EQUALITY, HUMAN RIGHTS AND RELIGION OR BELIEF IN ENGLAND AND WALES

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ABSTRACT

This paper presents selected findings of research commissioned in 2011 by the Equality and Human Rights Commission (the national human rights institution in Britain). The research explores the law in relation to equality, human rights and religion or belief in England and Wales and how it is understood and applied in the workplace, public services and the community. The paper examines some prominent legal cases and identifies areas where the law is unclear or contested. It includes a focus on situations where interests are perceived to conflict between claims based on religion or belief and those based on other 'protected characteristics'.

INTRODUCTION

This paper presents selected findings of research commissioned in 2011 by the Equality and Human Rights Commission (EHRC)[1] and conducted by London Metropolitan University. The research explores the law in relation to equality, human rights and religion or belief and how it is understood and applied in the workplace, public services and the community. It focuses particularly on situations where interests conflict (or are perceived to conflict) between 'religion or belief' and other protected characteristics.[2] The researchers used various means to engage with religion or belief organisations and other interested groups, including 67 semi-structured interviews.

Section 2 provides information about religion or belief in England and Wales. Section 3 explains the law on religion or belief and introduces some prominent legal cases. Section 4 discusses and identifies areas where the law is unclear or contested. Section 5 examines public debate about religion or belief.

RELIGION OR BELIEF IN ENGLAND AND WALES

Evidence about religion or belief in England and Wales is contradictory; differently worded surveys have produced widely varying results. However, some trends are clear: a decline in affiliation to historic churches; a rise in those stating that they have no religion; and (particularly in England) an increase in faiths associated with post-war immigration, especially Islam. Other trends are apparent: for example, the greater significance attached to their religion by minority religious communities compared to those that state a Christian affiliation.

In terms of discrimination on grounds of religion or belief, there is one dominant trend: the greater prevalence and seriousness of discrimination against Muslims compared to other groups defined by their religion. In recent years, there has been an increase in concerns and claims relating to perceived discrimination against Christians; however, evidence has not been adduced to substantiate such claims at a structural level.

Debate about multiculturalism in Britain has become intertwined with concerns about Islamic 'extremism' and the perceived segregation of communities with distinct social values. One response to these concerns is said to be a 'muscular' liberalism in which minorities are required to live according to the presumed shared social norms of the indigenous majority.[3] By contrast, 'progressive' notions of multiculturalism seek to address the powerlessness **both** of minority groups in relation to the centralised state **and** of individuals within those groups whose interests may conflict with those of dominant members of the group. Such an approach recognises and respects individuals' membership of a cultural or religious community, whilst also recognising the internal diversity of most such communities and ensuring that all their putative members are able to be full citizens of a liberal political community and enjoy full equality before the law.

THE LAW ON RELIGION OR BELIEF

In the past decade in the UK, both the quantity and the reach of the law on religion or belief have expanded as the state seeks both to facilitate and regulate the activities and practices of religious bodies in the context of a multi-faith society. There has been a considerable amount of litigation, much of which has been controversial.

The right to freedom of thought, conscience and religion

The Human Rights Act (HRA) 1998 came into force across the UK in October 2000.[4] Previously, the right to freedom of thought, conscience and religion was not expressly protected under UK law. The HRA introduced this right into domestic law through Article 9 of the European Convention on Human Rights (ECHR), as well as safeguarding equality through Article 14 of the ECHR which requires non-discrimination in the enjoyment of all other Convention rights. Under Article 9(1), the right to freedom of thought, conscience and religion is absolute; it may never be interfered with. The right to manifest one's religion or belief, either alone or in community with others and in public or private 'through worship, teaching, practice and observance' is qualified; it may be interfered with in certain circumstances.[5]

Discrimination on the grounds of religion or belief

Laws prohibiting discrimination on grounds of religion or belief are also of recent origin. In 2003, the Employment Equality (Religion or Belief) Regulations 2003 introduced obligations on employers not to discriminate, victimise or tolerate harassment on grounds of religion or belief, in line with European Union law. In a wide-reaching reform, the Equality Act 2010 replaced these regulations and a raft of other anti-discrimination laws. The Act prohibits direct and indirect discrimination, harassment and victimisation in relation to areas such as goods and services, employment and education. For the first time, it brings together all the 'protected characteristics' under one umbrella[6]

The Equality Act also introduces a new single Public Sector Equality Duty, which applies (unlike the previous equalities duties) to religion or belief. The duty on public authorities is to have due regard to the need to eliminate discrimination, harassment and victimisation on grounds of religion and belief; and advance equality of opportunity and foster good relations between people of different religions or beliefs and none.

Cases in domestic courts

The highest profile cases are those in which individuals or agencies have sought to abstain on grounds of religious conscience from providing goods or services to others on the grounds of their sexual orientation. In one leading case, a civil registrar (a Christian) refused to perform civil partnership ceremonies, leading to her being disciplined and threatened with dismissal.[7] The Court of Appeal held that her employer's policy of designating all registrars as civil partnership registrars had a legitimate aim of fighting discrimination. Moreover, the claimant was employed in a public role; she was required to perform a 'purely secular task' as part of her job and her refusal to perform that task involved discriminating against gay people. As of March 2012, this case is pending at the European Court of Human Rights (ECtHR), along with that of another claimant who wished to abstain from providing counselling to same-sex couples.[8] The claimants argue that their right to freedom of religion is not sufficiently protected in UK law. The EHRC has intervened in these cases to argue that the domestic courts came to the correct conclusions.

Also contentious have been cases relating to religious dress codes. In one case, a Christian worker for British Airways challenged her employer's refusal to allow her to wear a visible cross because it conflicted with its uniform code;[9] in another, a hospital nurse challenged her employer's ban on wearing a crucifix on a neck chain for health and safety reasons.[10] These claimants were unsuccessful in part because the law on indirect discrimination required them to show that their employers' actions put Christians **as a group** at a particular disadvantage; it was not enough to show that they alone had suffered disadvantage on the grounds of their religion. Moreover, it was held that the cross or crucifix were not prescribed by the claimants' religion or belief. In March 2012, these cases are pending at the ECtHR. The EHRC has intervened to argue that the domestic courts may not have given sufficient weight to the claimants' right to manifest their religion or belief.

AREAS OF CONCERN ABOUT THE LAW

This section highlights areas where our research indicates that the law on religion or belief is perceived to be unclear, under strain or vulnerable to challenge.

- There is concern that UK courts and tribunals have been too ready to dismiss religion or belief claims on the grounds that there has been no interference with the right, rather than considering in detail the justification for interference. This trend is not apparent at the ECtHR where establishing interference is generally a formality. Overall, there is a perception among some legal specialists and religious groups (particularly Christian ones) that Article 9 does not 'deliver the goods' and that the Equality Act 2010 provides a firmer basis for pursuing claims relating to religion or belief.[11]
- A related concern is that justification for restrictions on the manifestation of religion or belief should be assessed using sociological arguments rooted in the context of the

case, rather than arguments about whether particular beliefs or practices are prescribed by a religion or belief. This does not preclude scrutiny of the nature of beliefs and practices, but recognises the inherent difficulty that secular courts face in adjudicating doctrinal matters.

- Legal concepts have been stretched uncomfortably by the inclusion in the Equality Act 2010 of equality grounds which are qualitatively different from each other and which sometimes conflict. One effect has been to magnify conflicts – especially between the religion and sexual orientation 'strands' – which might not otherwise have become so visible or fraught.
- Underlying discussion of contentious legal cases are contested understandings about the nature of 'religion or belief' as a protected characteristic. The lack of consensus is particularly evident in relation to whether either 'religion' or 'belief' is a chosen or immutable characteristic. Less contestable is the observation that 'religion or belief' is distinct from other characteristics in having intellectual content and both proscribing and prescribing certain behaviour which impacts on adherents to the religion or belief and, indirectly, on others. As a result, some commentators suggest that religion or belief should enjoy an attenuated form of protection. By this account, a hierarchy between characteristics is inevitable - and is desirable if it prevents a levelling down of protection on other grounds; for example, if business needs can be used to justify indirect discrimination on grounds of religion or belief, then the same justification might in theory be introduced to justify sex or race discrimination. For others, the idea of prioritising some characteristics over others is anathema: the legal form of protection may differ, but the aim is to provide equivalence of protection.
- Tensions between the religion and sexual orientation strands have prompted calls, mainly from some Christians, for an extension of the right to conscientious objection to new and diverse situations. By this account, conscience (especially when religiously inspired) deserves special protection and can in most cases be accommodated without harming others. Other (both religious and non-religious) voices object to extending protection for conscientious objection where it allows an individual, on the basis of their religion or belief, to discriminate against others on another equality ground. A key principle established in case law is that employees or organisations that deliver public (and especially symbolic) functions cannot pick and choose who they serve on the basis of their beliefs. This principle was supported by a broad range of our interviewees, including some situated in the 'religion' strand, who viewed the ethos, reputation and reliability of public services as being at stake.
- A number of Employment Tribunal decisions have created a lack of clarity among employers about the definition of 'belief'; for example, anti-fox hunting sentiments[12] and a belief in the moral imperatives arising from man-made climate change[13] have been found to fall within the definition. There is consequent uncertainty as to which beliefs warrant legal protection and which do not.
- There is concern that the extension of the Public Sector Equality Duty to include religion or belief may, if poorly implemented, be divisive. Concerns include the potential for vociferous religion or belief groups to 'browbeat' public authorities and the difficulty of identifying authentic representatives of communities defined by religion or belief. However, the new single duty has the potential to address persistent disadvantage associated with religion or belief and the exclusionary effects of certain policies or practices. Participants suggested that to fulfil this potential, public authorities need to develop substantive understandings of equality as a vehicle to foster social inclusion and promote participation among marginalised groups defined by their religion or belief.

PUBLIC DEBATE ABOUT RELIGION OR BELIEF

A persistent theme of our research is the acrimonious nature of much public discussion about equality, human rights and religion or belief. Specific legal cases appear to act as a 'lightning rod' for a broader perceived gulf between the 'religious' and the 'secular'. Some participants situated in the 'religion' strand were vehement in their criticism of what they perceived as a combative 'secular' agenda to constrain the significance of religion in public life. In this sense, there is evident strain between the 'religion' and 'belief' strands.

However, our research suggests that the lines of debate are not always clearly drawn. For example, members of religion or belief groups (including co-religionists) argued both for and against extending protection for conscientious objection on religious grounds. Legal cases often reflect ideological and theological disputes that are taking place **within** religious organisations. It is also important to remember that the rights of lesbian, gay, bisexual or transgender believers are centrally at stake in this debate – a perspective that is overlooked in debates framed as 'religious' versus 'secular'.

Generally, participants spoke of the need to lower the emotional temperature of public discussion about religion or belief since 'copy-cat' claims for legal recognition and protection (between different religions or beliefs or different equality strands) were suppressive of debate.[14]

Areas of consensus

Notwithstanding the polarised nature of the debate, our research found several areas of broad consensus among groups situated in both the 'religion' and 'belief' strands (as well as other equality strands). Most interviewees stated that religion or belief groups are legitimate interest groups but should have no **privileged** role in the formation of law and policy. In particular, most interviewees - including a majority of those situated in the 'religion' strand – suggested that there is no room for 'truth claims' based upon a particular religion or belief. This suggests a broadly-held desire to maintain an appropriate balance between religion or belief and democratic debate.

We found a high degree of consensus about the desirability of making reasonable accommodation for religion or belief in the workplace, particularly in matters of dress codes and working patterns - in strong contrast to debate elsewhere in Europe.[15] We also found broad agreement about the **type** of criteria which might reasonably restrict the manifestation of religion or belief in some circumstances. These included: health or safety concerns; detrimental impact on colleagues (excluding pure offence); business efficiency; requirements for uniformity; and the capacity to communicate.[16] Virtually all interviewees agreed that individuals whose religion or belief is important to them may have to make personal sacrifices to avoid conflict with the law or professional requirements.

Another area of consensus was the undesirability of pursuing litigation except as a 'weapon of last resort'. Litigation may sometimes be necessary to challenge individual injustice or clarify the law. However, most interviewees stated that wherever possible, claims based on religion or belief should be pursued through action such as mediation, negotiation and public argument. Allied to concern about excessive litigation in this area is a view that the law is limited in its capacity to address complex questions of multiculturalism and social identity in modern Britain.

CONCLUSION

Overall, our research suggests that the most productive level of engagement for those who wish to advance debate, practice and understanding in relation to religion or belief is with those on the 'front line' of decision-making, such as policy-makers, practitioners and workplace managers. This places the focus on the use of equality and human rights as frameworks for day-to-day decision-making – on implementation rather than litigation. Where the principles established in legal cases are contested, it is important that public debate is conducted in good faith and with respect for the integrity of different perspectives, however irreconcilable they may appear to be.

NOTES

[1] The Equality and Human Rights Commission opened in 2007, covering England, Wales and Scotland (the Scottish Human Rights Commission covers devolved policy areas). A separate body covers Northern Ireland. The EHRC combines and extends the work of three former equality commissions (which covered race, disability and gender equality). It also takes on responsibility for other aspects of equality. It also has a mandate to promote understanding of the Human Rights Act (HRA) 1998. The research report, *Religion or belief, equality and human rights in England and Wales* was published by the EHRC in Spring 2012.

[2] 'Religion or belief' is a 'protected characteristic' under the Equality Act 2010. 'Religion' means any religion and 'belief' means any religious or philosophical belief; the lack of religion or belief is also covered. The others are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation. These are sometimes also called equality 'strands'.

[3] See David Cameron, speech at the Munich Security Conference on 5 February 2011; available at http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/.

[4] The aim of the HRA is to 'give further effect' in UK law to most of the fundamental rights and freedoms in the European Convention on Human Rights (ECHR). The Act makes available in national courts a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights (ECtHR) in Strasbourg.

[5] Under Article 9(2), limitations must be 'prescribed by law' and 'necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

[6] The Act contains exceptions permitting discrimination in certain limited and specified circumstances. Some of these relate to religion or belief and have proved highly controversial.

[7] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357

[8] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880

[9] *Eweida v British Airways* [2010] EWCA Civ 80

[10] *Chaplin v Royal Devon and Exeter NHS Foundation Trust* ET Case No. 1702886/2009, 6 April 2010

[11] In *R (Watkins-Singh) v The Governing Body of Abedare Girls' High School* [2008] EWHC Admin 1865, a Sikh pupil won her claim to be allowed to wear a *kara* bangle at school. Her legal team relied on race and religious discrimination rather than on Article 9. This distinction allowed the court to distinguish the claim from Article 9 case law. The judgment sidestepped the question of whether the wearing of the *kara* was obligatory to the claimant; disadvantage would also occur where a pupil was forbidden from wearing an item that was exceptionally important to his or her religion or race, even if it was not an actual requirement.

[12] *Hashman v Milton Park, Dorset Ltd (t/a Orchard Park)* ET Case No. 3105555, 4 March 2011.

[13] *Grainger Plc v Nicholson* EAT Case No. 0219/09/ZT, 3 November 2009.

[14] An example of conduct likely to accentuate conflict is that of a columnist in an independent Anglican newspaper, who described the leadership of gay rights organisations as 'the Gaystapo'. See 'Anglican newspaper defends "Gaystapo" article', *The Guardian*, 8 November 2011. Available at: http://www.guardian.co.uk/world/2011/nov/08/anglican-newspaper-defends-gaystapo-article.

[15] In recent years, there has been fierce public debate in Europe about the wearing of the *hijab* (cloth hiding the hair and neck), *niqab* (cloth covering the face) or *burqa* (garment covering the whole body except the eyes) in public with a ban on the concealment of the face in France and legislative proposals tabled in several other states.

[16] This criterion was suggested by interviewees situated in both the 'religion' and 'belief' strands and other equality strands, including a Muslim participant. They suggested that it would often be reasonable to restrict the wearing of a full face veil in public-facing roles. In the case of *Azmi v Kirklees Metropolitan Borough Council,* UKEAT/0009/07/MAA, 30 March 2007, the Employment Tribunal found that it was proportionate for a school to suspend a teaching assistant who wished to wear the full face-veil when providing teaching support to young children.

A BIT OF HISTORY...

Bill 107 – the latest reform

On June 30, 2008, Bill 107 came into force. This major reform of Ontario's human rights system included:

- Changing the role of the Ontario Human Rights Commission to not have carriage of individual human rights complaints, focusing instead on working on systemic or root causes of discrimination
- Having people make complaints – called applications – directly to the Human Rights Tribunal of Ontario
- Creating a new organization – the Human Rights Legal Support Centre – to provide legal advice to people making complaints.