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# Women Bishops: Equality, Rights and Disarray

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*In this article we discuss the recent history of the failed draft Bishops and Priests (Consecration and Ordination of Women) Measure, situating this within the broader context of the ordination of women and debates around the Equality Act exceptions for an organised religion. We aim to provide an account of the ways in which equality rights have been implemented in the relevant law; how the Church of England is responding to these rights; and how broader society understands the importance of gender equality and reacts to Synod's rejection of the draft Measure. We analyse these with reference to theories of heteronormativity and scholarship of human rights. In doing so, we aim to explain what is happening in the Church of England and broader society, and draw some conclusions about the current opportunities open to the Church and the state in matters of rights and equality.<sup>1</sup>*

**Keywords:** women bishops, Equality Act, Church of England, conflicting rights, heteronormativity

## INTRODUCTION

This article discusses the ways in which being a woman priest in the Church and a potential candidate for the episcopacy is conceived of in the secular law, specifically the Equality Act 2010, and in the Church. 'The Church' is understood in a pluralistic way, reflecting conflicting and intersecting identities: the institutional Church and its official legislation and policy, the different theological traditions within the institutional Church and current political alliances between different positions on the church tradition continuum that have an 'insider' presence, such as Reform and Forward in Faith. In addition, we consider the conceptions that 'broader society' (understood as encompassing commentary from both faith-based and non-faith-based individuals and groups) displays of women bishops and the current state of equality and rights within the Church. In studying the regulation of gender equality in the Church of England, the secular law's regulation of the Church and broader society's response to the defeat of the draft Bishops and Priests (Consecration and Ordination of Women) Measure, we aim

1 We thank those who have contributed to our thinking in various ways, especially Pete Palumbo and Matthew Waites. We are grateful to the colleagues who commented on earlier versions of this article (often at short notice), fellow trustees of Changing Attitude England, and the anonymous reviewers for their constructive comments.

to achieve an understanding of the ways in which religion and gender rights interrelate in the current UK context. This article is a development of earlier work both of us have undertaken with regard to Church and sexuality issues,<sup>2</sup> which, following Stevi Jackson,<sup>3</sup> we see as inextricably linked to gender issues.

## RIGHTS AND EQUALITY: THE NORMATIVE CONTEXT OF THE EQUALITY ACT 2010

The Equality Act 2010 provides significant exceptions from anti-discrimination legislation that underpin a lawful 'no' vote to women bishops in the Church of England. Before looking in more detail at its provisions, we situate the Act in the broader context of ideas, debates and norms about rights and equality.

The non-discrimination strands of human rights law and the equality strands of European Union (EU) law – which the Act implements – have conceptual and historical differences but have begun to converge somewhat. The European Convention on Human Rights (ECHR) has indirect influence on EU law via the Charter of Fundamental Rights of the European Union (2000/C 364/01), now legally binding via the Lisbon Treaty. The Lisbon Treaty also contains a commitment by the EU to accede to the ECHR,<sup>4</sup> but the conditions for accession are still being negotiated.

The relevant ECHR provisions relating to religion that have influenced equality legislation are Articles 9(1) (freedom of thought, conscience and religion) and 14 (prohibition of discrimination on the enjoyment of the Convention rights and freedoms). The ECHR's incorporation into UK domestic law by the Human Rights Act 1998 (HRA) requires that all legislation must be read and given effect in a way compatible with the ECHR, taking into account Strasbourg jurisprudence (sections 3 and 2 of the HRA respectively).

From a human rights perspective there is an implicit conflict between sexuality and religion. The most recent European Court of Human Rights (ECtHR) consideration of Article 9 rights conflicting with other human rights is *Eweida and Others v the United Kingdom*.<sup>5</sup> The cases of *Ladele* and *McFarlane*, two of the 'Others', concerned the claimants' religious justifications for discrimination against non-heterosexual couples that resulted in their dismissal from work (as a registrar of births, deaths and marriages who refused to officiate at civil partnership ceremonies and as a Relate counsellor

2 R Lucas, 'Religion, sexual orientation and the Equality Act 2010: gay bishops in the Church of England negotiating rights against discrimination', (2012) 46 *Sociology* 936–950; K Sharpe, *The Gay Gospels: good news for lesbian, gay, bisexual and transgendered people* (Winchester, 2011).

3 S Jackson, *Heterosexuality in Question* (London, 1999).

4 Enabled by Article 17(1) Protocol No 14 to the ECHR, amending Article 59(2) of the ECHR.

5 *Eweida and Others v The United Kingdom* (App Nos 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013, ECtHR, Fourth Section.

respectively). Both were unsuccessful in the ECtHR. The Court held that, in both cases, a permissible balance was struck between the rights relating to religion or belief (Article 9) and sexuality rights (Article 8).<sup>6</sup>

In EU law also, there is a tension between gender equality and religion, for example in Article 10 of the Treaty on the Functioning of the European Union (TFEU): 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'<sup>7</sup> (We look in more detail below at the EU legislation that the Equality Act transposes.) In the national arena, debates about the relationship of equality norms and human rights have been fuelled by the establishment of the Equality and Human Rights Commission in 2007,<sup>8</sup> which has the statutory remit to promote and monitor human rights and to protect, enforce and promote equality across nine protected grounds, including gender and religion and belief.

Alongside these developments, we may observe a different picture. Anthony Woodiwiss observes that:

... inequalities intrinsic to even 'good societies' also, to varying degrees, affect the coverage, value content and legal form of their domestic rights discourses ... each society will tend to produce a human rights regime that suits itself, especially in the sense that it interferes as little as possible with the prevailing disposition of power. Thus, although human rights regimes provide protections for the weaker parties in sets of social relations, there are always modes of protection available that are less disruptive of the status quo than others, and these less disruptive regimes are those that tend to become established.<sup>9</sup>

There are limitations in only discussing formal human rights.<sup>10</sup> Formal equality in the law and institutional arrangements 'may conceal and even perpetuate social inequalities' in their application.<sup>11</sup> Nonetheless, formal rights are important: 'formal legal inequality at least permits, and arguably encourages, discriminatory practice'.<sup>12</sup> Here we will argue that there is no formal equality in the

6 See also, in this issue, M Hill, 'Religious symbolism and conscientious objection in the workplace: an evaluation of Strasbourg's judgment in *Eweida and Others v United Kingdom*', (2013) 15 *Ecc LJ* 191–203.

7 See also Articles 8, 17 and 19 TFEU.

8 P Hynes, M Lamb, D Short and M Waites, 'Sociology and human rights: confrontations, evasions and new engagements', (2010) 14 *International Journal of Human Rights* 824.

9 A Woodiwiss, *Human Rights* (Abingdon, 2005), p 5.

10 Jackson, *Heterosexuality in Question*, p 157; S Seidman, *Beyond the Closet: the transformation of gay and lesbian life* (New York, 2002), p 6.

11 M Waites, 'Equality at last? Homosexuality, heterosexuality and the age of consent in the United Kingdom' (2003) 37 *Sociology* 637 at p 641.

12 Clucas, 'Religion, sexual orientation and the Equality Act 2010', p 939.

Equality Act as far as the interrelationship of some of the rights relating to religion and gender are concerned. Our discussion helps to clarify the social values and understandings that underlie this particular legislative accommodation of competing human rights.

## THE EQUALITY ACT: PROTECTED CHARACTERISTICS AND EXCEPTIONS FOR AN ORGANISED RELIGION

The Equality Act 2010 is now the principal source of anti-discrimination and equality legislation in the UK, harmonising, and in some cases strengthening,<sup>13</sup> existing law. This article is concerned with being a woman – one aspect of the protected characteristic of sex – within the context of employment or promotion by the Church as a bishop. More accurately in Church terms, clergy hold an office, and priests ‘promoted’ may exercise the office of a bishop within the Church, although clergy are workers for the purposes of anti-discrimination legislation.<sup>14</sup> The characteristic of religion or belief is itself protected from discrimination.

The Act defines the protected characteristic of sex as follows in section 11:

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

The anti-discrimination provisions of the Act apply to all employers except in the case of specific exceptions. This means that the Church must not discriminate, harass or victimise on the grounds of sex unless there is specific provision allowing this, and then only to the extent that is permitted by law (that is, the discrimination must be proportionate).

Whether the Church is a public authority or exercises public functions for the purposes of the public sector equality duty in section 149(1) and (2) of the Act, which has broader positive duties than non-discrimination, is unclear. Although *Aston Cantlow* indicated that certain of the ‘juridically . . . amorphous’ aspects of the Church may be ‘functions of a public nature’<sup>15</sup> within the meaning of ‘public authority’ in section 6 of the HRA, the precise circumstances in which the Church may be a public authority of some kind remain unresolved.<sup>16</sup>

13 For example in the provisions for the protected characteristic of gender reassignment.

14 *Percy v Church of Scotland* [2005] UKHL 73.

15 *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2003] UKHL 37; [2004] 1 AC 546 per Lord Rodger at para 154.

16 For further discussion of this issue and the *Aston Cantlow* cases, see C George, ‘The ecclesiastical common law: a quarter-century perspective’, (2012) 14 *Ecc LJ* 27–30.

Schedule 9 paragraph 2 of the Act provides the exceptions for the Church and other religious bodies, permitting discrimination ‘for the purposes of an organised religion’ where the application of the requirement engages the compliance principle (a requirement may be made ‘*so as to comply with the doctrines of a religion*’<sup>17</sup> (Schedule 9, paragraph 2(5)) or non-conflict principle (*to avoid conflict with the ‘strongly held religious convictions of a significant number of the religion’s followers*’<sup>18</sup> (Schedule 9, paragraph 2(6)), and the person to whom a religious body applies the requirement does not meet it (or the religious body has reasonable grounds for not being satisfied that the person meets it) (Schedule 9, paragraph 2(1)).

This discrimination can be in relation to employment, promotion and training. The permitted requirements include ‘to be of a particular sex’ (Schedule 9, paragraph 2(4)(a)). Discrimination issues that used to be dealt with separately – such as the sex discrimination in *Webb*<sup>19</sup> and the sexual orientation discrimination in *Amicus*<sup>20</sup> – are now governed by the same exception.

The exceptions in the Act make lawful the ‘no’ vote to women bishops in the Church of England. However, the legal situation may be more complicated than simple enquiry into the Act itself. In its second report on the Equality Bill,<sup>21</sup> the Joint Committee on Human Rights discussed the amendments to the Bill that were made at Committee stage in the House of Lords. The original Bill had expanded the provisions of the earlier Employment Equality (Sexual Orientation) Regulations 2003 (‘the 2003 Regulations’) better to transpose the relevant EU law provision, Article 4(2) of the Framework Equality Directive 78/2000/EC (the Framework Directive) on occupational requirements, as follows:

(5) The application of a requirement engages the compliance principle if the application is a proportionate means of complying with the doctrines of the religion;

(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the work, the application is a proportionate means of avoiding conflict with the strongly held religious convictions of a significant number of the religion’s followers.<sup>22</sup>

17 Emphasis added.

18 Emphasis added.

19 See *Webb v Emo Air Cargo (UK) Ltd (No 2)* [1995] 1 WLR 1454 for discussion of the interpretation of ss 1(1) and 5(3) of the Sex Discrimination Act 1975, implementing (imperfectly) Article 2(1) of Directive 76/207/EEC.

20 *Amicus v Secretary of State for Trade and Industry* [2004] EWHC 860.

21 Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill (second report)* (2010), HL Paper 73; HC 425, paras 1(3)–1(12).

22 The Committee also discussed Schedule 9, para 2(8): ‘employment... for the purposes of an organised religion’.

In the *Amicus* case, Richards J interpreted paragraph 7(3) of the Regulations (whose text is echoed in the enacted version of Schedule 9, paragraph 2) as compatible with the Framework Directive, provided it is ‘construed strictly since it is a derogation from the principle of equal treatment; and it has to be construed purposively so as to ensure, so far as possible, compatibility with the Directive’.<sup>23</sup> The Committee, discussing a reasoned opinion infringement of the European Commission, preferred the more expansive version in the original Bill, and concluded that ‘In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) [of the Act] we share the view of the European Commission that UK law does not comply with the Framework Equality Directive.’<sup>24</sup>

If we accept the views of the Joint Committee and the European Commission, then the situation regarding women bishops becomes more complicated. The 2003 Regulations applied only to sexual orientation discrimination, but the exception, restating the wording of the Regulations, now applies to all of the permitted requirements, including ‘to be of a particular sex’. If it is correct that the Act does not comply with the Framework Directive, there now exists the possibility of challenge to the Act’s permitted discrimination on requirements of sex and other grounds. The permitted discrimination against women bishops may arguably ‘[generate] legal uncertainty and [mislead] organisations who wish to make use of this exemption as to the true nature of the test to be applied in law’, as well as potentially failing the requirements for clarity and precision of EU law.<sup>25</sup>

Where domestic legislation attempting to transpose the Framework Directive fails and a case comes to court, there is, as demonstrated in the *Marleasing* case, a general obligation in EU law to interpret the national law in a way that gives effect to European law.<sup>26</sup> If the Act cannot be reinterpreted to comply with the Directive, there may be a claim of direct effect if the case is against a public body. Here, *Aston Cantlow* comes into play: could the Church of England be a public body when discriminating against women bishops for the purposes of employment? Additionally, if an EU law-compliant interpretation proves impossible owing to national drafting, and someone suffers a loss as a result of the UK’s faulty implementation of the Directive, this may give rise to a claim in state liability under the *Francoovich* and related principles.<sup>27</sup>

The original Schedule 9 of the Bill included proportionality in both the compliance (paragraph 2(5)) and non-conflict (paragraph 2(6)) principles. In the instance of women bishops in the Church, the case for discrimination is

23 *Amicus* at paras 115 and 122.

24 Joint Committee on Human Rights, *Equality Bill*, para 1(11).

25 *Ibid*, para 1(7).

26 *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89 [1990] ECR I-4135.

27 *Francoovich v Italy* (1990) Case C-6/90 and Case C-9/90; [1991] ECR I-5375.

unlikely to be justified on the grounds of the compliance principle, as in 1975 the General Synod motion that ‘There are no fundamental objections to ordination of women to the priesthood’ was carried. The non-existence of women bishops (and any discrimination against women bishops in whatever legislation is eventually passed) is more likely to be defended on the grounds of the non-conflict principle – to avoid conflict with the ‘strongly held religious convictions of a significant number of the religion’s followers’ (Schedule 9, paragraph 2(6)). This provision is also subject to the requirement of proportionality.

In sum, it seems that the exceptions for the purposes of an organised religion in Schedule 9(2) of the Act may be in breach of EU law in failing explicitly to require proportionality. Whether any remedy is available to an individual will depend on the possibility of the direct effectiveness of the Framework Directive in the case of the Church being a public body in refusing to employ women bishops.

#### WOMEN’S ORDINATION: OPPOSITION AND ACCOMMODATION

As mentioned above, in 1975 the General Synod motion that ‘There are no fundamental objections to ordination of women to the priesthood’ was carried. The first women deacons were ordained in 1987. After considerable time spent drafting the Priests (Ordination of Women) Measure 1993, making provision for those who wished to resign on conscience grounds and providing pastoral arrangements for those opposed to women’s ordination, the first women priests were ordained in 1994.

There has always been opposition to women’s ordination within the Church. The first attempt to remove legal barriers to women’s ordination miscarried.<sup>28</sup> According to a Church of England statistics document, by 2004, 512 clergy had left their stipendiary or non-stipendiary posts or retired owing to their opposition to the ordination of women priests.<sup>29</sup> More recently, five Anglican bishops announced their conversion to Roman Catholicism, reportedly over disagreement about female clergy and gay bishops.<sup>30</sup>

The Priests (Ordination of Women) Measure 1993 (‘the 1993 Measure’) makes it lawful for women to be ordained to the office of priest (section 1(1)), but this legislation also contains a number of provisions that accommodate those who oppose women’s ordination. (The readers of this journal may

28 Church of England, ‘Women bishops’, <<http://www.churchofengland.org/our-views/women-bishops.aspx>>, accessed 26 January 2013.

29 ‘Clergy leavers (and subsequent re-entrants) under the ordination of women legislation’, archived at <<http://web.archive.org/web/20080704210520/http://www.cofe.anglican.org/info/statistics/churchstats2003/leaversowl.pdf>>, accessed 12 February 2013.

30 A Arco, ‘Five Anglo-Catholic bishops resign’, *Catholic Herald*, 8 November 2010, <<http://www.catholicherald.co.uk/news/2010/11/08/five-anglo-catholic-bishops-resign/>>, accessed 3 February 2013.



be familiar with these provisions, but we set them out here in detail to assist our analysis below.) A bishop of a diocese was permitted to declare that a woman was not to be ordained, instituted or licensed, or given a licence or permission to officiate as a priest, within the diocese (section 2(1)(a)–(c)).<sup>31</sup> A parochial church council (PCC) may pass either or both Resolutions A (a PCC would not accept a woman as the minister who presides at or celebrates Holy Communion or pronounces the Absolution in the parish) and B (the PCC would not accept a woman as the incumbent or priest in charge of the benefice or as team vicar for the benefice) (Schedule 1), though Resolution A may not be passed if there is a women priest or assistant curate as part of its ministry team (section 3(1)). The same resolutions may be passed by the administrative body of a cathedral church (section 4(1) and Schedule 2). It is an ecclesiastical offence for ordained clergy to act in contravention of these declarations or resolutions (section 5). Section 6 sets out the exceptions to sex discrimination legislation.<sup>32</sup> Section 1(2) of the 1993 Measure declares: ‘Nothing in this Measure shall make it lawful for a woman to be consecrated to the office of bishop.’

Completing the picture is the so-called ‘Resolution C’. Where parishes wish to avoid coming under the jurisdiction of a male bishop who is willing to ordain women (or eventually a women bishop herself), PCCs may petition the diocesan bishop under section 7(1) of the Episcopal Ministry Act of Synod 1993 (‘Act of Synod’). The diocesan bishop is then required to provide ‘alternative oversight’ of the parish. In ‘Resolution C’, we see the idea that something about women priests is so powerfully wrong that male bishops willing to ordain women are contaminated also.<sup>33</sup>

Elsewhere in the Act of Synod, it is stated that ‘discernment in the wider Church of the rightness or otherwise<sup>34</sup> of the Church of England’s decision to ordain women to the priesthood should be as open a process as possible’ and ‘the integrity of differing beliefs and positions concerning the ordination of women to the priesthood should be mutually recognised and respected’ (parts 3(a)(i) and (iii) respectively of the preamble to the Act). Section 1 declares:

31 Section 2 constituted part of the transitional provisions so that a (diocesan, not suffragan) bishop in post at the time was not required to have women in his diocese. Although it is in force, its practical effect in now nil as no diocesan bishop in post at the time remains in post now. In practice, bishops unwilling to ordain women have found commissaries to do so. A bishop unwilling to ordain women may still permit, institute or license women clergy.

32 Since repealed by The Employment Equality (Sex Discrimination) Regulations 2005. Exceptions are now found in Schedule 9 of the Equality Act.

33 See A Burnham, ‘The work of provincial episcopal visitors’, in J Baker (ed), *Consecrated Women?* (Norwich, 2004), pp 199–200, for a discussion of ‘taint’.

34 Implying that the decision may be wrong: B Bagilhole, ‘Prospects for change? Structural, cultural and action dimensions of the careers of pioneer women priests in the Church of England’, (2003) 10 *Gender, Work and Organization* 363.



Except as provided by the Measure and this Act no person or body shall discriminate against candidates either for ordination or for appointment to senior office in the Church of England on the grounds of their view or positions about the ordination of women to the priesthood.

Here we see that opposition to women's ordination is formally protected within the Church. Section 1 of the Act of Synod, although phrased neutrally in a way that might protect both pro- and anti-women's ordination views, is understood in the context of the Act of Synod as ensuring that no person with 'traditionalist' views on women shall be discriminated against. This gives official approval to the idea that rejecting women priests is as legitimate as accepting them.<sup>35</sup>

Returning to the 1993 Measure, the first six sections (those of substantive importance to the issue of women priests), section 1(1) notwithstanding, are concerned with limiting the existence and activities of women priests.<sup>36</sup> This is in sharp contrast to the regulation of the ordination of men. Their requirements are those set out in the Canons, particularly Canon C 4(1). The principal limitation on male ordinands is age (Canon C 3(5) and (6)). Of course, female candidates for ordination are also subject to the Canons. Yet women priests have the additional restrictions of the 1993 Measure. In this way – being subject to additional regulation to men, and the specific content of that additional regulation – women priests are clearly understood and defined as deviations from the male norm.

This aberration is not just a historical accident: it is a consequence of a certain understanding of the proper order of things. The deviation of female priests is not just difference from male gender but has normative connotations. Here we see the operation of heteronormativity, understood centrally as the normative framework that constructs '(patriarchal) heterosexuality as natural and unchangeable'<sup>37</sup> and organises sexuality and gender in a historically specific manner that creates a binary divide between masculinity and femininity (the former being dominant), and marginalises the transgressor.<sup>38</sup> As Jackson says:

An effective critique of heterosexuality . . . must contain two key elements. The first of these is a critique of heteronormativity, of the normative status of heterosexuality which renders alternative sexualities 'other' and marginal. The second is a critique of what some have called 'hetero-patriarchy' or 'hetero-oppression' . . . in other words heterosexuality as systematically

35 Bagilhole, 'Prospects for change?', p 363.

36 The other sections comprise interpretation and amendments to existing legislation.

37 C Ingraham, 'The heterosexual imaginary: feminist sociology and theories of gender', in S Seidman (ed), *Queer Theory/Sociology* (Oxford, 1996), p 173.

38 J Weeks, *Sexuality* (second edition, Abingdon, 2003), p 37.

male-dominated. It follows that a critical stance on heterosexuality should pay attention to its interlinkage with gender, as both division and hierarchy.<sup>39</sup>

In other words, we are drawing attention to an underlying theological anthropology based on male being normative and female derivative that has influenced the institutional Church since Aquinas. It is likely that this will survive in some form whatever legislation is eventually passed to enable women to be bishops in the Church of England.

Elsewhere, one of us has written about the sexuality aspect of heteronormativity<sup>40</sup> in relation to the Church.<sup>41</sup> Here, our focus is on the structural dominance of the male gender as a class. We follow Jackson and Delphy that “men” and “women” are not biologically given entities but social groups defined by the hierarchical and exploitative relationship between them, [that is,] a product of this class relation’.<sup>42</sup> Sexuality and gender are inextricably linked to the hierarchical power relations that privilege men and presume (even demand) heterosexuality.

To summarise, the 1993 Measure and the Act of Synod organise women’s ordination within a framework that understands being male to be the norm, privileges the power of existing male bishops, authorises the anti-women position of some PCCs and administrative bodies of cathedrals and explicitly deviates from principles of gender equality that are elsewhere protected and promoted by law, at least formally. In the 1993 Measure and the Act of Synod, the Church organises people (priests) into a binary and hierarchical class system that is very obviously a contingent instantiation of one possible form of class-based power relations between the genders.

#### THE DRAFT BISHOPS AND PRIESTS (CONSECRATION AND ORDINATION OF WOMEN) MEASURE

After years of ministry by women priests, provision for women bishops became a more pressing question. In May 2012, clause 5(1)(c) of the draft Bishops and Priests (Consecration and Ordination of Women) Measure, concerning the preparation of a Code of Practice, was amended by the House of Bishops. The clause concerned Letters of Request, by which means PCCs would have been able to refuse the ministry of women priests and bishops. The amended clause referred to ‘the selection of male bishops or male priests the exercise of ministry by whom is consistent with the *theological convictions* as to the consecration or ordination of women [of

39 Jackson, *Heterosexuality in Question*, p 163.

40 We prefer this as an overarching term instead of Jackson’s ‘heterosexuality’.

41 See Clucas, ‘Religion, sexual orientation and the Equality Act 2010’.

42 Jackson, *Heterosexuality in Question*, p 131.

PCCs]'.<sup>43</sup> However, this formulation sat uneasily with the 1975 General Synod motion, and seemed to be a legal contradiction to the official doctrinal position of the Church.<sup>44</sup>

The later Appleby amendment, 'which *respects* the grounds on which parochial church councils issue Letters of Request',<sup>45</sup> would still have enabled PCCs to refuse the ministry of women priests and bishops because they are women (no mirroring provision exists to refuse the ministry of male priests and bishops on the grounds of their maleness), yet conservative strands of the Church felt that 'respect' was a concession too far. The Catholic Group in the General Synod claimed that 'the current draft Measure makes bishops for traditionalists 2nd class bishops, and us 2nd class members of the Church of England'.<sup>46</sup>

On 20 November 2012, 72.6% of Synod members voted in favour of the draft Measure, but it failed to achieve the required two-thirds majority in the House of Laity by six votes. The editor of this *Journal* has, however, suggested that there was an inevitability that the draft Measure would fail to secure the required qualified majority in the House of Laity as the proposed provision was perceived as insufficient.<sup>47</sup>

## THE DEFEATED DRAFT MEASURE: REACTIONS AND ACTION

### The Church

The *Church Times* reported 'Sorrow, dismay, distress, and grief . . . Many warned of the consequences for the church in wider society'.<sup>48</sup> Reactions among Church leaders showed a clear awareness of the disjunction between the religious values implicit in the 'no' vote and contemporary secular values focused on equality and human rights. Bishop Christopher Lowson of Lincoln, suggested that 'the church has suffered a serious credibility problem while it worked on the legislation, and this is a setback that could cement the church's reputation as being outdated and out of touch'.<sup>49</sup> Archbishop Rowan Williams of Canterbury told General Synod:

43 Emphasis added.

44 WATCH, 'A statement of our concerns', <<http://www.womenandthechurch.org/sites/default/files/files-tore/resources/WATCH%20Statement%20of%20Concerns%2011-6-12.pdf>>, accessed 19 October 2012.

45 Emphasis added.

46 The Catholic Group in the General Synod, 'Women bishops: moving forward – together' <<http://www.forwardinfaith.com/news/docs/wbd-cgigs.pdf>>, accessed 5 November 2012.

47 See M Hill, 'Editorial: a measure of credibility?', (2013) 15 *Ecc LJ* 1–3.

48 'Campaigners talk of betrayal and disaster after vote', *Church Times*, 23 November 2012, <<http://www.churchtimes.co.uk/articles/2012/23-november/news/uk/campaigners-talk-of-betrayal-and-disaster-after-vote>>, accessed 3 February 2013.

49 Quoted in L Davies, 'Church of England votes against allowing women bishops', *The Guardian*, 21 November 2012, <<http://www.guardian.co.uk/world/2012/nov/20/church-of-england-no-women-bishops>>, accessed 3 February 2013.

... whatever the theological principle on which people acted and spoke, the fact remains that a great deal of this discussion is not intelligible to our wider society. Worse than that, it seems as if we are wilfully blind to some of the trends and priorities of that wider society ...<sup>50</sup>

The Revd Lucy Winkett, often spoken of as a possible future bishop, described the failed vote as the Church 'detonating its credibility with contemporary Britain'.<sup>51</sup>

Although not all proponents of women bishops couched their concerns expressly in equality and human rights terms, there were clear references to the norms of contemporary society, for whom women's rights and equality were understood to be important. The majority of the institutional Church views thus construct the issue of women bishops as crucial to the Church's relevance and credibility to broader society, as well as an important issue of equality and justice within the Church itself.

Predictably, conservative voices were satisfied by the vote, although outermost conservative views such as that of Prebendary Rod Thomas rejected even the idea of alternative episcopal oversight, as this would be to accept the power of a woman bishop to delegate her authority.<sup>52</sup>

In early December the House of Bishops announced a working group drawn from all three Houses of Synod. It is hoped that discussion and meetings will result in a new legislative package that will be presented to General Synod in July.<sup>53</sup>

## Politicians

Many politicians commented on the Church needing to reflect the values of the nation.<sup>54</sup> Helen Goodman explicitly invoked equality: 'The case for women

50 Quoted in J Taylor, 'Church of England in crisis: Archbishop of Canterbury attacks members for voting against women bishops', *The Independent*, 21 November 2012, <<http://www.independent.co.uk/news/uk/home-news/church-of-england-in-crisis-archbishop-of-canterbury-attacks-members-for-voting-against-women-bishops-8339611.html>>, accessed 3 February 2013.

51 L Winkett, 'The vote against women bishops is a disaster for the church I love', *The Guardian*, 20 November 2012, <<http://www.guardian.co.uk/commentisfree/2012/nov/20/women-bishops-vote-disaster-church-of-england>>, accessed 3 February 2013.

52 G Pafflin, E Thornton, M Davies and G Drake, 'Special report on the fall of the women-bishops legislation', *Church Times*, 30 November 2012, p 22.

53 'Statement from the House of Bishops on defeat of women bishops legislation', 11 December 2012, <<http://www.churchofengland.org/media-centre/news/2012/12/statement-from-the-house-of-bishops-on-defeat-of-women-bishops-legislation.aspx>>, accessed 3 February 2013.

54 'MPs will ignore "deluded" Church over gay marriage, says MP', *Huffington Post*, 22 November 2012, <[http://www.huffingtonpost.co.uk/2012/11/22/mps-will-ignore-deluded-church-gay-marriage\\_n\\_2175557.html](http://www.huffingtonpost.co.uk/2012/11/22/mps-will-ignore-deluded-church-gay-marriage_n_2175557.html)>, accessed 3 February 2013; 'Church of England should allow female bishops, says Cameron', *The Guardian*, 21 November 2012 <<http://www.guardian.co.uk/world/video/2012/nov/21/church-female-bishops-america-video>>, accessed 3 February 2013; A Edemariam and L Davies, 'Pressure piles on Church to vote again on women bishops', *The Guardian*, 23 November 2012, <<http://www.guardian.co.uk/world/2012/nov/23/maria-miller-church-female-bishops>>, accessed 3 February 2013; Taylor, 'Church of England in crisis'.

bishops was totally comprehensible – God had surely created men and women equal, the gendering of roles was a product of historic societies and the time had come to recognise women’s gifts and use them.’<sup>55</sup> Frank Field presented his Private Member’s Equality Act 2010 (Amendment) Bill 2012–13 on 12 December ‘to amend the Equality Act 2010 to remove discrimination against women in relation to consecration of bishops in the Church of England’.

There was a widespread feeling among politicians of all parties that the ‘no’ vote was a seriously misguided decision that needed to be reversed quickly. There was hesitation over the extent to which it was advisable for Parliament itself to intervene – the convention is that Parliament no longer legislates on doctrinal matters, this being the proper preserve of the General Synod since the enactment of the Church of England (Assembly) Powers Act 1919. It was hoped that the Church, under the new leadership of Archbishop Justin Welby, would itself be able to resolve the matter.<sup>56</sup>

### Broader society

Newspapers declared ‘Church of England in crisis’.<sup>57</sup> *The Times* observed that ‘the Church ... got that decision dreadfully wrong’.<sup>58</sup> Letters to newspaper editors were overwhelmingly, though not universally, in favour of women bishops. The Revd Paul Hunt captured the theme of widespread disbelief when he wrote: ‘I just wonder how many Synod members realise the extent of what is at best the mystification and at worst the derision in which the Church is held’.<sup>59</sup> In the weeks following the vote, the majority of letters printed in the *Church Times* were broadly in support of the defeated draft Measure, but some voices were raised in opposition. There was concern about the betrayal of promises given to traditionalists at the time of the ordination of women to the priesthood, particularly the damage to the reputation of the Church.<sup>60</sup> Others felt that the inadequacy of the provision proposed for those unable to accept women bishops was a case of intolerance and double standards.<sup>61</sup>

55 H Goodman, ‘Women bishops: Church is being held to ransom by backward-looking minority’, *Daily Telegraph*, 21 November 2012, <<http://www.telegraph.co.uk/women/womens-life/9692489/Women-bishops-Church-is-being-held-to-ransom-by-backward-looking-minority.html>>, accessed 3 February 2013.

56 *Church Times*, 30 November 2012, p 4.

57 Taylor, ‘Church of England in crisis’; ‘Editorial: female bishops – embarrassing bodies’, *The Guardian*, 21 November 2012 <[http://www.guardian.co.uk/commentsfree/2012/nov/21/female-bishops-embarrassing-bodies?CMP=tw\\_tfd](http://www.guardian.co.uk/commentsfree/2012/nov/21/female-bishops-embarrassing-bodies?CMP=tw_tfd)>, accessed 3 February 2013.

58 ‘A terrible failure: the Church of England’s vote against women bishops does a disservice to half the population’, *The Times*, 21 November 2012.

59 Letters, *The Independent*, 22 November 2012.

60 A Bartley, *Church Times*, 14 December 2012.

61 C Whitney, *Church Times*, 30 November 2012.

## WOMEN BISHOPS: THE CHURCH, RIGHTS AND EQUALITY

We observed above that, although the ideological claim is that men and women have equal human rights, this declaration is not borne out in the legislative exceptions to anti-discrimination law found in Schedule 9 of the Act. Discrimination ‘for the purposes of an organised religion’ is permissible where the compliance or non-conflict principles are satisfied (Schedule 9, paragraphs 2(5) and 2(6) respectively). As Clucas argues, at the heart of the problems with the Act’s exceptions for the purposes of an organised religion is a legislative conception of what *justifies* lawful discrimination: ‘the strongly held religious convictions of a significant number of the religion’s followers’ is sufficient on the grounds of the non-conflict principle (Schedule 9 paragraph 2(6)). “Religious convictions” need only be strongly held: they need not be subjected to or susceptible to rational analysis.’<sup>62</sup> In a situation of competing gender and religion rights such as that concerning women bishops, the religion right wins: that is, discrimination against women is lawful, despite the content of the particular religious views being unreflective of the organised religion concerned. This legislative capitulation to minority religious ‘convictions’ amounts to a de-prioritisation of gender rights by the state, which sits uneasily with the human rights ideology of protecting the less powerful. Moreover, the lack of an explicit reference to proportionality may be unlawful.<sup>63</sup>

The institutional Church has an uneasy relationship with secular ideas of rights and equality. The Rochester Report of 2004 referred to ‘society at large[’s], in theory at least, general acceptance of the idea that women should enjoy the same opportunities as men in all spheres of life’,<sup>64</sup> rather than to ‘women’s rights’. In a Church legal opinion on appointing (male) bishops from 2011,<sup>65</sup> discussing the Equality Act, the language of ethics (virtue, godly living, behaviour constituting a focus for unity) was reserved for the Church, whereas the Act, implementing secular notions of rights and equality, was simply described draft in terms of its legal effects.<sup>66</sup> Very few of the religious reactions to the defeated draft Measure explicitly mentioned rights and equality, although these ideas were implicit in concerns about being seen by broader society as out of touch, irrelevant, unintelligible, wilfully blind and outdated.<sup>67</sup>

62 Clucas, ‘Religion, sexual orientation and the Equality Act 2010’, p 945.

63 See the Equality Act discussion above.

64 *Women Bishops in the Church of England? A report of the House of Bishops’ Working Party on Women in the Episcopate* (London, 2004), para 1.1.2.

65 Following the interim report of the Pilling group, the House of Bishops has since decided to allow celibate civil-partnered priests to become bishops: ‘House of Bishops: summary of decisions published’, 20 December 2012, <<http://www.churchofengland.org/media-centre/news/2012/12/house-of-bishops-summary-of-decisions-published.aspx>>, accessed 5 February 2013.

66 Clucas, ‘Religion, sexual orientation and the Equality Act 2010’, p 947.

67 A concern that Redfern and Aune suggest is well founded: C Redfern and K Aune, *Reclaiming the F Word* (London, 2010), pp 153–154.

The most explicit Church reference to rights and equality discourse around women bishops that we found came from Prebendary Rod Thomas, chairman of the conservative evangelical organisation Reform. Thomas thanked God that

the Church of England has avoided making a big mistake which would have led to real division and a less inclusive Church. The Synod's decision shows respect for the issues of conscience involved. It has avoided putting significant minorities who, as faithful Anglicans, seek to follow the Bible's teaching, into an impossible position.<sup>68</sup>

This view constructs the existing disarray in the Church as unreal, perhaps pretend, division. The 'significant minorities' who should be included are those who 'seek to follow the Bible's teaching'. Thomas thus proffers a view of reality in which the claims to equality of a larger section of the Church – women priests and those who support them – are sidelined. In the process, he co-opts the language of minority rights to claim that his version of 'inclusion' is the one that matters. Additionally, he presents those opposing women bishops as those who are faithful and seeking to follow biblical teaching: proponents of women bishops must be acting on some grounds other than interpretation of scripture, because the only right understanding (not interpretation – that would imply nuance and doubt) is his.

The majority of faith-based responses suggested the implicit belief that women's rights and equality do matter. However this positioning seems unformed and vulnerable in the face of the 'respect the traditional minorities' claim of the privileged conservatives. Responses to the vote from politicians and broader society expressed incredulity at the Church's failure to authorise a long-overdue recognition of women's equality in ministry. As feared by the Church, the world outside failed to see the merit of appeals to tradition and conservative interpretations of scripture: it was clearly right that women should be able to be bishops, and opposing views could only be the result of outlandish bigotry. Here we see a difference in the degrees of patriarchal values held by the Church in general and society in general, with the Church adhering more strictly to heteronormative values that construct women as inferior to men.

We suggest that, had the draft Measure passed, few mainstream voices would have objected to the formally unequal treatment afforded to women bishops: the fact that women bishops existed would have been taken as *prima facie* evidence of equality. As Woodiwiss observes (see above), the human rights regime of each society will interfere as little as possible with existing power relations, tending to choose modes of protection for weaker parties that are less disruptive to the

68 Quoted in 'Campaigners talk of betrayal and disaster after vote'.



status quo.<sup>69</sup> We can see this pattern within the 1993 Measure and the failed draft Measure, both of which offer a recognition of women's ministry that is different from and inferior to that of men, replicating heteronormative power relations that subsist in society and exist in amplified form within the Church. We can also observe this pattern in the exceptions for an organised religion in the Equality Act 2010: it was the path of least resistance to repeat (and, in the case of transsexual people, establish and expand) the existing exceptions from anti-discrimination legislation for women (and non-heterosexual people). In terms of our analysis, we see that heteronormativity is being challenged by equality legislation, although it still exerts a strongly dominant influence.

## CONCLUSION

This article has discussed the ways in which rights relating to religion and gender interrelate in the context of social inequality, and has shown the ways in which the Church and the law are negotiating tensions between religion and gender. We have demonstrated that there is no formal equality between religion and gender rights in the Equality Act in relation to an organised religion. Nor is there formal equality between the genders in Church legislation. We argue that discrimination against women's ministry results from the unacknowledged heteronormative power relations between the genders. The pervasive nature of structural male advantage in broader society and especially in the Church makes heteronormative regulation of women's ministry inevitable in the absence of serious critical reflection. The fact that the Equality Act leaves these structural power relations untouched amounts to a de-prioritisation of gender rights by the state that contradicts human rights and ideologies and political rhetoric of equality.

The Church displays little explicit concern for rights and equality, although we suggest that these norms are implicit in the acknowledged need to remain intelligible and relevant to broader society in the aftermath of the draft Measure's defeat. In the absence of a clear and reflective position on rights and equality and the relation of those norms to religious values, there is a danger that rights discourse may be used opportunistically by conservative elements of the Church to protect their privileged position, in much the same way that they monopolise the claim of being faithful to scripture.

This moment seems to be a time of enormous significance for rights and equality in secular and religious spheres, as well as for women and sexual minorities within the Church. As it considers renewed attempts to allow women in

69 Woodiwiss, *Human Rights*, p 5.

the episcopate, the Church has the opportunity to reconsider its current partly detached and partly oppositional stance to broader society, and to evaluate how far the vocal conservative elements of its traditions determine the Church's identity. The state, too, is faced with a choice: whether to take seriously the rights and equality claims of those who deserve its protection, and to put its political weight where easy speechifying currently stands.