 2001, E Ct HR.

45 *Karner v Austria* (2004) 38 EHRR 24, E Ct HR.

46 *Fretté v France* (2004) 38 EHRR 21, E Ct HR.

47 The recent case law actually leaves the extent of the European Convention on Human Rights quite unclear. Although Article 14 is a subsidiary right, only covering discrimination in the ambit of the right, it could be argued that any discrimination on grounds of sexual orientation raises a matter of 'private life' within the ambit of Article 8, and thus could ground a complaint. A similar argument can be mounted in respect of religious discrimination: see *Thlimmenos v Greece* (2001) 31 EHRR 15, E Ct HR.

48 Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621, ECJ.

49 *Ibid*, para 35.

50 *Ibid*, para 48.

51 Case C-122/99 *D v EU Council* [2001] ECR I-4319, ECJ.



of discrimination.<sup>52</sup> The most significant piece of legislation to emerge on the basis of this new mandate to combat sexual orientation discrimination is Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The Employment Equality (Sexual Orientation) Regulations 2003<sup>53</sup> enacted to implement that Directive largely follow the structure of the Sex Discrimination Act 1975 insofar as it applies to the employment field (Part II (sections 6–20)). The regulations render unlawful direct and indirect discrimination, victimisation and harassment on grounds of sexual orientation in the terms and conditions under which employment, contract work, office-holding and the like are offered. The government has also recently completed a consultation exercise on regulations to be enacted under the Equality Act 2006.<sup>54</sup> These regulations will cover discrimination and harassment on grounds of sexual orientation in the field covered by Part II (sections 44–80) (Discrimination on Grounds of Religion or Belief) of the Equality Act 2006: in other words, in the provision of goods, facilities and services and in the disposal and management of premises. These areas were already covered in respect of sex discrimination by Part III of the Sex Discrimination Act 1975 (sections 22–36), and so these new regulations will form a counterpart to the Employment Equality Regulations. However, if the regulations follow the scope of Part II of the Equality Act 2006 reasonably closely, they will bring within the ambit of the law the provision of goods and services to the public even at no cost,<sup>55</sup> which will be a remarkable instance of juridification.

The Civil Partnership Act 2004 creates a marriage-like legal relationship between two persons of the same sex.<sup>56</sup> It is very closely modelled on the existing law of marriage: procedures for registration, grounds of annulment and dissolution are virtually identical. Prohibited relationships, financial and proprietary consequences are similar, and a series of statutes have been amended to put a civil partnership in the same position as a marriage. Most notably, the Sex Discrimination Act 1975 has been amended to outlaw discrimination on grounds of status as a civil partner alongside marital status, and the exception for benefits determined by marital status contained in regulation 25 of the Employment Equality (Sexual Orientation) Regulations 2003 has been saved only for benefits accruing or payable before the Civil Partnership Act 2004 or conferred equally on both.<sup>57</sup> Provision has also been made under the

52 Charter of Fundamental Rights, Article 21.1.

53 Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661.

54 See the Equality Act 2006, s 81.

55 Equality Act 2006, s 46(5).

56 See J Humphrys, 'The Civil Partnership Act, same-sex marriage and the Church of England', (2006) 8 *Ecc LJ* 289.

57 Mark Bell questions whether civil partnership has been fully assimilated to marriage for all employment purposes: M Bell, 'Employment law consequences of the Civil Partnership Act 2004', (2006) 35 *Industrial Law Journal* 179.

Adoption and Children Act 2002 for same-sex couples to adopt children, and same-sex partners have rights to employment leave equivalent to paternity leave.

There are differences between civil partnership and marriage: the partnership is made effective by signing the register in the presence of witnesses, not by mutual promise and declaration. Furthermore, there is no requirement of sexual intimacy, although presumably unreasonable withholding of sexual intimacy – which again is presumably to be defined by reference to the reasonable expectations of the parties – will justify a dissolution. The recent decision of the High Court refusing to recognise a Canadian same-sex marriage as marriage for purposes of English law emphasises the nature of the provision for civil partnership as ‘separate but equal’.<sup>58</sup>

## GENDER EQUALITY AND THE PROBLEM OF RELIGION

In the broadest perspective, for the last 150 years English law has proceeded on the assumption that religion generally is an unqualified human good. The dismantling of the monopoly of the established church from the second quarter of the nineteenth century was a response to the critique that its privileges should either be pluralised so that they could be enjoyed by other denominations, or transferred to non-religious state bodies. The disabilities associated with dissent should be removed. A good statutory example of this sense that any religion is better than none can be found in Schedule A to the Places of Worship Registration Act 1855, which allowed places of meeting for religious worship to be registered even on behalf of people ‘who object to be designated by any distinctive religious appellation’. Where statute led, the common law followed, such that the courts could at times grant the privileges of charitable status to curious religious movements of questionable public benefit.<sup>59</sup>

Standard modern accounts of the relationship between law, religion and gender do not share this confidence in the value of religion.<sup>60</sup> Instead, they tell a different story: in the course of the twentieth century, and increasingly in recent decades, western societies have come to abandon a millennium-long tradition of more or less oppressive heterosexist patriarchy to adopt an ethic of gender equality. Individual choice is an important component of this new ethic: choices to commence and end a sexual relationship, choices to express one’s gender role, and indeed choices to determine one’s fundamental sexual identity, should be respected. While there are differences between sex

<sup>58</sup> *Wilkinson v Kitzinger*, unreported, 31 July 2006.

<sup>59</sup> *Thornton v Howe* (1862), 31 Beav 14.

<sup>60</sup> See, in respect of the legal status of women, F Raday, ‘Culture, religion and gender’, (2003) 1 *International Journal of Constitutional Law* 663.

discrimination, transsexual discrimination and sexual orientation discrimination, they are all connected under this plastic conception of gender. The ethic of gender equality has come to be expressed in law first through the mechanism of international human rights instruments, but increasingly in domestic law as well, most notably in criminal law, employment law, goods and services law, education law, housing law and, finally, family law. Recent legal changes in the United Kingdom are a long-awaited fruition of that process. The law is inherently conservative, since its authority structure depends on past political decisions and older, experienced lawyers. It takes time to catch up with social change. But religions and religious institutions are even more conservative, since their authority structures tend to be rooted in texts and traditions stretching back centuries, not merely decades. This is problematic, because they tend to function as bastions of gender inequality and obstacles to moral progress. But they too are changing, and the law has a role in moving them forward. In time, they too can and will be transformed.

This account of the progress of recent legal reforms, and the essentially problematic relationship of religion to these reforms, would now appear to be mainstream among western educated elites. It is increasingly shared by senior British judiciary. To quote Lord Walker of Gestingthorpe giving judgment in the House of Lords in March 2006:

The enactment of the 2004 [Civil Partnership] Act was possible only because of the profound cultural change which has occurred in most of Europe, within the last two generations, in attitudes towards homosexuality. Many people (and not only homosexuals) would say that that change has taken far too long, and they would be right ('They are taking him to prison for the colour of his hair. . . For the nameless and abominable colour of his hair' wrote A E Housman in a poem not published for many years after it was written). Nevertheless two generations is not a long time in which to change prejudices which have been deeply ingrained for many centuries. In Europe, where the Christian religion has provided the cultural matrix for two thousand years, male homosexual activity was regarded as a grave sin, at one time punishable as a form of heresy; it was also for centuries a capital crime under the secular law of many European countries; other world religions also condemned it, and many still do.<sup>61</sup>

Thus, gender-equality commitments result in the judicial critique of religion, and in increasing legal constraint on the scope of the sphere of religious liberty.

61 *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 at 122, 123, [2006] 2 WLR 637 at 664, 665, HL, para 92.

It is clearly observable in the context of international and European human rights that religions are now seen not primarily as beneficiaries of rights of protection from the state, as subjects enjoying religious freedom, but as potential sources of human rights breaches. Religion is a problem. There are any number of examples of this, but perhaps the most striking is the outright declaration by the European Court of Human Rights in the *Refah Party* case that Islamic law is per se incompatible with human rights.

... the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.<sup>62</sup>

Echoes of this sentiment can be heard in the decision of the House of Lords in the *Begum* case.<sup>63</sup> Shabina Begum wished to wear a jilbab to her school in Luton and was not permitted to attend until she appeared in one of the uniform options, which included a shalwar khomeez and headscarf. The House of Lords did accept that this raised a question of religious liberty – there is a view that clothing is not a religious matter either – but a majority held that there had been no limitation of her right, since she had a reasonable alternative schooling option permitting the jilbab. A minority held that the school had reached a proportionate and reasonable compromise in the light of competing pressures. The infringement of her liberty was justified.

The majority's approach is problematic in its reliance on a strand in the European case law which requires a high level of obstacle before there is an infringement of one's right: a job which imposes constraints on religious

62 *Refah Partisi (Welfare Party) v Turkey* (2002) 35 EHRR 3, E Ct HR, at para 72. This was approved by the Grand Chamber in *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1, E Ct HR, at para 123.

63 *R (S B) v Governors of Denbigh High School* [2006] UKHL 15, [2006] 2 All ER 487, [2006] 2 WLR 719, HL.

exercise can always be changed;<sup>64</sup> if one is not allowed to produce meat in accordance with religious dietary requirements, one can always import it.<sup>65</sup> Lord Hoffmann referred to the ‘expectation of accommodation, compromise and, if necessary, sacrifice’ on the part of religious people.<sup>66</sup> Religious people have to give way to dominant culture.

The other problematic aspect of the *Begum* judgment is the tendency to distinguish between good and bad religion. The Court of Appeal had taken the approach that any religious position, whether minority or majority, had to be taken into account in devising the uniform policy. This did not mean that everyone had to be accommodated, but it did mean that every view had a legitimate place at the table. By contrast, Baroness Hale engages in some discussion of why Muslim women wear various types of headdress. She then adopts a middle road: the adult woman must be allowed to wear what she pleases, even if she is colluding in ‘fundamentalist’ oppression,<sup>67</sup> but schools are different. They have a duty to enable and support girls to choose how far to adopt or distance themselves from their dominant culture. The implication, also present in the judgment of Lord Scott,<sup>68</sup> is that *Begum*’s views did not count, because they were not (yet?) really her own. At best, this seems to create a category of ‘tolerated’ religion which may be permitted between consenting adults in private, but which ideally would be eradicated; at worst it justifies state intervention to liberate those who, by failing to sign up to the gender-equality programme, are unwittingly colluding in fundamentalism.<sup>69</sup>

The other tendency in the face of problematic religious views is to deny that certain aspects of life are ‘religious’, and thus within the scope of freedom and equal rights. At European level we see this, for example, in the judgment of the European Court of Human Rights that participation in a school national day parade in Greece does not limit the religious freedom of pacifist Jehovah’s Witnesses, because they are simply wrong in seeing it as a religious issue.<sup>70</sup> One might also note the following comment from the *Refah Party* case referred to above:

[The Court] reiterates that freedom of religion, including the freedom to manifest one’s religion by worship and observance, is primarily a matter

64 *Ahmad v United Kingdom* (1981) 4 EHRR 126, E Com HR; *Stedman v United Kingdom* (1997) 23 EHRR CD 168, E Com HR.

65 *Jewish Liturgical Association Cha’are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, E Ct HR.

66 *R (S B) v Governors of Denbigh High School* [2006] 2 All ER 487 at 505, [2006] 2 WLR 719 at 736, para 54.

67 *Ibid*, [2006] 2 All ER 487 at 516–517, [2006] 2 WLR 719 at 748–749, para 95.

68 *Ibid*, [2006] 2 All ER 487 at 512–513, [2006] 2 WLR 719 at 743–744, paras 79–80.

69 Baroness Hale quotes with approval the words of Gita Saghal and Nira Yuval Davis: ‘One of the paradoxes . . . is the fact that women collude, seek comfort, and even at times gain a sense of empowerment within the spaces allocated to them by fundamentalist movements.’ *Ibid*, [2006] 2 All ER 487 at 517, [2006] 2 WLR 719 at 749, para 95.

70 *Valsamis v Greece* (1997) 24 EHRR 294, E Ct HR.

of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole.<sup>71</sup>

As an example of inappropriate confusion of religion and private law, the Court cited (perhaps ambiguously) giving religious marriages civil effect.<sup>72</sup> One is tempted to caricature and say that religious freedom is freedom to believe what you like so long as it has no impact on what you do.

In Britain, too, there is a tendency to deal with clashes of ideology by denying the religious character of the impugned behaviour. Two of the judges who ruled in *Williamson* on corporal punishment said that the discipline of children is not a religious matter.<sup>73</sup> There might be some underlying religious motivation, but it is not intrinsically religious, and hence not significant legally. Or take *Copsey* on the rights of religious employees – being made to work on Sunday is not a religious matter; it is not in the scope of a right to religious freedom.<sup>74</sup>

Generally speaking, the House of Lords has been more generous than the Court of Appeal in this area. However, the decision of the House in *Percy v Board of National Mission of the Church of Scotland* represents a new stage in the narrowing of the religious sphere.<sup>75</sup> It is a significant decision, not simply for the autonomy of the Church of Scotland, but for all religious bodies, and it demonstrates that the critique of religion from the perspective of gender equality applies not only to British cultural newcomers such as Islam, but to established bearers of cultural values.

Percy resigned her post as associate minister in the Church of Scotland after an allegation of sexual misconduct. She then alleged sex discrimination on the ground that a man engaging in similar sexual misconduct would not have been treated in the same way. The lower courts dismissed her case on the ground that under the Church of Scotland Act 1921 they had no jurisdiction over matters of discipline and, in any case, she had no contract with the Church. The House of Lords disagreed. She did have a ‘contract personally to execute work or labour’ within the terms of the Sex Discrimination Act 1975, and so counted as

71 *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1 at 45, E Ct HR, para 128.

72 *Ibid*, para 127.

73 *Williamson v Secretary of State for Education and Employment* [2002] HRLR 14 per Elias J, QB Admin Ct; *R (Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, [2003] QB 1300, [2003] 1 All ER 385, CA, per Buxton LJ.

74 *Copsey v W B B Devon Clays Ltd* [2005] EWCA 932, [2005] ICR 1789, CA, per Mummery LJ; Rix and Neuberger LJ found that the dismissal engaged Article 9(1) ECHR but that it was reasonable on the facts.

75 *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, [2006] 2 WLR 353, HL. Helpful commentary has already been provided by F Cranmer and S Peterson, ‘Employment, sex discrimination and the churches: the *Percy* case’, (2006) 8 Ecc LJ 392 and J Duddington, ‘Ministers of religion and discrimination law: a story from the Glens of Angus’, (2006) 156 *Law and Justice* 59.

‘employed’ for those purposes. This is a remarkable ruling in the light of twentieth-century case law on ministers of religion, but has in any case been superseded by the recent extension of the Sex Discrimination Act to office-holders.<sup>76</sup> What is more interesting is the second ground: notwithstanding a line of authority that the discipline of ministers is a matter within the exclusive jurisdiction of the Church, the provision of a remedy for unlawful discrimination is a civil matter and not a spiritual one, so the jurisdiction of the civil courts is not excluded by the Church of Scotland Act 1921. Sex discrimination in employment is not religious.

This seems very odd. The heart of Percy’s case was that the Church was operating a double standard. But just suppose the Church of Scotland does think that adultery by a woman is worse than adultery by a man? Would that not be a matter of moral doctrine and discipline?<sup>77</sup> The point is not moral but jurisdictional. In the context of what is surely a matter of mixed religious and secular concern, gender-equality issues are being defined here by the court as ‘not religious’. Not only does this mean that disputes can be litigated before secular courts; it also means that secular values trump any incompatible religious ethic. The gender-equality programme is restricting the scope of religious liberty.

If religions create problems for the gender-equality programme, the legal reforms potentially create difficulties for churches and other religious bodies who adopt a different ethic. The biggest practical problem may well be the internal one of positioning oneself in respect of a new challenge to traditional sexual ethics, and managing strongly held and competing views. And that practical internal problem may well have legal dimensions in ecclesiastical or canon law, not least in managing the formal international relationships between churches that have taken different stances towards the legal developments in their respective countries. However, this article is concerned primarily with the civil or ‘external’ legal aspect. Assuming that civil legal recognition of the new view of gender equality is not wholeheartedly endorsed, there will be some degree of conflict between the church’s sexual ethic and the law, and it is worth trying to tease out the dimensions of that conflict.

We should distinguish between problems arising directly from the new legal rights and the new status of civil partnership, and problems arising indirectly from the fact that this status gives shape to shifting conceptions of abstract values such as dignity, equality, privacy and family life. These abstract legal values can then affect other areas of law, with a knock-on effect. Broadly

<sup>76</sup> See note 4 above.

<sup>77</sup> Cranmer and Peterson (see note 75) raise the more plausible hypothetical that the case might have been resolved through the church courts, which would then face review by the secular courts: ‘Employment, sex discrimination and the churches’, 398.

speaking, the problems cluster around two substantive issues. First, there are questions of sexual identity and role: for certain purposes, it matters for religious associations whether a person is a man or a woman. Second, there are questions of sexual behaviour: typically, for many religious associations, sexual intimacy is reserved for marriage as traditionally defined, and departures from that are more or less problematic. We can note eight potential problems, in decreasing order of directness.

### (1) The religious marriage problem

Churches and religious associations may have the ability to conduct and register marriages with civil effect. The recognition of the new sexual identity of transsexual people and the introduction of civil partnerships or, more likely, the re-working of civil marriage to embrace same-sex couples, may carry with it obligations to offer their services to such couples. The risk is greater in the case of the established Church and the Church in Wales, which (it is assumed) have an obligation to marry couples resident in the parish,<sup>78</sup> but an argument extending non-discrimination requirements to other religious bodies exercising this public function is not implausible.<sup>79</sup> Since such a central and obvious problem has been avoided in the relevant legislation, problems in this area are likely to be more peripheral, for example in changes to degrees of affinity, to exclude from marriage those under no canonical bar on account of an earlier or current same-sex partnership.

### (2) The clergy employment problem

The next most obvious difficulty relates to the employment, or appointment, of ministers of religion and other workers. Some religious bodies take the view that certain offices are restricted to men. The vast majority take the view that certain forms of sexual activity that are legally tolerated are incompatible with one's office. Just as sex discrimination law is having an increasing impact on churches, so also the legal recognition of same-sex relationships may require churches to have employment policies, including pension provision and benefits for partners, that are neutral between heterosexual and homosexual conduct. Whereas previously the use of 'marriage' as a criterion of differentiation was seen as *prima facie* non-discriminatory, that will no longer apply. Although there are exceptions in European and domestic legislation for religious employers with an ethos opposed to homosexual partnerships, there may be difficulties in the case of large and diverse churches in establishing the requisite ethos to benefit from any legal exception.

<sup>78</sup> See the discussion in N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), pp 358–362, and in N Doe, *The Law of the Church in Wales* (Cardiff, 2002), pp 256–258.

<sup>79</sup> Human Rights Act 1998, s 6(3)(b), (5).



### (3) The member discipline problem

Churches and religious associations may wish to exclude same-sex partners from the full benefits of membership, or more likely to impose requirements of celibacy. Outside the scope of membership, there may be concerns about offering services that are generally available to the public, to individuals and groups publicly adopting an ethos contrary to that of the church or religious association. Generally speaking, it is not easy to frame an action against a religious association for unlawful exclusion or withholding of voluntary services but, where there is a cognisable legal interest at stake, an action may lie. 'Being discriminated against' is coming to be seen as an interference with a legal interest in respect of a widening range of benefits, giving rise to what is effectively a new statutory tort.<sup>80</sup>

### (4) The education problem

Many schools, both state-funded and independent, have religious foundations and a religious ethos. Such schools may not only want to restrict employment to those whose views and lifestyle are compatible with that ethos; they may also want to reflect that ethos in the content of what is taught. In respect of the maintenance of compatible religious beliefs, provision is made as regards the maintained sector in the School Standards and Framework Act 1998, and, in respect of independent faith schools, the Employment Equality (Religion or Belief) Regulations 2003 allow employers with an ethos based on religion or belief to impose a genuine occupational requirement.<sup>81</sup> But it is less clear that ethos requirements can extend to requirements in respect of sexual behaviour. Schools have sometimes struggled in cases of extra-marital pregnancy,<sup>82</sup> and may continue to struggle with the extension of gender equality.

### (5) The child services problem

Churches may offer fostering and adoption services, through associated agencies, and may take the view that the placing of children with a transsexual or homosexual partnership is inappropriate. They may then forfeit their right to co-operate with state social services in this area. The government's recent consultation exercise on the new Sexual Orientation Regulations assumes that

80 In respect of religious discrimination, see the Equality Act 2006, ss 66, 68.

81 Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 7. Whether this exception is adequate cannot be discussed here.

82 *O'Neill v Governors of St Thomas More School* [1997] ICR 33, EAT. In *Berrisford v Woodard Schools (Midlands Division Ltd)* [1991] ICR 564, EAT, the school successfully showed that its dismissal of a pregnant teacher was a non-discriminatory application of a rule against extra-marital sexual intercourse. It is not clear that this defence would survive the new section 3A in the Sex Discrimination Act 1975 (added by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, reg 4).

organisations not accepting the new public ethos will be denied the right to exercise public functions or to contract with the state to provide a public service.

### **(6) The free speech problem**

One indirect consequence of the new public conception of gender equality is the rise of constraints on speech. A church, or its representatives, or its associated institutions such as schools, may wish to teach that sexual activity outside marriage is unethical, or to speak specifically against the recognition of same-sex sexual partnerships, and find itself subject to criminal sanctions in respect of homophobic hate-speech, civil actions for damages, or some other adverse regulatory impact.

### **(7) The rule of law problem**

It is inevitable that, at times of social and legal change, there is uncertainty about the obligations and limits of the law. If Protocol 12 to the European Convention on Human Rights, which prohibits discrimination in the enjoyment of 'any right set forth by law', ever comes into force, the judiciary will be given considerable leeway to extend or limit existing laws in pursuit of new conceptions of justice. But even without this power, uncertainty has been exacerbated by the human rights dimensions of the changes. Once same-sex relationships are seen as a matter of fundamental dignity and equality, shifts in ethical consensus are given legal force. This creates a general problem of uncertainty as to what exactly the law requires, which in its turn has a chilling effect. It clothes what may only really be social pressure with the aura of legal obligation.

### **(8) The establishment problem**

Finally, the recognition of same-sex relationships raises a question about establishment. I do not mean either what has come to be known as 'high' or 'low' aspects of establishment. Rather, the problem relates to the symbolic identification and cultural function of a church or churches as the guardians of the moral and religious conscience of a nation. It is of course questionable whether we can 'make sense' of the law as based upon a coherent underlying ethic but, to the extent that this is possible, establishment can be defended as giving a different mode of expression to the same underlying ethic on which the law is based. Thus marriage is held out by the established Church as ideal and the secular law has to manage departures from that ideal with clarity and fairness. But, whereas the legal regulation of divorce and remarriage can be understood as part of the management of departures from the ideal, it is much harder to view the legal recognition of same-sex relationships in the context of a new public conception of gender equality in quite the same way. This points in the direction of a much more pluralistic model of

Church–State relations in which the Church represents (from the legal perspective) just one ethical position among many.

## RELIGIOUS EXCEPTIONS

The legal reforms in pursuit of gender equality, outlined in the first part of this article, have recognised the existence of potential clashes with different religiously grounded sexual ethics and have incorporated a number of exceptions. The question is whether these exceptions are sufficient to meet the legitimate concerns of churches and religious bodies.

The Matrimonial Causes Act 1965 included a ‘conscience clause’ for clergymen in the Church of England and the Church in Wales who objected to the remarriage of divorced persons during the lifetime of a former spouse. This permits them to refuse to marry such a person<sup>83</sup> and to prohibit the use of the church or chapel of which they are minister for such a purpose.<sup>84</sup> The same model was adopted by the Marriage (Prohibited Degrees of Relationship) Act 1986, which allows a clergyman to refuse to marry those related by affinity whose marriage would have been void but for that Act, and to prohibit the use of his church accordingly.<sup>85</sup> However, the exceptions created by the Gender Recognition Act 2004 are slightly more focused. A clergyman is not obliged to solemnise the marriage of a person if he reasonably believes the person’s gender to be an acquired gender under the 2004 Act,<sup>86</sup> and a clerk in holy orders of the Church in Wales is not obliged to permit the marriage to be solemnised in his church or chapel.<sup>87</sup> Other religious bodies empowered to solemnise marriages are probably under no legal duty to do so, and civil partnership can only be entered into in the context of a non-religious ceremony.

As originally drafted, section 19 of the Sex Discrimination Act 1975 was designed to create an exception for religious bodies with a male-only priesthood. It removed from the effective operation of the Act cases in which the employment, authorisation or qualification were limited to one sex, ‘so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers’. In the light of the judicial tendency to find that ministers were office-holders without a contractual relationship with their association, section 19 was not practically significant. The narrowness of this exception has also been recently demonstrated by *Percy v Board of National Mission of the Church of Scotland* in that it would not have operated to relieve the

83 Matrimonial Causes Act 1965, s 8(2)(a).

84 *Ibid*, s 8(2)(b).

85 Marriage Act 1949, s 5A (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 3).

86 Marriage Act 1949, s 5B (1) (amended by the Gender Recognition Act 2004, s 11, Sch 4).

87 Marriage Act 1949, s 5B (2) (as so amended).

Church of responsibility for an alleged discriminatory practice in the conditions of employment of a woman. Once a religious body has decided to admit women, it must do so on non-discriminatory terms. For this reason, section 6 of the Priests (Ordination of Women) Measure 1993 (No. 2) provided that the Sex Discrimination Act 1975 would not render unlawful sex discrimination against a women in respect of ordination, licensing or appointment, thus creating the legal space for the Church of England to adopt its pluralist solution to the question of women's ordination. Section 19 was further amended by the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102, when the concept of sex discrimination was widened to include transsexual people.

Section 19 has now been comprehensively redrafted.<sup>88</sup> It is not unlawful to apply a requirement in relation to employment, authorisation or qualification to be of a particular sex, not to be undergoing or to have undergone gender reassignment, not to be married or not to be a civil partner, or in relation to a former spouse or civil partner. One point of ambiguity relates to the requirement 'relating to not being married or to not being a civil partner'.<sup>89</sup> Presumably, this is disjunctive: a requirement that a person not be a civil partner, but may be married, would be acceptable.

Most importantly, the requirement must be imposed for the purposes of an 'organised religion' and applied 'so as to comply with the doctrines of the religion, or . . . to avoid conflicting with the strongly-held religious convictions of a significant number of the religion's followers'. This test can also be found in the Employment Equality (Sexual Orientation) Regulations 2003. These are, however, a little broader than section 19 of the Sex Discrimination Act 1975, in that they exempt from the provisions relating to direct and indirect discrimination<sup>90</sup> any 'requirement related to sexual orientation' in relation to the offer of employment, dismissal, promotion, transfer or training, but not the terms under which any employment is offered. The same applies for contract work, office-holding, partnership and other employment-related contexts. In other words, employment can be refused or terminated for reasons related to sexual orientation, but work cannot be offered under special conditions, unless those conditions apply to all employees and are a proportionate means of achieving a legitimate aim. Presumably a condition requiring an appointee to be completely celibate or to refrain from sexual activity outside marriage – if it is discriminatory<sup>91</sup> – must be enforced by the ultimate threat of dismissal to satisfy these requirements.

88 Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, reg 20 (i).

89 Sex Discrimination Act 1975, s 19(3)(c) (as substituted: see note 88 above).

90 But not victimisation (Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 4) or harassment (reg 5).

91 On which, see below.

In April 2004 several unions sought judicial review of the regulations on the ground, among other things, that the religious exception was disproportionately broad and therefore ultra vires the European Communities Act 1972.<sup>92</sup> Although they failed in their claim, they did so on the basis of a narrow interpretation of the exception. Richards J accepted that the phrase ‘organised religion’ was narrower than ‘for purposes of a religious organisation’, let alone ‘where an employer has an ethos based on religion or belief’, and that this referred essentially to ministers of religion, not (for example) to employment as a teacher in a faith school. He further held that the requirements of compliance with the doctrines of the religion, or of avoiding conflict with the strongly held convictions of a significant number of the religion’s followers, required an objective test that was very narrow. In respect of the second alternative, the need to consider ‘the nature of the employment and the context in which it is carried out’ required a careful examination.

There are three respects in which the submissions of the parties and the judgment may have been misguided. The first problematic assumption, which was not discussed at all, was that the protection against discrimination relates as much to the manifestation of orientation in the form of sexual behaviour as to the orientation itself.<sup>93</sup> This contradicts the European Commission proposal, which clearly distinguishes the two.<sup>94</sup> The second is that there is considerable ambiguity over whether regulation 7(3) is an exception to a fundamental right, and thus to be interpreted narrowly, or whether it is the expression of a balance between two competing rights, and thus simply to be interpreted in the light of the value of both rights.<sup>95</sup> While counsel for one of the parties submitted that freedom of religion does not extend to the public sphere, that is clearly mistaken: public manifestations of religious belief may indeed be limited, but such limitations are still prima facie unlawful unless proportionate. A case can be made that commercial activity with a religious ethos does not benefit from protection under Article 9 of the European Convention on Human Rights,<sup>96</sup> but the instances of impermissibly wide application cited in argument all seem to raise a prima facie issue of religious freedom.<sup>97</sup> The third remarkable feature of the Secretary of State’s submissions is that he defended the regulation as an instance of the general provision for genuine and determining occupational requirements in Article 4(1) of EC Directive

92 *R (Amicus and others) v Secretary of State for Trade and Industry and others* [2004] ELR 311.

93 Paragraph 119.

94 Proposal COM/99/0565 final—CNS 99/0225, p 8.

95 Compare para 115 with para 123.

96 *Kustannus Oy Vapaa Ajattelija AB v Finland* (1996) 22 EHRR CD69, E Com HR.

97 The hypotheticals include employment by a church as a cleaner, as a science teacher in a Catholic school, in a bookshop devoted to scriptural books and tracts, and as a librarian in an Islamic institute. See para 95.

2000/78. Yet Article 4(2) contains a much broader exception and subsequent explanation of its reach:

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Once one accepts that fundamental rights are in tension here, it is at least arguable that the regulations are *ultra vires* because by adopting the category of 'organised religion' they have *failed* to make sufficiently broad exception for organisations with a religious ethos.

The Equality Act 2006 offers yet another concept in the context of religious discrimination. It defines 'organisations relating to religion or belief' as organisations with the purpose of practising a religion or belief, advancing a religion or belief, teaching the practice or principles of a religion or belief, enabling persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or improving relations, or maintaining good relations, between persons of different religions or beliefs.<sup>98</sup> It does not apply to organisations whose sole or main purpose is commercial. The definition provided by the Equality Act 2006 would clearly extend to religious charities and para-church organisations. Charitable publishing houses devoted to the promotion of a specific religion and independent schools with a religious basis are arguably also included. What is striking is that the new law is far more prepared to recognise the need to create exceptions for religious organisations in respect of religious discrimination than to create exceptions in respect of religiously grounded gender discrimination.

Section 22 of the Gender Recognition Act 2004 creates a general offence of unauthorised disclosure of information relating to a person's 'gender history'. Although this applies only to those who have gained the information in an official capacity, that concept is broad enough to include receipt of information in connection with a voluntary organisation. The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005<sup>99</sup> makes provision for exceptions for certain legal, medical, financial and religious purposes. In respect of the religious purposes, disclosure is permitted to enable any person to make a decision whether to officiate or permit the marriage of the person, whether to appoint the person as a minister,

<sup>98</sup> Equality Act 2006, s 57.

<sup>99</sup> Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005, SI 2005/916.

office-holder or to any employment for the purposes of the religion, whether to admit them to any religious order or to membership, or to determine ‘whether the subject is eligible to receive or take part in any religious sacrament, ordinance or rite, or take part in any act of worship or prayer, according to the practices of an organised religion’.<sup>100</sup> Secondly, if a decision other than one relating to marriage is being made, the person making the disclosure must reasonably consider that that person may need the information in order to make a decision that complies with the doctrines of the religion in question or avoids conflicting with the strongly held religious convictions of a significant number of the religion’s followers.

Two general observations about the suitability of these exceptions to meet the religious concerns outlined in the previous section can be made. First, they do not always address the wider applications and implications of the new law. Rather, they tend only to address what are centrally ‘religious’ activities, and they do not address peripheral difficulties that might be experienced by religious people trying to work in a changed ethical environment. The narrow legislative exceptions mark a substantial shift away from the attitude of the government during the passage of the Human Rights Act 1998, when it was prepared to allay the fears of churches and religious bodies that their liberties might be restricted with a general interpretation provision:

If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (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.<sup>101</sup>

Second, the exceptions tend to require a rather crude attitude on the part of religious bodies, ruling out more nuanced and pastorally sensitive approaches. Matters of ethos and behaviour may be made a necessary condition of access to some benefit, but softer forms of preference are unlikely to be legally sustainable. One cannot avoid the conclusion that the exceptions have been drafted on the basis of the barest minimum necessary to satisfy international human rights standards of religious and associational liberty.

## THE ENIGMA OF EQUALITY

It is tempting to characterise recent legal developments as representing a fundamental tension in the political values of equality and liberty, in this case, gender

<sup>100</sup> Ibid, art 4.

<sup>101</sup> Human Rights Act 1998, s 13(1). For a discussion of the background to this provision, see J Rivers, ‘From toleration to pluralism: religious liberty and religious establishment under the United Kingdom’s Human Rights Act’ in RJ Ahdar (ed), *Law and Religion* (Aldershot, 2000).

equality and religious liberty. This is how the High Court viewed the matter when considering the religious exceptions to the Employment Equality (Sexual Orientation) Regulations 2003. Just as the claimants in that case considered the exceptions too broad, one might argue that the general tendency in recent years has been to make them rather too narrow. But, regardless of where the lines should be drawn, the terms of the debate would be about balancing two rights of equal constitutional status.<sup>102</sup>

However, in spite of its language of ‘balance’, this way of construing the problem is essentially critical of religion. It implies that the positions adopted by religious bodies are inegalitarian, and thus to be at most tolerated and, where possible, constrained. From the perspective of human rights, this has resulted in a curious reversal. Instead of considering whether the religious freedom of individuals and organisations has been proportionately limited in pursuit of the legitimate state aim of achieving gender equality, which would be the normal approach indicated by Article 9 of the European Convention on Human Rights, the court considers whether equality rights have been proportionately limited in pursuit of the legitimate aim of protecting religious liberty. Human rights reasoning originally required the state to justify its (often laudable) legislative incursions into a sphere of natural liberty, but the question is now whether the state has promoted religious liberty excessively in its legislative protection of ‘equality rights’. There seems to be a new priority to equality.

But the requirements of equality are enigmatic. In a famous article published twenty-five years ago in the *Harvard Law Review*, Peter Westen argued that the idea of equality was ‘empty’.<sup>103</sup> The basic Aristotelian maxim of equality that one should treat likes alike and unlikes differently was a purely formal conception of justice without substantive implications. Every possible legal rule drew distinctions, and thus could be criticised for treating certain people alike and distinguishing between others. Logically, Westen argued, there could be no ‘presumption of equal treatment’, since it would be entirely unclear what was being presumed. The only effect of equality language was to obfuscate the real issue of whether the particular claimant should benefit in the way claimed, and to grant a rhetorical advantage to those who managed to frame their claims in the language of equality.

This critique of equality can be well applied in any case where a class of persons is subject to distinctive treatment, and a case is being made for an expansion or contraction of that class. In *Ghaidan v Godin-Mendoza*, a surviving

102 This is also the basic approach of Ian Leigh’s helpful discussion: ‘Clashing rights, exemptions and opt-outs: religious liberty and “homophobia” in R O’Dair and A Lewis (eds), *Law and Religion* (Oxford, 2001).

103 P Westen, ‘The empty idea of equality’, (1982) 92 *Harvard Law Review* 537.



homosexual partner challenged the refusal of a landlord to extend to him the benefit of a tenancy which had been held by the deceased.<sup>104</sup> The relevant legislation granted the benefit to anyone living with the original tenant ‘as his or her wife or husband’. It had already been established that this applied to surviving heterosexual cohabitants. The House of Lords could not find any rational basis on which to justify the distinction on grounds of orientation. Baroness Hale concluded: ‘what matters most is the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial interdependence. Homosexual relationships can have exactly the same qualities of intimacy, stability and interdependence that heterosexual relationships do’.<sup>105</sup> This is an equality argument.

The problem is that it masks a moral ambiguity. Is the sexual dimension of the relationship a relevant similarity or not? If it is not morally significant, then the benefits of the legislation should be extended to all groupings of people, whether in a sexual relationship or not, so long as they display sufficient levels of intimacy, stability and interdependence. We know that there are many more non-sexual family and friendship groupings that might benefit from such an extension. But if the sexual nature of the relationship is essential to the legal benefit, one has to explain why. What is the good that is delivered by sexual intimacy within a homosexual relationship that is similar to other sexual relationships such as marriage and long-term cohabitation and different from, say, polygamy, or from a non-sexual friendship or family relationship?<sup>106</sup> Saying that the outcome in this case is required by equality begs all the questions. What happened in *Ghaidan’s* case is that one class of people (surviving homosexual partners) was moved from the class of those who do not benefit from a survivor’s tenancy (friends, family members) to the class of those who do (spouses and spouse-like cohabitants). This may be just, but it is not obviously a gain or a loss in equality.

However, this critique of equality is by itself inadequate. While it is true that the formal Aristotelian conception of equality has no substantive implications, there is also a liberal conception of equality that does. This liberal conception is rooted in the fundamental moral identity of all human beings, the moral irrelevance of fixed distinguishing personal characteristics, and the equal human capacity to benefit from a unified scheme of public general rights and duties.<sup>107</sup>

104 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 All ER 311, HL.

105 *Ibid.*, [2004] 2 AC 557 at 606, [2004] 3 All ER 411 at 459, para 139.

106 This agnosticism about the good of the sexual dimension of a same-sex relationship characterises the Civil Partnership Act 2004 as well.

107 Jeremy Waldron has recently argued that this liberal, Lockean conception of equality is rooted in Christianity: see *God, Locke and Equality: Christian foundations in Locke’s political thought* (Cambridge, 2002).

Such a conception of equality is centered on the removal of discrimination from the public sphere on the basis of fixed characteristics, historically used to justify exclusion, such as birth, race and sex. The liberal conception can also create a more general moral presumption against any differentiation between human beings. It is this conception of equality that lies behind the prohibition on direct discrimination. Difficulties start to arise when one moves beyond direct to indirect discrimination. Indirect discrimination occurs when some general rule is disclosed in fact to have a burdensome effect on a certain class. So, granting lesser employment protection to part-time employees discriminates indirectly against women,<sup>108</sup> and requiring all construction workers to wear safety helmets discriminates indirectly against Sikhs.<sup>109</sup> The key is how one responds to these uneven burdens. It is normal for some people to find certain rules harder to comply with, but the liberal will insist that the solution must be general: in the case of the second example, that either a helmet-wearing rule is (all things considered) justified for *all human beings* or it is not. To give Sikhs a special legal status, but not daredevil brickies, is to commit to the position that Sikh religious practice matters more than cheap thrills or personal convenience. From a liberal perspective this represents the politics of multiculturalism, of different legal regimes for different people. It may be just, but it is not equality.<sup>110</sup>

The liberal conception of equality clearly raises at least a burden of justification in respect of religious offices reserved only for men, but it is quite unclear what its implications are for marriage and sexual behaviour more generally. If sexual orientation is an irrelevant aspect of human identity, restrictions on sexual behaviour are only objectionable if they are harder for homosexual people to comply with than otherwise similarly situated heterosexual people, and if that cost is not to be borne in pursuit of some other good social aim. Given the fluid and contested nature of sexual orientation, it is not at all clear that a prohibition on sexual intimacy for single people puts homosexual people 'at a particular disadvantage when compared with other persons',<sup>111</sup> so it may not even be potentially indirectly discriminatory, let alone unjustifiable. Liberal equality struggles when it comes to matters of sex and gender, because it struggles to comprehend anything other than individuals and their choices. If it is objectionable to have separate facilities, or separate legal regimes, in respect of race, is it not also objectionable to have separate facilities, or separate legal regimes, for men and women? Sexual differentiation is an embarrassment, and the tendency of the liberal conception of equality is to

108 *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1, [1994] 1 All ER 910, HL.

109 See the Employment Act 1989, s 11.

110 For a vigorous critique along these lines, see B Barry, *Culture and Equality* (London, 2001).

111 Employment Equality (Sexual Orientation) Regulations 2003, reg 3(b)(i).

treat *any* gendered characteristic as morally irrelevant. Gender equality on this account requires the complete androgynisation of law. But the moral consequences of a thoroughgoing elimination of sex and gender are far-reaching indeed.

It is at this point that discussions of gender equality diverge significantly. Some liberals advocate 'substantive equality' or 'equal concern and respect' instead, which, far from being an equality of individuals rooted in the irrelevance of distinguishing personal characteristics, is based in the equal affirmation of different lifestyles.<sup>112</sup> This may require positive action to change the social status of hitherto excluded groups, and technical arguments about direct and indirect discrimination give way to more general considerations of protected victim status. Its limits are quite unclear, and one could even call this approach 'post-liberal' in its political amorality. By contrast, some feminist writers have questioned whether equality is the right concept at all.<sup>113</sup> For example, it is not clear that the special legal regime in respect of pregnancy in the workplace is a requirement of equality.<sup>114</sup> This is not to question whether it is correct; it is to question whether it is correct because it achieves 'equality'. Cultural feminists such as Carol Gilligan argue that women think and speak 'in a different voice', which needs to be respected and accommodated.<sup>115</sup> Radical feminists such as Catherine Mackinnon campaign against the social construction of women as subordinate to male desire and seek a programme of radical emancipation.<sup>116</sup> What these feminist views share with many religiously grounded accounts of sexual ethics is that they are fundamentally 'complementarian' in their approach to gender, resisting the tendency of liberalism to gender-blindness.

One could treat such complementarian accounts of gender as instances of Aristotelian or multicultural equality, but they are distinguishable in that they depend only on competing possible combinations of duality and identity in gender roles. For some purposes, men and women are indistinguishable; for others a morally relevant distinction should be taken into account. Furthermore, while the Aristotelian conception of equality would not object to the complete subordination of women – it objects to nothing – the complementarian account must find ways of making real the equal value of humanity's two sexes. The reason that marriage, as traditionally defined,<sup>117</sup> is seen as central to

112 R Dworkin, *Sovereign Virtue* (Cambridge, MA, 2000).

113 For an overview of legal feminisms, see PA Cain, 'Feminism and the limits of equality', (1990) 24 *Georgia Law Review* 803.

114 N Lacey, 'Legislation against sex discrimination: questions from a feminist perspective' (1987) 14 *Journal of Law and Society* 411.

115 C Gilligan, *In a Different Voice* (Cambridge, MA, 1982).

116 CA Mackinnon, *Feminism Unmodified: discourses on life and law* (Cambridge, MA, 1987).

117 *Hyde v Hyde* (1865–9) LR 1 P&D 130. A contrast could be drawn with polygamy, which expresses equality between men and women only in an Aristotelian sense, not a complementarian one.

the religious complementarian ethic is that it fixes the core meaning of gender equality: it takes one man and one woman to form the basis of a new and lasting social unit. Here is rooted the fundamental incompleteness of the individual gendered human being and the otherwise inexplicable moral commitment to twoness in sexual intimacy. A society expresses its commitment to gender equality by insisting that sexual intimacy be reserved to that end.

It therefore seems better to characterise the recent legal changes not as a clash between religious liberty and gender equality, but as a shift in possible conceptions of gender equality from more complementarian to more liberal, and even post-liberal, approaches. Religiously grounded views of sexual ethics are typically more complementarian in their approach to gender, and they thus find themselves at odds with the new law.

#### CONCLUSION: THE DIMINISHING SCOPE OF RELIGIOUS FREEDOM

In one sense, then, the recent legal developments have been liberal in their elimination of gender difference, and even post-liberal in their validation of new lifestyle options. On the other hand, the increasing encroachment of legal restrictions on what was hitherto a field of unregulated liberty is distinctly illiberal. It is not so much the fact that the public conception of gender and sexuality has shifted, as the thoroughgoing legal enforcement of that shift, that is remarkable. In the broadest perspective, the liberal legal project is the attempt to build a just and stable political and legal order in the face of religious and moral disagreement.<sup>118</sup> Human and constitutional rights as originally conceived were designed to prevent the state from overstepping its proper boundaries and thus jeopardising political stability. That is why they are full of freedoms: freedom of the person, freedom of speech, freedom of religion, freedom of association, freedom from interference with property and contract.

From the mid-nineteenth century the basic approach of English law has been to allow religious associations to form, divide and reform on a voluntary basis. In the doctrines they espouse, the conditions they set on membership, the appointment of workers, and the terms under which they make their services and facilities available to others, they have been virtually unfettered. Indeed, in some respects the law withdrew altogether, on the assumption that religion has nothing to do with secular law.<sup>119</sup> Increasingly, in areas of mixed state/religious interest such as marriage and the family, education, burial, and chaplaincies, religious associations have been free to provide services in pursuance of their

<sup>118</sup> J Rawls, *Political Liberalism* (New York, NY, 1993).

<sup>119</sup> See the twentieth-century cases on ministers of religion. With hindsight, the highpoints of this withdrawal of law are *President of the Methodist Conference v Parfitt* [1984] QB 368, [1983] 3 All ER 747, CA, and *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1036.

own ethos. The legal position of the established Church was also modified over time in the direction of this voluntarist model, either by reducing its coercive public dimensions, such as ecclesiastical jurisdiction and taxation, or by widening its privileges to other bodies. One can dispute some aspects of its remaining obligations and privileges but, broadly speaking, it has largely been able to reconcile the former with its own mission and use the latter altruistically.

The legal framework within which churches and religious associations have operated has thus been to a high degree facilitative rather than restrictive. Freedom of religion in English law has not simply been about the freedom to believe and manifest that belief in worship and doctrine, but about the construction of a plurality of protected social and material spaces in which believers could live faithfully to their religion. Within that protected social space, views of gender roles and sexual ethics have undoubtedly changed, but they have done so non-coercively. One can only wonder why this process of theological reflection and engagement with moral change should not be allowed to continue. It would have been much more in keeping with the traditions of English law to create *exemptions* for organisations with a religious ethos, rather than narrowly crafted exceptions.<sup>120</sup>

Instead it seems that a new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good. In Oliver O'Donovan's cogent image, 'equality-arguments [have] become the politicians' alchemy, producing the gold of judgment from the straw of non-committal stances'.<sup>121</sup> Churches and religious associations find themselves boxed in by its obligations, benefiting only from narrowly drafted exceptions narrowly interpreted by an unsympathetic judiciary. Of course, sight has not been lost entirely of freedom of religion, but it is now an open question whether our legislators and judges will be able to rediscover a liberal view of religion even while pursuing a liberal view of gender equality.

120 This is also Ian Leigh's conclusion (see note 102).

121 O'Donovan, *The Ways of Judgment* (Grand Rapids, MI, 2005), p 33.