*Of Rainbows and Crosses:*

*Why Religious Organizations Oppose EU Equality Legislation for Gays and Lesbians*

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1. *Introduction*

Christian religious organizations have been long and consistent supporters of European integration. European integration was crucial to responding to two postwar threats to their role and influence among Western Europe’s postwar democracies. Political integration would help prevent another devastating European war caused by virulent nationalism. Economic integration would accelerate Europe’s economic recovery and, therefore, contain the spread and appeal of domestic communist movements, especially in Italy and France. European integration would also be an opportunity for the Catholic Church and other religious organizations to imprint their values on the European integration process. In the view of Pope Benedict XVI, “The EU should defend three core areas of morality policy: the defense of all life from conception to death; defending heterosexual marriage and families as the only union deserving of legal recognition and alternatives relationship as harming the natural family; and, protecting the rights of parents to educate their children.”[[1]](#endnote-1)

However, now European integration is perceived as more of a danger than an opportunity for religious groups. The European Union is now perceived mora as an agent of secularism by religious groups. The Europeanization of national civil rights laws, religious organizations and domestic churches argue, is threatening the proper balance between church and state at the national level. The EU’s efforts to harmonize national laws regarding the treatment of sexual minorities are at the center of that threat. A key example is the adoption and implementation of the Equality in Employment Directive. The law is unique in that it is the first, and so far, only, piece of EU legislation that requires countries adoption legislation that prohibits discrimination based on sexual orientation. While there was broad consensus among the member states that EU legislation in favor of combatting such discrimination was necessary, they were deeply divided over whether and to what extent it would affect the autonomy of religious employers. Because the Directive would require governments treat religious employers just like secular ones and not permit them to discriminate based on sexual orientation, countries with strong ties to religious institutions had more difficulty implementing the law. Those states that strongly support religious organizations or established churches not only opposed the law, but also implemented the EU directive poorly.

This article builds on the growing scholarship that investigates how religious groups act within liberal democracies to advance their interests and influence public policy. While many studies focus on their role in domestic politics, less attention is paid to their role in shaping EU public policy and reacting to it. Similarly, while many studies of EU compliance focus on how domestic economic interest groups, institutions, and policy traditions can inhibit full implementation and, thus, harmonization of national laws, few studies examine the role religious groups are playing to block the domestic impact of EU law. This is somewhat puzzling given the growing role EU institutions and EU law have in transforming national social policies, such as discrimination laws, that were once off limits to EU legal intervention.

The next section highlights how religious organizations traditionally supported European integration, but then how the debate over granting sexual minorities equal treatment became the focal point at which religious organizations started to become concerned that the EU was impinging on traditional national norms. I then explain how the EED’s ban on discrimination based on sexual orientation challenged the core interests of these religious organizations. Quantitative evidence shows that those countries that strongly support religious institutions opposed a narrow exemption for religious employers at the bargaining table and implemented provisions of the EED incorrectly to protect the special relationship states had with religious institutions. The concluding section summarizes these results and highlights how religious organizations, backed by their national governments, will prevent further steps taken to realize equal treatment for gays and lesbians in the EU.

1. *Christianity, LGBT Rights, and the EU*

Christian organizations, especially the Catholic Church, have been long supporters of European integration. Many Christian Democratic leaders were observant Catholics who believed in reconstructing a new, democratic version of the medieval Carolingian Empire, when Catholic Europe was last unified (Kaiser 2007, 228). The Vatican under Pope Pius XII publicly supported a European federation to prevent Europe from slipping back into military conflict, while also containing the dual threats of communism and any resurgence of fascism (Philpott and Shah 2006). Subsequent popes have continued to support European integration through enlargement. Pope John Paul II called for Poland to join after the Iron Curtain fell as a moment to start “re”-evangelizing Europe (Byrnes 2006, 289). Efforts to define EU identity as Christian continued when Pope Benedict XVI pushed strongly for a reference to Europe’s common Christian heritage in the preamble of the European Constitution.

As EU law began to expand into national policy areas not foreseen by religious organizations, they became increasingly wary of the effect EU law would have on the institutional status quo for them. The EU’s attempt to extend equal rights to sexual minorities is one the chief areas in which religious groups started mounting opposition to European integration. Beginning in 1983 the European Parliament commissioned the Squarcialupi Report to assess conditions of gays and lesbians in the EU in the area of employment.[[2]](#endnote-2) Based on its conclusions the EP called on the Commission to create a common standard for protection from workplace discrimination based on sexual orientation for the entire then-EEC. While a majority of members of Parliament approved the resolution, the EP was clearly divided along a secular/religious cleavage, with most members of national conservative or Christian Democratic parties voting against it. Members of Ireland’s Fine Gael party in the EP abstained from the vote on the grounds that the then-EEC had no competence “to decide the moral attitudes of society or the pattern of the criminal laws of the member states.”[[3]](#endnote-3)

In 1994 the conclusions of the Roth Report were approved by the European Parliament, which again requested the Commission to propose legislation protecting sexual minorities from discrimination.[[4]](#endnote-4) It called for EU-level legal reforms that would end discrimination in all spheres of employment, including criminal, civil, and contact law and an “equivalent legal framework” of marriage and adoption rights for same-sex couples. Once again a majority of MEPs approved the resolution adopting the Parliament’s recommendations, but a significant majority of conservative MEPs cited religious and cultural objections to treating same-sex couples as equal to heterosexual ones. Doing so, they argued, threatened the family as a fundamental institution. Pope John Paul II, while not defending discrimination against homosexuals, believed the EP was condoning “moral disorder (Bell 2002).”

The Commission repeatedly rejected the Parliament’s requests for several reasons. First, the Commission has always had a close institutional relationship with organized Christian organizations (McCrea 2010). The Commission formally consults with religious bodies on pending legislation when appropriate. It values the public role religious organizations play in public life and their input with regard to issues of public morality. Perhaps more importantly, the Commission argued it did not have the competency to act in this sensitive area of national policy. Legally, the Commission and the European Court of Justice argues, member states were permitted to restrict the free movement of people under the EC Treaties’ “public morality, “public order, or morality” clauses (Articles 30 and 55 TFEU). For example, one member state was not required to recognize same-sex civil partnerships, unions or marriages that gay and lesbian workers may have in one member state when requesting equal treatment when trying to access national marital benefits when moving to another member state to work.[[5]](#endnote-5)

The EU finally gained the competency to legislate in the area of sexual minority discrimination when Article 13 (now 19) of the Amsterdam Treaty was approved in 1997. Article 19 permitted EU institutions to draft and enforce EU legislation that protected minorities from discrimination based on “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” As Mos (2014) shows, this victory for LGBT activists did not come easily (Mos 2014). The inclusion of same-sex orientation as a status deserving protection needed to overcome fierce opposition by Catholic members of the Dutch, Irish and Italian national governments.

The Equality in Employment Directive was the second piece of EU anti-discrimination legislation generated after the EU was delegated the competency to act in this policy area.[[6]](#endnote-6) It required member states pass national legislation banning discrimination based on an employee’s religious belief, age, disability, or sexual orientation. Despite widespread consensus in favor of the law, the same divisions that characterize past attempts to protect sexual minorities emerged again. In fact, the effect the Directive would have on religious groups and employers was the key source of conflict in the Council of Ministers. The member states disagreed over how broad exemptions from these mandatory protections should be for religious employers (Thomson et al. 2012).[[7]](#endnote-7) Those that favored a broad exemption were Ireland, the United Kingdom and Germany. Ireland’s four main churches, led by the Catholic Church, lobbied for the broadest possible exemption for religious employers.[[8]](#endnote-8) Indeed, Ireland threatened to veto the entire Directive if a broad exemption was not included.[[9]](#endnote-9) In the UK, even though Labour was in power and favored the general expansion of workers’ rights, it bowed to pressure from conservative Christian groups to oppose a narrow exemption for religious employers.[[10]](#endnote-10) As Lady Young, a Conservative Peer in the House of Lords argued, the Equality Directive with a narrow exemption would “make it illegal for a church to require Christian staff to fill posts such as the minister's secretary or the church vicar. Atheists and practicing homosexuals would be given just as much legal right to these posts as Christians.”[[11]](#endnote-11)

 In opposition to these broad exemptions were France and Belgium. French social affairs minister Martin Aubry argued that the Directive as it stood protected religious institutions because those who were engaged in such activities, such as Sunday School instruction, would be protected on the grounds of religious faith.[[12]](#endnote-12) The rest of the EU and the Commission, while somewhere in the middle, leaned towards the French and Belgian position. What explains the division in the Council of Ministers over this provision? And did those factors affect the cross-national variation in compliance behavior observed during its transposition into domestic law?

1. *Explaining Church Opposition: Interests and Morality*

Although religious groups attempt to represent the divine, they also have strong earthly interests. Although their political goals have varied across history, it has always been to limit the state, as a secular actor, from impinging on the special privileges and roles they have in shaping public policy when using their moral authority. In the late Middle Ages, during early national state formation, the Reformation was undermining the Catholic Church’s authority and legitimacy over both monarchs and laypeople. They collaborated with Catholic monarchs to try to defeat the advancement of Protestantism. In the 19th century, the spread of democracy threatened the Catholic Church’s special legal privileges, the control over the delivery of different social services, especially education, and their property. As consequence, they worked with Catholic lay leaders to form Christian Democratic parties that would defend their interests against the liberal state (Warner 2000; Kalyvas 1996). In the modern period, they are fighting for followers, revenues, and moral authority against competing faith groups and alternative modes of creating social solidarity (Gill 2007). They also attempt to shape national public policy, even when national citizens do not approve of their influence in secular politics (Grzymala-Busse 2015).

Even in light of a wide range of approaches to understanding the role of Christianity in Western democratic politics, scholars are in broad consensus over which interests they are trying to defend. Their core interests are twofold. First, they want to provide moral guidance through their authority, help followers make sense of the world, provide a philosophy and moral code of conduct that is universal and unassailable. They want to have exclusive influence over the beliefs individuals such that the public will follow their catechisms and moral proscriptions (Warner 2000, 7). Second, they want to maintain or expand the legal and institutional privileges that allow them to propagate that moral vision. This includes providing social services, receiving state funding for such activities, and remain immune from secular law that governs any other employer. In many EU member states, religious institutions are also the largest providers of social welfare in many European countries, especially in the field of education—both primary and secondary—but also elder care, emergency housing and shelter, and food assistance (Kersbergen and Manow 2009; Wilson 2014).

Religious groups’ main competitors are secular actors and the state itself as they struggle for authority over an individual’s beliefs and behavior (Warner 2000, 27–28). Secular actors have “an ideology or set of beliefs advocating that religion ought to be separate from all or some aspects of politics and/or public life (Philpott 2009).” Their view is that religious groups or institutions should be governed by the same laws and regulations as any other group. Secular actors also try to restrict the influence religious actors have by relegating their messages to the private sphere and not allow them to shape public morality policy. By adopting the Equality in Employment Directive, the European Union has now become a new secular challenge to religious authority and priviliege.

The “balance of power” that was created over centuries of struggles between secular and religious authorities is arranged differently across EU member states. Some states developed closer, more supportive relationships with religious actors than others. For example, some European states give significant state funding to religious organizations for the purposes of providing social services, while other states more directly subsidize the building and maintenance of church buildings and provide public salaries to clergymen. In some member states, religious groups receive tax exemptions or the government collects taxes on their behalf (Doe 2011). They are placed in charge of social services and have significant influence over determining how those services are provided. For example, in Denmark, the Evangelical Lutheran Church, a state church, receives subsidies and devises the public-school curriculum, which includes a compulsory “Christian studies” class.[[13]](#endnote-13) In Ireland, the Catholic Church has long held the responsibility of educating the national population; it operates more than 90% of all primary and secondary schools, can appoint its own administrators, and hire its own teachers. In countries that support the mission of religious organizations legally and materially, members of the clergy have special access to government leaders that not all secular leaders share. For example, members of the clergy sit as peers in the British House of Lords.

Comparative education policy is highly illustrative of the differences in church-state relations across Western Europe. Before the state assumed the task of educating its population, education had long been the purview of the Catholic Church or national churches. Today, some churches or religious organizations continue to retain the right to educate children up to the university level, such as in the Netherlands and Germany (Morgan 2009). By running schools or entire school districts, religious institutions achieve their two core interests. First, they can evangelize the population, enabling them to both create and retain worshippers (Gill 2007, 21). Governments that allow religious organizations to educate their population also exercise some control over religious institutions, sometimes by approving the curriculum or deciding whether religion is taught at all. However, in some countries, religious organizations retain considerable autonomy over how students are educated, and in some countries, the popularity of religious schools has increased while state-run schools have come to be perceived as inadequate. For example, Tony Blair’s Labour government encouraged the proliferation of religious schools, which were allowed to hold religious services reflecting the faith of local communities while at the same time receiving state funding (Ahdar and Leigh 2015).

How did the EED affect the balance between secularism and religious organizations? First, by including sexual orientation as grounds for protection from discrimination, the value-systems of various religious groups was challenged. Religious dogma of most mainstream Protestant and Catholic organizations deemed homosexuality a practice, not an identity (Carmody and Carmody 1993). For years, mainstream Protestant churches and Catholic churches viewed it as legitimate to discriminate against gay and lesbian employees for violating or not conforming to the religious employer’s codes of morality. In some countries, such discrimination was permitted because of the special immunity religious employers enjoyed from civil labor protections. For instance, in 1983, the German Federal Labor Court ruled that a Protestant charitable organization was permitted to dismiss a family counselor because he was gay.[[14]](#endnote-14) When Irish Minister of Justice was negotiating the EED in the Council for a broad exemption for the Catholic Church, Joe O’Toole, the general secretary of the Irish National Teachers’ Organisation, objected, arguing that it allowed the Church to scrutinize teachers’ private lives to establish whether they were upholding their employers’ religious ethos.[[15]](#endnote-15) If religious organizations and churches were to be treated like any other private employer, then the state could no longer permit them to discriminate based on sexual orientation and, thereby, prevent them from spreading their moral vision and influence the beliefs of younger generations. In increasingly secular Ireland (Breen and Reynolds 2011), EU law recognizing sexual orientation as an immutable identity deserving of protected status, only marginalized the Catholic Church’s moral vision that homosexuality was unlawful further.

As a possible compromise, a second paragraph was introduced into Article 4. It states, “churches or other public and private organizations the ethos of which is based on religion or belief” may engage in differential treatment when the occupation’s activities “by their nature or in the context of carrying them out” are a “genuine, legitimate and justified occupational requirement” with regard to the organization’s religious ethos. In brief, a religious organization is allowed to discriminate against an employee, but only if the person’s occupational duties were directly related to organization’s “religious ethos.” Otherwise, both public and private employers could not discriminate based on the employee’s sexual orientation. As Mark Bell argues, “…The reluctance of certain organizations with a religious ethos to employ lesbians and gay men is one of the key reasons why [Article 4.2] is present in the Directive, and therefore it would be naive to ignore the connections between these two issues (Bell 2002, 117).

Other provisions affected other areas of church autonomy and independence. While the provisions address national governments and the legislative action they need to take, they would substantially, albeit indirectly, affect the legal balance between church and state in some countries. For example, for the first time in some countries, sexual orientation would be defined as a protective status, clearly against the moral vision of some religious organizations. Both institutions and the people that work for them would be liable and punished for discriminating against such employees. Churches and religious institutions would be not permitted to refuse to hire gays and lesbians or fire them if it became known they were, unless it was crucial to the person’s occupational duties. Religious groups could not retaliate against employees if their own members reported discrimination based on sexual orientation. In short, the EED was undermining the autonomy religious institutions enjoyed in several member states from secular labor law.

1. *Opposition at the Front and Back Doors: The Evidence*

Levels of state support for religion explain why the member states were divided over how broad the exemption for religious employers should be. We can map member states’ positions according to levels of state support for religious actors. Figure 1 shows that how much a state supports organized religion is correlated with the member state’s position intensity on the exemption for religious employers. On the x-axis, a state’s involvement in religion is plotted based on scores drawn from the Religion and State project (Fox 2011). GIR (Official Government Involvement in Religion) measures whether the state supports the dominant religion, the extent to which a religion is enforced in society, and the extent it controls, regulates, and restricts religion (Fox 2015, 42–43).[[16]](#endnote-16) In the EU, GIR country scores vary from “strict separationist” (3; France) to countries where the state actively supports religion but does not dominate religious institutions (11; Denmark, Finland and Greece). Other states fall somewhere in-between, such as accommodating (4; the Netherlands), or cooperative, where there is no official state religion but certain religions benefit more than others (6; Germany, Luxembourg, Sweden, and Belgium), those that can be characterized as having multi-tiered preferences (7; Austria, Italy, and Spain), or, finally, countries like Ireland and Portugal, (9) where one religion (Catholicism) serves as the unofficial religion of the country and receives unique recognition and benefits from the state.

Preference scores vary from not wanting any legislation (little EU involvement in internal affairs) to 100 (a narrow exemption for religious employers, implying a stricter EU legislation).[[17]](#endnote-17) The salience of this issue also varied among the member states. To illustrate how the Council was polarized, I calculated a member state’s “preference intensity,” located on the y-axis. Preference intensity is the product of a state’s position and its saliency. The negotiating position of a member state matters little if that preference is not held strongly. When it is, we can expect it to fight harder for its preferred outcome. Each country’s preference intensity is placed on a spectrum of relative support for the legislation, where zero is the mean position in the Council. Scores greater than zero imply a country intensely prefers a narrow exemption for religious employers, while scores less than zero mean that a country intensely prefers a broad exemption.

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Those states that strongly support religion are associated with weaker EU legislation. While France and Belgium strong favored a stricter version of the law. Although different faiths are dominant in both countries and have different attitudes towards the European, they were united in their support for a broad exemption for religious organizations. Denmark, Greece, and Finland are important exceptions to the overall trend. This can indicate that overall levels of state support for religion matter less than how states support religion organizations. The limited sample-size of only 15 countries prevents us from testing how robust the relationship is. Even states that have a large degree of support for religion do so differently. Thus, instead of broad measures of state-church relations, we need to unpack the different ways the state supports religious organizations and whether those factors affect how well provisions of the EED were implemented.

**Opposition at the Backdoor**

The exemption for religious employers was not the only provision that required changes to national laws that address employer discrimination based on sexual orientation. Table 1 lists which countries implemented different provisions of the EED incorrectly with regard to discrimination based on sexual orientation.

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The first column lists countries and years national legislation was approved that protected gay and lesbian employees in the workplace. The national legislation varied by type of protection and scope. Some countries had no protections for gay and lesbian workers until the Directive was implemented, such as Germany, while others, such as Ireland, already had some legislation in place that protected gays and lesbians from discrimination in the workplace (Bell 2002). The second column lists those provisions of the Directive that require national legislation be adopted that addresses sexual orientation discrimination. The third column lists which countries implemented these provisions incorrectly. Germany and Luxembourg outnumber others, but a diverse set of countries—the Netherlands, Finland and Spain—failed to implement 8 to 10 provisions that required changes to national laws addressing discrimination based on sexual orientation. This pattern differs somewhat from the patterns of noncompliance reported in previous studies of noncompliance with the EED that do not control for legal subject matter. For instance, drawing from Commission reports and confirmed by labor law experts, Zhelyazkova and Torenvlied (2011) find 26 cases where an EED provision was not implemented correctly, without controlling for the legal subject matter, but experts in the field of sexual and gender discrimination law identify a total of 24 cases of incorrect transposition not included in the authors’ analysis specifically in reference to sexual orientation (Zhelyazkova and Torenvlied 2011). Moreover, incorrect transposition of laws addressing sexual orientation discrimination is not strongly correlated with noncompliance without controlling for subject matter (*r2 = 0.47*). This is preliminary evidence that noncompliance depends on what type of discrimination national legislation implementing the EED is seeking to address.

*Dependent Variable*

Compliance quality data come from several sources, including Waaldijk and Bonini-Baraldi’s comparative study of the Employment Equality Directive (Waaldijk and Bonini-Baraldi 2006). Their study provides a comprehensive list of legislation used to implement 15 provisions of the Directive related to non-discrimination based on sexual orientation and whether the implementing legislation complies with the goals of each provision of the Directive. Supplementary legal sources, including annual reports by the European Commission and the European Union Agency for Fundamental Rights are used to confirm the authors’ findings and extend their time period of analysis. Each provision was coded according to whether expert sources or the Commission evaluated the national legislation as conforming (1) or not conforming (0) to the Directive’s goals.[[18]](#endnote-18)

*Measuring Church-State Relations*

I draw on indicators from the Religion and the State Project, Round 2 to measure how much a state endorses religious groups and supports them.[[19]](#endnote-19) First, I include a general measure of the formal relationship between religion and the state by using its GIR score. I then include these specific measures: whether the clergy holds official government positions, which measures the extent to which religious organizations can have a direct impact on the implementation of EU law. Second, besides running charities and hospitals, education is one of the key social service activities religious groups—both Catholic and Protestant—provide. Therefore, I also include a measure of direct state support for religious schools. State support of religion is measured using data from the International Religion Freedom Dataset (Grim and Finke 2006). The IRFD project measures the extent to which governments fund religious efforts and varies from “not at all” to “yes, but funding is not equal for all.”

The extent to which the state supports religious creeds and doctrine is indicated by the state’s morality policy. According to the RAS project, there are approximately 51 different types of religious laws governments may adopt, some of which relate to dietary restrictions, homosexuality, blasphemy, as well as the recognition of religion and the Sabbath. It also includes whether the government collects taxes on behalf of religious institutions and whether those with religious positions hold positions in government. Jonathan Fox identifies 51 laws the state can have to enforce religious precepts (Fox 2015, 67–80). The number of religious laws a state has approximates the level of state support for the moral message of national religious organizations. I also include member states’ positions on the how broad the exemption for religious employers should be as a proxy for relative supportive for the Directive.

*Control Variables*

In countries where sexual orientation-based discrimination is high, implementing laws that improve protections for gay and lesbian workers will be more difficult. Reported high levels of sexual orientation discrimination in the workplace can reduce the quality of implementation in two ways. First, in societies where there are high levels of intolerance, governments are expected to experience a high level of opposition to the Directive. Employers may also oppose the law because it adds an additional regulatory burden. Yet, high levels of discrimination in society could suggest that the Directive is wanted to help combat discrimination, thereby improving the chances it is correctly implemented. It should be noted that data on the prevalence of discrimination are based on the 2002 Eurobarometer survey, which may introduce specific biases that could limit reliability of the findings (Commission 2002). For example, in societies where discrimination is prevalent, respondents may be hesitant to admit its existence, or simply view discrimination as justifiable and, therefore, not report it. Conversely, in some countries where laws exist to protect people from such discrimination, there is more reporting of its occurrence.

I also controlled for whether legislation protecting gay and lesbian workers existed in member states. According to the survey by Waaldijk and Bonini-Baraldi (2006), 12 of 15 countries had some form of protection for gay and lesbian employees. The costs of implementing these provisions are likely to be lower when they are in place, and thus improve the chances of correct implementation. Data are coded such that when a country has any existing laws protecting gay and lesbian workers, they are assigned a value of 1, if not 0.

Having existing legislation that protects employees from discrimination based on their sexual orientation may not be sufficient to guarantee compliance. Existing laws may be in place, but they do not meet the Directive’s requirements. For example, Zhelyazkova and Torenvlied (2011) find that the “degree of legal fit” explains when noncompliance happens across provisions.[[20]](#endnote-20) Legal fit does not refer just to the presence of a law, but how well existing policy or practice matches the requirements of the directive. They find that when existing policy and practices are in place, compliance improves.

In their study, the authors measure fit without considering the type of discrimination the national transposing legislation must address. Instead, it is a general measure of overall policy that does not control for the type of discrimination the transposing legislation needs to address. Each provision requires member states pass legislation that combats discrimination based on a worker’s religion, age, and disability, in addition to sexual orientation. Only Articles 5 and 6 refer to specific types of discrimination, disability and age, respectively. Yet, “degrees of fit” are not likely to be the same across the different types of discrimination the EED is trying to prohibit. For example, Article 2.1 EED forbids both direct and indirect discrimination across all four types. Yet, some countries have already such legislation that covers religious bias, but not disability or age discrimination. This led to a distribution of national preferences over how strict the Directive would be. For example, Italy was most concerned about what “reasonable” accommodations were for disabled workers, as Italian businesses had fewer resources to make the workplace more accessible, while other states had progressed further in providing equal access to disabled workers.

Therefore, general “degrees of fit” that do not control for legal subject matter can miss both much underlying variation, but also underlying causes of noncompliance can vary depending on the type of discrimination a national law is meant to address when transposing a Directive’s provision. In this study, I only consider sexual orientation discrimination. Additional research will be needed to assess whether similar or different factors account for noncompliance when considering the three other types of discrimination. However, to test whether overall policy fit matters and not the legal subject matter, I include Zhelyazkova and Torenvlied (2011)’s measure of “legal fit” explains when noncompliance happens either as often or better than those factors related to church-state relations.

Since national parliaments typically implement directives, the partisan composition of the government is expected to affect implementation (Treib 2003). Left governments will implement the law with fewer mistakes because they generally favor expanding employee protections, are more likely to oppose religious groups, and can be more supportive of equal treatment for gay and lesbian workers. I measure government ideology by calculating partisan composition of the cabinet weighted by the number of seats each party holds in parliament.[[21]](#endnote-21) Lower scores indicate a more left-leaning government.

Some provisions of the Directive contain more flexibility than others. Increasing levels of discretion improve the odds that governments can devise policy solutions that reduce adjustment costs and, thus, are more likely to comply with EED provisions. Following the existing literature (Thomson 2010), I code this as 1 if a provision grants states discretion and 0 if it does not.

Also included is an adjustment for whether the country’s majority religion is Catholic. In many Catholic countries, with the exception of Ireland, the secular state would challenge the Church’s role in education. The EED further challenged the Catholic Church by undermining its institutional and doctrinal power. Therefore, in Catholic countries, the Church may impede proper implementation of the Directive.[[22]](#endnote-22) Levels of Catholicism is an imperfect measure of the influence of the Catholic Church in both national politics and as an employer. While the indicator measures the percentage of the population that identifies as Catholic, it indirectly measures how involved the Catholic Church is in providing social services in a country and tries to influence state public policy. Catholic countries are more likely to oppose the Directive’s provisions that require them to refrain from discriminating against gay and lesbian employers and change other pieces of national legislation.

*Results*

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Table 2 reports the statistical results of fitting a mixed-effects logistical regression model. The dependent variable is the expected probability that a member state will implement a provision addressing sexual orientation incorrectly. The unit of analysis is the implementation of a provision of the Directive among 15 member states, yielding 225 observations for each model. A cross-classified design was used to account for the dependence between observations, which belong to two different groups—member state and provision (Raudenbush and Bryk 2002),

Model 1 includes factors affecting state preferences and the process of “uploading” EU policy unrelated to a country’s official religion policy, or opposition at the “front door.” Model 1 includes those factors that are likely to affect the demand for the EED. None of these factors are statistically significant. Model 2 then tests the probability that how a state supports religious actors decreases the probability that implementation will comply with the provision’s goals. All indicators with the exception of direct grants of organized religion’s strength show that the probability of correct implementation decreases when religious actors are strongly supported by the state, though the effects vary in extent. Figure 2 shows the marginal effects of the main variables of interest.

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Government funds to religious organizations and support for a religious educational system reduces the probability of compliance by approximately 5%, while religious policies decrease the chances of compliance by less than 1%. The one exception is whether states award grants to religious institutions. Compliance improves when governments directly support them. The positive relationship may indicate that governments already exercise a lot of control over the conditions under which religious organizations receive grants and, therefore, have less difficult implementing provisions when they support religion financial in the form of direct grants. Overall, general support for religious organizations decreases the probability a provision is transposed correctly.

Increasing percentages of EU citizens that report feeling discriminated based on their sexual orientation decrease the likelihood that a provision will be implemented correctly. This can indicate that rather than national governments perceiving that sexual orientation discrimination is a problem the directive will help alleviate and prevent, that governments consider implementing a provision correctly as costly. This may be due to entrenched public opinion that discrimination based on sexual orientation is legitimate and changing laws that address it are unwelcome.

The factor that has the largest effect is Catholicism. If a country’s dominant religion is Catholic, then the chances of implementation decrease by about 10%. One interpretation is that the dominance of the Catholic faith and dogma, which condemn homosexuality, explains poor implementation. But, overall, European societies have become more secular and, as public opinion has shifted toward accepting homosexuality by large segments of the population among all EU member states, it is more likely is that Catholic Churches have long been allowed to run separate educational systems and make hiring decisions without state interference. This was the core opposition advanced by Catholic school systems in Ireland and Scotland.

In contrast to other indicators of religious influence, if the government gives general grants to religious institutions, compliance improves. This may be an area that religious organizations care less about as it does not involve specific hiring and firing practices; as such, religious organizations might be less likely to mobilize resources to oppose compliance. One unexpected result is that politically right-leaning governments are more likely to comply with EED provisions. One explanation is that, controlling for support of religion, it is unlikely that politically right-leaning parties were supportive of the law. To recall, the Equality in Employment Directive was part of a series of legislative items to show that the EU would take an active role in combatting discrimination in Europe. The laws were also an attempt to blunt the growing popularity extreme rightwing populist parties, such as the entry of the extreme rightwing populist Austrian FPÖ. Center-right government may have supported the legislation in an attempt to delegitimize these parties that were increasingly competing with center-right ones. Overall, this model proves quite successful by predicting 63.11% of outcomes correctly.

Model 3 introduces a full model that includes factors that affect the uploading and downloading process. Our main variables remain statistically significant. Levels of government funding of religion and the state’s overall support for religious institutions reduce the likelihood of compliance. In addition, the effects of other covariates on the outcome decrease substantially. Existing laws increase the chances an EED provision will be transposed correctly, and transposition of the Directive in a Catholic country still has a significant adverse effect on provision implementation. The overall performance of this model is lower for the second model, suggesting that controlling for additional factors does not add significant explanatory power.

These results also show that there is a strong link between the negotiation phase of the Directive and the problems of implementation. One key expectation from the theoretical literature on compliance is that states have an incentive to deviate from an agreement reached during negotiations if it leads to unwanted or unexpected adjustment costs. However, findings are still inconclusive if member state preferences at the bargaining table affect implementation (Thomson, Torenvlied, and Arregui 2007). Analyzing both the bargaining and implementation stages of the EED with regard to banning sexual orientation discrimination shows that the two stages are linked. Those states that actively supported a broad exemption for religious employers, the primary issues that divided the member states, also had difficulties implementing the Directive. In addition, those provisions of the Directive that affect the balance between church and state were implemented most poorly. Just as non-secular states sought a broad exemption for religious employers, they also implemented provisions that affected the relative balance of power between secular law and the legal privileges religious organization enjoy.

Recent legal developments have proven that the fears of religious institutions losing their autonomy were somewhat prescient. In 2005 the British House of Lords heard the case of a minister’s dismissal by the Church of Scotland. It ruled that the Church of Scotland could be brought before an employment tribunal under the EED with regard to the firing of a former minister, Helen Percy. The Church of Scotland argued it had sole discretion to settle issues of employment under the 1921 Church of Scotland Act and was not subject to any civil authority in regards to doctrine, worship, government and discipline in the Church. The British House of Lords ruled otherwise, holding that the Church of Scotland was subject to the EED and such claims of autonomy were illegitimate (Steven 2010, 180). Without even the Scottish Parliament implementing the directive, usually required before British laws could have effect under devolution in the UK, the EU law took precedence over Scottish law and decades of the Church of Scotland’s autonomy from state interference had ended with regard to employment issues (Steven 2010, 181).

1. *Conclusion*

There are two methods by which LGBT rights are becoming “Europeanized.” Horizontal Europeanization occurs through the mobilization and coordination of NGO activists across European borders to pressure governments to change policies (Ayoub 2016). Activists form transnational alliances with EU members of parliament and officials that put pressure on national governments to change their policies. In contrast, vertical Europeanization refers to the process of “downloading” EU laws into the national legal order. Both methods, in some cases, lead to a convergence among national policies regulating the treatment of sexual minorities.

Have national anti-discrimination policies converged with regard to sexual orientation since the passage of the Equality in Employment Directive? In reviewing the impact every EU anti-discrimination directive, Mark Bell (2008) suggests the answer is a qualified yes. The EED specifically has inspired reforms in countries that both did and did not have existing laws protecting sexual minorities. However, Bell also recognizes that national legal models remain in place. Real change will only happen when we observe wider changes to the domestic social and political context (Bell 2008, 42–44).

This paper argues that one of the chief obstacles to those changes is the structure of church-state relations. When states strongly support religious organizations by delegating them a great deal of autonomy and permit them to evangelize through both national public policy and the operation of education institutions, it becomes less likely we will see a convergence in national anti-discrimination policies. The lack of convergence has also stalled additional steps towards Europeanizing the equal treatment of sexual minorities. For example, the Horizontal Directive, which would protect gay and lesbian citizens from discrimination by public authorities, is stalled in the Council of Ministers due to opposition by Poland and Lithuania because of “cultural incompatibilities” and by the current German government, which perceives it as too costly for businesses (Thiel 2015, 76). At the same time, horizontal Europeanization, whereby transnational alliances of LGBT activists form to advance EU rights through EU institutions and coalitions of national representatives appears to be increasingly effective. For instance, the European Parliament rejected Rocco Buttiglione as Commissioner for Justice, Freedom, and Security Affairs because of his alleged strong Catholic views against homosexuality, thus implying condemnation of homosexuality, even if privately held, delegitimized him from holding office (Gerhards 2010). These contrasting trends show that EU member states and its institutions are increasingly diverging from each other with regard to the equal treatment of sexual minorities. While the EU continues to try to move the agenda for gay and lesbian citizens further ahead, national governments act as powerful forces of inertia to further progress because of deeply entrenched and distinct national patterns of church-state relations.

Figures and Tables

*Table 1.*

*Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation—Provisions Related to Same Sex Orientation Employment Discrimination* (Source: Waaldijk and Bonini-Baraldi 2006, 73–75, 148)

|  |  |  |  |
| --- | --- | --- | --- |
| *Existing Laws* | *Provision #* | *Provision Summary* | *Incorrect Implementation*  |
| FR (1985) | Article 1.4 | Defining Sexual Orientation | DE, HE, LX, FI, FR |
| NE (1992) | Article 2.1 | Defining Direct Discrimination | DE, HE, LX, ES, PT |
| IR (1993) | Article 2.2 | Defining Indirect Discrimination | DE, HE, LX, FR, IR, IT, UK |
| ES (1995) | Article 2.3 | Defining Harassment | DE, HE, LX, ÖS, FR, SW, UK |
| FI (1995) | Article 2.4 | Bans instructions to discriminate | DE, HE, LX, FR, PT, SW, UK |
| DK (1996) | Article 2.5 | Does not prejudice the rights of others or laws necessary for public order | DE, HE, LX, IR, IT, NE, UK |
| LX (1997) | Article 3.1 | Law applies to all persons in public and private sector (material scope) | DE, HE, LX, ÖS, FR, PT, ES, SW, UK |
| SW (1999)BE (1999) | Article 4.1 | Occupational requirements | DE, HE, LX, DK, FI, IT, PT, SW, UK |
| DE (2001) | Article 4.2 | Allowable exceptions for religious employers | DE, HE, LX, DK, IR, IT, NE, UK |
| IT (2003) | Article 7.1 | Take positive action to reduce the effects of existing discrimination | DE, HE, LX, DK, FR, IT, NE, SW |
| UK (2003)PT (2003) | Article 9.1 | Create judicial and administrative procedures for enforcement | DE, HE, LX |
| ÖS (2004) | Article 9.2 | Create enforcement bodies | DE, HE, LX, ÖS, FR, IT, PT, UK |
| HE (2005) | Article 10 | Burden of proof placed on respondent to prove no violation of equal treatment | DE, HE, LX, DK, FR, IT, PT, UK |
|  | Article 11 | Employment protection from “whistle-blowing” or lodging complaints | DE, HE, LX, ÖS, IT |
|  | Article 17 | Sanction on individuals who violate these provisions | DE, HE, LX, ÖS, BE, DK, FI, IR, IT, SW, UK |

Table 2. Regression Results

|  |  |  |  |
| --- | --- | --- | --- |
|  | Model 1:Uploading Only | Model 2:Downloading Only | Model 3:Integrated |
| VARIABLES |  |  |  |
|   |   |   |   |
| % Feel Discriminated | -0.1237 | -0.5513\*\*\* | -0.7427\*\*\* |
|  | (0.1033) | (0.1279) | (0.2679) |
| Government Funding |  | -5.2139\*\*\* | -2.0161 |
|  |  | (1.9193) | (2.4316) |
| Official Religion Policy |  | -1.2554\*\*\* | -1.5505\*\*\* |
|  |  | (0.3027) | (0.5378) |
| Education |  | -5.9155\*\*\* | -7.3830\*\*\* |
|  |  | (1.4632) | (2.8663) |
| Official Positions for Clergy |  | 0.4447 | 1.5835 |
|  |  | (1.1087) | (1.3770) |
| Direct Grants |  | 5.9969\*\*\* | 5.5833 |
|  |  | (2.2111) | (4.3166) |
| Religious Laws |  | -0.5970\*\* | -0.9446 |
|  |  | (0.2361) | (0.6914) |
| Partisanship |  | 1.5884\*\*\* | 1.1445\*\* |
|  |  | (0.3762) | (0.5657) |
| Catholic | -1.0326 | -10.3949\*\*\* | -13.6886\*\*\* |
|  | (1.1275) | (2.3140) | (4.4717) |
| State Preferences | -0.0280 |  | -0.0855 |
|  | (0.0209) |  | (0.0646) |
| Discretion | 0.1520 |  | 0.1826 |
|  | (0.6340) |  | (0.6912) |
| Legal Fit | -0.0504 |  | -0.0459 |
|  | (0.1275) |  | (0.2039) |
| Laws in Place | 1.0046 |  | 1.5869\*\* |
|  | (0.7853) |  | (0.7698) |
| *Random Effects* |  |  |  |
| SD (Provision-level) | 1.041 | 1.0721 | 1.149 |
|  | (0.3074) | (0.3131) | (0.33579) |
| SD (Member-State level) | 1.050 | 1.81 X 10-7 | 4.32 X 10-10 |
|  | (0.3384) | (0.2869) | (0.1717) |
| Log-Likelihood | -132.85 | -119.48 | -114.16 |
| Wald *X*2 | 5.694 | 27.93\*\*\* | 20.20\* |
| Observations | 225 | 225 | 225 |
| Standard errors in parentheses |  |  |
| \*\*\* p<0.01, \*\* p<0.05, \* p<0.1 |  |  |

Figure 1.



Figure 2.



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1. Address of His Holiness Benedict XVI to the Members of the European People’s Party on the Occasion of the Study Days on Europe, May 20, 2006. Available at <https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians.html> (accessed April 24, 2017). [↑](#endnote-ref-1)
2. European Parliament, “Report for the Committee on Social Affairs and Employment on sexual discrimination at the workplace,” [Squarcialupi] A1-1358/83. [↑](#endnote-ref-2)
3. Ryan, Debates of the European Parliament No I-311/71, March 13, 1984. [↑](#endnote-ref-3)
4. European Parliament, “Report for the Committee on Internal Affairs and Citizens Rights on Equal Rights for Homosexuals and Lesbians in the European Community,” [Roth] A3-28/94. Art. 14. [↑](#endnote-ref-4)
5. The European Court of Justice, in a series of case decisions, also refused to interfere in national morality policies because of the similar concerns that doing so would generate a backlash it and further European market integration would be stymied. [↑](#endnote-ref-5)
6. The Equal Treatment Directives refer to the 8 EU directives that address discrimination in employment and, in some cases, elsewhere. Six cover anti-discrimination based on gender: Equal Treatment in Social Security Directive (79/7/EC) Equal Treatment in Access to Goods and Services According to Gender (2004/113/EEC), the “Recast” Directive (2006/54/EC), the Parental Leave Directive (2010/18/EC), and Equal Treatment in Self-Employment Directive (2010/41/EC). The Racial Equality Directive (2000/43/EC) protects people from discrimination based on race or ethnicity in both public and private settings. The Equality in Employment Directive (2000/78/EC) only addresses discrimination in the private sphere. [↑](#endnote-ref-6)
7. The other issue of conflict in the Council was accommodating disabled workers, between those members that faced few costs of adjusting public services for the disabled and those, such as Italy and Ireland, who would have to invest a large number of funds to accommodate disabled workers. [↑](#endnote-ref-7)
8. Sean Flynn and Alison O’Connor, “Churches lobbied on EU directive,” *Irish Times*, October 19, 2000. [↑](#endnote-ref-8)
9. Mark Brennock, “Minister May Block Equality Directive,” *Irish Time*s*,* October 17, 2000. [↑](#endnote-ref-9)
10. Cahal Milmo, “Churches to Protest Over EU Rules,” *The Independent (London)*, June 30, 2000. [↑](#endnote-ref-10)
11. Stephen Bates, “Work of the Devil,” *The Guardian*, July 26, 2000. [↑](#endnote-ref-11)
12. Denis Staunton, “O’Donoghue Happy with Equality Talks Despite EU Doubts,” *Irish Times*, October 18, 2000. [↑](#endnote-ref-12)
13. Countries that actively support religion are not only Protestant. The Catholic Church is the official church of Argentina, and receive a significant amount of state subsidies to carry out social services (Fox 2015: 49). [↑](#endnote-ref-13)
14. BAG decision of 30.06.83 case 2 AZR 52/81 NJW 1984, 1917. [↑](#endnote-ref-14)
15. Education Staff, “O’Toole Anger on Equality Line,” *Irish Times*, October 24, 2000. [↑](#endnote-ref-15)
16. Data accessed through “The Religion and State Project, Round 2,” hosted on ARDA (Association of Religion Data Archives), available at http://www.thearda.com/Archive/Files/Descriptions/RAS2012.asp. [↑](#endnote-ref-16)
17. According to Thomson et al. (2012), position scores vary from 0 to 100. 0 means a member state wanted legislation in this area, while 100 (France and Belgium) implies very few exceptions to the principle were desired. 60 implies a government wanted some exceptions with a narrow definition (most EU member states and the Commission), while 40 (Germany, Ireland, and the UK) implies some exceptions with a broad definition. Salience scores vary from 0 to 100 (Thomson et al. 2012). [↑](#endnote-ref-17)
18. Legal experts qualitatively assess whether the implementing legislation meets the objectives the EED’s provisions. Any reservations about the quality of its transposition I count as incorrect. This can create higher levels of noncompliance then if a more conservative estimate is used. However, since there is no selection bias based on country, this does not hinder cross-national analysis. [↑](#endnote-ref-18)
19. Jonathan Fox, Religion and State dataset, http://www.religionandstate.org. [↑](#endnote-ref-19)
20. The authors rely on extensive reports published by the European Trade Union Institute to assess levels of compliance. The limits are that these studies do not include experts on sexual orientation law and end in the year 2004. Many pieces of national EU legislation covering sexual orientation discrimination had yet to be implemented. It is also unclear which national legislation the studies are referring to since multiple pieces of legislation are required to address all four types of discrimination. [↑](#endnote-ref-20)
21. (Döring and Manow 2016) (accessed January 23, 2017). [↑](#endnote-ref-21)
22. A country is categorized as Catholic if 70% or more of the population reports as Catholic according to the World Factbook, following the practice (Andersen and Fetner 2008). [↑](#endnote-ref-22)