

## HUMAN RIGHTS WITHIN THE CHURCHES

### The Church of Scotland's anti-Discrimination legislation: an example of "equivalence of protection"

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#### Summary

*The Church of Scotland has developed an approach to human rights principles that is consistent with its distinctive spiritual jurisdiction, which is recognised in British civil law. By legislating on the basis of offering 'equivalence of protection' to those subject to the Church's jurisdiction, the Church is able to set its standards of conduct and justice that are derived from religious beliefs, whilst ensuring no diminution of personal rights to ministers and others.*

#### 1. Church and State

Throughout Europe, Churches experience many different kinds of constitutional relationship with the civil states in which they operate. Some have no distinctive spiritual jurisdiction in law, and are subject to civil law just like any other voluntary or professional body. Some enjoy particular religious freedoms within the law, perhaps in the form of exemptions from certain statutory obligations or regulations. A few Churches have some kind of recognized legal jurisdiction for their own spiritual purposes, an area of authority where the writ of civil law does not run. The Church of Scotland is an example of the last category.<sup>1</sup> Consequently it faces a profound and constant question, whether it has a responsibility – parallel to the moral responsibility of the civil magistrate – to enshrine into its own legal system the same standards and principles of human rights we have become used to seeing become visible in national laws.

##### 1.1. Human Rights and Civil Law

Even when a separate spiritual jurisdiction is conceded to a Church by the state, the civil law may regulate many aspects of the Church's life: to the extent that it is an employer, to the extent that it provides services to the public, to the extent that it operates public buildings, and so on. In those non-spiritual activities, the Church is subject to the principles of human rights (for example the principle of non-discrimination) expressed in those regulations. Most of the time that is not problematical, but just occasionally there may be a clash of competing beliefs. Famously in Great Britain, the Roman Catholic Church found itself caught by laws outlawing discrimination against prospective adoptive parents who are homosexual,

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<sup>1</sup> see MacLean, M.A., *The Crown Rights of the Redeemer: The Spiritual Freedom of the Church of Scotland*, Edinburgh: St Andrew Press 2009

because it was not exempt from the requirement of the civil law in that area of its work.

### **1.2. Church Law and Personal Rights**

It is rather tempting to assume that the Churches are only ever negatively distinctive, or resistant to the promotion of personal human rights. Far from it: one can demonstrate the Biblical and theological roots of much of the Western tradition of rights *in persona*, and the Churches take pride in guaranteeing individuals' rights, sometimes going beyond the practice of secular institutions in doing so. Across Europe, Christians will readily bear witness to their Churches' example and courage in difficult circumstances.

But where secular law is founded on a basis of universal personal rights, the perennial challenge for Churches is this: is it possible to be different from secular society? Is it right to be, in this rights-driven age? Why bother having a separate spiritual jurisdiction if it is not possible to be different from the world regulated by civil law? If there can be no distinctiveness in the Church's attitude to rights and obligations, why trouble to maintain our own legal system?

### **1.3. The Concept of Equivalence of Protection**

The Church answers this puzzle by offering within its own community an 'equivalence of protection' alongside whatever is provided by the civil law. It cannot do otherwise without denying the relevance of fundamental human rights in Church life. It is not 'identity of protection'; but it is a separate, parallel, comparable enshrining into Church law of human rights principles, which are read by Christians from Natural Law but also from Divine Law. And often indeed the expected standards of conduct are higher within the life of the Church: where adultery is often still treated as a disciplinary offence even where the civil law does not treat it as a crime; where a minister's breach of confidentiality is regarded very seriously even in countries where clerical confidence would not be protected by the civil courts; or where ordination or marriage vows are regarded more solemnly than they would be in civil law.

## **2. Anti-Discrimination Principles**

A flurry of activity in the European institutions over the last decade makes the field of anti-discrimination law one of the most visible illustrations of the concretisation of human rights into positive law. It also happens to be the area in which Churches seem to act most distinctively, most problematically.

### **2.1. The Churches and Discrimination**

Churches have often wanted, for sincerely spiritual reasons, to exercise discrimination in ways the civil law would not allow: against women's ordination in some traditions, against homosexuals' leadership of the Church in some traditions, and of course on grounds of doctrinal integrity in virtually every tradition. Sometimes this distinctiveness of practice draws admiration, and often it draws criticism from commentators within and beyond the Churches. Often, however, the Church will wish to provide exactly the same protection against the same illegitimate grounds of discrimination as the civil law provides. And often, as I have argued above, the Churches offer an equivalence of protection, serving a single fundamental principle of rights but doing so in an unmistakable Christian way.

### **2.2. The Need for Separate Protection**

The recent experience of the Church of Scotland provides an interesting illustration of how 'equivalence of protection' can work. As part of an exercise with the Churches, the Department of Trade and Industry (as it was then called) of the UK Government considered whether clergy could be said to have adequate protections as workers, even where they were not regarded as 'employees' in conventional terms. Behind the exercise was the implied threat that the government might introduce regulation to

protect clergy where the denomination itself did not adequately do so within its own jurisdiction. In some ways this felt slightly sinister, as if the government was allowing the Church its independent jurisdiction but then determining what should be included in its terms, and threatening to supply that want in civil law if all else failed. In particular, the government observed that the Church's procedures to tackle discrimination were not clearly articulated and rather difficult to identify.

### 2.3. Church of Scotland Anti-Discrimination Legislation

The Church's Ministries Council and its Legal Questions Committee took the view that the right response was to provide 'equivalent protection' by introducing into the law of the Church a measure meeting both the highest standards of civil anti-discrimination legislation and the best practice of the Church's life. The DTI having made a reasonable observation of a slight gap in the Church's own law, it would be foolish to react aggressively and try to defend the jurisdiction – and the gap in its protection! With the help of a specialist discrimination lawyer, legislation was framed.<sup>2</sup> Its terms went beyond the equivalent civilian legislation, for example by requiring the process to include an attempt at mediation of the situation before resort to a solution imposed by the Church's courts. The Church thus borrowed the best of the civil law's provision but added its own ethos, providing an equivalent (but much better) kind of protection for the Church's needs.

An interesting footnote to the process emphasises the independence of spirit still very much in evidence within the Church. As soon as this legislation was passed, the same Committees proposed that the Courts of the Church should have the power to impose financial penalties in proven discrimination cases, an element missing from the original text. Through consultation it became clear that most of the Church rejected the proposed addition, as being a copying of a temporal civil law provision that was unnecessary and inappropriate within a spiritual jurisdiction. No one, therefore, can say that the Church of Scotland exercised its own jurisdiction by slavishly importing everything relevant out of the civil jurisdiction.

### 3. Conclusions

This article has described the approach in one denomination with a historically unique relationship with the state in which it operates. Perhaps, though, the conclusions to which this Church's experience points have a more universal relevance:

- The fundamental principles of human rights derive from Divine Law as well as from secular sources of legal principle. Therefore Churches must have some duty to enshrine these principles in their own law making.
- This may, in practice, mean that Churches enact measures very much like civil laws. This should not be mistaken as an incorporation of civil law into Church law, no matter how strong the similarity. Doing the same good thing others have done does not necessarily mean 'conforming to the world' provided that motivation is Christian and faithful.
- Churches may have to be ready to defend any distinctive position that appears to operate a lower standard of discrimination policy than society normally expects. Indeed they may find legal pressure against doing so.
- Churches, however, should not forget that they have the opportunity to operate a higher standard, or a better practice, or a nobler example, than secular society gives.

**Often it is assumed that the Churches' role in the protection of human rights must lie only in serving those whose rights are under threat. This article suggests that it is also in its bearing of obligations as a legal authority that the Church has a difficult role, which it must fulfil without apology or hesitation.**

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<sup>2</sup> Act V 2007 anent Discrimination