LAW AND RELIGIOUS ORGANIZATIONS: EXCEPTIONS, NON-INTERFERENCE AND JUSTIFICATION

DPHIL THESIS (LAW)

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ABSTRACT

While the United Kingdom has a general commitment to religious freedom, there is currently very little written on what this commitment ought to mean for religious organizations. This thesis contributes to religious freedom literature by considering when United Kingdom law ought to apply to religious organizations. It answers this question by exploring certain potential conflicts between United Kingdom law and religious organizations paying particular attention to those that are under-examined and where the possibility of differential treatment is strongest.

The thesis is divided into three parts. Part One consists of Chapter One and sets out the doctrinal and theoretical foundations of religious freedom. Here the thesis accepts that autonomy is the liberal normative justification for religious freedom.

Part Two consists of Chapters Two to Chapter Seven and examines the interaction between United Kingdom law and religious organizations in six contexts: employment; the provision of goods and services; membership admission; internal discipline, internal property disputes; and family matters. Each chapter in Part Two is divided into two parts. The first part considers the legal doctrine that applies to religious organizations in that context. It then considers whether that approach can be justified in light of the commitment to religious freedom and autonomy identified in Part One.

Part Three consists of the final chapter, Chapter Eight. This chapter uses the conclusions from the preceding doctrinal chapters to suggest a general approach for determining when law should apply to religious organizations. The thesis concludes that a contextual approach, that considers the often competing interests involved, is the best way of determining when law should apply to religious organizations. Such consideration ought to pay special attention to the importance of the particular activity to ensuring that the option of a religious way of life is available.

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1. FOUNDATIONS

Although a general theory of religious freedom is widely accepted as fundamental to any liberal democracy, tensions arise between the norms of religious organizations and other parts of the law. Such tensions are not prima facie solved by a commitment to religious freedom. Should religious organizations be permitted to discriminate in their employment practices or in providing goods and services? Should the courts interfere in these organizations to protect the interests of a member or to resolve internal property disputes? Should the state allow religious tribunals to determine or advise on family matters? A commitment to religious freedom per se tells us little about how it ought to operate in a wide range of situations. It tells us even less about how it ought to apply where it conflicts with other commitments of the liberal state. The aim of this thesis is to consider when United Kingdom (UK) law ought to apply to religious organizations. It does this by exploring certain potential conflicts between United Kingdom law and religious organizations and then suggesting an approach for dealing with such conflicts.

1. FOUNDATIONS OF THESIS

a. Scope

The literature on religious freedom is vast. This thesis does not attempt to provide a complete account of the interaction between law and religion. Nor does it claim any particular knowledge of religious law (such as canon law). Rather, it is primarily concerned with the

extent to which UK law does and should apply to religious organizations – intermediary religious bodies that sit between the religious individual and the state – in particular contexts. It does not claim to be a complete account of the law that is relevant to religious organizations.

This thesis is not able to cover all contexts where religious organizations and UK law interact and therefore the areas considered in detail raise issues that are both underexamined and have wide doctrinal implications. As it is relatively well-settled that in most circumstances criminal law and private law apply to religious organizations just as they would apply to any other legal person, this thesis pays particular attention to the extent to which principles that have traditionally been considered part of public law – such as non-discrimination and due process – apply to such organizations. This is where the possibility of differential treatment is strongest.

As its focus is religious organizations, this thesis is only indirectly concerned with the application of UK law to the activities of religious individuals. Where the application of law to individuals is considered, it is in the context of its implications for religious organizations and their relationship with the state. Due to the large amount of literature already on religious discrimination, this thesis is not directly concerned with cases where a privilege or benefit (such as an employment position) is withheld on account of religious belief or where a person is persecuted because of such belief. Nor is it looking in any particular detail at instances where a religious group is seeking state advancement for their religion – for example, through the performance of the 'public sector equality duty'[1] – or arguing that the

[1] Equality Act 2010, s 149.

law should be extended to include their group, such as blasphemy offences. Rather, this thesis is largely concerned with the differential treatment of religious organizations – instances where a religious organization may claim that certain laws or legal principles do not or should not apply to them. As such it is also not focused on religion's legitimate role in the public sphere – for example, in terms of influencing policy or legislation – or 'freedom from religion' – for example, whether religious symbols should be present in public spaces or prayers given by public officials – but on the state's impact upon the religious sphere. It does necessarily, however, consider the extent to which the religious doctrine or social norms[2] of an organization ought to be recognized or enforced by the state when it is determining whether state law ought to apply to that organization. Religious freedom in the context of education – for example, whether faith schools ought to be publicly funded or the extent to which they should self-govern – is not specifically addressed although some issues that arise out of litigation involving religious schooling are relevant to religious organizations.

b. Methodology

The general inquiry of this thesis is whether state law[3] should apply to religious organizations. It is both descriptive and normative in that it asks first how UK law has been applied to religious organizations (or not) through both legislative and judicial action and secondly, whether it should apply in this manner. It does not seek to come up with a doctrinal classification for conflicts between state law and religious organizations but to critically examine existing and potential conflicts between religious organizations and state law.

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2 This thesis uses the terms social norm and internal norm interchangeably.

3 By state law, this thesis means the law of the United Kingdom.

The primary focus of this thesis is UK law – and within this largely the position in England and Wales – and applicable European law and jurisprudence from the European Court of Human Rights (ECtHR). While it is not a work of comparative law, illustrations from Canada, and to a limited extent the United States, are discussed where helpful and transferable due to their long history with religious freedom issues. Case law and academic literature from other common law countries, where used, are merely illustrations of more general issues surrounding religion and its interaction with liberal democratic legal systems.

This thesis is both doctrinal and theoretical. Drawing on political philosophy, it begins in Part One by setting out the theoretical foundations of religious freedom. These general principles provide a framework against which legal responses to potential conflicts between state law and the activities of religious organizations can be evaluated and a normative approach suggested. It then examines, in Part Two, certain doctrinal areas where religious organizations and UK law interact, identifies issues arising from the doctrine, and considers the justification for the doctrine in light of the principles underpinning religious freedom identified in Part One. These specific conflicts are illustrations of the broader question posed by this thesis. While the focus in this section is on UK doctrine these discussions necessarily entail a normative view of what the law ought to be in that particular context. Part Three suggests a normative approach for when state law ought to apply to religious organizations more generally, using the theoretical foundations identified in Part One and discussion in Part Two as guidance. It then briefly comments on the current UK position in light of that suggested approach.

While examining the interaction between UK law and the religious freedom claims of religious organizations will often mean examining *conflicts* between religious organizations and UK law (and, by extension, the circumstances in which UK law should or should not be imposed upon these organizations), it will also involve considering the extent to which religious doctrine and the social norms of religious organizations are or should be *applied by the state*. This is because the question of whether state law should apply to a religious organization can arise when the organization is asking the state to recognize or enforce its internal norms. Whether state law should apply to these organizations thus necessarily involves considering the corollary question: the circumstances in which the state (or more specifically, the courts) will directly apply the norms of these religious organizations (for example, when adjudicating property, or other internal, disputes), norms which may differ from or even conflict with state law. This question can raise different issues from other state responses such as exceptions.

c. Structure

This thesis is divided into three parts. Part One consists of Chapter One and is foundational. It outlines the doctrinal and theoretical justifications for religious freedom that will inform the rest of the thesis. Part Two consists of Chapter Two to Chapter Seven. It analyzes the interaction between UK law and religious organizations in six contexts and whether the UK approach in each context can be justified. Chapters Two and Three consider the exceptions granted to religious organizations from discrimination legislation, namely the Equality Act 2010, in the employment and goods and services contexts. Chapters Four and Five considers the law that relates to the regulation of membership admission and internal discipline by

religious organizations. Chapter Six considers state adjudication of internal property disputes. The final chapter in Part Two, Chapter Seven, considers the application of UK law to the activity of religious tribunals in the context of family matters.

Each context discussed in Part Two raises issues with the least attention paid by the literature. The contexts are diverse but raise most starkly the general points of tension between law and religion. Part Two is organized according to context because each chapter gives rise to differing normative issues. Any other organization, for example doctrinally or according to relief sought, would mean too much overlap between the issues in each chapter, a lack of internal coherence within the chapters, or potential difficulty in comparing approaches between legal conflict categories.

Each chapter in Part Two is divided into two parts. The first part considers the current UK approach to the religious freedom claims of religious organizations in that particular context. It then considers the justifications for the doctrinal approach and any normative issues that arise from it. While there will inevitably be some overlap in the normative discussions, for the most part each chapter addresses issues that arise distinctly from the particular context discussed in that chapter.

Each chapter in Part Two also demonstrates an aspect of the relationship between UK law and religious organizations. They show how the UK has responded to religious group norms and activities that differ from state law. These various approaches include granting

exceptions[4] (or not), refusing to intervene in the operation of religious organizations, and applying the social norms of the particular organization to resolve a dispute.

Part Three consists of one chapter – Chapter Eight. This chapter does three things. First, it identifies the main normative considerations and conclusions from the preceding doctrinal chapters. Secondly, it uses these normative considerations to suggest a general approach for determining when state law should apply to religious organizations. Finally, it assesses whether the current position in the UK is broadly consistent with this approach.

d. Timeliness and contribution

Although religious freedom is generally accepted as an important right in the United Kingdom the state now regulates many areas traditionally occupied by religion. Moreover, neither the state nor religion exists in a vacuum isolated from the other. As a result more and more occasions exist for conflicts between religious actors and government that this general commitment to religious freedom cannot in and of itself resolve. In addition, the Human Rights Act 1998 marks a change in British constitutional law that inevitably impacts religion-state relations and religious freedom. With the advent of the Act and the enactment of other equality and non-discrimination legislation, discussions surrounding notions of rights have become increasingly important. At the same time, the parameters of religious freedom have become increasingly unclear – its 'scope and meaning … is anything but settled.'[5] What

[4] Although their meaning can differ, this thesis uses the terms exception and exemption interchangeably. As we will see in Chapter Two, UK discrimination legislation refers to exceptions and therefore it is the term predominantly used by this thesis.

[5] Christopher McCrudden, 'Religion, human rights, equality and the public sphere' [2011] Ecc LJ 26.

religious freedom means and how tensions should be resolved between it and other areas of the law requires regular examination.

As we will see in this thesis, the relationship between law and religion in the UK has developed organically as conflicts have emerged and been resolved in 'the absence of any codified Constitution that might set out the basic principles governing the relationship.' The result is a complex system of accommodation rather than 'a system of principled resolution.'[6] As such, few scholars have attempted to determine when state law *does* apply to religious organizations let alone how it *should*.

The Archbishop's lecture in 2008[7] demonstrates the timeliness of this inquiry. It showed both the extent to which religious norms are capable of being authoritative in some circumstances within the United Kingdom legal system (such as the application of shari'a law in commercial arbitration and Jewish law in marriage) and also the possibility that further demands for recognition may be made. It also raised questions around the extent to which religious tribunals ought to be permitted to operate free from state regulation. His speech highlighted occasions for conflict between state law and religious norms and also showed the need to be careful about the rationale by which religion receives distinctive treatment in law and the need for awareness of the implications of this treatment for both individuals and the state. Prime Minister David Cameron's speech at the Munich Security

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6 Julian Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in Rex Ahdar (ed), *Law and Religion* (Ashgate 2000) 133.

7 Rowan Williams, Archbishop of Canterbury, 'Civil and Religious Law in England: a Religious Perspective' (lecture at Royal Courts of Justice in London on 7 February 2008) <http://www.archbishopofcanterbury.org/1575> accessed 12 August 2011. See also Lord Phillips, 'Equality Before the Law' (East London Muslim Centre, 03 July 2008) <http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-03072008> accessed 12 August 2011.

Conference in 2011[8] shows that issues surrounding state tolerance of religious groups are far from settled.

While the literature on religious freedom in the UK is expanding there is almost a complete lack of literature on UK law as it applies to religious *organizations*. The one text that does consider this law does not specifically focus on what it means for religious freedom or on conflicts between UK law and religious group norms.[9] Most literature is either concerned with religious discrimination or individual religious freedom as a general matter without substantially addressing its limits when it conflicts with state law. In the UK context in particular there is almost no literature on how to reconcile recent discrimination legislation – namely, the Equality Act 2010 – with religious freedom or whether the exceptions for religious organizations contained within that legislation can be justified.

A central question for this thesis is therefore how the state should respond to claims of religious freedom that run counter to constitutional principles such as non-discrimination or natural justice. While many political theorists have attempted to tackle the problem of "illiberal" or "intolerant" communities for the liberal state, this discussion has most often been in the context of the political system and democratic participation. Few lawyers have

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[8] Prime Minister David Cameron, 'PM's speech at Munich Security Conference' (5 February 2011) <http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293> accessed 12 August 2011.

[9] Sadurski notes that there have been few significant contributions to the subject of religion and law in the English language outside the United States. See 'Introduction' in Wojciech Sadurski (ed), *Law and Religion* (Aldershot 1992) xii. More has since been published, most notably Russell Sandberg, *Law and Religion* (CUP 2011); Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008), Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006), and Rex Ahdar and Ian Leigh, *Religious Freedom and the Liberal State* (OUP 2005). The latter two do not focus exclusively on the United Kingdom. None focuses solely on religious organizations except Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010).

written on the relationship between religious freedom and other constitutional principles. Moreover, where religious communities are examined in the literature on difference and cultural pluralism they are usually put under the umbrella of "ethnic" groups alongside indigenous and immigrant groups and other cultural minorities. They seldom receive any substantive discussion distinct from other groups.

While there have been many theoretical treatments of this issue by political theorists,[10] these treatments have paid insufficient attention to legal doctrine, particularly that of the UK. This thesis thus contributes to the debate by examining the justifiability of the UK's treatment of religious organizations and paying close attention to the doctrine relating to these organizations

Further, while there is a body of literature that discusses justifications for exceptions to ordinary laws in isolated contexts, such as those regulating health and safety, there is less that discusses exceptions to discrimination law in particular. This discussion is needed given that this law addresses unique state concerns and arguably carries weightier aspirational concerns than mere workplace dress codes. Exceptions to discrimination law also place limitations on the rights of others, which exceptions to ordinary laws usually do not. Moreover, much of the literature on exceptions arises out of the United States, rather than United Kingdom, context. There is even less literature that considers state application of the social norms of religious organizations despite such application being an integral aspect of the relationship between state law and these organizations.

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[10] eg Anne Phillips, *Multiculturalism without Culture* (Princeton 2007); Will Kymlicka, *Liberalism, Community and Culture* (OUP 1989).

Finally, many discussions of religious freedom, since the writings of Hobbes and Locke, involve exploring the relationship between the individual and the state. The relationship between the state and the religious organization and the religious organization and the individual, however, are under-considered. While much has been written about religious individuals and the law, less has been written about religious organizations and the law. The 'special place, role and freedoms' of religious organizations 'are often overlooked.'[11] This gap in the literature requires attention given the special protection given to religious organizations *qua* organizations.

e. Terminology

Religious organization

This thesis is examining those organizations that are organized largely around religious doctrine and are formed with the primary purpose of manifesting religious belief, following religious doctrine or otherwise helping to make the option of a religious way of life possible. This can include a spectrum of organizations from those that engage mainly in religious worship, such as churches and congregations, to organizations that have religious and some non-religious purposes such as adoption, health and counselling services provided by churches or religious charities. It is not, however, concerned with the activities of organizations that are only incidentally religious such as an association that has a large number of religious members, an employer who happens to also be religious, or a school or university that is nominally religious. It is also not concerned with organizations whose

[11] Richard Garnett, 'Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses' (2008) 53(2) Vill L Rev 273, 291.

purpose is primarily commercial. This thesis acknowledges, however, that from the theological perspective of religious believers it may be difficult to draw these boundaries.

While this thesis refers to religious organizations, it is primarily concerned with organized religion – religions that have an organized structure through which the religion is practised. As this thesis is not just concerned with the operation of religion as it relates to its members but also with certain activity in the public sphere – which can occur through certain bodies that have been established by organized religions for this purpose but are not organized religions in themselves – the term organized religion is too narrow. Moreover, as we shall see, it has specific meaning in United Kingdom legislation. Thus the term religious organization is preferred.

Religion

This thesis does not attempt a comprehensive definition of religion. Religion is a complex notion; defining it is 'extremely difficult' and potentially problematic.[12] Definitions risk being either over or under inclusive and trying to find one can involve engaging in theological debates that extend beyond their legal significance. A satisfactory definition may not even be possible and therefore any attempt 'misguided.'[13] It is for these reasons that UK courts are reluctant to define religion – instead preferring to confine any such discussion to what is an acceptable manifestation of religious belief – and therefore there is little case law to guide us. The ECHR itself lacks a definition of religion and Article 9 case law has

[12] Edge (n 9) 29.

[13] George C Freeman, III, 'The Misguided Search for the Constitutional Definition of Religion' (1983) 71 Geo LJ 1519.

developed without any clear definition.[14] As we shall see, UK legislation also avoids adopting a single definition of religion. Rather, it has 'a body of related definitions which depend upon the context in which they occur.'[15] By contrast, there is a substantial amount of academic literature on how to define religion and a wide range of approaches has been proposed.[16]

The difficulty in defining religion is not a serious problem for this thesis. Most debates concerning what constitutes religion usually occur at the level of individual practice – whether a particular practice constitutes part of a religion. These debates usually relate to claims of religious discrimination, which are not the main focus of this thesis, and are concerned with preventing insincere claims from being successful. Judicial decisions that discuss religion for the purposes of religious freedom claims usually also focus on what constitutes a particular religious belief rather than a religion more generally.[17] While claims to financial benefits granted by the state, such as tax exemptions, make it extremely important to determine whether an organization is religious for those purposes, this context is also outside the scope of this thesis. In the contexts covered by this thesis, what constitutes a religious organization is relatively easy to establish given the features that an organization needs – both practically and legally – to make a serious claim in that context. Moreover, the religions that are the main examples in this thesis are uncontroversial due to their long

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14 Carolyn Evans, *Religious Freedom under the European Court of Human Rights* (OUP 2001) 51.

15 Edge (n 9) 28.

16 See Kent Greenawalt , 'Religion as a Concept in Constitutional Law'; (1984) 72 Cal L Rev 753; Freeman (n 13); Edge (n 9) 27-34; Ahdar & Leigh (n 9) 110-126.

17 *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23].

history of being accepted as such – Evangelical Christianity, Catholicism, Judaism, and Islam. Religious organizations, where they are connected to such organized religion, are usually so well established that their existence is a matter of fact rather than definition.

Where falling under a particular term automatically carries with it certain privileges, however, who falls under that term is highly important. Given that we are discussing the special treatment of *religious* organizations, a working meaning of religion is needed; a meaning that sets out the minimum requirements an organization must meet to be considered for such treatment. This description may be modified in the course of the thesis to take into account the requirements of specific laws.

This thesis accepts, therefore, a conventional understanding of religion: a religion possesses a relatively clear and coherent structure and belief system.[18] After all, in order to have members, a religion must have content that its members can follow. While there is no single factor which distinguishes a belief system as religious, at a minimum such belief systems consist of comprehensive ideas relating to one's nature and place in the universe. A religion can also claim authority over its members' lives – it can impose duties upon them and instruct them on how they ought to conduct their lives.

A key debate surrounding defining religion is whether it is an individual or communal phenomenon. As will be discussed later in this chapter, religion is a combination of both individual belief and 'a way of structuring and living a communal existence in fidelity to

[18] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23].

religious teachings and cultural practice.'[19] As we shall see in this thesis, this latter social aspect provides much of the support for the protections granted to religious organizations.

Religious freedom

Unless otherwise stated, when referring to "religious freedom" this thesis means the special protection for religion that is one constitutive component of the liberal state rather than simply the constitutional protection guaranteed in positive law such as the Human Rights Act 1998. It is a rhetorical, rather than legal, term.

2. FOUNDATIONS OF PROTECTION FOR RELIGIOUS FREEDOM

This section provides a brief doctrinal and theoretical overview of the foundations of religious freedom in the UK. It will be expanded upon throughout this thesis.

a. Doctrinal foundations

Religious freedom is now firmly established as fundamental to any liberal democracy. It is guaranteed in numerous constitutional and international law instruments and affirmed in the UK by decisions that draw on domestic, regional, and international law. The doctrinal support for religious freedom will be discussed in more detail in subsequent chapters in the context of its relationship with particular areas of law.

The historical doctrinal foundations of religious freedom in the UK are 'far from clear, essentially being a tangled web of statute and case law.'[20] Its central quasi-

[19] Carolyn Evans, 'Introduction' in Peter Cane, Carolyn Evans, and Zoe Robinson (eds), *Law and Religion in Historical and Theoretical Context* (CUP 2008) 8.

constitutional protection is now provided, however, through the Human Rights Act 1998 (HRA). It incorporates the European Convention on Human Rights (ECHR), Article 9 and provides a formal right to religious freedom, subject to certain restrictions. Religious individuals and organizations[21] can now assert Convention rights directly against the government in a British court. Article 9 reads:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The Article 9 protection for religious freedom is similar to that in the United Nations Declaration of Human Rights and the International Covenant on Civil and Political Rights. It includes not just the freedom to believe but the freedom to manifest that belief in a two tier structure. The first tier right of religious conscience – the *forum internum* – is purportedly absolute while the second tier right – the *forum externum* – concerns manifestations and can be limited as set out in the Article. While religion is protected in this right alongside non-religious thoughts and conscience, s 13(1) of the HRA provides distinct protection for religious organizations:

> If a court's determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members

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[20] Peter Cumper, 'The Protection of Religious Rights under section 13 of the Human Rights Act 1998' [2000] PL 254, 254.

[21] *X and the Church of Scientology v Sweden* (1979) 16 DR 68 (European Commission of Human Rights extends Article 9 to churches). See also Julian Rivers, 'Religious Liberty as Collective Right' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (OUP 2001).

collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

This section was the result of lobbying by religious groups although its effect remains unclear.[22] Most commentators suggest that it does not give any greater weight to Article 9 than it would otherwise enjoy.[23]

On its face the HRA provides protection for public sector employers only (who can bring an action against their employer, the state). However, section 3 of the Act imposes an interpretative obligation on the courts to read and give effect to legislation in a way that is compatible with Convention rights or make a declaration of incompatibility under section 4, which may compel the government to amend the legislation. In addition, the Act's "indirect effect" may impact private employment relations. The courts, as public authorities under section 6, may be under a duty not to develop the common law inconsistently with a Convention right.[24]

As this thesis will show, the doctrinal protection for religious freedom extends beyond that contained in Article 9. It involves a collection of rights given to religious organizations that include rights of expression (as in Article 10), association (Article 11), and non-discrimination (Article 14) as well as other statutory and common law protections

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22 Mark Hill, *Ecclesiastical Law* (3rd edn, OUP 2007) para 1.47.

23 McCrudden (n 5) 36. Commentary summarised in Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] Public Law 488, fn 35.

24 Keith Ewing, 'The Human Rights Act and Labour Law' (1998) 27 Ind L Jnl 275.

including equality legislation.[25] These protections can, and indeed must, overlap in order for religious freedom to be meaningful.

b. Theoretical foundations

Recognising that religious freedom may be formally protected in UK law tells us little, however, about the concerns behind that protection and what is at stake if it is limited. We must look to the value or justification underlying religious freedom for guidance.[26] Why it is considered valuable will influence the manner and scope of its protection.

This thesis bases its examination of UK doctrine on the value of personal autonomy. There are, however, a number of values that underpin religious freedom and a wealth of scholarship exists on how special treatment for religion can be justified. Schemes of protection have been proposed that are grounded in toleration,[27] respect,[28] equality or vulnerability,[29] social cohesion,[30] the social benefit[31] or intrinsic value of religion,[32] or the value of the search for religious meaning.[33] Others simply offer an historical explanation for why this special protection occurs – to ensure civil peace.[34] It is unnecessary and unwise to attempt to find one justification for any special protection for religion. After all, religious freedom protections may not be 'reducible to a single value; many values count.'[35] While some of the possible justifications for religious freedom are flawed many of them are plausible and not inconsistent with a justification based on autonomy. As this thesis shows,

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[25] For an overview see Rivers (n 9) 50-71.

[26] 'a jurisprudence based on an inadequate understanding of the values and purpose of religious freedom *will* be shallow and unpersuasive.' Paul Horwitz, 'The Source and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond' (1996) 54 U Toronto Fac L Rev 1, 48.

special protection occurs in a range of contexts and in a variety of ways. A justification for special protection can therefore also vary depending on the particular claim and the context.

Taking every conception of religious freedom as the theoretical foundation for this thesis would, however, be confusing. It could also create conceptual difficulties when considering whether the UK doctrine is normatively justifiable in Part Two. It is therefore necessary for this thesis to address just one important value underlying religious freedom protection.

This thesis accepts that liberalism provides the normative philosophical foundations for law in any modern democracy. The UK is a liberal state and the discussion of the relationship between religion and UK law in this thesis is conducted within the framework provided by liberalism. While identifying the defining features of liberalism can be a controversial or even impossible task,36 this thesis will state those it accepts in the course of

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27 Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003).

28 Brian Leiter, 'Foundations of Religious Liberty: Toleration or Respect?' (2010) 47 San Diego L Rev 935.

29 Christopher Eisgruber and Lawrence Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 U Chi L Rev 1245, 1248.

30 Evans (n 14) 23.

31 eg John Garvey, 'God is Good' in *What Are Freedoms For?* (HUP 1996) 42-57.

32 William James, 'The Will to Believe' in Frederick Burkhardt, Fredson Bowers and Ignas Skrupskelis (eds), *The Will to Believe and other Essays in Popular Philosophy* (HUP 1979) 1; Timothy Macklem, 'Faith as a Secular Value' (2000) McGill LJ 45; Ahdar & Leigh (n 9) 56 discussing the work of John Locke.

33 Andrew Koppelman, 'Is It Fair to Give Religion Special Treatment' [2006] U Illinois L Rev 571.

34 Douglas Laycock, *Religious Liberty, Volume One: Overviews and History* (Eerdmans 2010) 58 ('the answer [to why religion is singled out for special protection] depends far more on history than on logic').

35 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (Princeton 2008) 1.

36 Will Kymlicka, *Liberalism, Community and Culture* (Clarendon 1989) 9.

the thesis when discussing their implications for religious freedom in particular contexts. Given that religious freedom is generally accepted as one of the hallmarks of any liberal state, the values underpinning liberalism will provide the theoretical foundations for its protection of religion.

This thesis accepts that autonomy is a value that encompasses the concerns of liberal theory. Autonomy is therefore an important liberal normative justification for religious freedom. If we value personal autonomy then we must value autonomy in relation to religious matters too.37 This idea will be both relied on and supplemented later in the thesis when it considers the relationship between religious freedom and specific areas of state law.

Autonomy has been chosen, as opposed to other values, as the value underpinning religious freedom protection because it is a prominent and influential justification in the literature on religious freedom,38 and one that is increasingly adopted by UK courts. As we shall see in this thesis, recent UK case law shows a clear trend towards an autonomy-based conception of religious freedom.39 Given the influence and significance of autonomy as a justification for religious freedom, both in academic commentary and in recent UK case law, the adoption of this justification makes the conclusions of this thesis relevant for current debates concerning the special treatment of religion. At the very least, any examination of

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37 Farrah Ahmed, 'The Value of Faith' (2010) 38 (2) Religion, State & Society 169, 169. See also Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton 2006) 3–4.

38 eg Greenawalt (n 37) and Evans (n X). Michael Sandel also accepts that an autonomy-based conception of religious freedom is the predominant contemporary liberal understanding of religious freedom: 'Religious Liberty – Freedom of Conscience or Freedom of Choice?' [1989] Utah L Rev 597, 611.

39 *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [95]-[96], *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [22], *E v Governing Body of JFS* [2008] EWHC 1535 (Admin), [2008] ELR 445 [157], *Eweida v British Airways Plc* [2010] EWCA Civ 80 [40].

religious freedom protection in the UK needs to address whether this protection is consistent with the underlying value identified by the doctrine. This is not to say, however, that religious freedom protection could not be justified by an appeal to any of the different values identified above, such as equality or even the intrinsic value of religion. Evaluating religious freedom doctrine by reference to these other values could lead to different conclusions from those reached here. While an evaluation based on values other than autonomy might be a useful – it would have to be a different project from the one this thesis undertakes. It is for these reasons that this thesis focuses primarily on the justification for religious freedom that is based in autonomy. Any additional justifications for special treatment will be discussed where relevant in the course of this thesis.

Autonomy

While there is a wide range of conceptions of autonomy within the literature, it is, generally speaking, the capacity to self-direct or 'make'[40] one's own life. It is 'an ideal of self-creation'[41] or 'a life freely chosen,'[42] which this thesis takes to mean a person 'fashioning' or 'controlling, to some degree, their own destiny' through a series of 'successive decisions throughout their lives.'[43] This involves critically assessing and revising one's ends; 'reflect[ing] on and, within the limits of our circumstances, either endors[ing] or chang[ing] the way we act or live.'[44] This can be contrasted with a life of coerced choices, no choices, or

40 Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 369.

41 ibid 370.

42 ibid 371.

43 ibid 369.

44 Anne Phillips, *Multiculturalism without Culture* (Princeton 2007) 101.

simply drifting.[45] This thesis generally accepts Raz's account of autonomy because it is the most influential and the most developed in legal philosophy.

As distinguished from moral autonomy, personal autonomy[46] in the Razian sense is concerned with the purposes and limits of state action. It admits that the state need not intervene to correct all moral wrongs; it is not a theory aimed at determining which actions are moral or immoral.

Autonomy is valued on a theory of liberty because a 'person's well-being consists in the successful pursuit of self-chosen goals and relationships.'[47] Its value, however, rests on a person's capacity to decide (and the exercise of that capacity) rather than the decision itself. An autonomous life, claims Raz, 'is discerned not by what there is in it but by how it came to be.'[48] After all, many nonetheless valuable decisions may be incompatible or incommensurable. As we shall see in this thesis, however, it is not illegitimate for a liberal state that values autonomy to promote decisions that are more likely to support autonomy.

Raz sets out three 'conditions of autonomy' (ie: the conditions necessary for a person to enjoy an autonomous life): (i) 'the mental abilities to form intentions of a sufficiently complex kind, and plan their execution';[49] (ii) 'an adequate range of options', which includes

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45 Raz (n 40) 371.

46 Although Raz refers to 'personal autonomy', this thesis uses the terms individual and personal autonomy interchangeable to distinguish such discussions from those regarding group autonomy.

47 Raz (n 40) 370.

48 ibid 371.

49 Raz (n 40) 372.

a variety of options, from which to choose;[50] and (iii) 'independence', which requires freedom from coercion (which 'diminishes a person's options) and manipulation (which 'perverts the way [a] person reaches decisions')[51] as both 'subject the will of one person to that of another' and this is inconsistent with autonomy.[52]

Protection for religion is essential to this autonomy-based conception of liberalism. To exercise their autonomy an individual must have an adequate range of valuable choices available to him or her in order to make decisions about how to construct their life.[53] Thus a commitment to autonomy necessarily also entails a commitment to protecting this range of choices. Although Raz does not discuss religion in any detail, one of these ways of life could be religious. A choice between a variety of ways of living could include holding religious beliefs, engaging in religious practices or belonging to religious communities. Evans suggests that 'choice in matters of religion … must be an essential component of autonomy.' This is because '[c]oercion in matters of fundamental importance [such as those addressed by religion] would deny people the ability to be authors of their own lives.'[54] Choice with respect to religious matters is a 'good thing'[55] – essential to individual wellbeing – whether

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50 ibid 373-377.

51 ibid 377.

52 ibid 378.

53 ibid 398.

54 Evans (n 14) 29-30.

55 Douglas Laycock, *Religious Liberty, Volume One: Overviews and History* (Eerdmans 2010) 2.

we accept that religion itself is good or not and regardless of whether a person chooses a religious way of life. A commitment to autonomy thus necessarily results in diversity.[56]

While autonomy requires an adequate range of options it does not require the presence of a particular option.[57] Some options – for example, to play a particular sport – can be eliminated and replaced with others without the loss of autonomy since all that is required is an adequate range of options.[58] Thus we could argue that even if the state must provide the background conditions for an autonomous life this does not demand special protection for religion. However, religion is a particular option that cannot be replaced with something else. An autonomy-based theory of religious protection sees the ability to choose in relation to religious matters as an important part of choosing one's life. If we value a person's autonomy in relation to religious matters then we value their ability to choose a religious way of life. It would not be an adequate range of options without being given a choice as to one's spiritual life.

Raz's conception of autonomy, however, is reluctant to protect religions that do not support autonomy.[59] Many theorists who adopt Raz's conception of autonomy to support religious freedom ignore or overlook this aspect of his argument.[60] Raz acknowledges that 'autonomy itself is blind to the quality of options chosen. A person is autonomous even if he

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56 Raz (n 40) 396 cf William Galston, who sees liberalism as 'about the protection of diversity, not the valorization of choice' (at 523), and who argues that a liberal state committed to autonomy 'not infrequently' acts in ways to diminish diversity (at 522-25) 'Two Concepts of Liberalism' (1995) 105 Ethics 516.

57 Raz (n 40) 410.

58 ibid 411.

59 ibid 423-44.

60 eg Evans (n 14).

chooses the bad' but he nonetheless sees 'autonomy [as] valuable only if it is directed at the good.'[61] This is because 'it supplies no reason to provide, nor any reason to protect, worthless let alone bad options chosen.'[62] Thus '[s]ince our concern for autonomy is a concern to enable people to have a good life it furnishes us with reason to secure that autonomy which could be valuable: providing, preserving or protecting bad options does not enable one to enjoy valuable autonomy.'[63]

This thesis accepts that a religious way of life can be valuable although as we will see in the context of internal minorities not all religious ways of life are indeed good and in this regard the liberal state may distinguish between them. In any event, we can still accept, even under Raz's theory, that choice with respect to religious matters is valuable whether we accept that religion itself is good or not and whether or not we accept Raz's claim that autonomy is only valuable if directed at the good. Choice in relation to religious matters is an essential component of an autonomous life even if we make 'bad' choices.

While toleration as an independent value is outside the scope of this thesis, respecting personal autonomy, however, entails some measure of toleration. If one values another's autonomy then one may also have to tolerate the life they have chosen. This includes tolerating bad or evil actions but also other morally acceptable tastes and pursuits.[64] Unlike tolerance-based theories of liberalism, however, this does not come from scepticism about the good but from a commitment to autonomy and pluralism; it is a requirement of the good.

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61 Raz (n 40) 411.

62 ibid 411.

63 ibid 412.

64 ibid 404.

'Given the necessity to make those forms of life available in order to secure autonomy there is a need to curb people's actions and their attitudes in those conflicts [between valuable but incompatible forms of life] by principles of toleration.'[65] As we shall see in Part Three, toleration is also necessary to comply with 'principled reasons for restricting the use of coercion', for example, the "Harm Principle" – the principle that no one should be coerced unless their behaviour harms others.[66] Thus conduct that does not cause harm must be tolerated in order to enable people to live autonomous lives.

Criticisms of autonomy

An autonomy-based conception of liberalism does have potential weaknesses. Under an autonomy-based theory of religious freedom, religion could be conceived solely as an 'individual phenomenon.'[67] This conception is problematic as we will see particularly in Chapter Four in the context of membership admission, Chapter Five in the context of internal discipline and Chapter Seven in the context of family matters. It has the potential to both downplay the importance of religious groups to the exercise of religious freedom while also leaving individual members vulnerable to oppression by downplaying the power a group can have over an individual's life. While it is the exercise of individual autonomy that ultimately creates religious organizations, these organizations also have a strong role to play in constructing individual religious affiliation and identity – it is a symbiotic relationship. These organizations are also necessary if someone wishes to pursue a religious way of life. As we shall see in this thesis, comprehensive goals or options such as religion depend on 'existing

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65 Raz (n 40) 407.

66 Joseph Raz and Avishai Margalit, 'National Self-Determination' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1996) 172.

67 Benjamin Berger, 'Law's Religion: Rendering Culture' 45(2) Osg Hall LJ 277, 309.

social forms, i.e. … forms of behaviour which are in fact widely practised in … society'[68] in order to be successfully pursued. For religious individuals, therefore, their well-being depends on the existence of these social forms. Group membership is therefore part of this notion of autonomy – it is necessary to realize personal autonomy. Autonomy is not an atomistic concept but one that 'presupposes community and laws to which its members can be expected to subscribe.'[69] It requires a background of social forms of life or what some term a 'context of choice' – a structure that makes individuals aware of the choices available to them in life and allows them to examine their value.[70] The freedom to make intelligent, conscious and purposive decisions about what is valuable in life, it has been argued, cannot exist, or at least be effectively exercised, if the individual does not belong to a culture or society.[71] This is because we learn about different possibilities for living through cultural interaction and it is only through a secure cultural structure that people can become aware of the options available and intelligently examine their value. Similarly, Raz sees cultural membership (which could include religious groups) as important because it enhances a citizen's personal autonomy and as such cultures play a role 'as a precondition for, and a factor which gives shape and content to, individual freedom.'[72] Membership in a culture community bears directly on an individual's capacity for independence, opportunities to flourish, feel a sense of belonging, and enjoy dignity and self worth – all necessary

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68 Raz (n 40) 308.

69 Geoffrey Brahm Levey, 'Equality, Autonomy, and Cultural Rights' (1997) 45(2) Pol Theory 215, 235.

70 Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon 1989) 165.

71 ibid.

72 Joseph Raz, 'Multiculturalism: A Liberal Perspective' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1996) 163.

components of a valuable life.[73] Thus it is not inconsistent with autonomy to conceive of it as having a significant social component and, as such, it is not simply an individual phenomenon.

One of the main criticisms of the personal autonomy rationale for religious freedom, however, is the potential neutrality shown towards the exercise of autonomy. If the freedom to *choose* is paramount under autonomy-based support for religious freedom, then the object of that choice is irrelevant; it is simply the process of that choice that must be protected.[74] The freedom to make religious choices is simply valued because they are 'one of many possible options that individuals might select as an aspect of his or her self-definition.'[75] Religion can be seen therefore as 'one possible expression of personal autonomy.' To protect religion is to protect a person's ability to make choices about their spiritual life.[76] Taking this view of religion that sees it as part of an autonomous life inevitably casts it as a 'product of choice.'[77] This offends, or at least is of some concern to, those who see religious beliefs as being of a different kind to other claims and may even be worthy of respect in themselves not because they are the product of someone's capacity to choose.[78] This protection grants no special status to religious choices over any other type of choice. To class them with leisure or

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73 Joseph Raz, 'National Self-Determination', in *Ethics* (n 72) 115.

74 Ahdar & Leigh (n 9) 61.

75 Berger (n 67) 293 (discussing Canadian Supreme Court Case that adopts this approach – *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [42]).

76 Berger (n 67) 309.

77 ibid 294.

78 eg Macklem (n 32).

commercial interests in this way could be seen as disrespectful or trivializing them.[79] Thus an argument from autonomy that emphasises personal choice risks placing religious convictions on a par with other various interests making it difficult to distinguish between 'claims of conscience' and 'mere preferences.'[80] Religious claims get ranked alongside other claims despite them being of a different kind or quality.

If religion is subsumed into a category of 'mere preferences'[81] then it does risk being only weakly protected. The true nature of religious beliefs for the individual believer would not be appreciated – that they can carry with them commands and very real non-negotiable duties. This would be particularly concerning given that the consequences for religious believers for any limitation on that choice would be greater than for many other lifestyle choices. While religion is a choice, it is a particular type of choice that distinguishes it from other exercises of autonomy. It is 'a 'fundamental choice … [because it is] closely related to an individual's concept of identity and self-respect'[82] or 'essential components of self-identity.'[83] Religious interests may also be more profound than other interests. It involves 'very strongly felt commitments, commitments central to a person's life.'[84] Peter Edge argues that religious beliefs have a special importance in people's lives because they form a central part of a person's inner self. They define a person's very being and sense of who he is and

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79 Edge (n 9) 7.

80 Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, CUP 1998) xii-xiii.

81 ibid xii–xiii.

82 Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc LJ 280, 302.

83 Evans (n 14) 32.

84 Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) 167.

why he exists, and how he should relate to the world and as a result they cannot meaningfully be separated from the person himself. Thus, as we shall see in Chapters Two and Three in the employment and goods and services context, a person who is placed in a position where their beliefs and practices conflicts with the law may suffer special harm compared to another individual who conflicts for another reason.[85]

Autonomy is also concerned with the type of choices available to someone and distinguishes between them. The simple presence of choices does not per se make a life autonomous. To be autonomous a person requires not just a choice but an adequate range of choices. Raz's example of 'the man in the pit' illustrates how a life of choices is still not an autonomous life unless there is an adequate range. A man trapped in a pit with sufficient food may be able to survive and he may have choices – as to which ear he should scratch, for example – but he cannot flourish because all his choices are trivial.[86] To be adequate, the range of choices should include trivial and important options, involve short-term and long-term consequences, and be varied.[87] While Raz does not give examples of important choices it would include religion given the nature of such a choice – its subject matter and long-term consequences.

Thus valuing autonomy does not mean that all options are viewed the same; some can be short term and of little consequence and some can be long term with pervasive consequences. Autonomy does, therefore, require a distinction to be drawn between trivial

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85 Edge (n 9) 7.

86 Raz (n 40) 373-374.

87 ibid 375.

and important choices and it does not demand that all choices be treated the same. It would not be inconsistent with autonomy, therefore, for the state to distinguish between decisions regarding religion and other choices.

Moreover, within a range of options there must be comprehensive options or goals. These are complex options that 'structure'[88] or 'pervade important dimensions'[89] of one's life. Comprehensive goals are more important than other goals[90] because their success is one of 'the most important elements of one's well-being.'[91] It is consistent with, and even demanded by, the value of autonomy, that religion, as a comprehensive goal, is therefore treated as more important than other goals. Adopting a comprehensive option means subscribing to a range of social norms. The more extensive the set of beliefs and norms that accompanies the religion is – in other words, the more the religion reaches into various aspects of a person's life – the stronger the argument is that religious freedom is essential to a person's autonomy and their ability to be part-author of their own life. This is because the extensive range of beliefs demonstrates the range of areas upon which they must make choices.[92] Thus the comprehensive nature of religion supports an argument that personal autonomy in religious matters is important and therefore ought to be granted special protection.

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88 Leslie Green, 'Un-American Liberalism: Raz's "Morality of Freedom"' (1988) 38 U Toronto LJ 317, 322.

89 Raz (n 40) 308.

90 ibid 370.

91 ibid 308.

92 Thank you to Farrah Ahmed for this point.

It is correct, therefore, to suggest that religion differs from mere preferences. Some choices are weightier than others and this includes religion. An autonomy-based theory of religious freedom does distinguish between such choices.

Related to the idea that religion can differ from other choices, personal autonomy as a basis for religious freedom has also been criticized for failing to appreciate that for many people religious liberty consists of freedom of conscience, not freedom of choice. Sandel suggests that this voluntarist conception of personhood, which is embodied in the idea of individual autonomy and the idea that we are independent in our aims and attachments and capable of assessing and revising them, fails to secure religious liberty in many instances. He sees religious liberty's broader mission of protecting individual autonomy as 'depreciat[ing] the claim of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to a choice.' [93] Thus protecting religion as one value among many that an independent self may choose as a lifestyle misses the role that religion plays in people's lives. For most, observance of religious duties is an end in itself; 'essential to their good and indispensable to their identity.' Treating religion as an expression of individual autonomy risks not seeing persons as bound by duties originating from sources other than themselves.[94] He sees freedom of conscience as better suited to securing religious liberty than freedom of choice. For Sandel, where freedom of conscience is at stake, the relevant right involves fulfilling a duty, not making a choice.[95] Religious liberty conceived this way addresses the problem of 'encumbered selves' – those whose religious beliefs are constitutive of their sense

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[93] Michael Sandel, 'Religious Liberty – Freedom of Conscience or Freedom of Choice?' [1989] Utah L Rev 597, 611.

[94] ibid.

[95] ibid.

of self and who are therefore 'claimed by duties they cannot renounce, even in the face of civil obligations that may conflict.'[96]

Living a religious life comprised of duties can, however, still be an autonomous life. The presence of duties does not make autonomy less valuable as a basis for religious freedom and, as we shall see in this thesis, recognising such duties is not inconsistent with an autonomy-based justification for religious freedom. Indeed, a person's autonomy can be enhanced by undertaking certain duties as to do so may make other options available. Moreover, while religion can entail duties, a person may still be free in some sense not to fulfil them because, for example, they are not coerced. They may also make certain choices as to *how* to fulfil these duties, as the varying interpretations of religious doctrine demonstrates.[97] Autonomy does not require complete independence. Raz acknowledges that to be autonomous means to be 'part author' of one's life because all decisions are made within certain limitations, both natural and social. 'Autonomy is only possible within a framework of constraints …. The completely autonomous person is an impossibility.'[98] An autonomy-based justification for religious freedom is not therefore inconsistent with recognising that a religious way of life can carry with it particular duties.

Conclusion

Despite any potential weaknesses with an autonomy justification, it is still valuable as a basis for religious freedom protection. A general commitment to autonomy, however, does not tell

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96 Sandel (n 94) 611.

97 Thank you to Farrah Ahmed for drawing my attention to this point.

98 Raz (n 40) 155.

us much about the scope of religious freedom protection. While it provides guidance, it does not in and of itself resolve tensions between religion and specific areas of state law. Nor does this commitment tell us how the state ought to respond to activities of organizations that are inconsistent with autonomy or toleration. The next section of this thesis will explore these issues by examining the relationship between religious freedom and state law in specific contexts.

2. EMPLOYMENT

Religious freedom and state law can conflict starkly in the context of employment, primarily in relation to the practices of religious organizations and discrimination law. Religious organizations seek exemptions from discrimination law, most notably from that prohibiting discrimination on the grounds of sex or sexual orientation.[1] Part One examines how legislation and case law address religious freedom in the context of discriminatory employment practices. Part Two considers whether special treatment for religious organizations in this context can be justified. The legislation addressed is illustrative and a focal point for the broader questions addressed in Part Three of the thesis regarding the relationship between religious freedom and state law more generally.

1. DOCTRINE

The UK government provides numerous religion-based exceptions in its equality and antidiscrimination legislation. This exception approach attempts to reconcile religious freedom and discrimination law by placing certain religious positions outside the reach of the legislation. This section provides an overview of employment discrimination law.

[1] Unless stated otherwise, 'discrimination' includes direct and indirect discrimination, victimisation, and harassment.

a. The employment discrimination law framework

Generally speaking, discrimination laws prohibit an employer from treating a person less favourably because of a certain characteristic or using rules or practices to disadvantage that person. Discrimination law in the UK in relation to employment consists of both European and domestic legislation.

i. Europe

Europe has a comprehensive framework of discrimination law. Article 19 TFEU of the Lisbon Treaty provides that the Council of Ministers, acting in accord with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' It is 'the most significant source of ... competence in the field of human rights protection within the EU …. and supplement[s] the existing range of EU gender equality policies.'[2] Prior to Article 13 EC, the predecessor to Article 19 TFEU, discrimination on the grounds of sex and nationality only was prohibited by EU law and even then 'the basis for adopting general legislation in these fields was … unclear.'[3]

Sex discrimination had been addressed primarily through what is now Article 157 TFEU (ex Article 141 EC), and directives issued pursuant to that Article or Article 352

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2 Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (4th edn, OUP 2008) 408.

3 ibid.

TFEU (ex Article 308 EC). Thus the Equal Treatment Directive 76/207[4] issued by the Council prohibits sex discrimination and established the EC framework of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions. This Equal Treatment Directive has now been amended by Equal Treatment Directive 2002/73 ('ETAD').[5] The Equal Treatment Directive 2006/54,[6] adopted under Article 141 EC, consolidates and tidies the European equal treatment in employment legislation but 'does not introduce any substantially new amendments' to override the earlier Directives.[7]

Unlike Article 157 TFEU, however, Article 19 TFEU is not directly effective and instead enables the EU to adopt measures to combat discrimination on the listed grounds.[8] As a result of Article 19, the UK now has to conform to EU Directives. Thus the Employment Directive 2000/78[9] prohibits discrimination on grounds of sexual orientation, religion or belief, disability and age, and the Racial Equality Directive 2000/43[10] prohibits

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4 Council Directive (EEC) 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

5 Council Directive (EC) 2002/73 of 23 September 2002 amending Council Directive 76/207/EEC [2002] OJ L269/15.

6 Council Directive (EC) 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

7 Craig & de Burca (n 2) 881.

8 ibid 410.

9 Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ('Employment Directive 2000/78').

10 Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 ('Racial Equality Directive 2000/43').

discrimination on the grounds of race or ethnic origin in a broad range of situations including employment.

ii. The United Kingdom

The Equality Act 2010 (the 'Equality Act') consolidates and extends UK law on discrimination. Prior to the Equality Act, discrimination law was piecemeal. The grounds and contexts of discrimination were addressed in separate legislation, often through different legal tests. The Equality Act now provides a single legislative framework, which restates and amends the UK's implementation of the relevant EU Directives. It will ultimately repeal most of the existing legislation on discrimination law.[11]

The Equality Act protects certain characteristics – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation ('protected characteristics')[12] – from certain conduct, which includes direct discrimination, discrimination arising from disability, indirect discrimination, harassment and victimization ('prohibited conduct').[13]

iii. The Human Rights Act 1998

Article 14 (Prohibition of Discrimination) ECHR – as incorporated into the HRA – provides that Convention rights 'shall be secured without discrimination on grounds such as sex, race

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[11] Case law and commentary based on repealed legislation is referred to where consistent with the current law. For a summary of the repealed legislation see Explanatory Notes to Equality Act 2010 paras 3-12 ('Explanatory Notes'). Explanatory notes provide guidance to interpreting legislation but are not exhaustive or authoritative statements of the law.

[12] Equality Act, ss 4-12.

[13] Equality Act, ss 13-27.

… religion … or other status.'[14] Article 14 must be pleaded in conjunction with another Convention right.

b. Exceptions for religious organizations

Religious organizations that employ people are generally subject to employment law like any other employer, including that which addresses discrimination.[15] The UK courts have shown great deference to religious organizations, however, in relation to the appointment of ministers. Historically, they were considered to be outside the reach of employment law, often on the basis that there was no contract of service.[16] Moreover, until recently, discrimination law protected only a limited range of characteristics and therefore the potential for any conflict with the employment practices of religious organizations was limited. However, the regulatory reach of the state has 'substantially increased' in this area and a wider range of characteristics is now protected under discrimination law.[17] Moreover, UK discrimination law now potentially applies to ministers and lay clergy as office-holders.[18]

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[14] 'other status' includes sexual orientation: *Salgueiro Da Silva Mouta v Portugal* (1999) EHRR 1055.

[15] eg *Islamic Cultural Centre v Mahmoud* App No UKEAT/0615/06/MAA (27 June 2007) and *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28 (employment by a religious organization does not raise a presumption of no intention to create legal relations).

[16] *President of the Methodist Conference v Parfitt* [1984] ICR 176; *Davies v Presbyterian Church of Wales* [1986] ICR 280 (HL); *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309; *Birmingham Mosque Trust Ltd v Alavi* [1992] ICR 435; *Diocese of Southwark v Coker* [1998] ICR 140, and *Khan v Oxford City Mosque Society* (EAT, 23 July 1998) cited in Aileen McColgan 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Ind L Jnl 1, 3 cf: *Percy* (n 15) (sex discrimination complaint allowed by woman minister; no doctrinal issue pleaded).

[17] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 122-124.

[18] The category of officeholder is 'very broad' and 'may include…members of the clergy and other ministers of religion': Explanatory Notes to the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003, para 116. Rivers warns against automatically assuming that ministers of religion are office-holders and says that the status of ministers is still unclear (n 17) 117 and 129.

The presumption is now that employment law generally applies to religious organizations, with the onus on the organization to show otherwise.

The law does, however, permit employment practices that would otherwise conflict with discrimination legislation in certain circumstances. Such accommodation takes the form of protecting religious believers themselves from discrimination, justification for indirect discrimination or specific legislative exceptions.

i. Direct discrimination

Direct discrimination is where a person treats another, because of a protected characteristic, less favourably than they treat or would treat others.[19] While discrimination because of religion is prohibited under the Equality Act, a person's religious belief may also cause them to discriminate in a way that is prohibited in other parts of the legislation. That person may argue that not permitting such discrimination discriminates against them on the basis of their religion. It is here that religious freedom and religious discrimination claims can overlap.

The extent to which a person can rely on a claim of religious discrimination to discriminate against another on other grounds is not clear. In *McClintock v Department of Constitutional Affairs*[20] the Employment Appeal Tribunal viewed such circumstances narrowly. A former magistrate alleged that he was forced to resign by the department's refusal to accommodate his religious beliefs and relieve him from the duty to officiate in adoption cases involving same-sex couples. Dismissing the direct discrimination claim, the

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19 See Equality Act, s 13(1).

20 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

Tribunal held that the employer would have treated anyone who had not been prepared to officiate the same regardless of their belief. It also concluded there was no indirect discrimination: the employer was justified in holding the appellant to the judicial oath requiring him to hear all types of cases; the contrary result would undermine the administration of justice; and the means were proportionate as there was no legal obligation to make a blanket exception to accommodate religious beliefs.

Similarly, in *Ladele v London Borough of Islington*[21] a civil registrar failed in her appeal claiming direct and indirect discrimination on the grounds of her Christian religious belief and harassment when she was disciplined and threatened with dismissal for refusing to register same-sex civil partnerships. The registrar was treated the same as all other employees and any disadvantage she suffered was justified by the employer's equality policy. The judgment is somewhat 'one-sided' as there is no acknowledgment that the equality policy and legislation also protect discrimination on grounds of religion.[22] A Christian counsellor's claim also failed where he was dismissed because he refused to counsel same-sex couples on sexual matters. In *McFarlane v Relate Avon Ltd*[23] the Court held that his employer did not treat him less favourably on grounds of religion; he was treated as he was because of his unwillingness to provide counselling rather than because of his Christian faith.

This limited case law indicates that a direct discrimination claim will rarely succeed where a claimant is not permitted by their employer to engage in discriminatory activity

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21 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [2010] 1 WLR 955.

22 Russell Sandberg, 'Laws and religion: unravelling McFarlane v Relate Avon Limited' (2010) 12 Ecc LJ 361, 363.

23 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872.

based on their religious beliefs. In any event, it is hard to envisage an organization, as opposed to an individual, plausibly being able to make such a claim since an organization does not have protection from religious discrimination. These decisions do, however, also indicate the extent to which a religious freedom claim under Article 9 would be successful. More protection seems to be given to preventing discrimination on grounds of sexual orientation and this results in Article 9 becoming 'increasingly toothless.'[24] While special protection for religion as part of a framework of discrimination law may have different justificatory bases than special treatment for religion under the rubric of religious freedom,[25] there may be some overlap as discrimination on the grounds of religion can limit one's religious freedom.

ii. Indirect discrimination

Indirect discrimination is where a generally applicable or 'facially neutral' provision, criterion or practice puts, or would put, a certain group and the particular claimant who share a protected characteristic at a particular disadvantage, and cannot be justified. To be justified it must be a proportionate means of achieving a legitimate aim.[26] The proportionality principle requires that 'the measure serves an important purpose, is rationally related to the achievement of that purpose, and no alternative measure that avoids discrimination is

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[24] Sandberg (n 22) 370.

[25] Bamforth (n 99) 872.

[26] Equality Act, s 19. The wording of the Act suggests less emphasis on necessity than in the Employment Directive 2000/78, Art. 2 where any indirectly discriminatory practice must be 'objectively justified by a legitimate aim and the means of achieving that aim [must be] appropriate and necessary'. In assessing, however, whether a requirement is proportionate a tribunal will interpret the Act to comply with the Directive. Thus any difference in wording may not be particularly significant: Lucy Vickers, *Religious Discrimination at Work* (Institute of Employment Rights 2008) 22.

available.'[27] Where the justification defence succeeds, it is deemed that no discrimination has occurred.[28]

The grounds of justification include state policy (for example, increasing labour market participation) and employers' justifications (such as managerial efficiency). Unlike the 'margin of discretion' granted to state policies, the range of justifications for employers is 'tightly circumscribed.'[29]

The relevant issue here is whether religious freedom can be a justification for the claimed discriminatory rule. Situations may occur where certain religious requirements imposed upon all workers by a religious organization affect the non-discrimination interests of certain individuals such as non-religious, gay or female employees. Here there may be a conflict between a permitted requirement relating to religion, as discussed below, and other protections under the Equality Act. For example, an employer may set religious observance as a preference in making an appointment to maintain the religious ethos of the organization. This may indirectly discriminate because of sexual orientation where that religion is hostile to homosexuality.[30] The proportionality test limits the instances where a religious requirement that indirectly discriminates can be justified, and thus religiously homogenous

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27 Hugh Collins, *Employment Law* (2nd edn, OUP 2010) 62.

28 Simon Deakin and Gillian Morris, *Labour Law* (5th edn, Hart 2009) para 6.29.

29 ibid paras 6.30-31.

30 Lucy Vickers, Religious Freedom, Religious Discrimination and the Workplace (Hart 2008) 138.

workplaces may not be allowed where they result in indirect discrimination because of the 'high standards required to justify sex or sexual orientation discrimination.'[31]

Where an employee chooses to work for a religious employer it may be proportionate for the employer to make demands in terms of loyalty and lifestyle,[32] but such requirements must be enforced in relation to both heterosexual and homosexual employees,[33] and must not have a greater impact upon one of these groups.[34] This is also known as the 'specific situation rule' and it recognizes, at least in relation to Article 9, that a person's rights may be influenced by the particular situation of the individual claiming that freedom, namely that they have voluntarily submitted themselves to a system of norms and thus cannot then claim that they do not apply to them.[35] Applying this principle to employment discrimination protection, however, has the potential to seriously undermine that protection.

Certain other interests of religious organizations, such as their associative freedom, could influence a proportionality determination. Vickers argues that there may be some 'specialised circumstances' where such indirect discrimination could be justified in terms of

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31 ibid.

32 Vickers (n 30) 37. See also *Siebenhaar v Germany* App no 18136/02 (ECtHR, 3 February 2011) and *Obst v Germany* App no 425/03 (ECtHR, 23 September 2010) cf: *Schüth v Germany* App no 1620/03 (ECtHR, 23 September 2010).

33 *Percy* (n 15).

34 *O'Neill v Governors of St. Thomas More RC School* [1997] ICR 33 (only with pregnancy that breach of requirement to abstain from extra-marital sexual activity was made known to employer; exception for organized religion in the Sex Discrimination Act 1975, s 19 not considered presumably because it was not a requirement of a religious education teacher that they be female: Rivers (n 17) 122). See also *Berrisford v Woodard Schools (Midland Division) Ltd* [1991] IRLR 247.

35 See *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [22]-[23] citing a strong line of European authority: *X v Denmark* (1976) 5 DR 157; *Ahmad v United Kingdom* (1981) 4 EHRR 126, *Kalaç v Turkey* (1997) 27 EHRR 552, *Sahin v Turkey* App no 44774/98 (29 June 2004).

proportionality. In these limited circumstances religious groups should be allowed to 'retreat from mainstream society' and discriminate against others to maintain religious freedom for their members.[36]

As the differing judgments in *Ladele* highlight, the distinction between indirect and direct discrimination is not always clear. One can only draw a distinction 'if there is a clear line between who a person is and what they believe or do.' As Rivers notes, this line is 'particularly obscure in cases of religion or belief and sexual orientation.'[37] Discrimination by religious organizations, however, largely involves direct discrimination, not neutral workplace requirements. Moreover, it is difficult to think of an instance where indirect discrimination would be allowed where it is not covered by the exceptions for religious employers discussed below. Therefore this chapter largely focuses on these exceptions.

iii. Specific legislative exceptions

The UK provides certain exceptions, envisaged under UK law, to its discrimination legislation thus relieving the courts of having to resolve certain conflicts with religious freedom.

(a) Occupational Requirements

An occupational requirement justifies excluding an individual from a certain position where it would otherwise be prohibited. The Equality Act, sch 9 para 1(1) has a general exception for occupational requirements based on any of the protected characteristics where 'the

[36] Vickers (n 30) 138.

[37] Rivers (n 17) 130.

application of the requirement is a proportionate means of achieving a legitimate aim.' While this exception could potentially apply to religious organizations, analysis will be confined to those exceptions that specifically do.

(b) The EU directives

The ETAD, the recast Equal Treatment Directive 2006/54, and the Employment Directive 2000/78 all provide that in certain limited circumstances different treatment may be justified within churches or other religious associations or communities. These circumstances include where the nature of the particular occupational activity requires it or there is a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[38]

In accordance with Article 288 TFEU the exception provisions in the Directives accord the UK flexibility to choose the form by which to implement the Directive. The implementing Regulations contain some language that is unique to the UK,[39] but largely they mirror the wording in the Directives varying from it only to make the exceptions narrower. The UK exceptions have not been successfully challenged as ultra vires and thus, by implication, they correctly implement the EU obligation and are the governing UK law. Thus the Equality Act exceptions, rather than the Directives, will be referred to when employment exceptions are discussed.

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[38] ETAD, art 2; Directive 2006/54, art 14; Employment Directive 2000/78, art 4(1) and (2).

[39] See *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891, 1906– 1907. See also Article 288 TFEU.

(c) The Equality Act exceptions

The Equality Act, sch 9 pt 1 provides two exceptions to the Act's general prohibition on discrimination specifically for religious employers.[40] The first exception permits a person (which includes an organization) to discriminate on the grounds of sex, transexuality, marital status, or sexual orientation 'for the purposes of organized religion.' The second exception permits a person 'with an ethos based on religion or belief' to discriminate because of religion or belief in relation to work.[41]

(i) Organized religion exception: sex, transexuality, marriage, and sexual orientation discrimination

The Equality Act, sch 9 pt 1 permits discrimination in relation to employment under para 2(1), and qualifications under para 2(3), 'for the purposes of an organized religion' where the discrimination is necessary for limited religious reasons. Para 2(4) lists requirements for potential employees that are not unlawful if they are for such purposes. This list includes a requirement that an employee be of a particular sex, not be a transsexual person, not be married or a civil partner, or not be married to, or the civil partner of, a person who has a living former spouse or civil partner, a requirement relating to circumstances in which a marriage or civil partnership came to an end, and a requirement relating to sexual orientation.

[40] The Schools Standards and Framework Act 1998 provides exceptions for teachers at voluntary-aided schools (s 60) and voluntary-controlled schools (s 58). This thesis is not considering faith schools as part of its discussion of religious organizations.

[41] Prior to the Equality Act, similar exceptions were granted in the Sex Discrimination Act 1975, s 19, the Employment Equality (Religion or Belief) Regulations 2003, reg 7 and the Employment Equality (Sexual Orientation) Regulations 2003, reg 7.

The application of the requirement must engage either the compliance or non-conflict principle. Under para 2(5), the compliance principle is where a requirement is imposed 'so as to comply with the doctrines of the religion.' Under para 2(6), the non-conflict principle is where 'because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.' The applicant must not meet this requirement or the employer be reasonably satisfied that they do not.[42]

This exception[43] applies only to offers, benefits, or dismissal of employment.[44] Thus a religious organization is not permitted to harass or victimize a person once employed or appointed to office.

The grounds on which a court can examine the requirement are limited as there is no proportionality test. This could express 'a preference for the judgment of the organized religion as to the relevance of the protected characteristic' over that of a court.[45] The

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42 A court has refused to allow a religious employer to use this exemption only once: *Reaney v Hereford Diocesan Board of Finance* Case no 1602844/2006 (17 July 2007) (unreasonable for employer not to be satisfied that applicant did not meet celibacy requirement).

43 This provision may more appropriately be termed an exemption since it involves very little discretion by the court. It sets the limits of the freedom in advance rather than subjecting it to case-by-case analysis through, for example, a proportionality test: Rivers (n 17) 134. On the distinction between exceptions and exemptions, see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 309-310. As stated in Chapter One, this thesis uses the terms interchangeably.

44 Para 2(2).

45 Rivers (n 17) 134.

Explanatory Notes do, however, state that applying the requirement must be a proportionate way of meeting either principle, which suggests that the court could read in such a test.[46]

The only challenge to religious exceptions of this kind was presented in *R (Amicus-MSF Section) v Secretary of State for Trade and Industry*,[47] which involved similar exceptions in the now repealed Employment Equality (Sexual Orientation) Regulations 2003 (Sexual Orientation Regulations 2003). The court dismissed the challenge holding that the regulations were compatible with the UK's Directive obligations and did not interfere with Articles 8 and 14 ECHR.

The Act does not define 'organized religion.' In *R (Amicus-MSF Section)*, Richards J relied on parliamentary material to support the view that 'organized religion' should be construed more narrowly than 'religious organization.'[48] If this is correct, then the exception is also narrower than the protection given to 'religious organization[s]' under HRA, s 13(1). This exception is also narrower than the para 3 exception discussed below because it does not apply to organizations that simply have a religious ethos, such as care homes or schools, where the employment would be to provide health care or education not for the purposes of an organized religion. The Explanatory Notes predicted that it would be only in exceptional

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46 Explanatory Notes (n 11) para 791.

47 [2004] EWHC 860 (Admin), [2007] ICR 1176 (*R (Amicus-MSF Section)*).

48 *R(Amicus-MSF Section)* (n 47) [116].

circumstances that an organized religion ran an organization in a way that the employment would be for the purposes of organized religion.[49]

The scope of this exception could potentially include not only members of the clergy, but staff such as cleaners who work for the organized religion. This is because the exception applies where the 'employment is for the purposes of an organized religion.' The Explanatory Notes 2003 suggest, however, that the compliance principle will often not be met. This is because, the Notes claim, organized religion has very little to say about sexual orientation that would dictate such a requirement in its workforce. Where such doctrines exist they are likely to apply only to those persons whose work is spiritual, such as ministers, rather than employees such as cleaners.[50] Sandberg and Doe echo this narrow view of these exceptions.[51] The courts' traditional reluctance to rule on the content of religious doctrine also indicates that this exception may rarely be used.[52] The courts consider examining extracts from the Bible on homosexuality, for example, as outside their legitimate role.[53]

The alternative basis for the exception – the non-conflict principle – is also difficult to satisfy. Unlike the compliance principle, it applies only where the requirement is imposed due to the nature and context of that work. *In R (Amicus-MSF Section)*, Richards J stated that

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[49] Explanatory Notes to the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 (Explanatory Notes 2003) para 92.

[50] Explanatory Notes 2003 (n 49) para 95 cf: *Reaney* (n 42) (youth officer post fell within small number of posts outside clergy covered by this exemption because it promoted the diocese).

[51] Russell Sandberg and Norman Doe, 'Religion Exemptions in Discrimination Law' (2007) 66 CLJ 302, 312.

[52] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23]; *R v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036, 1042-43.

[53] *R (Amicus-MSF Section)* (n 47) [36].

this test is also objective and hemmed by restrictive language regarding the nature and context of employment, which 'require careful examination.' The 'strongly held' and 'significant number' tests will also make the conditions for exception 'very far from easy … to satisfy in practice.'[54]

An earlier version of the current exception specified the posts covered – core liturgical, ritual, and doctrinal teaching posts.[55] While this wording was removed, the Explanatory Notes state that the exception covers only a very narrow range of employment – ministers of religion and a small number of lay posts, including those that exist to promote and represent religion.[56] Moreover, the requirement must be crucial to the post, and not merely one of several important factors.[57] The exception would apply to a requirement that a Catholic priest be a man and unmarried. It is unlikely to permit a requirement that a church youth worker who primarily organizes sporting activities be celibate if he is gay – presumably because sports would not be considered for the purposes of religion – but it may apply if the youth worker mainly teaches Bible classes. It would not permit a requirement that a church accountant be celibate if he is gay.[58]

Few cases involve discrimination in religious employment or consider these exceptions more broadly either under the old legislative regime or the Equality Act. One commentator predicted that similar exceptions under the Sexual Orientation Regulations

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54 ibid [117].

55 Rivers (n 17) 136.

56 Explanatory Notes (n 11) para 790.

57 ibid para 791.

58 ibid para 793.

2003 would be interpreted narrowly and therefore rarely used.[59] The limited case law suggests that this was indeed the case. It would seem, therefore, that an occupational requirement is difficult to establish.

(ii) Religious ethos employer: religious discrimination

The second exception is based on the requirements of the role. The Equality Act, sch 9 para 3 allows any employer who has 'an ethos based on religion or belief' to apply 'in relation to work a requirement to be of a particular religion or belief' provided that, 'having regard to that ethos and to the nature or context of the work' it is an occupational requirement and 'the application of the requirement is a proportionate means of achieving a legitimate aim.'

Arguably this religious ethos exception has no 'obvious purpose' given that it is almost identical to the general occupational requirement exception granted to all employers.[60] It does, however, clarify that a religious ethos employer can impose an occupational requirement and that it can do so by pointing to the ethos of the organization and to the nature or context of the work. Rivers argues, however, that the Convention rights of religious associations make it obvious that it is a legitimate aim for an organization with a religious ethos 'to seek to preserve their identity by appointing … those who are able to do that' and so the exception 'adds nothing.'[61] Either way, these provisions have specific implications for religious ethos employers.

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59 Vickers (n 30) 7-8.

60 Rivers (n 17) 132.

61 ibid.

Under this exception a religious organization could refuse to employ a worker not of that religion. For example, they may restrict applicants for the post of head of the organization to co-religionists because such a post, by contrast with other administrative positions, may require an understanding and commitment to the religion.[62]

The exception will more likely apply where the job has particular importance for maintaining the organization's ethos. The Explanatory Notes to earlier similar legislation state that it would not be an occupational requirement for a shop assistant to be of a particular faith to work in a religious ethos bookstore.[63] Vickers, however, disagrees arguing that workplaces run according to the religious principles of the workers, such as religious bookstores, may be able to require all staff to share the religion because they do not need to show that their religion requires workers to work in a religious environment.[64] Any requirement, however, must still be linked to the job in question. Thus it will be difficult for an employer to argue that all staff must share the same religion unless they all participate in the religious purposes of the organization.[65] An ethos of an employer based in a specific religious belief (as opposed to general adherence to a religion) – for example, that gay sex is

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62 Explanatory Notes (n 11) para 796.

63 Explanatory Notes 2003 (n 49) para 87.

64 Vickers (n 30) 136-137 (discussing the similar exemption in the Employment Equality (Religion or Belief) Regulations 2003). Note that the Employment Equality Directive, Art 4(2) envisages allowing religious ethos employers to require religious loyalty from their staff.

65 Vickers (n 30) 137. See Case 2901366/06 *Sheridan v Prospects for People with Learning Disabilities* (ET, 13 May 2008); *Glasgow City Council v McNab* [2007] IRLR 476 (EAT); Case 2909090/06 *Hender v Prospects for People with Learning Disabilities* (ET, 13 May 2008).

sinful – means it is unlikely that having that belief will be an occupational requirement unless it is particularly relevant to the nature or context of the job.[66]

Although broadly worded, this exception applies to religious discrimination only and contains limiting language. The condition must be a 'requirement.' This 'is stronger than … merely a factor, a preference or a qualification for the job – it is something which is essential for the person to be able to perform the functions of the job.' A simple desire to work with like-minded colleagues is not sufficient.[67] This requirement must be applied proportionately in the particular case. This means it must be 'an appropriate and necessary means of achieving the legitimate aim in question.' Generally speaking 'an appropriate means is one that is suitable to achieve the aim in question, and which actually does so' and a 'necessary means is one without which the aim could not be achieved' and this includes considering whether the aim could be achieved through another less discriminatory means.[68]

The reference to context, however, means 'that the nature of the job is not to be considered narrowly, but can include wider elements related to the job.'[69] For example, a Christian support group counsellor may provide advice and support and, viewing this role narrowly, a person holding any belief could be suited to it. Having regard to the wider

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66 Explanatory Notes to the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 para 87.

67 Vickers (n 26) 13.

68 Explanatory Notes 2003 (n 49) para 78.

69 ibid para 72.

context, however, it would be 'self-evident' that the counsellor is to provide advice from a Christian perspective.[70]

While this exception applies to a broader category of employers than the organized religion exception, the limited case law and legislative guidance indicates that it would also be narrowly applied.

(iii) Racial discrimination

No specific exception exists for religious employers to discriminate because of race.

As will be discussed in Chapter Four, religious identity can often overlap with race or ethnic identity. Where practices associated with a religion are practised by many members of a racial or ethnic group it is possible that religious discrimination can also be racial discrimination. Thus Jewish people are recognized as an ethnic group and Sikhs are similarly protected by special provisions in the Employment Act 1989.[71] Muslims, however, have been seen as constituting a range of ethnic groups so not covered by race discrimination legislation.[72]

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70 ibid para 72.

71 *Mandla v Dowell Lee* [1983] 2 AC 548; *Seide v Gillette Industries Ltd* [1980] IRLR 427; *Board of Governors of St Matthias Church of England School v Crizzle* [1992] UKEAT 409, [1993] ICR 401 (requirement that headteacher be a 'committed communicant Christian' was indirectly discriminatory on grounds of race because it precluded Asian Christians. Such discrimination could be justified by the need to maintain the school's religious ethos. It would have been difficult to defend a claim of direct ethnicity discrimination against a Jewish or Sikh applicant: Rivers (n 17) 123).

72 *JH Walker Ltd v Hussain* [1996] IRLR 11.

This means, however, that permitted religious discrimination could be impermissible racial discrimination where a person is discriminated against on the basis of a religious practice. With regard to these exceptions, permitted religious discrimination would not become impermissible simply because the applicant's racial characteristic was also protected, provided they were not considered for the position on religious not ethnic or racial grounds.[73]

This additional protection aside, it is not clear, however, why there should be specific religious exceptions on the grounds of religion, sex, or sexual orientation but not on the grounds of race. Given that there is no express hierarchy of protected characteristics within the legislation there is no reason why race should be given greater protection than religion. It may well be that the exceptions simply reflect practice, and as no religion expressly discriminates on the grounds of race such exceptions were not sought. Should they discriminate on the grounds of race, however, it is hard to see why an exception for race should not be granted on the same basis as sex and sexual orientation discrimination exceptions.[74]

2. JUSTIFICATION

These exceptions demonstrate one way the UK has responded to potential conflict between the activity of religious organizations and state law in the context of employment. Such conflict may be inevitable and therefore any attempt at reconciliation may be imperfect. The

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73 *Crizzle* (n 71).

74 This will be discussed further in Chapter Eight.

main theoretical issue is whether such exceptions (and any harm they permit) can be justified.

Although narrowly drawn, these exceptions derogate from the principle of equal liberty; they grant greater liberty to religious employers. They also permit harm to individuals by not affording them protection from discrimination under the legislation. They therefore need to be justified. A simple appeal to Article 9 – a 'positivist approach to the special status of religion'[75] – does not, in and of itself, justify this particular legal treatment granted to religious organizations. A deeper theory is needed.

Generally speaking, there are two categories of exceptions: those where the state accommodates a religious practice that does not directly conflict with the interests of another party and those where the state recognizes a religious claim instead of another party's claim. The exceptions contained in the Equality Act are part of the latter category although the justifications for affording greater liberty in the former category are also relevant.

a. Exceptions: the equal liberty issue

In diverse liberal societies it is not unusual for members of certain groups to be granted exceptions to generally applicable laws by the courts or legislature. In the UK, Sikhs are exempt from wearing hard hats on construction sites and motorcycle helmets, the Jewish and Muslim communities are exempt from animal slaughter laws, and a criminal exemption exists for carrying a blade for a religious reason.

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[75] Peter Edge, *Religion and Law: an Introduction* (Ashgate 2006) 6.

These exceptions grant liberties to some and not to others, which could be problematic given the liberal state's commitment to *equal* liberty and the rule of law – not individual morality – 'which emphasises the general applicability of laws.'[76] The principle of legality makes all equally subject to the law; 'no hierarchies should exist under law.'[77]

In many cases exceptions are granted because the general law may be over-inclusive and allowing the exception causes little or no harm nor undermines its purpose. Requiring a religious person to comply with a rule may, however, actually promote its goal. In this instance, compliance with discrimination legislation would promote the goals envisaged by the legislation. Discriminating because of a person's sex in employment, for example, is a type of activity that the law aims to remedy. The UK exceptions could not therefore be justified on the basis that the law was overly broad.

If we accept, however, that the law may be overly broad in that its purpose could still be achieved while providing exceptions, granting exceptions for religious practices may still be unfair if they 'must be distributed according to rules that are the same for all.'[78] If there is room for an exception, why should that benefit, like any limited resource, be given to someone on the basis of their religious group membership?[79]

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[76] Jacob Levy, 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights* (NYU 1997) 28.

[77] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) 164.

[78] Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 Wash&Lee L Rev 3, 19.

[79] Jeremy Waldron, 'Status versus Equality: The Accommodation of Difference' International Conference in Social and Political Philosophy at University of Guelph (13-14 November 2004) 25-27.

We could answer that both religious and non-religious claims should benefit from exceptions – and indeed the occupational requirement exception extends special treatment to non-religious employers – but then we might have to query why the law exists if so many parties are exempt. Brian Barry maintains that there should rarely be exceptions to rules – on the basis of religious membership or otherwise – arguing that either there is a good argument for the rule, or there is a case for an exception. If the case for an exception is persuasive then this forms a basis for abandoning the rule altogether. In order for the rule to remain, but be qualified by exceptions, one must show why the exception pertains only to some and not to all. This condition is hard to meet so, argues Barry, many approaches towards diversity are unsound.[80]

It could be argued, however, that only where there are persistent and pervasive exceptions, such that the rule is not applied more than it is applied, that should we consider abandoning the rule altogether. In employment circumstances, religious exceptions would hardly become the norm and are just a small aspect of what is otherwise comprehensive equality and non-discrimination legislation. Moreover, exceptions for religious organizations may be founded on reasons that are unlikely to extend to other claimants.

Barry also rejects any special treatment for religion on the basis that no citizen should receive special treatment. His 'politics of solidarity' appeals to the functioning of the democratic processes arguing that society should resolve disputes 'by adopting the policy favoured by the majority,' and minorities should receive no special protection so long as they

[80] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (HUP 2002) 39.

have had 'an equal say in the outcome.'[81] He argues for this approach on the basis that it is needed to maintain liberal democracy – a sense of common nationality requires that the interests of everyone must count equally and citizens must be willing to make sacrifices for the common good.[82] To him, exceptions to generally applicable laws are tantamount to 'moral anarchy' because it means '[t]here are no overarching norms by which groups and communities can be judged.'[83]

Barry's approach is problematic as it does not allow for instances where the legislature has either not turned its mind to the situation of minorities – because, for example, minorities lack the influence necessary to make their voices heard – or the legislature has heard these voices but acted in the interests of the majority nonetheless. It relies on individuals resorting to claims that their human rights have been breached – allegations of serious breach – in instances when minor accommodations may be all that is needed. Individuals who cannot show clear violations of their human rights could have their religious practices limited.[84] Nonetheless, Barry's approach may not be inconsistent with the UK's Equality Act exceptions as his criticisms should be largely directed at judicially-crafted exceptions.

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81 ibid 300.

82 Abner Greene, 'Three Theories of Religious Equality ... and of Exemptions' (2009) 87 Texas L Rev 963, 971.

83 Barry (n 80) 133.

84 Greene (n 82) 972.

Rules with exceptions can therefore be legitimate. A commitment to 'equality before the law' will not necessarily be jeopardized by religious exceptions.[85] Equality does not require us to treat every person the same where they have distinguishing features, or the situations are unequal.[86] Thus, while an exception claim could be made on the basis of religious freedom, it could also be framed in terms of equality: the law affects the claimant differently from others because of the claimant's religious belief. Moreover, the creation of 'complex as opposed to simple laws' – in other words, laws that contain various exceptions – is not incompatible with the rule of law.[87] Such laws are commonplace and if they can be granted on the basis of non-religious or material interests, then it is hard to see how they are incompatible with the rule of law because they are granted for religion.

But how in this instance may the law affect religious believers differently? Arguably there is no 'satisfactory answer' as to why there should be exceptions for religion.[88] One answer is that state law can place particular burdens on religion. As with indirect discrimination, certain ostensibly neutral laws may burden religious believers, because they either impair their religious practice or compel them to do something their religion prohibits. In this way a religious believer may suffer a hardship that others claiming a similar exception may not.[89] Thus exceptions can be seen as relieving a person of an unequal burden because it

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85 Waldron (n 79) 12.

86 ibid 7.

87 Jeremy Waldron, 'Questions about the Reasonable Accommodation of Minorities' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 105. See also Jeremy Waldron, 'Status versus Equality: The Accommodation of Difference' in Omid A Payrow Shabani (ed), Multiculturalism and the Law: A Critical Debate (University of Wales 2007) 138.

88 Waldron (n 78) 22.

89 ibid.

was 'distinctive'[90] or had 'a special kind of impact'[91] on religious group members. Because the freedom to live a religious way of life is something that we value then we may wish to relieve this burden.

Relieving this burden may enhance a religious believer's autonomy by allowing them to live a religious way of life and access an adequate range of options without compromising their religious identity. Not relieving this burden may eliminate an option thus potentially compromising autonomy. While autonomy does not require the presence of a particular option, burdening religious identity may compromise access to an adequate range of options. This is because a religious way of life is an important option. It consists of comprehensive norms; it encompasses many, if not every, aspect of life.[92]

b. Exceptions: conflicts with other rights

An argument based on the burdens religious believers may suffer does not justify exceptions whenever there is a competing religious norm. After all, the state may still have an interest that is strong enough to justify still applying its law in that area. Religious believers and non-believers alike are subject to laws that limit desired activity and claiming that such limitation is a burden may not on its own be sufficient justification to avoid complying with it. The question is when it is a sufficient justification.

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90 Levy (n 76) 25.

91 Waldron (n 78) 24.

92 Joseph Raz and Avishai Margalit, 'National Self-Determination' in Joseph Raz (ed), *Ethics and the Public Domain: Essays in the Morality of Law and Politics* (OUP 2001) 129-133. See also Benjamin Berger, 'The Limits of Belief: Freedom of Religious, Secularism, and the Liberal State' (2002) 17 Can Jnl of L&Soc 39, 46 and *R (Williamson) v Secretary of State for Education and Employment* (n 52): 'the tenets of a religion may affect the entirety of a believer's way of life' (per Lord Nicholls) [17].

Where exceptions are to "victimless laws", such as uniform regulations, they may not pose serious difficulty for liberal theory. Allowing a person an exception where the law burdens their religious freedom enhances autonomy by giving them access to a greater range of options – a religious way of life *and* participation in the workforce 'without having to compromise their pride in their [religious] identities.'[93] It is harder to justify an exception where it conflicts with the rights of another individual, as opposed to the other interests of society more generally. Here the state must strike a balance between the two claims. The possibility of injustice means that how this balance is struck is crucial. It is one thing to exempt an individual from a victimless law and quite another to have the state create specific exceptions for an entire group from legislation granting rights to other individuals. Waldron, giving the example of homicide laws, suggests that where certain laws are 'right-based', and thus 'oriented to the interests of individuals … one-by-one rather than *en masse*', there may not even be room for an exception.[94] Presumably this is because of the harm principle – their behaviour directly harms others.[95] Refusing exemptions in relation to homicide is easily justifiable because it prevents harm to others. There is, obviously, no right to kill people whereas the right to life is a basic human right. Conflict between religious freedom and non-discrimination rights differs from this example in that both right holders can claim they are harmed by the exercise of the other's right. The recognition of one right causes harm to the other right holder by reducing their ability to exercise their right. Any attempt to reduce that harm may only cause a different sort of harm to the other right holder.

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93 John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law', in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law?* (Mansell 1992) 162.

94 Waldron (n 78) 29-31.

95 Discussed further in Chapter Eight.

It is often the case that two claims cannot be reconciled, since 'human goals are many, not all of them commensurable, and in perpetual rivalry with one another.'[96] The question is which claim should give way. Resolving conflicts between rights is one of liberal theory's most complex questions.[97] Ultimately, however, the state is interested in avoiding social harm and will limit people's liberty accordingly. Liberal theory also maintains, however, that this burden should be distributed evenly and to the smallest extent possible.

In answering this question in relation to conflicts between religious freedom claims and non-discrimination rights we must, as a preliminary matter, consider the justificatory basis for discrimination law. Without knowing what value it serves to protect or promote we cannot assess whether any limitations on that protection are justified. Equality (or equal treatment) has been generally accepted as the 'meta-principle' upon which anti-discrimination law rests.[98] It is referred to as the underlying principle behind both domestic and European legislation in governmental documents and Directive recitals. It is, however, a 'complex', 'essentially pluralistic' and 'diverse' principle; no one legal meaning exists in UK law.[99] The 'recurring theme' is, however, that discrimination law is justified because it promotes equality.[100]

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96 Isaiah Berlin, *Liberty* (Henry Hardy ed, OUP 2002) 216.

97 eg Ronald Dworkin, *Taking Rights Seriously* (HUP 1977); John Rawls, *A Theory of Justice* (HUP 1971).

98 Christopher McCrudden (ed), *Anti-discrimination Law* (Ashgate 2004) xviii. For an autonomy-based analysis see John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1.

99 David Feldman (ed), *English Public Law* (OUP 2004) para 11.02–11.03; N Bamforth, M Malik, and C O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008) 174; Derek Parfit, 'Equality and Priority' in Andrew Mason (ed), *Ideals of Equality* (Blackwell 1998).

100 Bamforth (n 99) 172-3.

However, if we accept, as we did in Chapter One, that personal autonomy is the value that best underpins liberalism then the coercive power of the state is limited to prohibiting those activities that harm personal autonomy. In other words, it is limited by an appeal to an autonomy-based harm principle. Discrimination legislation being a 'coercive intervention' must be justified on this basis.[101]

UK discrimination law can be justified by the role which it plays in enhancing personal autonomy. It does this, argues Gardner, by 'open[ing] up valuable options to people who have previously had few, and help[ing] people to take pride in their identities, both of which are essential if they are to live autonomous lives.'[102] Discriminating in the employment context because of certain characteristics a person may possess harms autonomy by limiting the range of options available to that person in a very important sphere of life – the workplace. Prohibiting such discrimination is thus justifiable under the harm principle because it helps to secure an adequate range of options for persons possessing those characteristics. Moreover, if we accept that self-respect or pride in one's identity is essential to living an autonomous life – one cannot live a truly self-directed life if one does not respect one's own choices – being excluded from a particular job because of a characteristic is liable to threaten a person's pride in their identity.[103]

If discrimination law is justified on the grounds that it enhances autonomy – and that the law should be generally concerned with maximizing autonomy – then the exceptions to it

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101 Gardner (n 93)155.

102 Gardner (n 93) 155. See also Gardner (n 98).

103 Gardner (n 93) 155.

must also be autonomy-enhancing, or at the very least not harmful to autonomy. Thus in order for any limitations on the protections in discrimination law to be justified they must also be justified by an appeal to autonomy. As we saw in Chapter One, religious freedom protections can be justified by the value of autonomy.

In relation to these exceptions, the consideration is, therefore, which claim would cause the most harm to autonomy or, alternatively, on whom would the burden of not recognising their claim fall most heavily?

c. The United Kingdom exceptions

The exceptions fall into two categories. In the first, the employer must have 'an ethos based on religion or belief' and being of a particular religion or belief must be an occupational requirement. The second applies only to 'organized religion.'

i. Religious ethos exception

The religious ethos exception is just a more specific version of the general occupational requirement exception, which applies across society including to non-religious organizations. Organizations that are formed around a particular identity or purpose may require their employees to possess certain characteristics in order to maintain that identity or advance that purpose. This need is not confined to religious organizations. The occupational requirement exception could exclude religious people from some secular organizations or heterosexual people from gay rights organizations. Moreover, the religious ethos exception is not confined to religious employers but extends to all those with an ethos based on a belief, which can

include non-religious, philosophical beliefs such as atheism. The religious ethos exception does not therefore need to be justified in the same way as those for organized religion although the proportionality test within the exception requires any occupational requirement to be justified. Some argument has been made, however, that unlike with secular organizations an exception to hire co-religionists should extend to all positions where employment in a religious organization is akin to membership.[104]

ii. Organized religion

Exceptions for 'organized religion' raise two questions. First, why should organized religion have greater associative freedom in employment than non-religious organizations? If the purpose of the law can be to improve existing cultural practices[105] then why should organized religion be exempt 'from a painful process that *every* culture … [has] to undergo.'[106] Secondly, why must certain groups of people – such as gay people or women – bear the burden of another's religion? These questions can both be answered by an appeal to autonomy.

(a) Harm to the organization

The first question can be addressed by the discussion of equal liberty. Prohibiting an organized religion from refusing to hire people who engage in activity they believe sinful, for example, may be more harmful to autonomy than prohibiting a non-religious employer from

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[104] Alvin Esau, '"Islands of Exclusivity": Religious Organizations and Employment Discrimination' (1999-2000) 33 U Brit Colum L Rev 719, 735.

[105] Waldron (n 78) 27.

[106] ibid 28.

refusing to hire those same people. This is not to say that other organizations do not also have an interest in selecting their own leaders and employees who reflect the organization's identity and advance its purpose. These organizations may also suffer harm if their ability to do so is limited. Their associational interest is, however, addressed by the general occupational requirement exception. The organized religion exception recognizes – as highlighted in the compliance principle – that these organizations have a competing normative system and defers to their judgment on who is appropriate for certain positions.

This still does not justify refusing to grant *any* religious employer the same exception. The concern addressed by these exceptions – as reflected in the non-conflict principle – is the collective or associational dimension of religious freedom. It is an argument from autonomy. As we will argue throughout this thesis, group autonomy is essential to the exercise of individual religious freedom and hence individual autonomy.

This collective dimension of religious freedom is recognized by Article 9 ECHR and HRA, s 13(1), which recognizes the 'institutional nature of religion and its inescapable public and social dimensions.'[107] It is often through religious organizations that individuals exercise their religious freedom.[108] Moreover, religious organizations (usually through their leaders) are responsible for declaring doctrine and preserving and demonstrating adherence to it –

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[107] Ahdar & Leigh (n 43) 10.

[108] *Hasan & Chaush v Bulgaria* (2002) 34 EHRR 55 [62]: 'The Court recalls that religious communities traditionally and universally exist in the form of organized structures …. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.' See also *New Testament Church of God v Stewart* [2007] EWCA Civ 1004; [2008] ICR 282 [60].

they are 'exemplars'[109] – and thus any instances where they could not comply would be felt particularly hard.

This thesis accepted in Chapter One that a religious way of life can be valuable. It is a comprehensive and important option and thus it is an option that we *always* want to protect as it is essential to accessing an adequate range of options. As religion is a social form, individuals need membership in religious organizations in order to exercise their religious freedom. In this way religious organizations differ from other associations. If we accept that religion is valuable then we do not want to burden its exercise unjustifiably. The more important an aspect of the religion is for ensuring that option exists then the greater the justification is needed for any law that limits it.

While religious organizations may have special concerns and interests in addition to the individual interest in religious freedom, for now what is relevant is that an individual has an interest in being part of an organization that is self-governing. Membership in a self-governing organization enables individuals to practise their religion collectively in a way that they choose. A burden upon religious group autonomy, therefore, is a burden on individual religious freedom. While the religious organization may have interests that an individual does not have, an individual may have an interest in benefiting from that organization having those interests protected. The importance of religious organizations to the exercise of religious freedom will be discussed continually throughout this thesis and concluded on in Part Three.

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[109] Rivers (n 17) 133-134.

While this exception does not specify which positions are exempted, at a minimum it would include those positions that are essential to the organization's identity and purpose – those who lead it in its activities and declare, sustain and influence its doctrine. A group must be able to select its own leaders to be autonomous. This is not to say that a group selecting its own leaders is necessarily an exercise of autonomy by all the individual religious believers within the group. But that individual religious freedom requires groups that practise that religion and these groups need to be self-governing in order to do so – including governing according to the doctrine of their religion, which includes views on who its leaders should be. Religion requires social institutions and these cannot exist – or at least exist in a way that enables individuals to practise that religion – without being able to select those people who shape and sustain their religious identity. The importance of being able to choose one's own leaders has been recognized by the ECtHR.[110]

A side issue therefore arises here regarding the organized religion exception. Does this exception really support the individual autonomy of group members? It may be that not all group members determine what a religion requires under either the compliance or non-conflict principles of the organized religion exception.

Although used rarely, the compliance principle – which allows an organized religion to impose a requirement 'so as to comply with the doctrines of the religion' – is potentially problematic because religious doctrine may be declared by 'self-appointed or self-perpetuating' leaders who advance conservative or unrepresentative views of the religion's

[110] eg *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 [117]; *Hasan* (n 108) [62] and [82]; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v Bulgaria* App nos 412/03 and 35677/04 (2009). See also *McClure v Salvation Army* (1972) 460 F 2d 553 (5th Cir): '[t]he relationship between an organized church and its ministers is its lifeblood.'

doctrine that oppress internal minorities such as women or gay people.[111] If a court unquestioningly accepts such doctrine it eliminates less powerful members' ability to determine religious meaning.[112]

The second basis for this exception – the non-conflict principle – was enacted to avoid the preceding problems but may similarly not advance individual autonomy. Determining the convictions of a religion's members may have similar consequences to the compliance principle. On its face, this non-conflict principle caters to diverse views within the community by requiring only a significant number of people to ascribe to the view.[113] As these convictions apply to exceptions to discrimination legislation, however, that significant number must always be advancing a view contrary to another's autonomy. Moreover, because 'significant' does not have to mean a majority of the members,[114] this exception effectively favours the conservative view of a (possible minority) number of members, even if a majority supported the legislation. While an organized religion would presumably have procedures to deal with such circumstances, the legislation still allows a conservative religious view to justify an exception. Moreover, it may impede internal reform efforts to contest repressive norms and effect religious change.[115] The result is that while a religion

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111 Susan Moller Okin, 'Multiculturalism and Feminism' in Avigail Eisenberg and Jeff Spinner-Halev (eds), *Minorities Within Minorities: Equality, Rights, and Diversity* (CUP 2005) 74.

112 Madhavi Sunder, 'Cultural Dissent' (2001) 54 Stan L Rev 495.

113 *R (Amicus-MSF Section)* (n 47) [118].

114 Explanatory Notes 2003 (n 49) [96]. The Notes suggest that it does not have to be a majority of followers but must be substantial or more than a few. See also *R (Amicus-MSF Section)* (n 47) [107] and [118].

115 Ian Jones, *Women and the Priesthood in the Church of England: Ten Years On* (Church House 2004) 152-3.

may be internally diverse and individual members may wish to broaden the norms of their religion, the exception favours the status quo.

While it may not be that these exceptions always advance individual autonomy in each particular instance of appointment, it is still the case that individual autonomy *overall* requires an organization to be self-governing. Individual autonomy is better advanced by the organization selecting its own leaders – even if on some occasions this does not reflect the choice of all members – than by the state interfering in the process. This is because state interference in such selection would pose more harm to autonomy by threatening the existence of the organization (potentially eliminating a social form and thus more valuable, comprehensive options) than denying individuals the option of selecting their particular choice of leader on one particular occasion.

One must still ask why individual religious freedom should be a reason for permitting discrimination that would otherwise be unlawful because, for example, it harms another person's autonomy. A preliminary point should be made here: the UK government has not given religious employers carte blanche to discriminate against any person in any employment situation. Religious doctrine alone will not justify any exception to any discrimination law; religious employers must show they can meet certain substantive and procedural criteria. These criteria have been interpreted narrowly and include a standard of reasonableness. Outside of these exceptions the legislation still applies.

(b) Harm to others

The argument that a law would compromise religious freedom may still not justify an exception where the activity impacts another's autonomy. Why should another individual bear the burden of an exercise of religious freedom? As mentioned, where competing interests cannot be reconciled, we must consider which option would cause the least harm and where some harm is inevitable this burden should be distributed evenly. In the case of discrimination law one could argue that society has already decided which interest should be favoured and the correlative burden is distributed evenly by requiring *all* employers to comply with discrimination law.

As noted, however, the burden on religious freedom – and hence harm to individual autonomy – that would be caused by not granting these exceptions is high because discrimination laws may have a great impact upon the ability of religious organizations to self-govern. The positions exempted – spiritual leaders – are those important to associative and religious freedom. Religious freedom would be almost non-existent if religious organizations were unable to appoint their leaders according to the tenets of their religion and if individuals could not choose whom to rely on for spiritual guidance. Some choices therefore are more important than others. Whom one has as their religious leader is an important choice. For a religious way of life to be a meaningful option, people have to be able to choose their own religious leaders. Thus if we do not have these exceptions then this option will cease to exist and this compromises autonomy. These exceptions for religious organizations are therefore necessary for individual autonomy.

It would seem, therefore, that the harm to religious freedom and hence autonomy may depend on how close the subject matter is to the core of the religious organization.[116] Employment law directly affects whom one must associate with and thus it can directly impact on group identity and purpose. Discrimination allows, after all, 'a community to retain its identity.'[117] Thus the closer employment law impacts on the essential values or practices of a religious organization the harder it may be to justify its application. The case for restraint may be at its strongest where a position is directly tied to matters of teaching or conscience, such as those of an organization's spiritual leader because these are essential to the identity and purpose of the group.[118]

The harm to the autonomy of the excluded individuals may be less than the harm to individual religious freedom should these exceptions not be granted. The excluded individuals can still benefit from the legislation and seek employment outside this narrow category of exempted positions. It is questionable, however, whether the possibility of alternative employment outside one's religious community (or within it but in a different role) makes the exceptions any less objectionable for the individual seeking one of the exempted roles.

The individual applicant may have a particularly strong affiliation with their religion and be religiously motivated to undertake certain positions, such as clergy. Thus, although the limitation on overall autonomy may be small compared to the harm to religious

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116 *Hasan* (n 108) (leadership of Muslim community); *X v Denmark* (1976) 5 DR 157 (appointment of clergy).

117 Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (John Hopkins 2000) 167.

118 The interveners in *R (Amicus-MSF Section)* (n 47) took this position [32].

communities overall, for the particular individuals for whom there is no discrimination protection the harm is potentially great. This approach offers these individuals no possibility for access to a particular job *and* religion.[119] As noted, however, autonomy does not require access to a particular option, but rather to a range of meaningful options and, provided there are other such options available, the excluded individual can still live an autonomous life. The narrowness of these exceptions ensures that other options exist. However, it may be difficult for certain subordinated groups to work for change from within when they are denied leadership positions, because the leadership may be self-perpetuating. As such, even though the exclusion is from a small number of positions, they are significant positions.

Moreover, despite any availability of other options, a person's pride in their identity is liable to be threatened if they are turned away from a particular position with an organization because of that identity. This may not necessarily harm autonomy, however, as it is at least arguable that such a person can also exercise their autonomy by being a member of a group that can similarly select its own leaders. The alternative – external selection of group leaders by the state – would cause *more* harm to autonomy overall by denying other members of the organization the option of belonging to a group that selects its own leaders.

Whether religious organizations should be exempt from legislation ultimately depends on the harm caused by the interference with religion and the strength of the state justification. As noted, the harm to religious communities with regard to the positions exempted could be substantial. At the same time, the justifications for state interference in this narrow category of positions are weaker when we look at the relative harm to autonomy.

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[119] Sunder (n 112) 560-561.

These exceptions do, however, result in the state abandoning discrimination protections in certain circumstances and accommodating discriminatory religious norms. This causes harm to autonomy. The alternative, however, is to abandon aspects of religious freedom protection which, given the importance of certain positions to both the values and functioning of the religious organization, could strike at the heart of this freedom. Where religious organizations have no other non-discriminatory way to realize their beliefs it is hard to see how freedom of religion could be meaningfully exercised without these exceptions.

As mentioned, the difficulty is that both sides can claim that the exercise of the right harms the other. The balance of the rights of the organization and individual is inherently contestable and this necessarily means that one person's exercise of autonomy has to carry some burden to allow for the exercise of the other's. The goal is to reach a solution that causes the least harm. The normative arguments discussed earlier provide some justification for when religious organizations should have exceptions. This necessarily means there are individuals who may not be able to hold certain positions, although the legislation still shows only limited deference to religious employers and imposes many duties on them to comply with its protections.

It may be, however, that we cannot compare which harm is greater. They may be incommensurable, the weight and preference of each depending on what one values. Thus the issue may not be how to balance non-discrimination rights against religious freedom. If this were the issue then any employer with a religious belief who ran any business could be considered for an exemption for any position when instead the focus is on certain types of religious employers and a narrow class of positions. Rather, the issue may be the extent to

which the state can intervene in a religion's internal affairs. Rivers suggests that while these exceptions are viewed as a limit on the principle of non-discrimination, the legislation as a whole could be seen as an exception to the right of collective religious liberty. Forcing a religious organization to accept a certain person must then be 'the least intrusive means of pursuing an "equalities agenda".'[120] It is not then a matter of balancing the rights of one group of people against the rights of another, but carving out an area of religious life that is beyond the reach of the state.

While these exceptions have carved out an area of religious life that is beyond the reach of discrimination law, it is, however, ultimately up to the state to determine whether a requirement related to a particular characteristic is necessary for a particular job. A court is unlikely to accept that mundane positions require a particular characteristic even if an organization believes they do because, for example, it sees the work as inseparable from the community's whole activity or identity.[121] The case law indicates that these exceptions will be interpreted narrowly and confined to those positions that are directly tied to advancing the organization's identity. While this may risk 'distorting … a religious body's self-perception',[122] it is necessary to limit the harm that may be caused by the discrimination, and the state has a legitimate interest in limiting such harm. The harm that would be caused by regulating the appointment of essential positions would, by contrast, be greater than regulating these mundane positions and this justifies granting the exception.

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120 Rivers (n 17) 135.

121 Rivers (n 17) 133.

122 ibid.

Conclusion

There need to be some exceptions for religious organizations in the employment context in order to ensure religious freedom. The UK discrimination legislation finds a balance between allowing no exceptions to this legislation and allowing religious organizations any exceptions to any legislation that limits their members' religious freedom. Given, however, that discrimination principles and religious freedom may never be completely reconciled this compromise may be the solution that best advances autonomy.

3. GOODS AND SERVICES

Religious organizations are actively involved in welfare provision. The law relating to the welfare provision is extensive but this chapter focuses on UK discrimination law as it applies in the context of the provision of goods, services, facilities, and premises ('goods and services') as this is where the interaction between religious freedom and state law is most pronounced. Part One of this chapter examines how recent discrimination legislation responds to the provision of goods and services by religious organizations. Part Two considers whether this approach is justifiable.

1. DOCTRINE

a. The discrimination law framework

As with the employment discrimination law framework, UK law prohibiting discrimination in the provision of goods and services consists of both European and domestic legislation.

i. Europe

In addition to prohibiting discrimination in employment, Europe's discrimination law scheme prohibits discrimination in the provision of goods and services on certain grounds.

Article 19(1) TFEU of the Lisbon Treaty (formerly Article 13 TEC) is the legal base for EU legislation combating sex discrimination outside of the employment field. Thus, having regard to the former Article 13, the Equal Treatment in Goods and Services Directive

2004/113/EC[1] was adopted, which extends European sex discrimination law to the supply of goods and services in both the public and private sectors. It expressly excludes education and the content of media and advertising from its coverage. It applies to goods and services available to the public 'which are offered outside the area of private and family life.'[2] The term 'services … refers to commercial services provided for payment.'[3]

As a result of Article 19 TFEU, the UK also has to conform to the Racial Equality Directive 2000/43,[4] which prohibits discrimination on the grounds of race or ethnic origin. No other Directives currently exist to prohibit discrimination in the provision of goods and services on other grounds such as sexual orientation or religion and belief, although one has been proposed by the European Commission and is under negotiation.[5] Currently, however, such discrimination can be addressed through UK primary legislation only.

ii. United Kingdom

The Equality Act 2010 ('Equality Act'), s 29 prohibits discrimination in the provision (whether for payment or not) of goods, services or facilities[6] 'to the public or a section of the

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1 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Goods and Services Directive).

2 Article 3(1).

3 Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (4th edn, OUP 2008) 882.

4 Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Racial Equality Directive 2000/43).

5 Commission of the European Communities, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' (COM (2008) 426) (2 July 2008).

6 ' Services' includes reference to goods and facilities under s 31(2).

public' on the grounds of sex, sexual orientation, religion or belief, race, and disability.[7] Similar provisions prohibit discrimination in the disposal and management of premises.[8] Providers must not discriminate against persons requiring a service by not providing a service, or by discriminating against them as to the terms on which they provide the service, by terminating the provision of the service, or subjecting them to any other detriment. A person is protected both when requesting a service and during the course of being provided with one. Such discrimination can include direct and indirect discrimination, victimisation, and harassment – although religion or belief and sexual orientation are not protected characteristics for the purposes of harassment protection.[9] Such treatment could, however, constitute direct discrimination.[10] Refusing to provide or not providing a service includes providing a person with a service of different quality, or in a different way (for example in a hostile or less courteous manner), or on less favourable terms than the service would normally be provided.[11]

The Equality Act does not define goods, facilities, or services and therefore they should 'be given their ordinary and natural meaning.'[12] As the goods or services must be offered to the public or a section of it, the legislation in this context is 'not … concerned with

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7 Age (under 18 years) and marriage or civil partnership protection does not generally extend to the provision of goods and services.

8 Equality Act, Pt 4.

9 Section 29(3).

10 Section 212(5)

11 Section 31(7).

12 Karon Monaghan, *Equality Law* (OUP 2007) para 10.08.

purely private or one-off arrangements.'[13] Discrimination specifically related to membership is also addressed by the goods and services discrimination law and will be discussed in Chapter Four.

b. Exceptions for religious organizations

As in the employment context, European and UK legislation provide exceptions specifically for religious organizations from discrimination law in the provision of goods and services.

i. Indirect discrimination

Indirect discrimination in goods and service provision is the same as for employment and accords with the Directive-based definition of indirect sex discrimination.[14] Here the justification defence may also mean that certain facially neutral rules or policies that disadvantage a person are not considered discrimination. Religious freedom may be put forward by goods and services providers as a justification for a rule that would otherwise indirectly discriminate. It is unlikely, however, that the same conflict between protected characteristics can occur as in the employment context. While a person is protected from religious discrimination in the workplace (which can mean that certain of aspects of their religious identity are also protected allowing them to manifest their religion in the workplace) there is arguably no positive right to provide goods and services such that forbidding a certain practice could potentially conflict with that right.

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[13] Monaghan (n 12) para 10.05.

[14] Previously indirect goods and services discrimination was much more difficult to establish than indirect employment discrimination as the claimant had to show an inability to comply.

Nevertheless, religious freedom has been advanced as a justification for an otherwise discriminatory rule. In *Hall and Preddy v Bull*,[15] Christian guesthouse owners argued that their practice of refusing to accommodate a gay couple could be reasonably justified by the fact that it was required to enable them to live and work in their own hotel and home as practising Christians holding the relevant religious belief protected under Article 9 ECHR as incorporated into the HRA. The judge queried whether the running of a hotel along Christian principles could be described as manifesting one's religion, but came to the conclusion that it could, after the claimants did not attempt to argue otherwise. Given that indirect discrimination is concerned with facially neutral practices, the court ultimately found that the defendants had to show that the prohibition on a double room for those in civil partnership was reasonably justified *irrespective* of sexual orientation. The court found this was not possible given that it had already found it to be based on sexual orientation and directly discriminatory. The court also concluded that although the regulation prohibiting sexual orientation affected the right of the defendants to manifest their religion, this right was not absolute and could be limited to protect the rights and freedoms of the claimants. Without reasoning further, the court concluded that this limitation was proportionate to protect the rights of others.[16]

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15 *Hall and Preddy v Bull* [2011] EW Misc 2 (CC).

16 Compliance with equality policy and legislation prohibiting sexual orientation discrimination has also been seen to justify any potential indirect *religious* discrimination. See *Johns, R (on the application of) v Derby City Council* [2011] EWHC 375 (Admin), [2011] 1 FLR 2094 where the applicants seeking local authority approval as foster carers believed that sexual relations other than those within marriage between one man and one woman were morally wrong. The reasoning in *Johns* is substantially similar to that of the court in *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955 and effectively begs the question of whether state policy justifies the limitation on religious freedom. It indicates, however, that religious freedom claims are unlikely to succeed where they impact upon sexual orientation rights outside the narrow confines of legislative exceptions.

This case shows the difficulty in relying on religious freedom as justification for indirect discrimination. Given that specific legislative exceptions are provided for religious organizations it seems unlikely that religious freedom would be considered a sufficient justification for discrimination outside of these instances. As *Hall and Preddy v Bull* shows, discrimination in the provision of goods and services would most likely involve direct discrimination, not neutral requirements. Thus this chapter will largely focus on direct discrimination.

ii. Specific legislative exceptions

1. Europe

The only relevant EU directive – the Goods and Services Directive – deals with sex discrimination. It does not provide specific exceptions for religious organizations although Recital Three states that when prohibiting discrimination it is important to respect freedom of religion. This Directive lays down minimum requirements and thus Member States can still introduce stricter legislation to comply with it. As we will see below, however, the United Kingdom legislation does the opposite; the Equality Act provides exceptions for religious organizations arguably not anticipated by the Goods and Services Directive.

2. United Kingdom

In addition to various exceptions for non-religious bodies, the Equality Act contains specific exceptions for religious organizations.

(a) Sex discrimination

Schedule 3, para 29 permits a minister of religion to provide a service to persons of one sex, or separate services for persons of each sex if (a) the service is provided for the purposes of an organized religion, (b) it is provided at a place which is (permanently or for the time being) occupied or used for those purposes, and (c) the limited provision of the service is necessary in order to comply with the doctrines of the religion, or is for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.

(b) Religion or belief and sexual orientation discrimination

Schedule 23, para 2(3) provides that it is not unlawful for a religious organization, so far as it relates to religion or belief or sexual orientation, to restrict the provision of goods, facilities or services in the course of activities undertaken by the organization or restrict the use or disposal of premises owned or controlled by the organization. A similar exception exists in para 2(5) for ministers.

There is no case law interpreting these sections although parliamentary debates concerning similar provisions in the now repealed Equality Act (Sexual Orientation) Regulations 2007 (Sexual Orientation Regulations 2007) indicate that the legislation aims to exempt the internal activities of an organization.[17]

[17] For example, the Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Andrews) moving that the draft Sexual Orientation Regulations 2007 be approved, stated that '[t]he regulations will not make it unlawful for a church, a mosque or a temple to refuse membership

A restriction relating to religion or belief can only be imposed if it is (a) because of the purpose of the organization, or (b) to avoid causing offence, on grounds of the religion or belief to which the organization relates, to persons of that religion or belief.[18]

A restriction relating to sexual orientation can only be imposed (a) because it is necessary to comply with the doctrine of the organization, or (b) to avoid conflict with strongly held convictions of a significant number of the religion's followers.[19]

The exception does not permit, however, anything prohibited by the Equality Act, s 29 so far as it relates to sexual orientation, if it is done (a) on behalf of a public authority, and (b) under the terms of a contract between the organization and the public authority.[20]

A religious organization under all exceptions is one the purpose of which is:[21]

> (a) to practise a religion or belief,
> (b) to advance a religion or belief,
> (c) to teach the practice or principles of the religion
> (d) to enable persons of the religion to receive benefit, or to engage in activities, within the framework of that religion; or
> (e) to foster or maintain good relations between persons of different religions.

The definition excludes any 'organization whose sole or main purpose is commercial.'[22]

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of its congregation to a lesbian, gay or bisexual in accordance with its religious doctrine. Regulations will not force a priest to bless a same-sex couple.' Hansard HL vol 690 col 1292 (21 March 2007).

18 Para 2(6).

19 Paras 2(7) and 2(9).

20 Para 2(10).

21 Sch 3, para 29(3); Sch 23, para 2(1).

(c) The charity exception

Other exceptions also apply to religious organizations. In addition to exceptions for solemnization of marriage[23] and for services generally provided for persons who share a protected characteristic,[24] religious organizations may benefit from the charity exception. Section 193 permits charities to restrict the provision of benefits in accordance with its charitable instrument to persons who share a protected characteristic, provided such provision is a proportionate means of achieving a legitimate aim or is for the purpose of preventing or compensating for a disadvantage linked to that characteristic. A charity which, prior to 18 May 2005, made acceptance of a particular religion a condition of membership and thereby entitlement to the benefit, service or facility provided by that charity, and has continued to impose that condition since that date, also does not contravene the Act.[25]

The charity exception has given rise to the most high-profile litigation surrounding the Equality Act exceptions. Following the enactment of the sexual orientation discrimination legislation, eleven Roman Catholic adoption agencies – who had previously refused to consider same-sex couples as adoptive parents in accordance with the tenets of their church – either closed down or severed their ties with the church. Catholic Care had hoped to obtain an exemption by amending their charitable objects to bring themselves within the exception

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22 Sch 3, para 29(4); Sch 23, para 2(2).

23 Sch 3, pt 6.

24 Sch 3, para 30.

25 Section 193 (6).

for charities,[26] which provides that it is not unlawful for a person to provide benefits only to persons of a particular sexual orientation.

The procedural background of this litigation is convoluted. For our purposes, the Charity Commission had initially rejected Catholic Care's request to amend its charitable instrument to include provision to provide adoption services to heterosexuals only. The High Court,[27] sending the decision back for reconsideration, said the question the Commission needed to answer in applying the exception was whether the proposed amendment to Catholic Care's objects clause would constitute a proportionate means of achieving a legitimate aim, so that the less favourable treatment it proposed would be justified under Article 14 (Prohibition of Discrimination) ECHR. The High Court noted that, in light of the European jurisprudence, there must be particularly convincing and weighty reasons to justify sexual orientation discrimination because the state margin of appreciation in this regard is narrow.[28] Furthermore, the more public and secular the sphere in which the conduct takes place, the less protection is afforded by Article 9.

In its final hearing before the Charity Tribunal,[29] Catholic Care argued that the legitimate aim was described as *the prospect of* increasing the number of children (particularly 'hard to place' children) placed with adoptive families. The Charity argued that

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[26] First under the Sexual Orientation Regulations 2007, Reg 18 and then under the Equality Act 2010, s 193.

[27] *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] PTSR 1074.

[28] *Kozak v Poland* App 13102/02 [2010] ECHR 280 (2 March 2010).

[29] *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007, 26 April 2011, First-Tier Tribunal (Charity) General Regulatory Chamber (an appeal of the Commission's reconsideration as ordered by the High Court).

the discrimination proposed was proportionate to the achievement of this aim because the services would be available to same sex couples via other voluntary adoption agencies and local authorities. The Charity argued that unless it were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters on which it relied to run the adoption service, and it would therefore have to close its adoption service permanently on financial grounds. This would result, the Charity argued, in a consequent loss in the overall provision of services by the adoption agency sector and a lost opportunity to increase the number of children placed with adoptive families.

The essence of the Catholic Care's final appeal was that the Commission should have considered its reasons for discriminating sufficiently weighty to justify the exception. The Tribunal concluded that while the aim was in principle legitimate, the proposed approach was not capable of achieving it. For example, it saw Catholic Care's proposed means of operation as likely to reduce the pool of potential adopters by (a) excluding same sex couples from assessment by the Charity and (b) risking the loss of suitable same sex couples to the adoption system as a whole by subjecting them to the 'particularly demeaning' experience of sexual orientation discrimination.[30] The Tribunal also rejected the argument that the availability of alternative services could justify Catholic Care's own discrimination. Similarly, it held that the negative attitudes of third parties cannot justify discrimination on grounds of sexual orientation.[31]

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30 ibid [52].

31 *Catholic Care* (Charity Tribunal) (n 29) [57].

This litigation shows the high evidentiary standard that religious organizations seeking further exceptions to discrimination legislation must meet. The risk of closure of a valuable social service – the provision of which may be a manifestation of religious belief – was not sufficient to justify an exception. Not only must 'weighty' reasons be given but they must be cognizable by secular law and given without reliance on religious beliefs. All parties ultimately agreed that religious belief cannot provide a lawful justification for discrimination on grounds of sexual orientation when delivering public-facing services.[32]

Little other case law has arisen relating to discrimination in the provision of goods and services, particularly that occurring due to religion. While this may be largely attributable to the recent passage of the legislation, it may also reflect the limited overlap between religious practices and state regulation in this context. Where there is an overlap, there may be less conflict between the two normative systems than in, for example, the employment context. It would appear that where there is conflict, however, religious belief will rarely provide a justification for discrimination outside the specific Equality Act exceptions.

2. JUSTIFICATION

The basic approach towards religious freedom in the goods and services context is to give religious organizations broad exceptions to discrimination legislation subject to certain qualifications. There is a wide exception for sex discrimination provided such discrimination occurs at a place ordinarily used for organized religion. More detailed exceptions exist for

[32] ibid [14].

sexual orientation and religious discrimination. Sexual orientation discrimination may only occur if the restriction is necessary to comply with the doctrine of the organization or to avoid conflicting with the religious convictions of the religion's followers. Religious discrimination restrictions may only be imposed because of the purpose of the organization or to avoid causing offence to persons of that religion or belief. The sexual orientation and religious discrimination exceptions do not apply to organizations whose sole or main purpose is commercial. The sexual orientation exceptions do not apply where the organization provides goods or services on behalf of a public authority under the terms of a contract with that authority.

This section first considers whether the exceptions to the general non-discrimination rule can be justified, an issue already raised by the employment exceptions discussed in Chapter Two. Secondly, it considers whether this justification also supports limiting the exceptions to organizations that are not commercial or where the organization is not contracting with a public authority.

a. Justification

The first question is how exceptions for religious organizations from goods and services discrimination legislation can be justified.

In Chapter Two we concluded that the strongest possible justification for religion-specific exceptions was that they relieve burdens suffered by religious believers due to certain state laws. These burdens may be particular to religious individuals or groups because they have a special impact on them because, for example, they restrict their ability to live a

religious life. This may harm their autonomy by limiting their access to an adequate range of options, which includes the option of belonging to a religion and living a religious life.

The justifications for these exceptions recognize the burden that this legislation may place on religious organizations. The Impact Assessment for the Sexual Orientation Regulations 2007 saw the exceptions as a means by which religious organizations 'do not have to act in contravention of their core doctrinal beliefs.'[33] Lord Morrow argued in parliamentary debates that the Northern Ireland Regulations would have the opposite effect by 'requir[ing] religious organizations to choose between obedience to God and obedience to the state.'[34] This is also effectively the point Cardinal Cormac Murphy-O'Connor, the Archbishop of Westminster, made in a letter to the Prime Minister where he said that the Regulations would 'would require [adoption agencies] to act against the principles of Catholic teaching.'[35]

The justification for the employment exceptions based on the burden the legislation would otherwise put on religious organizations may not, however, entirely apply to the goods and services exceptions. Except where it would apply to the provision of goods and services to its *members*, the legislation would not burden the organization's associative freedom – an essential aspect of religious freedom and thus individual autonomy. Unlike employing persons who maintain the identity and advance the purpose of the organization – which is

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[33] Department for Communities and Local Government, 'Equality Impact Assessment: Equality Act (Sexual Orientation) Regulations 2007' (March 2007) para 6.5.

[34] Lord Morrow on the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. Hansard HL vol 688 col 180 (9 Jan 2007).

[35] Statement by Cardinal Cormac Murphy-O'Connor (Letter to Prime Minister and Cabinet, 22 January 2007) <http://www.rcdow.org.uk/cardinal/default.asp?library_ref=&content_ref=1179> accessed 12 August 2011.

exempted under the employment legislation – religious organizations in this context are largely providing goods and services to the wider public. Employment discrimination law offers almost no exceptions for religious employers working with members of the public who would not also be members of the religion. As such, the goods and services exceptions differ from the employment exceptions; they are not concerned primarily with protecting associative freedom.

As discussed in Chapter Two, exceptions are traditionally granted because an ostensibly neutral law burdens religious freedom by either impairing religious practice or compelling something that is religiously prohibited. While it is arguable that the goods and services legislation does neither of these – no one is required not to hold their beliefs (or is punished for doing so) nor to provide services – where an organization does provide services they are required to provide them in a particular manner. This could create a burden where such requirements conflict with religious belief.

This legislation would only burden religious freedom, however, if providing the services were somehow part of living a religious life. UK and ECtHR case law takes varying approaches to identifying when a particular activity is an exercise of religious freedom (and thus protected by Article 9) but the general approach reflects the wording of Article 9: it must be a *manifestation* of a religious belief.[36] What constitutes a manifestation is not always clear, but if the belief takes the form of a perceived obligation to act in a specific way then doing that act pursuant to that belief can constitute a manifestation of that belief in practice.[37]

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[36] For an overview see Russell Sandberg, *Law and Religion* (CUP 2011) 81-99.

[37] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [32].

Choosing to provide goods and services, for example, independent of any religious belief would not create a situation where religion was potentially burdened by the state law such that exceptions were needed.

It is possible that religious organizations may feel religiously obligated to offer goods or services. The majority of those who sought a wider exception to the discrimination law argued that a distinction between practices that arise from basic doctrines of faith and the provision of wider services to the community was false, and cited the experience of many faith-based voluntary and community organizations to show that serving the community is an integral part of religious observance.[38] The Archbishop of York also made this claim in the parliamentary debates concerning the Sexual Orientation Regulations 2007.[39] The Archbishop of Westminster similarly stated that Catholic teaching urges followers to work for the 'common good' in matters of social care and education.[40] Religious practice and observance may not mean simply the narrow context of communal worship, but extend to other activities. As such, organizations could be manifesting their religion through the provision of certain goods and services.

When deciding whether to accommodate certain religious practices both the UK courts[41] and Strasbourg jurisprudence[42] draw a distinction between practices that are

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38 Women and Equality Unit, 'Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods and Services' (13 March 2006) 15.

39 Hansard HL vol 690 col 1310 (21 Mar 2007).

40 Statement by Cardinal Cormac Murphy-O'Connor (n 35).

41 *R (Williamson) v Secretary of State for Education and Employment* (n 37) and *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728.

42 *Arrowsmith v UK* App 7050/75 (1980).

motivated and those that are *required* by one's beliefs. To justify protection under Article 9, for example, any manifestation of belief must be 'intimately linked' to the belief.[43] Article 9 jurisprudence thus draws a distinction between the holding and communication of a belief, and acts motivated by the belief but not central to its expression.[44] The latter will not be a manifestation of belief and thus not qualify for protection. Ahdar and Leigh note some problems applying this distinction between motivated and required practices. First, it involves inquiring whether the practice in question is *required* by the applicant's beliefs, which can be beyond the court's competence. Secondly, it involves narrowing the reach of religious freedom protection so that certain religious options – that may indeed turn into duties or requirements when taken up – may not be open to them.[45] While Ahdar and Leigh do not express exactly why this would be an unfair limitation, narrowing the range of options available to any individual needs justification and it is the same with religious believers.

In any event, the distinction can be strained. Is it really meaningful, for example, to protect only those actions one must perform as opposed to those one's religion says are a good thing? The latter still informs a religious way of life and therefore a person may wish to perform them in order to live that way of life. Where, however, there is more than one way of complying with a religious way of life then there may be an argument for saying that the person ought to adopt that which does the least harm to another's autonomy. In other words,

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43 See *Arrowsmith* (n 42); *C v UK* App 10358/83 37 D&R 142 (1983) (protection under Article 9 is limited to 'acts of worship or devotion which are aspects of the practice of a religion or a belief in a generally recognized form.'); *Application 10295/82 v UK* [1983] 6 EHRR 558. Affirmed by the House of Lords in *R (Williamson) v Secretary of State for Education and Employment* (n 37) [32] - [33].

44 Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights* (4th edn, OUP 2006) 304-305.

45 Rex Ahdar and Ian Leigh, *Religious Freedom and the Liberal State* (OUP 2005) 164-165.

that which does not discriminate because of a certain protected characteristic. Or at least, if he chooses not to adopt that way then he can hardly claim that his autonomy is then compromised. It is probably for this reason that Ahdar and Leigh concede that required behaviour may 'weigh heavier in the scales' despite the distinction being flawed.[46] Being *motivated* by one's religion to perform an activity may be a factor to take into account when accommodating a practice whereas being *required* may be a reason for accommodating. This is because being limited in what one is required to do causes greater harm to autonomy. In this instance, a person could not both provide goods and services in the required manner *and* live a religious life. In terms of the internal affairs of an organization, such as those discussed in Chapter Two and later in Chapter Four, however, this distinction is largely irrelevant – religious organizations should be free to conduct their internal affairs as they wish whether motivated or required by their beliefs. This distinction becomes relevant where the practice has to be balanced against another's interest as it does in the goods as services context.

Thus even where the practice is motivated by religious belief, it may still be part of living a religious way of life. While the goods and services legislation may burden religious freedom, this burden may not be as heavy as when activity is required by religious belief.

The exceptions themselves do not draw a distinction between required and motivated practices as they lack an express proportionality criterion.[47] The sex and sexual orientation exceptions do acknowledge that such activities can be obligated by referring to the doctrines

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[46] Ahdar & Leigh (n 45) 165. See also Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton 2006).

[47] Although to be valid under human rights law any limitations placed Convention rights would have to be proportionate and this could involve drawing such a distinction.

of the religion. However, they acknowledge this only as a criterion which limits the application of the exception – the condition imposed by the religious organization must comply with religious doctrine – not as a reason for the exception to apply. This condition applies to the discriminatory act by the religious organization not the provision of the goods or services. There is no requirement that the goods and services themselves are provided in order to comply with religious doctrine. For example, the belief that homosexual conduct is a sin does not directly support a belief that certain goods and services should be provided *and* that these should not be provided to people engaged in homosexual activity. Any burden caused by this legislation could therefore be relieved by ceasing to provide the service. As such, it is not clear from the legislation that the exceptions are granted in order to allow religious organizations to comply with their religion by providing goods and services.

As such, the provision of goods and services may be seen not as an exercise of *religious* liberty but simply liberty. Thus the exception would be needed simply to allow the organization to participate as a provider of these goods and services like any other citizen. It is hard to see how this can justify allowing religious organizations to operate in a manner that limits the autonomy of others. It may be that the government concluded, after consultation with religious organizations during the drafting process, that the provision of these services by religious organizations would always be an exercise of religious freedom and therefore no criterion needed to be met before the exception applied. However, unlike the employment exceptions for organized religion that also lack such a criterion, these are wide exceptions to generally-applicable laws that limit other individuals' autonomy. As such, there should be an onus upon a particular organization, if challenged, to demonstrate that they are complying with the doctrines of their religion when making use of them.

Thus even if we accept that providing certain goods or services may be a part of living a religious life – a manifestation of religious belief – an organization would need to show a connection between the belief and the service provided;[48] without such connection they cannot claim that their religious freedom is infringed when they cannot provide the service in the manner they wish. For example, to support an exemption for an adoption service from placing children with same-sex couples, any belief that adoption services should be provided by the religious organization would also need to include a belief that the services should be provided in that particular manner (ie: excluding same-sex couples).

If we accept that exceptions to law regulating the provision of goods and services could *per se* be justified on the grounds of religious freedom – the legislation would otherwise harm the autonomy of religious believers by limiting their ability to live a religious way of life – the next question is whether exceptions can be justified where religious freedom harms the autonomy of others.

As we saw in Chapter Two in the employment context, discrimination legislation plays a role in enhancing personal autonomy; it allows people access to valuable options – often where previously denied. Access to a reasonable range of goods and services is essential to living an autonomous life because it provides the means by which one can exercise options. Allowing all groups access to goods and services can enable them to participate more fully in the options offered by society. An individual is marginalized from wider society, and thus access to options, if they cannot, for example, eat or live where the rest of society can. Moreover, excluding an individual from access to essential services (such

[48] See also *Getting Equal* (n 38) para 3.33 (only activity linked to doctrine should be exempted).

as health care or housing) causes material disadvantage compared to the rest of society, compromising their autonomy. In addition to closing off options, exclusion from goods or services provision can harm a person's self-respect and this harms their ability to live an autonomous life.[49]

Thus the burden that autonomy-enhancing (or harm preventing) legislation such as discrimination law places upon the autonomy of religious believers would only justify an exception if not granting the exception would result in *more* harm to autonomy. The provision of goods and services must then be so requisite to a religious way of life that not to be able to provide them (because to do so would require compliance with discrimination legislation which went against religious belief) decreases an individual's autonomy by denying them access to a religious way of life.

The state may have a stronger interest in regulating this area than it does with the appointment of certain organizational figures, because of the harm that limiting access to goods and services can do to autonomy. The justifications for discrimination law in the context of goods and services are more compelling in relation to the activities of religious organizations where the organization is dealing with the general public rather than its own members and internal affairs.[50] While those narrow aspects of the exceptions that relate to the organization's internal affairs or members who have chosen to seek the goods or service from the religious organization may not involve much harm to autonomy, where the organization is providing them to the general public – particularly where there is limited access to or

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[49] John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Anti-Discrimination Law', in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law?* (Mansell 1992) 155.

[50] The position of internal minorities is discussed in Chapter Four.

choice of service-providers – then there is greater justification for the non-discrimination principle to apply. This is because the harm to autonomy may be more wide-ranging. One could argue, however, that unless the religious organization dominates the provision of a particular good or service, an individual's autonomy is not harmed by being excluded from it; they could simply go elsewhere. Being sent elsewhere, however, could still harm autonomy by harming a person's self-respect.

If the provision of goods and services is, however, a manifestation of religious belief such that the inability to provide them would harm autonomy in some way, it is difficult to see how *some form* of exception (not necessarily *this* form) could not be justified as with employment exceptions. These exceptions, however, are potentially wider and extend beyond the sphere covered by the employment exceptions. The issue may not be, therefore, whether an exception can be justified but what its scope should be.

b. Scope

The second question concerns the scope of the exceptions. Specifically, can the qualifications to the exceptions be justified? As the sexual orientation exceptions are similar to the religious discrimination exceptions, with an additional qualifier where the organization contracts with a public authority, the majority of this discussion will focus on them. The sex discrimination exemptions are not considered in any particular detail as their reach is relatively confined.

As outlined in Part One, religious organizations are granted extensive exceptions to discriminate when providing a wide range of goods and services. The exceptions are, however, detailed and not open-ended unlike the occupational requirement exceptions

discussed in Chapter Two. These exceptions are limited where the organization is engaged in a commercial purpose and, in relation to sexual orientation discrimination, where the organization provides goods and services 'on behalf of a public authority under the terms of a contract.'

If we accept that provision of goods and services can be a manifestation of religious belief such that without the exceptions the legislation would limit access to a religious way of life and thus harm autonomy, the next question is why these exceptions are nonetheless qualified in this way. Why is the justification for the exceptions not sufficient to justify an exception even where the organization is either engaged in a commercial purpose or contracting with a public authority? After all, the harm to the autonomy of religious believers could be the same in both instances.

i. Commercial purpose

The first main way these exceptions are limited is in the legislation's definition of 'organization relating to religion.' Organizations whose sole or main purpose is commercial are not considered religious organizations for the purpose of the exceptions.

This does not mean that any commercial activity of religious organizations is not exempted; rather, that if the purpose of the organization itself is mainly commercial then none of their activities (religious or otherwise) will be exempted. Therefore, a church that ran a bookstore to raise money for church maintenance, for example, could be covered by the exceptions since the purpose of the organization would not be commercial even if the bookstore was. This approach is similar to that of Strasbourg jurisprudence where the

purpose of an organization will affect whether it has sufficient status to put forward a religious freedom claim.

Excluding organizations whose sole or main purpose is commercial means there may be some inconsistency as to when a commercial purpose will not be considered an exercise of religious freedom under the Act. For example, a church bookstore could exclude gay people from purchasing its goods but a commercial religious publisher could not. The activity and its purpose – the selling of religious materials to raise money – may be the same in both instances, but only the former would be granted an exception because only the former would be considered a religious organization. This would be the case even if the commercial publisher felt religiously obligated to sell (or even give away) a particular range of books in order to proselytise. This distinction presumes that only the former was a religious activity because it was conducted by an organization whose purpose was not commercial. In other words, an organization cannot be religious where its main purpose is commercial.

This qualifier raises the broader question of whether an organization with a commercial purpose can exercise the collective religious freedom of its members. The ECHR jurisprudence on the legal standing of religious organizations in relation to Article 9 claims is helpful here in showing which activities are protected under the Convention. It is not considering, however, specific legislative exclusions on the grounds of 'commercial purpose' so should be treated cautiously in relation to the UK legislation.

While freedom of religion doctrine extends to the public sphere and limitations on public manifestation of religious belief are unlawful unless proportionate, ECHR jurisprudence has generally not regarded the commercial purposes of religious organizations

as protected freedom of religion activities under Article 9. In *Kustannus Oy Vapaa Ajattelija AB v Finland*[51] the Commission held that a profit-making collective body cannot exercise (or claim a breach of) religious freedom rights under Article 9. It did 'not exclude,' however, the possibility that a profit-making body formed for the purposes of exercising beliefs in community with others could have a claim under Article 9 in the future.[52] While the case was decided on other grounds, it was clear that an organization formed for a commercial purpose (rather than a religious purpose with commercial activities) could not bring a claim.

As mentioned, this jurisprudence focuses on the legal standing of a putative religious organization to bring an Article 9 claim and therefore only indirectly concerns whether a commercial purpose can be an exercise of religious freedom. It is framed by the overarching question as to whether organizations can bring religious freedom claims on behalf of its members. While the case law has recognized that religious organizations may have religious rights,[53] the overall approach to whether they can bring a religious freedom claim 'appears to be whether the organization has as an aim the exercise of religious rights by its members.'[54] Thus the European Commission has 'consistently denied that a profit-making corporation could have any claim … under Article 9.'[55] For example, in *Company X v Switzerland*,[56] the

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51 *Kustannus Oy Vapaa Ajattelija AB v Finland* (1996) 22 EHRR CD69 (Commission Decision).

52 *App No 20471/92* 85-A DR 29, 43 cited in Carolyn Evans, *Religious Freedom under the European Court of Human Rights* (OUP 2001) 14.

53 *Holy Monasteries v Greece* (1994) 20 EHRR 1 .

54 Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006) 101.

55 Evans (n 52) 14.

56 *Company X v Switzerland* (1979) 16 DR 85.

Commission dismissed a company's claim that being forced to pay ecclesiastical taxes was a breach of its freedom of religion.

Both the Strasbourg jurisprudence and the UK legislation then presume that an organization established with a commercial purpose cannot exercise religious freedom. It is not clear why this is. One possible answer is that the members of such organizations do not join them in order to collectively exercise their religious freedom, in other words to live a religious way of life. Therefore the organization cannot bring (or exercise) a religious freedom claim on their behalf. While this may be arguable, it is not clear that a sharp distinction between such profit-making organizations, which may also engage in religious activity, and an organization formed for religious purposes can be drawn. Nor that an organization *not* formed for a commercial purpose is necessarily engaged in religious activity such that they should be granted an exception otherwise their freedom of religion will be infringed. Thus drawing a bright line between organizations formed with commercial objectives and those with religious objectives may not be justifiable for the purposes of granting exceptions.[57] Unlike the UK exceptions regarding goods and services, however, the Strasbourg jurisprudence recognizes that even if an organization is religious not all of its activities may be an exercise of religious freedom.[58]

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[57] In the context of individual religious belief, the court in *Christian Institute and others, Re Judicial Review* [2007] NIQB 66 noted that the exemption was lost if the organization's sole or main purpose was commercial. He suggested that a different approach, favoured in the Canadian *Ontario Human Rights Commission v. Brockie* [2002] 22 DLR (4th) 174, might be preferable: believers should not be compelled to act in a way that promotes that which their belief teaches to be wrong even in the commercial sphere. The Court in *Brockie* did not exclude commercial activity from religious freedom protection but placed it on the periphery.

[58] *Pastor X and the Church of Scientology v Sweden* (1979) 16 DR 68 (Commission distinguished between words in publicity material related to the beliefs of the sect and words aim at selling, which were not within Article 9(1) since they were 'more a manifestation of a desire to market goods for profit than the manifestation of a belief in practice.') Note that the Article 9 jurisprudence differs from the UK goods and

The alternative to this qualifier would be to focus on the purpose of the activity not the purpose of the organization. While this could be unwieldy and result in organizations only knowing whether their activity was exempted after the fact, it is effectively the same approach as taken in the listed exceptions themselves. In this instance, however, the government has chosen to limit the exceptions further by granting them to qualifying religious organizations only. While certain commercial organizations could also be religiously motivated or even obligated, in most instances they are not and it may be the case that the government decided to draw a bright line rule to avoid any commercial organizations benefiting from these exceptions (and subsequently causing unjustifiable associative harm towards certain groups of people) by pretending to be religious.[59] The exceptions could therefore be open to abuse by commercial organizations.[60] While proof of any claim's sincerity could have been required by the legislation, the government may have seen it as more efficient to draw this bright light rule to ensure such harm is avoided except in instances where it is justified by a competing religious freedom claim.

The law continually struggles with problems of over and under-inclusiveness. If the non-commercial criterion did not exist, or if it were less peremptory than at present, the exception could lead to very real difficulties both in terms of over-inclusiveness and during adjudication in deciding whether such an exception should apply. From the point of view of any normative autonomy-based justification for this qualifier, however, these pragmatic considerations are less significant.

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services legislation in this respect – once an organization is considered an 'organization relating to religion' the broad language of the legislative exceptions potentially covers profit-making activities.

59 Baroness O'Cathain, Hansard HL vol 673 col 1163 (13 July 2005).

60 Baroness Scotland of Asthal, Hansard HL vol 673 col 1164 (13 July 2005).

ii. Contracting with the state

1. A doctrinal justification

A potential doctrinal justification for the state contract qualifier must first be considered here: that the qualifier is necessary to avoid conflict with the HRA. Without limiting the exception in this way, the HRA could arguably apply either because the Act applies directly to the religious organization as a 'public authority' or because the public authority would breach the Act by contracting with an organization that discriminates.

As to the first aspect of this argument, it could be argued that upon contracting with the state a religious organization is then subject to the potential application of the HRA, s 6(1), which provides that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.' In effect, it stands in the place of the public authority. Indeed, even the use of the term 'public authority' in the qualifier indicates a concern for consistency with the HRA.

The law is unsettled, however, as to whether religious organizations can be public authorities under the HRA. Section 6(3) of the Act sets out two definitions of 'public authority' —'pure' or 'core' public authorities, which must act compatibly in all they do, and those 'hybrid' authorities which come under this obligation only when discharging a 'public function.' Religious organizations are potentially public authorities under Section 6(3) although the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial*

Church Council v Wallbank[61] determined that a parochial church council of the Church of England is not a core 'public authority' for the purposes of the HRA, s 6(3)(a) because the Church was essentially a religious organization despite its 'special links with central government.' The role of the church councils was to 'promote the mission of the Church' which meant it 'engaged in self-governance and promotion of its affairs' not 'acts [which] engage the responsibility of the state.'[62] A hybrid public authority under the Human Rights Act, s 6(3)(b), however, can include any 'person certain of whose functions are functions of a public nature' but not, under s 6(5), 'if the nature of the act is private.' A religious organization may, however, have both public and private functions. The House of Lords held, however, that a church council was not performing a function of a public nature in enforcing liability for repairing the parish church. The fact that parishioners had certain rights in relation to the church, which may constitute '"public" involvement', were not sufficient to characterize the council's action as of a public nature and render it a hybrid public authority.[63] *Aston Cantlow* leaves open the possibility, however, that on another occasion a religious organization might be subject to the HRA.

Under this functional (rather than institutional) approach the Convention rights protected under the HRA are not against the government as such but 'are designed to impose

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61 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 WLR 283.

62 *Aston Cantlow* (n 61) [13]-[14] per Lord Nicholls.

63 ibid [16].

constraints upon the performance of governmental tasks, activities, or functions.'[64] Cane sees the idea of a public function as 'evaluative', 'context-specific' and:

> rest[ing] on value judgments about the interest that society can legitimately claim in regulating the lives of individual citizens. Under the functional approach the public/private divide is not between government and non-government but between society … and the individual … Judgments about which activities are public and which are private will depend on the purpose for which the distinction is being drawn.

The functional approach differs in this way from institutional approaches which determine public authority depending on whether the body meets certain 'reasonably hard-edged factual criteria.'[65]

A contract with a public authority, however, does not necessarily mean that a body is performing a public function. The law is still not clear whether acting under a contract means they are subject to a public law claim and the courts take into account a broad range of factors when determining if they are. If the source of the body's power is contractual, the fact that it performs a public function will not necessarily render it amenable to judicial review[66] although 'contract does not weigh so heavily against a finding of publicness under the HRA as it does in the context of [a judicial review claim].'[67]

Under the new discrimination law framework, however, the 'crucial issue is the nature of the benefits provided, not their source, public or private.'[68] Thus the law applies to both public and private bodies.[69] These exceptions, however, effectively maintain this traditional distinction between public and private. Most activities of (private) religious

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[64] Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 254.

organizations with regards to goods and services are exempt from discrimination law except where they are provided under a contract with a public authority.

As to the second aspect of this argument, the HRA, s 6 provides that acts of public authorities that are inconsistent with Convention rights are unlawful. No definition of 'act' is provided so it could include entering into a contract with a religious organization that discriminates.

Under the discrimination law scheme, it is now also expressly unlawful for a public authority to discriminate in carrying out its function.[70] This includes indirectly providing benefits by facilitating access to the service, facility or benefit.[71] Thus, the legislation shows a clear concern that public authorities should not discriminate against certain groups of people, even indirectly. The qualification to the exception could be seen as ensuring that this is the case and that the exceptions are consistent with other parts of the legislation. The

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65 ibid 254.

66 *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 WLR 112. See also *R v Servite Houses, ex parte Goldsmith* [2001] LGR 55 (unless there is 'sufficient statutory penetration.' For example, contractual function may be embedded in the statutory regime of service provision indicating that the function is 'public').

67 Cane (n 64) 259. See *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] EWCA Civ 595, [2001] 3 WLR 183 (Poplar bound by the HRA because it was an integral part of the arrangement by which the council fulfilled its statutory housing functions) cf *Servite* (n 66)*; R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, (2002) 69 BMLR 22*; YL v Birmingham City Council* (n 66).

68 Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (2nd edn, Hart 2005) 277.

69 As discussed in Chapter Two, historically private citizens have been able to discriminate in conducting their affairs even where this involved members of the public: *Charter v Race Relations Board* [1973] AC 868 and *Race Relations Board v Dockers' Labour Club and Institute Ltd* [1976] AC 285, which resulted in Race Relations Act 1976, s 25. This included private associations. Discrimination law could, however, apply to public authorities although its application was unclear: *R v Entry Clearance Officer, Bombay ex parte Amin* [1983] 2 AC 818 (much criticized and subsequently overturned).

70 Equality Act 2010, s 31(3).

71 Equality Act 2010, s 212(4).

discrimination occurring in such instances would be seen as committed by the public authority rather than the religious organization.[72]

Ultimately, however, the 'contracting with a public authority' qualification is most likely irrelevant to any HRA challenge to this exception. Legislation that authorizes a breach of a Convention right is 'incompatible with the Convention regardless of whether the breach constitutes "state action".' Thus discrimination law that permits one citizen to breach another's right to private life would be incompatible with Article 8. This is because 'sections 3 and 4 provide protection against breaches of Convention rights that are "legally regulated" – in the sense of required or authorized by primary or subordinate legislation – by whomever they are committed.'[73] The 'contracting with a public authority' qualifier, therefore, would not prevent the exception from being successfully challenged under the HRA. Any challenge to the exceptions would begin by arguing that the discrimination permitted under them was contrary to the HRA. A court would then examine whether the exception was a justifiable limitation on any ECHR right. If the court found that the exception were justified, then whether the organization was acting under a contract with a public authority would have no bearing on its justifiability. Similarly, the legislation would not be incompatible with the HRA simply because it was not qualified to exclude situations where there was a contract with a public authority. As such, compatibility with the HRA cannot be a reason for the contract qualification. This also means, therefore, that if the exception were considered a

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[72] There remain, however, instances where a religious organization may not be under contract with the state and still be covered by this legislation. Similarly, the legislation applies to non-religious organizations that are not acting under a contract with the state. This indicates that the concern behind not granting the exemptions is not *solely* that the organization is acting in place of the public authority.

[73] Cane (n 64) 250. See also Nicholas Bamforth, 'The True "Horizontal Effect" of the Human Rights Act 1998' (2001) 117 LQR 34.

justifiable limitation under the HRA in order to realize religious freedom then the contract limitation on that exception is not justifiable. Moreover, any successful argument against providing an exception for contracting with a public authority could also defeat the justification for the exceptions all together.

This also means that whether the religious organization is a public authority under the Act is irrelevant. Either the legislative exception does not breach the HRA (in which case whether the organization is a public authority when it is acting pursuant to it is irrelevant) or it does breach the HRA (in which case whether the organization is a public authority is also irrelevant as the legislation will be incompatible with the Act regardless). This means that whether the actions of the religious organization can be attributed to the public authority is also irrelevant: the legislation (or any actions under it) will be either compatible with the HRA or not. Moreover, whether the public authority is breaching the Act by contracting with the religious organization is also irrelevant; it will not be breaching the Act provided the legislation is compatible and where the legislation is incompatible the state will have acted inconsistently with the Act (by virtue of passing the legislation) whether it entered into a contract with the religious organization or not.

2. An autonomy-based justification

Regardless of whether a doctrinal justification for the state contracting qualifier exists, we must still consider whether the qualifier can be justified by our commitment to the value of autonomy before it can be seen as legitimate.

We concluded earlier that this discrimination legislation and its exceptions may be justified by an appeal to the value of autonomy. While protection from discrimination in the provision of goods and services is necessary to ensure autonomy, the autonomy of religious believers could also be harmed if there were not some exceptions to this legislation. Exceptions for religious organizations from goods and services discrimination legislation may be justifiable to realize religious freedom – to securing the option of living a religious way of life. Without these exceptions a religious way of life may not be possible and this would harm autonomy. This legislation attempts to strike a balance between these two autonomy claims. The qualifications to these exceptions show, however, that a claim to religious freedom may not always justify an exception.

The scope of these exceptions, however, does not appear consistent with this justification. Drawing a distinction based on whether the organization is contracting with a public authority in the sexual orientation exception does not appear consistent with a justification based on preventing harm to autonomy – either that of the religious believer or that of the person seeking goods or services.[74]

Adopting the reasoning in Chapter Two, the first question is, therefore, whether the harm to the organization is lessened where there is a contract with a public authority.

One could argue that by contracting with a public authority the organization is accepting that the activity is to be regulated by state law. As such, religious organizations are

[74] The justification for this specific qualification is not considered in much detail in the governmental materials and is not considered at all by Joint Committee on Human Rights in its legislative scrutiny report: Joint Committee on Human Rights, 'Legislative Scrutiny: Sexual Orientation Regulations' (HL Paper 58) (6th Report, 27 February 2007).

not torn between two codes of regulation and a justification based on the burden the law imposes upon a religious way of life does not apply. The weakness of this argument is that it applies regardless of whether the organization is acting under a contract. Merely operating in the sphere of goods and services could be tacit acceptance of secular norms. With regards to the contract qualification, a doctrinal question would then arise regarding the extent to which the state can lawfully pressure religious organizations to change the way they offer services.[75] Could a government commissioning body, for example, require in the terms of service contract that a religious organization limit certain religious practices? Aside from obligations under the HRA, s 6(1) to respect Convention rights that arise even when using the contracting power, public authorities may not discriminate on grounds of religion and are under a new public sector equality duty to promote equality.[76] This, of course, presumes that religious organizations have a right to engage in welfare provision. It is at least arguable that they do in which case the state cannot discriminate against a religious organization when considering providers for a public contract.[77] Moreover, in some instances it may be unavoidable that the organization provides the services through governmental contract – such an arrangement may say more about the practicalities of service provision than the weight of the religious obligation. Thus it is at least arguable that harm to an organization through state regulation of its religious practices is not reduced when it occurs through governmental contract.

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[75] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 278.

[76] Equality Act, s 149; Rivers (n 75) 279.

[77] Rivers (n 75) 280.

Alternatively then, is the harm to those individuals discriminated against greater where goods or services are provided on behalf of a public authority, such that the exception can no longer be justified?

One could argue that a discriminatory service connected with the state causes greater harm to excluded individuals. This harm may occur because any service provided on behalf of the state will mostly be that which is essential. This speaks more to the nature of the service than the connection with the state and therefore any exception should address this concern by limiting its provision to certain services. It could also be the case, however, that greater harm is caused where the provider is harnessing the mechanisms and resources of the state. These enable organizations to provide their services more effectively but also in a manner that can affect more people. The funding provided and the range of people affected, however, may vary widely from contract to contract. Not every contract would necessarily cause additional harm – it could vary depending on the extent of the provision, the essential nature of the activity, alternatives available, and the particular nature of the discrimination. Thus it is not clear that contracting with the state would always cause additional harm.

Moreover, goods and services provision is generally made possible through a government regulated market regardless of whether the provider is acting under a governmental contract. Thus the state gives some support to discriminatory practices by allowing exceptions regardless of whether the practices occur under a public authority contract.

Could contracting with a public authority to provide goods and services cause greater harm to autonomy then because in such instances the organizations are dealing with the

public – those who do not subscribe to the norms of the religion – rather than its own members? While this justification was put forward in parliamentary debates[78] and governmental materials,[79] the organization may be dealing with the public whether or not they are contracting with the public authority. After all, one of the requirements for the general legislation to apply is that the goods and services must be provided to the public. So by its nature anything that falls under the legislation is arguably a *public* act. Moreover, the activities are not confined to those that just apply to their members. Thus it is not the case that the activity is private and confined to an area of activity in which the state ordinarily refrains from interfering.

While some conditions for providing the service may not be discriminatory – and there is no reason for the state to be concerned with these – it is not the case that the activity is private until a condition is attached that is discriminatory and there is a contract with the state. It is simply that while the activity may be public, outside of these circumstances the state shows either no concern or has exempted the organization. In this way, these exceptions can be contrasted with the employment exceptions which do not necessarily apply in instances where the organization is interacting with the public and where interaction with the public is part of the job description it will be less likely that the exception will apply.[80]

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[78] Baroness Andrews (n 17): 'But where religious organizations choose to step into the public realm and provide services to the community, either on a commercial basis or on behalf of and under contract with a public authority, that surely brings with it a wider social responsibility to provide those services for the public as they are, in all their diversity, and not to pick and choose who will benefit or who will be served.'

[79] Getting Equal (n 38) 10: 'However, where religious organizations enter into an agreement to provide social or welfare services to the wider community, on behalf of and under contract to a public authority, the rights of lesbian, gay and bisexual people to have equal access to those services comes to the fore.'

[80] *Sheridan v Prospects for People with Learning Disabilities* Case No 2901366/06, (ET, 13 May 2008). See also *Hender v Prospects for People with Learning Disabilities* Case No 2909090/06 (ET, 13 May 2008).

It is possible that the exception was intended to be interpreted narrowly with 'activities' meaning only those that are 'intimately linked' to the religion. In this way, the exception could more easily be justified on grounds of religious freedom and, moreover, as they would apply only in relation to the religious community the organization would not be dealing with a wider public. As such, there would be no inconsistency with the qualifier regarding contracts with a public authority. This interpretation, however, goes against the statutory context which indicates that 'activities' is the umbrella term for what the religious organization is doing when it is providing the goods, facilities, or services referred to earlier in the legislation. As such, 'activities' is what the organizations is engaged in when it is seeking to make use of the exception. Similarly, given the religious doctrine requirement referred to later in the section it would seem that if 'activities' was intended to be given this meaning it would have been expressly stated. Moreover, there would be no need for an exception if the meaning did not encompass the provision of goods, facilities or services to the *public* because then the activities would not fall under the legislation in any event.

Presuming then that any harm to autonomy resulting from the closing off of options due to the exceptions is the same whether provided under a contract or otherwise,[81] the concern with the qualifier seems to be the association with the state rather than closing off options to those individuals discriminated against. After all, the activity and any limitation on discrimination rights are the same whether the religious organization contracts with the state to provide the service or not. This differs from the employment exceptions where the

[81] It could be argued that when acting under a contract with a public authority the state is the recipient of the goods or services, and hence the object of any potential discrimination, not the public. It is clear from the legislative context that it is the public (not the state) that is protected from discrimination by the lack of exceptions in this situation.

emphasis is on whether the requirement, for example, was proportionate and proportionality was directly connected to the position and needs of the employer. The qualifier to the goods and services exception does not seem concerned with ensuring that any limitation on discrimination rights is the smallest necessary to realize religious freedom and thus causes the limitation on the range of options available.

So what is the concern about the state associating with the discriminatory practices of religious organizations?

We concluded earlier that it may not be possible to justify the qualifier to the exception by an appeal to autonomy – contracting with a public authority may not necessarily cause more harm to autonomy by limiting access to options even further than would otherwise be limited under the exception. An appeal to autonomy may still, however, justify this qualifier. As we noted in Chapter Two and above, discriminating in employment or in access to goods and services because of a protected characteristic can harm the self-respect of those individuals possessing those characteristics. This harm may be increased if discrimination is somehow sanctioned by the government. Exceptions excuse such discrimination by an appeal to the autonomy of another. Positively supporting or enabling such discrimination through a contractual relationship whereby the organization provides the goods or services *on behalf of a public authority* does not simply excuse but sanctions the discrimination. It throws the moral weight of the state's sanction behind it. Such sanction tells the person discriminated against that it is also the state's view that discriminating against persons like them is justifiable. The sanctioning of such discrimination by the government

would therefore cause greater harm to a person's self-respect than if it such discrimination were performed by a private body.

We could argue therefore that by contracting with a public authority a religious organization should be held to the same standard as a public authority and therefore an exception to this discrimination legislation should not be permitted. As such, it should have a different set of values and criteria applied to its actions than it would if it were simply operating as a religious organization. The religious motivation behind its conduct, for example, could be irrelevant if it is discriminatory. This is a normative claim and differs from that which states that because the organization is dealing with the public certain exceptions should not be granted. After all, as we have seen, an organization can deal with the public while still acting privately. Here the views put forward by the organization are not approached in the same manner as if they were offered simply by a private, religious organization. If the organization is providing services that would otherwise be undertaken by the state the normative balanced is changed. It would effectively be acting as the arm of the state and therefore certain standards, such as state neutrality, should be adhered to even at the expense of adherence to religious beliefs. Bodies which are public in this way should 'set an example' or avoid 'send[ing] the wrong message about the government's overall commitment to the legislation.'[82] This justification is reflected in parliamentary materials,

[82] Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 571 (writing in the context of determining whether a governmental body that was a pure public authority or 'so public' could ever be considered to be acting privately such that the HRA would not apply).

which indicate, for example, that the concern behind the qualifier is with granting public funds to a discriminating organization rather than dealing with the public as such.[83]

Pragmatically speaking, receipt of government funds means there ought to be some consistency with government policies. After all, it would not be in the government's interest to undermine its policies by contracting with organizations that do not adhere to them. This argument may also be consistent with the public sector equality duty to advance equality, which applies to public authorities and bodies exercising public functions.[84] While contracted bodies may not be required to comply with the public sector equality duties, the public sector must when determining contractual providers. Here they may have regard to sexual orientation equality, although how this would be considered along with religious equality is still unclear.

The concern about associating discriminatory practices with the mechanisms of the state was apparent in *Ladele v Islington LBC*.[85] Here the court emphasized that, despite the claimant's religious view of marriage, she 'was employed in a public job and was working for a public authority; she was being required to perform a purely secular task.'[86] The court spent little time considering whether requiring the claimant to perform civil partnerships against her religious belief was a proportionate means of implementing the workplace 'Dignity for All' policy and minimize discrimination. It would appear that only a blanket

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83 See Maria Eagle (Minister for Women and Equality): 'It would be unacceptable to have an exception in the law for any agencies that were offering publicly funded services in respect of regulations designed to prevent discrimination.' Hansard HC vol 481 col 160 (21 October 2008).

84 Section 149.

85 *Ladele* (n 16).

86 *Ladele* (n 16) [53].

requirement that all registrars perform the ceremonies could implement this policy, despite the state's obligation to prevent religious discrimination and permit religious freedom. This decision appears more concerned with the legitimacy that any association with the state may give the activity than the actual harm caused. In any event, the decision concerned a public official not a private service provider. However, the court in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*[87] noted an 'essential distinction between private acts of worship such as blessings and the provision of a public service such as an adoption agency' even when provided by a private organization.[88] Rivers suggest, however, that the value of the voluntary sector lies 'precisely in its diversity of ethos and provisions.' Equality 'does not require the imposition of a single secular ethos on all organizations which occupy the domain of the State's activity.'[89]

Conclusion

In the context of goods and services, the UK governmental has provided broad exceptions for religious organizations from discrimination law even when dealing with the general public. It provides two main qualifiers which limit the application of these exceptions and which differ from the employment exceptions.

The qualifier to these exceptions, which limits the exceptions where the organization has a commercial purpose, is difficult to justify as it presumes that an organization with such

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87 *Catholic Care* (Charity Tribunal) (n 29)

88 ibid [60].

89 Rivers (n 75) 287.

a purpose cannot manifest a religious belief. It would be more appropriate to limit the exception where the *activity* is commercial.

By contrast, the qualifier that limits the exceptions where the organization has contracted with a public authority can be justified. While there may be good grounds for exempting religious organizations from the legislation there is no justification for the state positively supporting violations of the law through funding (or otherwise mandating) discriminatory practices. There is no positive right to freedom of religion in this respect. Without the qualifier to these exceptions the claim that the law imposes a burden upon religious freedom would become a claim for positive state support of a group's particular discriminatory social norm. This would cause further, and unjustifiable, harm to the autonomy of the individuals discriminated against.

4. MEMBERSHIP

Determining group membership is an important activity of religious organizations. Control over membership includes not only determining who to admit but the terms on which they are admitted, the benefits they receive once admitted, and the disciplining and potential expulsion of members. This chapter is concerned with admission to membership and the interplay between state law – most notably again, discrimination law – and religious freedom in this context. Part One sets out the discrimination legislation and accompanying exceptions relating to membership in religious organizations. Part Two considers the justification for group or institutional autonomy in matters of membership.

1. DOCTRINE

The main body of UK doctrine that specifically addresses religious membership admission arises, as in the employment and goods and services, from discrimination law. This includes doctrine that applies to voluntary or unincorporated associations and that which is specific to the membership practices of religious organizations.

a. Europe

Any EU law that would apply to discrimination in membership would arise in the goods and services directive context. As discussed in Chapter Three, there is only one EU Directive which is relevant in this context: the Equal Treatment in Goods and Services Directive

2004/113/EC,[1] which extends European sex discrimination law to the supply of goods and services in both the public and private sectors. It applies to goods and services available to the public 'which are offered outside the area of private and family life.'[2] The Racial Equality Directive 2000/43,[3] which prohibits discrimination on the grounds of race or ethnic origin, prohibits discrimination in membership. There are no EU Directives that address membership discrimination on other grounds such as sexual orientation or religion and belief although one has been proposed by the European Commission.[4]

i. Exceptions

The European Directives have no specific exceptions for membership discrimination by religious organizations or associations more generally. The Goods and Services Directive, Recital 16 does state, however, that 'differences in treatment may be accepted only if they are justified by a legitimate aim,' which can include 'freedom of association (in cases of membership of single-sex private clubs).' The Recitals in both the Goods and Services Directive and the Proposed Council Directive also stress the importance of respecting freedom of religion and freedom of association when prohibiting discrimination. The Racial Equality Directive 2000/43 stresses the importance of respecting freedom of association only.

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1 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Goods and Services Directive).

2 Article 3(1).

3 Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Racial Equality Directive 2000/43).

4 European Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' (COM (2008) 426) (2 July 2008) ("Proposed Council Directive")

The Racial Equality Directive, Article 14(2), however, expressly prohibits any exceptions for membership discrimination by stating that:

> Member States shall take the necessary measures to ensure that … any provisions contrary to the principle of equal treatment which are included in … rules governing associations … are … declared null and void.

b. United Kingdom legislation

The Equality Act 2010, Part 7 prohibits discrimination in associational membership. An association is that which has at least 25 members[5] and where admission to membership is regulated by the association's rules and involves a process of selection.[6] It is unlawful for an association to discriminate against, harass or victimise an existing or potential member or an associate because of a protected characteristic (excluding marriage and civil partnership). An association cannot refuse membership to a potential member or grant it on less favourable terms because of a protected characteristic. Nor can an association, among other things, refuse an existing member or associate access to a benefit, facility or service or deprive him or her of membership or rights as an associate or subject him or her to any other detriment

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[5] Religious organizations with fewer than 25 members may not qualify as a recognized religion under other tests including that for the goods and services discrimination exceptions discussed in Chapter Three and therefore their exception benefits would be limited to this narrow exception.

[6] Section 107(2). See *Dockers Labour Club & Institute Limited v Race Relations Board* [1976] AC 285, 291 ('genuine selection on personal grounds in electing candidates to membership') See also *Charter v Race Relations Board* [1973] AC 868, 897 ('genuine system of personal selection of its members') applied in *Dockers.* Both decided prior to the now repealed Race Relations Act 1976, s 25 which outlawed discrimination on the grounds of race in associational membership.

because of a protected characteristic.[7] It does not, however, prohibit harassment of members or potential members because of their religion or belief or sexual orientation.[8]

Where they overlap, the prohibitions on goods and services discrimination apply.[9] This means that associations that provide goods or services to the public or section of it fall within the goods and services provisions outlined in Chapter Three when offering services only to members if these members are also considered a section of the public. Such provision could be discriminatory if membership is discriminatory because of a particular protected characteristic. In this way, such associations could also be indirectly prevented from discriminating in membership when providing goods and services. As we will see below, however, due to the exceptions that exist for associations to discriminate in membership it is unlikely that organizations that limit their membership in this way would still be considered public. As discussed in Chapter Three, where persons are admitted not because of their 'role as members of the public but by reason of … having been chosen because of their characters as private individuals'[10] then an organization is most likely not public.

i. Exceptions

The Equality Act, Schedule 16 provides an exception for 'single characteristic associations.' It allows an association whose main purpose is to bring together people who share a

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7 Sections 101–102.

8 Section 103(2).

9 Section 100(2)(a).

10 *Dockers* (n 6) 294. If an organization, however, was flexible in its admission criteria on occasion and admitted the public, it would be considered to have stepped out of the private sphere and potentially be liable if it refused to admit a person on one of the protected grounds. *Dockers* (n 6) 291.

particular characteristic (which could include religion but excludes colour) to continue to restrict membership to such people. This includes imposing similar restrictions in terms of access to benefits, facilities or services on those who can exercise the rights of an associate, or who can be invited as guests.[11]

Schedule 23 of the Act provides an exception to the protections under Parts 3 (Services), 4 (Premises), and 7 (Associations) specifically for religious organizations. Paragraph 2(3) allows an 'organization relating to religion', so far as relating to religion or belief or sexual orientation,

> (a) to restrict membership of the organization,
> (b) to restrict participation in activities undertaken by the organization or on its behalf or under its auspices […]
>
> A similar exception exists in para 2(5) for ministers.

As discussed in Chapter Three, this restriction relating to religion can only be imposed if it is (a) because of the purpose of the organization, or (b) to avoid causing offence, on grounds of the religion or belief to which the organization relates, to persons of that religion or belief.[12] A restriction relating to sexual orientation can only be imposed (a) because it is necessary to comply with the doctrine of the organization, or (b) to avoid conflict with strongly held convictions of a significant number of the religion's followers.[13]

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11 Sch 16, para 1.

12 Para 2(6).

13 Paras 2(7) and 2(9).

Again, an 'organization whose sole or main purpose is commercial' is excluded from this exception.[14]

Thus even if a religious organization *were* considered to be a public (not private) association by the courts or was providing goods and services to the public it would be permitted to discriminate by restricting membership because of religion or sexual orientation provided it met the other criteria to constitute being a religious organization discussed in Chapter Three.[15]

In addition to permitting discrimination by religious organizations in admitting members, the Schedule 23 exception therefore also potentially permits discrimination in the membership terms offered or the treatment of members once they are admitted. It is not unlawful for religious organizations 'to restrict participation in activities undertaken by the organization', 'restrict the provision of goods, facilities or services in the course of activities undertaken by the organization', or 'to restrict the use or disposal of premises owned or controlled by the organization' on the grounds of religion or belief or sexual orientation. Thus once admitted, despite the general prohibition on discriminating in the treatment of members, these exceptions mean there is nothing in discrimination law to prevent a religious organization from treating a member once admitted less favourably than other members with

[14] Sch 3, para 29(4); Sch 23, para 2(2).

[15] This may include not just clearly religious organizations, such as mono-religious churches or mosques, but organizations that are open to members irrespective of their particular faith but require a certain religious belief. For example the promise 'to love my G-d' required by the Girl Guides Association and which may be 'fundamental to its aims and ethos.' Hansard HL vol 673 cols 1184-6 (13 July 2005) (discussing similar exceptions for religious discrimination in the now repealed Equality Act 2006, s 57(3)(a)).

respect to any of the goods, facilities or services provided to its members.[16] The treatment of members once admitted will be discussed in Chapter Five.

c. United Kingdom case law

No UK case law addresses these legislative exceptions for religious organizations. Some case law, however, involves membership decisions by religious organizations. Membership admission will be discussed in this chapter and internal discipline will be discussed in Chapter Five. No case law addresses the treatment of admitted members (for example, in their access to facilities) outside the internal discipline context.

Traditionally the courts have adhered to a principle of non-interference in relation to religious membership disputes. This principle has two bases. The first is associational freedom. As we will see below and in Chapter Five, a primary reason the courts have refused to interfere in membership decisions of religious organizations (for example, through subjecting the organization to judicial review) is because the internal workings of religious organizations, including membership decisions, are seen as essentially private matters. Thus associational, rather than solely religious, freedom appears to be the basis for the courts' refusal to intervene. For example, in *R v Imam of Bury Park, ex parte Sulaiman*[17] the Court of Appeal affirmed the lower court decision choosing not to review the decision of an Imam to deny a group of Muslims a vote in a mosque election. The court held that in compiling the

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[16] See the discussion of Lord Diplock in the context of private clubs in *Dockers* (n 6) at 294. He observed that while this treatment would not contravene the RRA it may have amounted to a breach of the contract contained in the club rules. Breach of contract as an action against an organization is discussed in Chapter Five.

[17] [1994] COD 142.

list of voters the imam was not subject to judicial review because his function and decisions were not of a public law nature but based in contract.

While in limited circumstances the courts will intervene by applying the private law of contract, even contract law claims against membership admission decisions are rare. It is difficult to show any contract exists between an organization and potential members. The absence of any legally cognizable claim coupled with legislative exceptions to discrimination law means that for the most part religious organizations are left alone to determine admissions according to internal processes and criteria. The end result is extensive associative freedom in matters of admission.

As we will see in Chapter Five, the second basis for non-interference in religious community disputes is judicial competence. The courts have shown a marked reluctance to adjudicate disputes that concern matters of religious doctrine.[18] This reluctance extends beyond a straight concern for associational freedom. Religious matters – which can include who is considered a member according to religious doctrine – have been seen as beyond the understanding of the courts.

Recently, however, UK courts have shown more willingness to engage with religious doctrine and this has even extended to examining such doctrine in the context of religious membership disputes. Their previous 'reticence has … been replaced with a much more self-

[18] *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036.

confident willingness to adjudicate contested issues touching on the religious sphere.'[19] This increased engagement with religious doctrine means the courts no longer always defer to religious organizations' determinations of group membership, nor take a 'hands-off' approach to such matters.[20]

This new willingness to engage with religious doctrine was evident in *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)*[21] where the Supreme Court examined the substance of who was to be considered Jewish – a question of Jewish religious doctrine – in the context of religious school admission. It concluded that a Jewish school engaged in racial discrimination when it used Orthodox Jewish doctrine on religious membership to determine who was Jewish for the purposes of admission to the school. This decision is significant because it has implications beyond the school admission context – the criterion for admission to the Jewish school was the same as that used by the Orthodox Jewish community for group membership more generally – and shows some of the difficulties that can arise for religious group autonomy where the courts adjudicate on matters related to religious membership. It also highlights some of the problems with current discrimination law as a result of its attempt to draw a clear line between permitted religious discrimination, on the one hand, and prohibited racial discrimination on the other. Moreover, as the court queries, some of the difficulties that arose in this case could also have been

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[19] Christopher McCrudden 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* case considered' (2011) Int Jnl of Const L, Oxford Legal Studies Research Paper No 72/2010 1, 24 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701289> accessed 12 August 2011.

[20] Joel Harrison, 'Jewish Identity and the Discourse of "Religion": JFS and 'Hands-Off' Religious Adjudication' (draft paper on file with author).

[21] [2009] UKSC 15, [2010] 2 AC 728 ('the *JFS* case').

avoided if there were a defence of justification in cases of direct discrimination.[22] The current law does not distinguish between invidious discrimination and discrimination which is potentially justifiable.

This case concerned the lawfulness of the decision by JFS – a publicly-funded and designated Jewish faith school – to give preference in its oversubscription policy to pupils who were Jewish according to the Office of the Chief Rabbi (OCR).[23] The OCR is the religious authority for the Orthodox Jewish community in the UK. Any statements it makes on religious doctrine apply to the entire community. The OCR recognizes a person as Jewish if they are descended in the matrilineal line from a woman whom the OCR would recognizes as Jewish or has undertaken a qualifying course of Orthodox conversion. The school was oversubscribed so it applied its oversubscription policy and refused the claimant's son a place because he was not Jewish according to the OCR. His mother had undergone a non-Orthodox conversion and therefore he did not satisfy the requirement of matrilineal descent. The school did not make the practice of Judaism a requirement for admission.

In seeking judicial review of the school's refusal to admit his son, the claimant argued that the Orthodox Jewish definition of who was a Jew, whether by descent or conversion, was a question of ethnicity. The refusal to admit someone because their mother was not Jewish according to the OCR was therefore unlawful because it constituted either racial

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22 ibid [9], [69], [70], [184], and [237].

23 Neither this thesis nor this chapter are considering admission to faith schools as such but rather the membership of religions, which, as the *JFS* case shows, may have some overlap with admission to religious schools. On admissions to faith schools see Julian Rivers, *The Law of Organized Religion: Between Establishment and Secularism* (OUP 2010) ch 8.

(which includes ethnic origins) discrimination, contrary to Race Relations Act 1976 (RRA), s 1(1)(a) or indirect discrimination having no legitimate aim under RRA, s 1(1A).

The central question for the court was, therefore, whether the criterion that the claimant's son be recognized as being Jewish by the OCR – in other words, that he be descended from an Orthodox Jewish mother – was racial discrimination (because it was based on ethnic origins) or religious discrimination. If it were racial discrimination, then it was unlawful under RRA, s 17 which outlaws racial discrimination in the arrangements made for selecting children for admission to schools. Whether the admission criterion related to ethnicity or religion was crucial because religious discrimination in school admissions is not unlawful. The law permits oversubscribed faith schools to adopt a priority policy for members of the faith or those who practice the faith.[24]

In deciding the racial discrimination claim, the High Court[25] had refused to make any legal determination on the qualities that make, or ought to make, a person Jewish. It effectively deferred to the OCR in determining who was eligible for admission on the basis that it could not enter into matters of Jewish law. It concluded, however, that the admission policy was primarily based on religious law which happened to refer to a criterion of descent. The High Court decision was unanimously reversed by the Court of Appeal. JFS then appealed to the Supreme Court.

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[24] Under the then Equality Act 2006, s 50, now Equality Act 2010, Sch 11.

[25] *E v The Governing Body of JFS & Anor* [2008] EWHC 1535 (Admin), [2008] ELR 445 (Munby J).

The majority Supreme Court Justices[26] held that JFS had directly discriminated against the claimant's son on grounds of his *ethnic* origins contrary to the RRA. Two Justices would have also dismissed the appeal on the ground that the policy was indirectly discriminatory – while the aim of providing Jewish education was legitimate, the policy was disproportionate. Two Justices would have allowed JFS's appeal in its entirety.

In considering whether the matrilineal descent criterion constituted direct discrimination based on ethnic origins, the Supreme Court examined the essential characteristics of ethnicity set out in *Mandla v Dowell Lee*:[27] the group shared a long history and a cultural tradition of its own. Other relevant indicia might include a shared geographical origin; a shared religion and other social characteristics. The Jewish people have long since been recognized as an ethnic group under the RRA.[28]

The Supreme Court reasoned that if the preference afforded to children whose mothers were Jewish depended on an ethnicity criterion then, as a matter of ordinary construction of RRA, s 1(1)(a) and on precedent, such preference was directly discriminatory and unlawful. The majority held that since Jewish people are recognized as an ethnic group, a criterion which depended upon Jewish (matrilineal) descent was necessarily direct discrimination on grounds of ethnic origins. A religious motive for this discrimination based on a sincerely held religious belief was irrelevant.[29] Since the admission criterion was ethnic, it did not matter that it was also a religious criterion.

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26 The school's appeal was dismissed by a 5-4 majority.

27 [1983] 2 AC 548.

28 *Seide v Gillette Industries Ltd* [1980] IRLR 427.

29 citing *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155.

The decision is problematic for various technical reasons already addressed by others.[30] For the purposes of this chapter, it shows the problems that are inherent in judicial intervention in what was effectively an internal membership dispute concerning the content and application of religious doctrine. Despite the judges giving repeated assurances that they were not passing judgment on the merits of Jewish law on membership,[31] the Supreme Court ended up adjudicating upon an internal disagreement within a religious minority; determining Jewish status is not uncontroversial within the wider Jewish community. The JFS decision was a 'challenge … that [went] to the definition of membership of the religion itself, and thus may involve contesting the authority of the leadership of that religion to prescribe who is to be regarded as a member of that religion.'[32] After all, the criterion that was under scrutiny is the very same one that applies to Orthodox Jewish membership generally.

The fact that the court was doing more than engaging in a simple act of statutory interpretation was made apparent by the ease with which some of the judges felt comfortable making unequivocal statements on the content of Jewish law.[33] It was this lack of reticence that resulted in the majority Supreme Court Justices effectively adjudicating on the substance of who was to be considered Jewish. A large portion of the judgment is spent attempting to

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30 John Finnis, 'Directly discriminatory decisions: a missed opportunity' (2010) 126 LQR 491; Susanna Mancini, 'To be or not to be Jewish: The UK Supreme Court answers the question' <http://ssrn.com/abstract=1693127> accessed 12 August 2011.

31 The *JFS* case (n 21) [69-71] (Baroness Hale), [157-160] and [182] (Lord Hope), and [239] (Lord Brown).

32 McCrudden (n 19) 5.

33 The *JFS* case (n 21) [2] – [3] (Lord Phillips discussing the meaning of the seventh chapter Deuteronomy and its relevance to Jewish law on membership) and [42] (Lord Phillips stating that 'The Jews to whom Moses spoke at Mount Sinai would have shared all seven of the characteristics of ethnic identity itemised by Lord Fraser in the *Mandla* case … The passage in Deuteronomy to which Jews look as the basis of the matrilineal test plainly focuses on race.').

directly engage with Jewish law on membership. Despite this attempt to engage with Jewish doctrine, the court ultimately concludes that the matrilineal descent criterion applied by the OCR – and applied by the Orthodox Jewish community to determine membership for thousands of years – is a racial, not religious, criterion. The school's decision to refuse admission on the basis of this criterion therefore constituted direct racial discrimination and was unlawful.

The decision has significance, therefore, beyond simple statutory interpretation in the context of school admissions; it impacts religious group autonomy. In determining that the criterion applied by the OCR was unlawful racial discrimination, the court imposed upon the community an external view as to who their group members ought to be and how they ought to be determined. After all, the criterion applied by the OCR is the same as that which applies for Jewish group membership generally. Moreover, it is a *religious* obligation of Orthodox Judaism that the JFS was fulfilling – the education of children considered to be Jewish by that community.[34] It is these children who then go on to be future members and leaders of the Jewish community. To change who has access to a Jewish education therefore impacts the future composition of the Jewish community and impacts the ability of the community to fulfil its religious obligation to its future members.

Ultimately, the decision was unsatisfactory to all Jewish groups as the resulting non-ethnicity based criteria reflect a Christian understanding of religious membership that is

[34] The *JFS* case (n 21) [256] (Lord Brown: 'the essential aim of an Orthodox Jewish school … is to fulfil its core religious duty: the education of members of its religion in the Orthodox faith.').

inconsistent with the membership doctrine of all branches of Judaism.[35] In deciding that the discrimination was based on ethnic origins, the Supreme Court repeatedly implied that religious membership must be based on religious beliefs and practice – the fact that the school was indifferent to these indicated to the court that it was discriminating based on ethnicity. In fact, the school was indifferent to these because membership in the Jewish religion has *never* been based on belief or practice and *always* been based on matrilineal descent or conversion. Jewish people have never defined themselves by practice. Lord Phillips' judgment in particular draws attention to the failure of the court to truly understand a different normative system. He stated that '[m]embership of a religion or faith normally indicates some degree of conscious affiliation with the religion or faith on the part of the member'[36] – 'normally' according to a non-Jewish understanding of religious affiliation. This statement, for McCrudden, 'bear[s] all the hallmarks of an external viewpoint, and not a cognitively internal viewpoint.' After all, McCrudden notes '[e]vidence was presented on behalf of the Chief Rabbi that explicitly denied the need for any such 'conscious affiliation' in Judaism. Indeed, a central aspect of the Chief Rabbi's argument was that one could be

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[35] See the dissents of Lords Rodger and Brown in the *JFS* case (n 21) [225] ('The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief …. Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching') and [248] ('[the claimant] is not really seeking to prevent JFS from adopting oversubscription criteria which give priority to Jews but rather is asking for JFS to define Jews more expansively than Orthodox Jews in fact do … The Court of Appeal's judgment insists on a non-Jewish definition of who is Jewish … a religion which for over 3,000 years has defined membership largely by reference to descent, will be unable henceforth even to inquire whether one or both of the applicant child's parents are Jewish.').

[36] The *JFS* case (n 21) [44].

Jewish according to religious law and explicitly reject any conscious affiliation with the Jewish religion or faith.'[37]

The difficulty was that ethnicity contains a religious component and the exception for school admissions applies to purely religious criteria only. Given that Jews are recognized as an ethnic group, any criterion the school applies based on descent (unlike with descent from a Catholic parent, for example) will necessarily be ethnic discrimination. This problem arises from discrimination law's attempt to draw a clear separation between religion and ethnicity, when for Jews they may be inseparable.[38]

The court's inability to conceive of religious membership as being something other than an individualized, subjective phenomenon shows the soundness of the judicial competence basis for non-intervention in issues of membership status. While this basis relates specifically to religious organizations, the concern behind it is ultimately less about judicial competence; it is more about determining religious doctrine for the organization which then affects group autonomy – the group's ability to determine its own doctrine and its own membership. The difficulties inherent in the JFS litigation could have been avoided if the court had simply deferred to the decision of the OCR.

This decision fundamentally altered JFS' admission policy – applicants must now meet certain religious practice criteria – and this will significantly affect the composition of its student body. As it was not argued under the HRA, however, the JFS case was primarily a

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[37] McCrudden (n 19) 26.

[38] See Davina Cooper and Didi Herman, `Jews and other uncertainties: Race, faith and English law' (1999) 19 Leg Stud 339; Rivers (n 23) 256.

case about the interpretation of UK discrimination law rather than the extent to which a religious group (and by extension schools affiliated with that religion) can determine its own membership under Article 9.[39] The statutory context and judicial precedent made it difficult for the courts to avoid determining whether the application policy was racial discrimination.

This decision has serious implications, however, for religious freedom beyond that which affects religious education. What remains to be seen are the implications this decision will have for Orthodox synagogue membership. If membership determined by matrilineal descent is racial discrimination then synagogue membership policies could very well also be unlawful unless such discrimination could fall within the Schedule 16 exception that permits single characteristic associations (including those based on race) to restrict benefits, facilities or services to those who share that characteristic. As we saw earlier, religious discrimination is permitted in associational and religious group membership but racial discrimination is not. While the state may have a legitimate interest in limiting discrimination in the public sphere – which includes educational institutions – it has very little legitimate interest in preventing such discrimination in religious group membership.

The effect of this decision for synagogue membership could be to seriously undermine religious freedom. After all, as will be discussed below, religious freedom is not simply about an individual's identity and their freedom to believe and manifest that belief. It has a strong associational aspect and this necessarily requires individuals to be able to practise their religion together with those holding similar beliefs and according to similar

[39] It is arguable whether JFS, as a state-maintained school, could have made an Article 9 claim in any event. Organs of the state cannot claim to be victims of HRA violations and thus the school must have 'substantial autonomy' from government to be treated as a potential victim. See Rivers (n 23) 246.

doctrine. This decision ignores that religious identity can have a collective, external element – after all religion involves the continuation of tradition. As Article 9 acknowledges, this is something which can require the presence of other individuals adhering to that same tradition. That tradition may include the belief that only certain individuals, however determined, are part of that religion. State law that declares associational preferences unlawful thus seriously undermines religious freedom.

While arguably the state has an interest in avoiding racial discrimination in its education system, it has no interest in determining who is a member of a religious congregation or who is entitled to the benefit of certain religious rituals (as the statutory exceptions outlined in this chapter and in the goods and services context discussed in Chapter Three acknowledge). But the effect of this decision is that these exceptions may no longer apply to those Jewish communities whose membership is based on matrilineal descent because they do not extend to racial discrimination. A mohel – an expert in Jewish circumcision, which is a ritual at the centre of Jewish life and practice – would not be permitted to discriminate under the goods and services discrimination legislation against a person who considers themselves Jewish but is not considered Jewish by the Jewish community.

Moreover, should synagogue membership policies constitute racial discrimination then JFS' revised admission policy – which operates on a 'points' system whereby parents are required to present a Certificate of Religious Practice, signed by their rabbi or another community official – could still fall afoul of equality legislation by being indirectly

discriminatory.[40] Although no distinction is made between Orthodox and non-Orthodox synagogues, synagogue membership (although not attendance) in most synagogues is based on descent.

Ultimately, the *JFS* case is about who ought to determine religious group membership. The Supreme Court found that membership should be based on an individual's own identification, belief, and practice rather than group determination based on religious law. It largely dismisses this associational aspect of religious identity preferring instead to focus on individual affiliation. This has the potential to ultimately undermine religious freedom. This case marks a shift towards 'a much more questioning approach towards organized religion, particularly when it comes up against equality values' than the previous stance of non-interference in internal disputes.[41]

Overall, however, the state generally still shows significant deference to religious groups to determine membership admission. This deference is demonstrated through specific legislative exceptions to discrimination law. The relative lack of case law indicates that such admission decisions are rarely contested either because individuals accept the authority of the organization on such matters or know that any claim would be unlikely to succeed under UK law. While the recent *JFS* case indicates an emerging confidence about the state's ability to grapple with the substantive validity of any membership determination, membership admissions to core religious organizations – such as congregations and other organizations devoted to worship – still remain largely outside the reach of state law.

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40 As the court notes (n 21) [50].

41 McCrudden (n 19) 36.

2. JUSTIFICATION

We have seen that the state is generally unwilling to apply its law – particularly non-discrimination principles – to membership admissions of religious organizations. We have seen in Chapters Two and Three, however, that being discriminated against on the basis of certain protected characteristics can harm a person's autonomy. It may mean that the option of practising a certain religion is closed off to them or their self-respect may be harmed by being refused admission on the basis of who they are. How then can this harm be justified?

This harm can be justified by, first, the importance of religious organizations to individual religious freedom and thus personal autonomy and, secondly, by the importance of determining membership to these religious organizations. Any harm to autonomy that is caused by membership discrimination is therefore justified by a further appeal to autonomy.

a. Religious organizations and individual religious freedom

We have observed in earlier chapters that religious organizations are necessary if someone wishes to pursue a religious way of life. Comprehensive options such as religion depend on existing social forms of life in order to be successfully pursued. It is through these social forms that autonomy is realized because they provide the community and norms that make up this comprehensive option.

A religious way of life cannot therefore be pursued without membership in a religious organization that provides this social form. Constructing a sense of religious identity and meaning may not also be possible outside of group membership. After all, religion is not just

a set of beliefs. It can be defined in relation to 'community, culture, and ethnicity …. [It can be] a way of structuring and living a communal existence in fidelity to religious teachings and cultural practice.'[42] Religious organizations are therefore necessary to realize personal autonomy because they help provide this comprehensive option.

Freedom of religion depends therefore on certain institutions for its existence and flourishing. Religious freedom requires an 'infrastructure'. It is 'not only lived and experienced through institutions, it is also protected and nourished by them.'[43] Religion, like speech, most often 'happens in, through and by institutions.'[44] Some religious practices need a critical mass of participants to be viable and organizations ensure this critical mass.[45] Ahdar and Leigh explain this relationship between the individual and their religious organization well:

> Religion is seldom if ever solely an individual matter. While a lone individual may clearly follow his or her own unique chosen path in matters of belief, worship and practice, the vast majority of human beings only find it meaningful to pursue their religious objectives together with other like-minded individuals. There is an ineradicable collective or communal dimension to religion. Organizations or associations are formed to give effect to this communal aspiration. An individual's religious life is very much tied to and dependent upon the health of the religious community to which that believer belongs.[46]

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42 Carolyn Evans, 'Introduction' in P Cane, C Evans and Z Robinson (ed), *Law and Religion in Historical and Theoretical Context* (CUP 2008) 8.

43 Richard Garnett, *'Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses'* (2008) 53(2) Vill L Rev 273, 274.

44 ibid 277.

45 See Denise Réaume's version of group rights in which groups have a right to participatory practices only: 'Individuals, Groups, and Rights to Public Goods' (1988) 38 U Toronto LJ 1.

46 Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 325.

This role religious organizations play in ensuring religious freedom is reflected in positive law. The HRA, s13(1) and Article 9 ECHR and associated case law[47] all recognize the communal aspect of religious freedom.

b. The importance of determining membership

We have seen that a religious way of life requires the presence of a group through which that religion can be practised. An individual's religious freedom is therefore tied up with the freedom of the organization through which they practise their religion. The individual religious believer thus has an interest in their religious organization not only existing but functioning in a way that allows them to live that religious way of life.

Institutional autonomy is therefore essential to individual exercise of religious freedom. Without institutional autonomy the option of living this religious way of life is closed off. Brady argues that religious communities are not 'simply aggregations of like-minded individuals who come together to exercise pre-existing beliefs with those who share their view' because they 'play an essential role in shaping the beliefs that individuals hold as they teach and transmit ideas from one generation to the next.'[48] In other words, they provide the option of living a religious way of life. Thus where the state interferes in the internal affairs of a church – particularly the allocation of authority – it interferes with the forming of

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[47] eg in *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECHR, 5 October 2006) [58] the court stated that the Article 9 right to religious freedom must be interpreted in light of the Article 11 right to freedom of association.

[48] Kathleen Brady, 'Religious Group Autonomy: Further Reflections about What is At Stake' (2006-2007) 22 J L & Religion 153, 156.

the religion.[49] If the state interferes in these affairs it affects the nature of this option. While religious organizations may have different concerns from that of the individual – an individual, obviously, does not have an interest in determining their own membership or adjudicating upon their own disputes – an individual may have an interest in being part of an organization that is self-governing in this way because it allows them to pursue the option of a religious way of life. In other words, exercise their religious freedom.

Institutional autonomy thus enables a group to self-define and self-direct according to religion, which is necessary for the option of a religious way of life to be meaningful. This autonomy necessarily requires the ability to exclude those who do not share the beliefs around which the group or association is organized. Interfering in the composition of an organization affects a person's religious freedom and thus ultimately their autonomy because it affects who they practice their religion with and thus the meaningfulness of the option. As with employment decisions discussed in Chapter Two, state intrusion would affect the group's ability to self-define. In this way, the associative aspect of religious group membership, and thus the existence of the group itself, is as important as the ability to exercise one's own individual religious freedom.

The idea that religious bodies can regulate their own membership to include only those who share their religion can therefore be seen as 'uncontroversial.'[50] However, while an individual may require religious group membership in order to live a religious life,

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[49] Douglas Laycock, 'Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,' (1981) 81 Colum L Rev 1373, 1391.

[50] McCrudden (n 19) 21 citing *Society of Locomotive Engineers and Firemen (ASLEF) v United Kingdom* (2007) 45 EHRR 793 [39] and *Taylor* v *Kurtstag* 2005 (7) BCLR 705 (W) (no right to impose oneself on a religious community).

membership of a religious organization may not depend solely on the self-identification of that individual. As the *JFS case* demonstrates, a conflict can arise between the individualistic aspects of freedom of religion, and its associational aspects – a person who considers themselves a member of a particular religion may not necessarily be considered a member by an organization embodying that religion.

Is a justification for the protections given to religious organization based on the importance of institutional autonomy for religious freedom consistent therefore with a conception of religious freedom that is grounded in individual autonomy? It is arguable that allowing an organization to conduct its internal affairs as it wishes is inconsistent with individual autonomy where, for example, a person wishes to join a particular religious group and was denied membership. The option of living that particular religious way of life is therefore denied them. However, to recognize that person's desire to be member of that particular group in the form of the state forcing the group to accept them as a member would undermine not only institutional autonomy, but *also* the individual autonomy of the other members of that group who did not wish to practise their religion with that person, which could include for reasons of doctrine. Being forced to accept that person as a member of their group would undermine their ability to pursue their religious way of life.

In any event, a person denied the choice of a particular religion may not be denied autonomy – autonomy requires an adequate range of choices not the presence of a particular choice. Thus, the argument goes, exclusion should not be seen as harmful to autonomy. Indeed, if the state were to prevent such exclusion it would be denying freedom of

association – 'a basic aspect of religious liberty.'[51] Those who have been excluded from one particular group are free to join other groups that share their beliefs or to form their own group.

Thus while the autonomy of the group's members would be affected if institutional autonomy were not respected, that person denied membership would still be free to consider themselves a member of that religion and practise their religion with other like-minded people but just not in that particular organization. Thus their individual autonomy would be unaffected and so would the members of the organization. Thus recognizing the institutional autonomy of religious organizations is way of realizing the individual autonomy and religious freedom of the group's members without compromising the individual claimant's autonomy.

It could be argued, however, that the claimant's individual autonomy is not unaffected since they may wish to practise their religion in a particular way that can only be realized by belonging to a certain group. It may be no consolation to someone who wishes to be an Orthodox Jew, for example, that they can always join a Reform Synagogue especially given the role communal worship plays in Judaism. Moreover, what the person's autonomy may demand is not just the ability to choose to be Jewish but the *recognition* as being such. After all, a person's identity is 'partly shaped' through the recognition of others.[52] If we

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[51] Ian Leigh, 'Clashing Rights, Exemptions, and Opt-Outs: Religious Liberty and Homophobia' in Richard and O'Dair and Andrew Lewis (eds), *Law and Religion,* 4 Current Legal Issues 247 (OUP 2001) 265.

[52] Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed). *Multiculturalism: Examining the Politics of Recognition* (Princeton 1994) 25 (although his argument is from an equality perspective and is addressed towards political institutions – and the tradition liberal claim that government should be blind as to people's identities – rather than private bodies).

accept that in such instances a claimant's individual autonomy *is* affected through non or misrecognition there could still be a justification for exclusion based in individual autonomy on the basis that the individual autonomy of the group's members would be affected *more*.[53] After all, being forced to recognize a person as a member of one's group would defeat the ability of the group to form its own identity and could change the character of the group should that person's membership go against the doctrine around which the organization is formed.

Thus the argument that we must question individual autonomy as a basis for religious freedom if protections are given to Orthodox Jewish communities to determine their own membership (and they choose to do this based on matrilineal descent rather than individual belief) cannot stand. Such protections recognize the individual autonomy of the group's members to live a religious way of life by associating with whomever they wish and according to whatever religious doctrine they wish. It would thus undermine the religious freedom of the group's members for the state to tell them how to determine membership in their group. As we saw, this is effectively what happened in the *JFS case*. Although the matter was complicated by the particular wording and interpretation of the Race Relations Act and the fact that the dispute involved school admissions (rather than membership of a synagogue only), which added a public element to the membership dispute, the court held that the Chief Rabbi's determination of who was Jewish on the basis of descent was a race-based rather than religion-based criterion. This judgment effectively held, therefore, that religious group membership could not be determined on the basis of any other criterion that was not considered to be related to individual belief and practice. And moreover, that

[53] Thank you to Farrah Ahmed for this point.

religious membership could not be determined by anyone other than the individual believer. By not recognizing institutional autonomy in this instance, this judgment violated individual autonomy.

The *JFS case* also demonstrates the risk involved in the courts adjudicating upon who is a member – they can interpret religious doctrine badly and decide wrongly. This is not a *reason* for granting institutional autonomy to organizations to determine their own membership, but it confirms that state interference in such matters can harm religious freedom by making decisions inconsistent with the autonomy of the group.

Conclusion

This chapter has shown that individual religious freedom requires membership in organizations that enable a person to live a religious way of life and carry a particular religious identity. In order for these organizations to enable this exercise of religious freedom they must have institutional autonomy including over membership admissions. This is because members of a group carry group identity and without institutional autonomy over who carries that identity these organization cease to exist in a form which manifests that particular identity. This would compromise religious freedom, and thus personal autonomy, by harming the organization through which it is realized.

5. INTERNAL DISCIPLINE

Control over membership includes not only determining whom to admit but how they should be treated once admitted. This chapter specifically considers how the state responds to the disciplining and potential expulsion of members by religious organizations and whether this response can be justified. Part One examines the large body of case law on membership disputes within religious organizations and unincorporated associations. Part Two considers the justification for group autonomy in matters of internal discipline.

1. DOCTRINE

No statutory provisions address internal discipline or treatment by religious organizations or other private associations more generally.[1] As mentioned in Chapter Three, the exceptions for religious organizations from certain goods and services discrimination laws permits them to discriminate (which could include against members) in the provision of goods, facilities or services so far as relating to religion and belief or sexual orientation[2] or the provision of services so far as relating to sex.[3] These exceptions will not be discussed further here.

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[1] With the exception of the Church of England's Clergy Discipline Measure 2003 which provides structure for dealing with formal complaints of misconduct against members of the clergy, other than in relation to matters involving doctrine, ritual or ceremonial. While synodical measures – church law enacted by the Church's central legislative body under Church of England Assembly (Powers) Act 1919 – has the same authority as state law once given parliamentary approval and royal assent, it is rightly seen as internal church law: Norman Doe, *The Legal Framework of the Church of England* (Clarendon 1996) 17.

[2] Equality Act 2010, sch 23, para 2.

[3] Equality Act 2010, sch 3, para 29.

The courts are generally reluctant to resolve disputes involving the internal discipline of members within religious organizations. Again, this refusal can arise from two bases: first, a general respect for associational freedom; and secondly, the view that they lack the competence necessary to determine the dispute because the matter concerns religious law. This second basis will be discussed in more detail in Chapter Six.

Religious organizations are generally viewed by the courts as consensual societies founded on voluntary association; there is a 'consensual compact' between members.[4] Thus, in law, they are treated as unincorporated voluntary associations whose members are bound together for the purpose of advancing religion as a matter of private agreement.[5] They are therefore basically private institutions.[6] Their authority is seen to arise from their members' consensual submission to their jurisdiction.[7] Thus, the law relating to voluntary associations applies and the internal rules[8] of religious organizations (including their rules of membership

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4 *Scandrett v Dowling* [1992] 27 NSWLR 483. See also *R v The Provincial Court of the Church in Wales, ex parte Reverend Clifford Williams* (1999) 5 Ecc LJ 217 (the church is a voluntary association whose authority was based on 'consensual submission to its jurisdiction').

5 See *Halsbury's Laws* (4th edn, 1991) vol 6. The definition of a club or voluntary society requires that the association be private. *Halsbury's Laws* (4th edn, 2003) vol 6 reissue, para 101.

6 For example, the Governing Body of the Church in Wales, the central legislature of the church, is seen to be an institution of private law: *R v Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 Ecc LJ 129. This view has been echoed in parliamentary debates. For example, 'Much of what the Churches do is, in the legal context and in the context of the European Convention on human rights, essentially private in nature, and would not be affected by the Bill even as originally drafted. For example ,… admission to the Church membership or to the priesthood and *decisions of parochial church councils about the running of the parish church* are, in our judgment, all private matters.' Jack Straw HC Deb 20 May 1998, vol 331, col 1017 (on the proposed Human Rights Act).

7 *Clifford Williams* (n 4); *R v Beth Din, ex parte Bloom* [1998] COD 131; *R v Imam of Berry Park Jame Masjid Luton ex parte Sulaiman Ali* [1994] COD 142.

8 Unless otherwise stated, the terms internal rules and social norms are interchangeable.

and discipline) to which all members subscribe exist as a contract (either express or implied) and may be enforced by the secular courts.[9]

While the courts are 'not always clear as to the basis' of any legal enforceable rights that members of religious organizations may have,[10] they are generally seen as arising from this contract of association.[11] The rules of the religious body form a contract of association between the members, which the courts will intervene to uphold if necessary.[12] Instances of the relationship between a voluntary society and its members being treated as one of contract abound. *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*[13] and *Law v National Greyhound Racing Club*[14] both confirmed that a contract existed between the members and the society. The presence of a contract in such situations is purported to enable members to deal with oppression or breaches of rules by a majority or a powerful minority of members. Reflecting the view that religious group membership is a type of voluntary association, the courts in religious membership disputes often draw analogies with sporting

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9 *Long v Bishop of Cape Town* (1863) 1 Moore NS Cases 461. Note that the rules or 'constitutions' of certain churches have received statutory recognition eg: the Baptist and Congregational Trusts Act 195 and the Methodist Church Act 1976.

10 Julian Rivers, *The Law of Organized Religion: From Establishment to Secularism* (OUP 2010) 88.

11 McLean suggests that identifying the source of private power as arising from consent was not uncontroversial. The contractual view of membership can also be strained in some instances eg: it leaves open the possibility that every member who voted for an expulsion could be sued in their personal capacity: Janet McLean, 'Intermediate Associations and the State' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 161-164. Viewing judicial intervention in property disputes as grounded in contract can also be problematic. The rules of association, while based upon consent and possibly enforceable in civil courts, are not necessarily the legal equivalent of a contract; elements may be missing from these rules that are essential for a contract to be legally enforceable.

12 Julian Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the UK Human Rights Act 1998' in Rex Ahdar (ed), *Law and Religion* (Ashgate 2000) 141.

13 [1993] 1 WLR 909.

14 [1983] 1 WLR 1302.

bodies, member clubs and trade unions and rely upon cases involving expulsions from such non-religious organizations.[15]

Not every term of association, however, is enforceable. The courts will generally only intervene in internal decision-making where civil or property rights are involved and the matter is financial in nature. In the seminal case of *Forbes v Eden*,[16] an ecclesiastical dispute, Lord Colonsay stated that:

> a Court of Law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interest.[17]

Similarly, in *Dilworth v Lovat Highland Estates Ltd and Trustees for St Benedict's Abbey* the court observed that:

> [i]t is well established that the Court will take no concern with the internal resolutions of voluntary associations … In the absence of any suggestion that the pursuer has suffered or will suffer patrimonial loss or loss to his reputation, the question as to whether the Trustees have acted contrary to the statutes or the Congregation is not a matter of which this Court can take cognizance.[18]

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15 Hoffman LJ, in refusing to grant judicial review in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* (n 13) noted that '[t]he attitude of the English legislator to racing is much more akin to his attitude to religion .... it is something to be encouraged but not the business of government .... I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.'

16 (1867) LR 1 Sc & Div 568 (HL).

17 ibid 588.

18 [1999] GWD 38-1840 per Lord Philip.

As religious organizations are considered to be 'inherently private' bodies, plaintiffs generally cannot bring public law actions such as that for judicial review.[19] The general position is that if the nature of the functions are not such as to generate any governmental (not just public) interest, the body will not be amenable to judicial review.[20] In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann*[21] a rabbi applied for leave to move for judicial review of a decision of the Chief Rabbi that he was not morally or religiously fit to hold rabbinical office. Simon Brown J refused the application holding that the jurisdiction of the Chief Rabbi was not susceptible to judicial review in respect of the discharge of his essential functions[22] as the spiritual head of the United Hebrew Congregations of the British Commonwealth. The public element of a decision of a non-governmental body was not sufficient for it to be properly regarded as an exercise of a public function capable of attracting the court's supervisory jurisdiction. Instead, there must be governmental interest in the decision-making power of the body, in this case the commission set up by Chief Rabbi. This government interest was absent because it could not be suggested 'that the Chief Rabbi performed public functions in the sense that he is regulating a field of public life and but for his offices the government would impose a statutory regime.'[23] The Chief Rabbi's functions were said to be 'essentially intimate, spiritual and religious, and the government could not and would not seek to discharge them if

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19 Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) para 026-034.

20 See *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036; *Sulaiman Ali* and *Bloom* (n 7).

21 *Wachmann* (n 20).

22 His essential functions are to advise and rule on matters of Jewish law, ritual, and doctrine, to officiate at special functions and ceremonies, and to certify religious officiants as religiously and morally fit (or unfit) to hold their respective offices within their congregations.

23 *Wachmann* (n 20) 1041.

he were to abdicate his regulatory responsibility,' and nor would 'Parliament … contemplate legislating in this field.'[24] Moreover, '[w]hether or not a decision has public law consequences must be determined otherwise than by reference to the seriousness of its impact upon those affected.'[25] Thus the Chief Rabbi's discharge of his religious functions did not have 'a truly public law character such as alone would attract the court's supervisory jurisdiction.[26]

Religious organizations that are subject to some legislative regulation have also been seen as unsuitable for judicial review. The mere fact that the existence and some functions of the Chief Rabbi are recognized by Jewish United Synagogues Act 1870 and the Slaughterhouses Act 1974 is not sufficient to subject it to judicial review. In *R v London Beth Din, ex parte Bloom*,[27] a restaurateur, applied for judicial review of a decision of the London Beth Din (the Court of the Chief Rabbi) (appointed under the United Synagogues Act) not to renew his Kashrut licence to sell kosher meat. The court held that the decision was not reviewable because judicial review was only available to challenge the decisions of bodies exercising a statutory or governmental function and not such private bodies as the Beth Din unless, exceptionally, they acted in breach of their charter or constitution.[28]

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24 ibid 1042-1043.

25 ibid (n 20) 1042.

26 ibid (n 20) 1043.

27 *R v Beth Din, ex parte Bloom* (n 7).

28 cf *Reg v Rabbinical Commission, ex parte Cohen* [1987] COD 1259 (Rabbinical Commission, in exercising statutory licensing functions under the Slaughterhouses Act 1974, was subject to judicial review).

Beginning with a series of 19th century cases,[29] plaintiffs can now, however, bring a natural justice claim against an association exercising its disciplinary function although any breaches of natural justice are seen to be a breach of an implied contractual term. [30] There was a concern that private, often monopolistic, power of voluntary associations be 'tempered by corresponding responsibilities' including the duty to hold fair inquiries.[31] A duty to act in accordance with natural justice will typically arise 'when a decision directly affects any proprietary or personal right or interest. For example, decisions which affect a person's livelihood [or] which deprive a person of … property rights'.[32] Principles of natural justice can be expressly excluded from the rules, including the power of expulsion, but the courts may consider whether such exclusion is in accordance with public policy.[33] Provided, however, that the rules for expulsion have been complied with and the committee has acted properly in accordance with natural justice, the court has no jurisdiction to interfere in the decision of a committee.[34] Specific case law has evolved that specifically applies this natural justice duty to ecclesiastical bodies.[35] While the case law relating to membership disputes involving non-Established religious organizations is sparse, some suggest that while the

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29 *Fisher v Keane* (1878) 11 ChD 353; *Innes v Wylie* (1844) 1 Car & Kir 257, *Wood v Woad* (1874) LR 9 Exch 190.

30 *Aga Khan* (n 13) 860 (Bingham MR) and 876 (Hoffman LJ).

31 Lord Woolf, Jeffrey Jowell, and Andrew Le Sueur, *De Smith's Judicial Review* (6th edn, Sweet & Maxwell 2007) para 6-042 citing *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *Russell v Duke of Norfolk* [1949] 1 All ER 109; *Abbott v Sullivan* [1952] 1 KB 189.

32 *Halsbury's Laws* (4th edn, 2003) vol 1(1), para 96.

33 *John v Rees* [1970] Ch 345, 400. See also *Wood v Woad* (n 29) 196; *Russell v Russell* (1880) 14 ChD 471, 478.

34 *Weinberger v Inglis (No 2)* [1919] AC 606 (HL).

35 *Capel v Child* (1832) 2 Cr & J 558; *M'Millan v General Assembly of the Free Church of Scotland* (the 'Cardross' case) (1861) 23 D 1314; *Bonaker v Evans* (1850) 16 QB 162. See also *R v North, ex p Oakey* [1927] 1 KB 491 (CA); but cf *Marquess of Abergavenny v Bishop of Llandaff* (1888) 20 QBD 460; and *R v Archbishop of Canterbury, ex p Morant* [1944] KB 282 (CA).

courts will not determine the substantive outcome of a dispute they will similarly order them to administer themselves in accordance with their constitutions.[36] In other words, comply with procedural propriety.

Consensual compact will not always be a basis for declining judicial review. The court in *Wachmann* observed that the rabbi was pursuing a vocation and therefore had no choice but to accept the Chief Rabbi's jurisdiction. Thus the rabbi was not considered, unlike with the jurisdiction of arbitrators or 'private or domestic tribunals,'[37] to have consensually submitted to the Beth Din's jurisdiction such that judicial review was inappropriate.[38] The court observed that it knew of no other bodies (including, presumably, religious bodies) aside from the two mentioned that have been held exempt from judicial review on the basis that the parties had consented to its jurisdiction.[39] Thus *Lee v Showmen's Guild of Great Britain*[40] – the often-cited decision on membership discipline albeit from a trade union – gives little support for the proposition that judicial review of the decisions of religious bodies (at least with regards to clergy as opposed to ordinary members) will not be available because their authority is based on consent despite holding that the court's jurisdiction to intervene would arise from contract not public law. Nonetheless, the decision in *Wachmann* makes it clear that judicial review of such decisions will be extremely rare. Moreover, whether the person

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36 eg *Motleib v Latif* (CA, 3 November 1992) and *Hothi v Khella* (CA, 20 May 1999) cited in Rivers (n 10) 95.

37 *Lee v Showmen's Guild* (n 31).

38 *Wachmann* (n 20) 1040 cf *R (Datafin plc) v Panel for Takeovers and Mergers* [1987] QB 815 and *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302.

39 *Wachmann* (n 20) 1040.

40 *Lee v Showmen's* (n 37).

has consented to the body's jurisdiction will be relevant in determining whether the body in question is fulfilling a public law duty and thus its decisions have public law consequences.[41]

It is arguable, however, that the court dismissed 'too quickly' the argument that the rabbi's submission to the jurisdiction of the Chief Rabbi was not consensual. Inherent in associational membership is agreement to submit to the rules of the association. This includes agreeing to how those rules are made, amended, and enforced. Unlike other associations in which the court mentions that the state has a public interest in ensuring the conditions of membership is reasonable for all people (such as Bar associations), '[t]here is no equivalent public interest in the case of religious bodies.'[42]

With the recent exception of the *JFS* case,[43] the courts have generally adopted a definite stance of non-interference in matters of *religious doctrine*. While the internal management of religious bodies is regarded by the courts as essentially involving private matters, the *Wachmann* case saw the courts willingness to intervene in such matters presented not just as reluctance, but as an almost established or declared principle of non-interference. In *Wachmann* the court observed that it would never exercise its jurisdiction over questions of Jewish law and a distinction could not be drawn between substantive matters for religious consideration and those procedural considerations with reference to the common law rules of natural justice. The reviewing court was not 'in a position to regulate what is essentially a religious function – the determination whether someone is morally and

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41 *Wachmann* (n 20) 1040.

42 Rivers (n 10) 104.

43 *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728 (SC).

religiously fit to carry out the spiritual and pastoral duties of his office.'[44] Moreover, the court must 'be wary … [of] straying across the well-recognized divide between church and state …. if judicial review lies here, then one way or another this secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community.'[45] These considerations 'that prompt the court's reluctance to regulate this area of decision-making demonstrates also its lack of real public law character.'[46] Similarly, in *Blake v Associated Newspapers Ltd*,[47] the claimant brought a defamation action for the publication of articles in a daily newspaper alleging that the claimant was not validly consecrated a bishop. Citing *Wachmann*[48] and *R v Imam of Bury Park, ex parte Sulaiman Ali*,[49] the court held that it was well-established that courts would not venture into doctrinal disputes. This also meant that it would not adjudicate on issues relating to procedures adopted by religious bodies, or on the fitness of person to carry out pastoral and spiritual duties of their religious office. Since the defence raised these non-justiciable issues the defamation action had to be stayed.

Whether the courts will review the decisions of a religious body may depend on whether they are decisions of an Established body, in other words the Church of England. The courts of the Established Church of England have been seen to hold special status as 'part of the fabric of the State.'[50] It is regulated by the government through both primary and

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44 *Wachmann* (n 20) 1043.

45 ibid 1043.

46 ibid 1043.

47 [2003] EWHC 1960 (QB). See also *Maharaj v Eastern Media Group Ltd* [2010] EWHC 1294 (QB).

48 *Wachmann* (n 20).

49 *Sulaiman* (n 7).

50 *Clifford Williams* (n 4).

secondary legislation and it has numerous other associations with the state, including that its consistory courts (which adjudicate its internal disputes) are state courts.[51] Unlike the constitutions and rules of members clubs, its rules are state laws and its doctrines and government are susceptible to change through state legal processes:[52] the law of the Church of England, unlike other religious and voluntary organizations, has been considered part of the 'public law' of England rather than private, contractual law.[53] Indeed, its Measures – as primary legislation – must be read and given effect in a way that is compatible with the ECHR[54] or a court may make a declaration of incompatibility.[55] It is this connection with the state, argues Hill, which means that the Church of England, unlike other religious organizations, cannot be analogized to a members' club.[56] It has meant that the courts may issue, albeit reluctantly, injunctions preventing ordinations taking place that are not in accordance with its laws.[57] It is also the reason its processes can be subject to judicial review

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51 This also means they are subject to those duties incumbent upon public authorities such as the duty to apply the ECHR when making decisions eg *In re Durrington Cemetery* [2000] 3 WLR 1322.

52 *Williamson v the Archbishop of Canterbury and York* (CA, 5th September 1996) 15C-D cited in Mark Hill, 'Judicial Approaches to Religious Disputes' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (Current Legal Issues) (OUP 2001) 415.

53 *Diocese of Southwark v Coker* [1998] ICR 140 where it was held that the spiritual duties of an assistant curate were 'defined by public law rather than by private contract' (at 147) and the relationship between the bishop and the assistant curates was 'governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement' (at 148). Presumably the court meant public law in this context to mean state law rather than law that concerns the exercise of public power.

54 Human Rights Act 1998, s 3(1). Measures of the Church of England and the General Synod are 'primary legislation' under s 21(1).

55 Human Rights Act 1998, s 4(2).

56 Hill (n 52) 411.

57 *Gill v Davies* (1997) 5 Ecc LJ 131, Smith J (preventing ordination lacking sanction of the acting bishop from taking place for a short period).

when acting ultra vires or in breach of natural justice.[58] This means, for example, that a consistory court would have to act impartially in accordance with Article 6(1) (right to fair trial).[59] Despite this public nature of the Church, the Church of England still has powers of self-government granted by Parliament and vested in its General Synod similar to other religious organizations. In this respect the 'practical effect' of the Convention on Church of England legislation 'may be limited' and members would find it difficult to bring a claim for any breach against the church.[60]

The discipline of clergy from any religion may raise different issues, however, from discipline involving ordinary members since whether there is a contract (of employment or otherwise) between a religious organization and its clergy is not settled in law and will often depend on the facts of the particular dispute. In many instances the courts have refused to intervene in such employment disputes because the nature of the relationship between clergy and their religious bodies was spiritual not contractual and therefore they could not even bring a private law action.[61] This is the approach taken by the ECtHR in *X v Denmark*[62]

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[58] Hill (n 52) 411. *R v Archbishop of Canterbury, ex parte Williamson* (10 March 1994); *R v Bishop of Stafford, ex parte Owen* [2001] ACD 14; *R (Gibbs) v Bishop of Manchester* [2007] EWHC 480. See also *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* [1948] 1 KB 195; *R v Chancellor of the Chichester Consistory Court, ex parte News Group Newspapers* [1992] COD 48; and *R v Exeter Consistory Court, ex parte Cornish* (1998) 5 Ecc LJ 212 (CA) cited in Mark Hill, *Ecclesiastical Law* (3rd edn, OUP 2007) para 2.62.

[59] Ian Leigh, 'Freedom of Religion: Public/Private, Rights/Wrongs' in Mark Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press 2002) 155. See eg *Tyler v UK* App no 21283/93 (Commission Decision, 5 April 1994) (unsuccessful challenge to the composition of a consistory court on the grounds that is was not independent and impartial).

[60] Leigh (n 59) 153 eg *Williamson v UK* App no 27008/95 (Commission Decision, 17 May 1995) (dismissing challenge to Measure permitting ordination of women to the priesthood on the grounds that it violated the claimant's Article 9 right to freedom of religion).

[61] See *President of the Methodist Conference v Parfitt* [1984] ICR 176; *Diocese of Southwark v Coker* [1998] ICR 140; *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323; *Birmingham Mosque Trust Limited v Alavi* (1992) ICR 435; and *Singh (Santokh) v Guru Nanak Gurdwara* [1990] ICR 309.

which, although an Article 9 (rather than private law) claim, held that a clergyman accepted the discipline of his church when he took employment, and his right to leave the church guaranteed his freedom of religion. However, we saw in Chapter Two that this position may be changing in the UK at least in relation to certain employment law claims.

It may be the case, however, that a religious group member's interests can be enforced just as easily through a private law action based on an agreement to associate than through judicial review. Similarly, clergy may be able to bring a private law action based on this agreement to associate even where there is no contract of employment. The lack of any public or employment law remedies may not deprive members and clergy of *all* legal remedies. Rivers suggests that both *R v Imam of Bury Park, ex parte Sulaiman Ali*[63] and *R v Beth Din, ex parte Bloom*[64] could have been bought as private law claims whereby the rules of association were informed by the principles of natural justice.[65] Similarly, if *Wachmann* had been brought as a private law action he could well have been successful. In *Davies v Presbyterian Church of Wales* – the leading authority on the relationship between ministers and their religious body – the House of Lords held that churches were not to deprive a nonconforming minister of an office carrying a stipend save 'in accordance with the provisions of the book of rules' despite there being no contract of employment.[66] In other words, the secular courts had the jurisdiction to enforce the terms of association between

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62 (1976) 5 DR 157.

63 *Sulaiman* (n 7).

64 *R v Beth Din, ex parte Bloom* (n 7).

65 Rivers (n 10) 105.

66 *Davies v Presbyterian Church of Wales* (n 61) 329A–D. In *Clifford Williams* (n 4) the judge also considered whether the normal procedures of the Church had been followed.

members (which includes clergy) of a religious body to the extent that they affected their financial and property interests. The court's concern in *Wachmann* was that it could not adjudicate on the procedural complaints without inquiring into the substantive requirements of Jewish law. The assumption made by the judge, notes Rivers, was that it would be wrong for him to consider whether or not requirements of Jewish procedural law had been satisfied. This is what the judgment in *Davies v Presbyterian Church of Wales* requires, assuming that a financial or proprietary interest was at stake in the dispute.[67]

Ultimately, whichever procedural route is taken by a UK court when adjudicating on membership disputes may make little difference 'to the extent of the oversight.'[68] The relationship between a member and an organization is seen as based on agreement. As such, there is a general respect for any internal disciplinary process provided these internal rules are complied with and subject to possible oversight with regards to natural justice. There is almost complete deference (or non-competence) on matters of religious law.[69] By contrast with this principle of restraint or even non-interference with regards to the disciplinary decisions of religious bodies, the courts are often more willing to regulate the distribution of property belonging to religious organizations. This will be discussed in Chapter Six.

2. JUSTIFICATION

The doctrine regarding membership shows significant deference to religious organizations to conduct their internal affairs as they wish. While there is some variation for the affairs of

67 Rivers (n 12) 141.

68 Rivers (n 10) 106.

69 ibid 106-7.

established Church of England and the treatment of clergy members of all religions, the doctrine concerning the internal affairs of religious organizations is generally based around the idea that such organizations are voluntary associations with any law that potentially governs the relationship between an organization and its members usually being founded in contract. The courts will defer to the decision of the religious organization, even where the claim is legally cognizable, provided that its internal rules have been complied with.

The question arises here as to whether this deferential approach on matters of internal discipline can be justified. Its doctrinal basis is the idea of consensual compact – members have consented to the organization's authority. Such deference can therefore be justified on the basis of individual autonomy. Individuals should be free to agree to comply with certain rules and undertake certain responsibilities; holding a person to such agreements is to respect their choices and treat them as autonomous human beings. A system that holds people to agreements can also enhance autonomy by making it possible for certain options that require cooperation and predictability to exist. The power to enter into contracts can, for example, allow people to establish new relationships and make future plans.[70]

We saw in Chapter Four that institutional autonomy over membership admission is necessary for the option of living a religious way of life to be possible; in other words, for religious freedom to exist. Without institutional autonomy, a group is unable to self-define and therefore construct or sustain the religious identity needed to enable its members to live a religious life. Does the justification for institutional autonomy in determining membership admission extend, however, to *treatment* of members? Institutional autonomy over internal

[70] Leslie Green, 'Rights of Exit' (1998) 4 Legal Theory 165, 175.

discipline has a similar justification. Discipline or expulsion of members is part of group self-definition – it enables a group to determine who should remain a member and what behaviour is acceptable to the group.[71] The state's reluctance – either judicially or legislatively – to interfere in the internal affairs of religious organizations enables these organizations to create and maintain their group identity despite potentially differing societal beliefs and practices.

However, while the state may have little legitimate interest in determining membership, it may have an interest in how members are treated once admitted. Where a legally cognizable interest of a member is at stake, it may also be consistent with autonomy for the state to hold either the organization or the individual to any internal rules that they have agreed to comply with. An approach which defers to the processes of the organization provided they have complied with internal rules allows for both institutional and personal autonomy by respecting the authority of the organization over its internal affairs while holding both the institution and the individual to freely undertaken responsibilities. Thus a purely deferential approach – one that refuses to adjudicate upon the dispute at all as in the *Wachmann* case – deprives an individual of the protection of the law available to other citizens while not holding the organization to its responsibilities under the agreement with the member. This is inconsistent with personal autonomy and will be discussed further in Chapter Six.

While group autonomy potentially also enhances personal autonomy by allowing for the option of a religious way of life it may also, however, involve limiting autonomy in some

[71] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (HUP 2001) 174.

aspects of the person's life. Doctrinal structures created by case law or legislation that enable religious organizations and their members to maintain their religious beliefs, practices and identity can potentially operate, paradoxically, to allow religious organizations to limit the autonomy of their members and deprive them of rights that they would otherwise have under state law. A woman member may, for example, have a right to non-discrimination in the wider society when accessing goods and services but not when accessing certain services provided by a religious organization of which she is a member.[72] While access to goods and services is a separate issue from internal discipline, the extent to which the state ought to tolerate treatment according to non-state norms that limit individual autonomy arises from the same considerations.

The classic liberal justification for non-interference in the internal affairs of religious groups even where their activity is not autonomy-enhancing or deprives them of rights that they may otherwise have under state law is based on the interrelated ideas of consent and exit.[73] First, that the members have freely consented to adhere to their group's terms of association and therefore the limitations on their autonomy. Secondly, in any event, they have "a right to exit." As we have seen, religious communities are seen to be *voluntary* associations, which members freely join and therefore can freely leave if they no longer wish to live by the terms of association.[74] This argument was espoused by both John Locke[75] and

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[72] See Equality Act 2010, sch 3, para 29.

[73] eg Chandran Kukathas, 'Are There Any Cultural Rights?' in W Kymlicka (ed), The Rights of Minority Cultures (OUP 1995) 228; John Rawls, *A Theory of Justice* (HUP 1971) 212.

[74] For a discussion of religious organizations as voluntary or unincorporated associations see Zechariah Chafee, 'The Internal Affairs of Associations Not For Profit' (1930) 43 Harv L Rev 993. See also Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003) who argues that all groups, including religious groups, should be considered voluntary associations.

John Rawls.[76] The justification extends to tolerating any internal group illiberalism because 'those who regard themselves as harshly treated by their group are free to disaffiliate or assimilate to the majority.'[77]

The main issue arising in the internal discipline context is whether consent and a right to exit can really justify a deferential approach to the internal disciplinary processes of religious organizations in all circumstances. This chapter accepts that while consent may be difficult to gauge, before a court adopts a deferential approach it must be assured that the terms of association have been consented to and that there is a meaningful exit. This does not mean, however, that the state has no interest in the treatment of members once admitted or who choose to remain but that its approach should be deferential where terms of association have been complied with. Two further issues arise: first, the extent to which either internal substantive norms or internal procedures should accord with state law norms such as principles of natural justice; and secondly, how the state should protect the interests of those members who are placed even further outside the protection of the law due to their inability to bring claims to court. These issues will be discussed in later chapters: the first issue in Chapter Six and the second in Chapter Seven.

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[75] John Locke, *A Letter Concerning Toleration* (James Tully ed, Hackett 1983) 28: a church is 'a voluntary society of men, joining themselves together of their own accord, in order to the publick worshipping of God, in such a manner as they judge acceptable to them…' 'No body is born a member of any Church' and it should remain 'as free for him to go out as it were to enter.'

[76] John Rawls, *Political Liberalism* (Columbia 2005) 221. Rawls concludes that the authority of the church is 'freely accepted' by its members and 'those who are no longer able to recognize a church's authority may cease being members…'

[77] Leslie Green, 'Internal Minorities and their Rights' in Will Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995) 262.

a. Consent

This section addresses the argument that consent can justify non-interference in the internal disciplinary matters of religious organizations.

A consent justification is reflected in both European and UK doctrine, which see autonomy as protected by the ability to join and leave religious associations. Thus these courts will not entertain a claim, for example, where an individual is attempting to invoke their individual religious liberty against their religious group. In *X* v *Denmark*[78] the Commission found that clergymen exercised their religious freedom when they accepted or refused employment, and their right to leave the church guaranteed their freedom of religion should they oppose its teachings. In other words, the church is not obliged to provide religious freedom to its members in the same way that the State must to its citizens. This stance is also evident in the refusal by both the European Commission and the UK Court of Appeal to consider a complaint made by a vicar regarding the ordination of women by the Church of England.[79] A justification for this general position of favouring the collective body's autonomy over that of the individual is that:

> [i]f the law sides with the individual, there is no way of protecting collective [religious] freedom … but if the law sides with the collective body, there is always the option of exit and founding a new organization.[80]

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78 *X v Denmark* (n 62).

79 See *R* v *Archbishops of Canterbury and York, ex parte Williamson* (CA, 1 March 1994) as discussed in Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 343. See also *New Testament Church of God v Stewart* [2007] EWCA Civ 1004; [2008] ICR 282 [47] ('The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs').

80 Rivers (n 10)135. See also *Hasan v Bulgaria* (2002) 34 EHRR 55 and *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46.

We saw, however, that the courts will intervene in some instances to ensure a religious organization complies with its terms of association. As we will discuss further in Chapter Six, there is a difference between upholding associational terms and entertaining other general claims against the organization that may involve replacing its own internal disciplinary process or assessment with that of the state. The former is consistent with both personal and group autonomy whereas the latter can undermine group autonomy while undermining the personal autonomy of members other than the claimant. This intervention is more likely to occur in relation to members than clergy. This because whether there is a contract between a religious organization and its clergy is not settled in law and in many instances the courts have refused to intervene in such employment disputes. Ironically, this indicates that any lack of legally cognizable agreement means that a person may be *outside* the protection of the law. In this way consent has been used both to refuse to intervene in the internal affairs of the organization and to enforce the terms of any agreement between the organization and its member. Only in the latter instance are both institutional *and* personal autonomy respected.

Thus while the courts are willing to enforce the terms of association under the law of contract, there are still instances where the courts are unwilling to intervene in internal disciplinary matters on the basis of consent also. As discussed further in Chapter Six, viewing the rights of members as being based on a contract of association (either express or implied) with the organization means a member's claim must be confined to those interests that are legally cognizable in order for the courts to accept jurisdiction. Not every rule of an

association is enforceable.[81] Moreover, where the organization has followed its internal disciplinary procedure, a claim will be unlikely to succeed. The particular reluctance of the judiciary to intervene in the disciplinary proceedings of religious organizations means that external protections for religious group members are even further reduced in cases where no contractual relationship can be found as often occurs in the clergy relationship.

Is it really accurate, however, to say that members of religious communities have always consented to the authority of the organization? It is relatively uncontroversial to say that individuals are free to prescribe to certain norms of behaviour through the membership of certain religions, even those that limit their autonomy. True consent may not, however, exist. Many members are born into (rather than consent to join) a particular community and group identity can be ascriptive rather than voluntary. Unlike the model of voluntary associations, Green argues, members of religious communities did not 'assess … the options and freely joined … [but] typically found themselves members of an institution whose character is largely beyond their control but that structures their lives.'[82] Even choosing to remain may not demonstrate consent; it may just demonstrate failure to exit.[83] Individuals may have no choice but to stay and it does not follow that by remaining in a community one has consented to any limitation the group seeks to place on their rights. Moreover, one may consent to be a member of a community but not necessarily to the specific limitations placed on their rights.

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81 Rivers (n 10) 89

82 Green (n 77) 266.

83 Green (n 70) 172.

However, even where the individual has not expressly consented to the organization's authority or its internal rules, or true consent is difficult to gauge, the courts have seen the presence of an exit as justifying not intervening to prevent any ill treatment. The court in *Wachmann* recognized that a member of a religious organization may not have consented to the authority of that organization but nonetheless still refused to judicially review the decision of the organization to remove the rabbi from his position. The next question is, therefore, whether the presence of an exit justifies this non-intervention.

b. The Right of Exit

The availability of an exit, the second concept underpinning non-interference in a religious organization's treatment of its members, is related to consent. The idea is that a religious group member can always choose to leave and, if they do not, that is tacit acceptance of their situation.

The idea of an exit, however, is also potentially problematic for two reasons. First, leaving a community may not be a realistic option in many instances. For those members born into a particular religious community the idea of "exit" may be psychologically and practically extremely difficult. It is difficult to leave many social groups as one is born into and socialized within them: 'contemplat[ing] leaving requires enough cognitive and emotional distance to understand and envision a new future.'[84] The internalised subordination that girls and women, for example, experience in many religions means that they are 'unable

[84] Green (n 70) 172.

to scrutinise the practices with which they have grown up.'[85] Thus in many cases there is no real prospect for exit and thus members may not freely choose to adhere to the norms of the group.[86]

Secondly, it is questionable whether an apparent exit obviates all individual rights and justifies not intervening in the internal affairs of a religious community. It may not be sufficient to justify the state perpetuating limitations on personal autonomy within a religious organization by granting it certain exceptions or adopting an attitude of non-interference. This will be discussed further in Chapter Seven.

It is clear that a right of exit is necessary if any group authority is going to be legitimate. Even strong advocates of state non-intervention would not claim that a group has a right to detain an individual against their will or to live in a way that they did not accept. Thus a right of exit 'is one of the few uncontested rights' in any debate about the legitimate role of the state in the affairs of groups.[87] Thus the real questions are what is required for an exit to be meaningful and whether the presence of an exit is not just necessary but sufficient to justify deferring to group authority.

It is not entirely clear, however, to what extent criticisms of the exit justification for non-interference can apply to religious organizations in the UK as opposed to self-governing indigenous groups or insular religious communities that people are born into, the context in

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85 Cass Sunstein, 'Should Sex Equality Law Apply to Religious Institutions?' in Joshua Cohen, Matthew Howard, and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women?* (Princeton 1999) 88.

86 Green (n 77) 264-267.

87 Anne Phillips, *Multiculturalism without Culture* (Princeton 2007) 136.

which most theorists on this issue are writing.[88] Most religious groups in the UK, particularly those connected with the Church of England, are relatively easy to leave and return to; those that may not be will be discussed further in Chapter Seven. Most religious believers in the UK have access to an exit from their community. Insular religious communities that isolate their members from mainstream society and deny them the tools they need to leave – such as minimum level of secular education or access to independent means of support – are in the minority. In contrast to Green, Rosenblum notes that 'the traditional view of religious membership as ascriptive … cannot be sustained … when so many people arrive at religious beliefs independent[ly] … and actively join (and leave, and join other) religious groups rather than stay with their childhood faith.'[89] A distinction also ought to be drawn between ascriptive *identity* and group *jurisdiction* – even if identity is not voluntary, a person may be able to leave or join a group's jurisdiction.[90] In any event, it would seem that those who wish to remain as members of these communities do so when they are aware of alternative ways of life and religions (and indeed these communities' stances on the role of women). Moreover, the disciplinary matters that appear before the UK courts usually involve clergy, in other word community leaders, not internal minorities.

What constitutes a realistic exit and how it ought to be secured is beyond the scope of this thesis, although it will be discussed in slightly more detail in Chapter Seven. We can presume in the context of internal disciplinary disputes that members who come to court to

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88 eg Will Kymlicka, *Liberalism, Community and Culture* (Clarendon 1989) and Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001).

89 Nancy Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton 2000) 73.

90 Green (n 70) 174.

assert their claims have an adequate, rather than merely formal, exit. The real issue for the liberal state that values personal autonomy is those members who do not come forward with claims. How can the state assess whether they have consented to group authority? While this is a political question, detailed examination of which is outside the scope of this thesis, it will also be addressed briefly in Chapter Seven. For the purposes of this thesis, however, the state must assure itself that there is a meaningful exit for members of religious communities before it refuses to adjudicate on a membership dispute.

In any event, the internal disciplinary matters that have appeared before UK courts clearly demonstrate that an exit is available in those instances, but it is an 'involuntary exit.'[91] Here the individual still identifies with the group but has broken one of its internal norms and therefore is excluded from the group. Thus, while religious organizations cannot force someone to remain a member against their wishes, 'they can and do excommunicate those they see as promoting beliefs incompatible with church membership.'[92] What the member wants is not to exit but to remain as a member, or even leader, of that organization.

We concluded in Chapter Four that forcing a group to accept someone as a member would harm group autonomy and thus freedom of religion. It would also harm autonomy for a court to require a group to *readmit* a member. Such interference would harm group autonomy (and thus the personal autonomy of the other members of the group) when the option of joining another religious group would still be available to the excluded member.

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[91] Susan Moller Okin '"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit' (2002) 112(2) Ethics 205, 216–22.

[92] Phillips (n 87) 137.

Forcing a group to readmit someone as a member would therefore harm autonomy *more* than allowing that person to pursue religious way of life elsewhere.

Even if a meaningful exit does exist, however, this may not in itself necessarily secure justice within the group. Green notes that when 'a certain social structure is unjust, it cannot become just merely by becoming avoidable.'[93] Rights of exit may not 'be an adequate substitute for basic liberties.'[94] Whether the availability of an exit secures justice is a question of political morality, not law. For the purposes of this thesis it is sufficient to say that the availability of an exit secures religious freedom because a person still has the option of pursuing a religious way of life elsewhere. It is also a strong indication of consent to the terms of association. Thus provided that the organization has complied with its internal processes then there is little justification for state intervention.

c. Illiberal internal norms

It is clear from UK case law that internal discipline by religious organizations would most likely involve instances where the individual has consented to the group's internal norms or, if not expressly, then an exit is available. This does not mean, however, that the internal norms are those that the state ought then to enforce.

We have accepted that consent may be a reason for the courts not to interfere in the internal processes of religious organizations, provided that these processes accord with their internal norms. What should the state do, however, where there has been consent but those

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93 Green (n 77) 266.

94 Green (n 70) 165–167.

internal processes, or even the substantive norms being applied in these processes, are inconsistent with autonomy?

It is one thing for the courts to enforce or recognize the internal norms of an organization that *differ* from state law norms. It is another for them to enforce norms that *conflict* with state law norms by, for example, causing harm to autonomy. It may be legitimate, or even required, for the state to enforce internal norms that are consistent with autonomy but the state has little interest in enforcing internal norms that harm autonomy. If we accept Raz's conception of autonomy, as set out in Chapter One, then 'autonomy is valuable only if it is directed at the good.'[95] This is because 'it supplies no reason to provide, nor any reason to protect, worthless let alone bad options chosen.'[96] While a state that values autonomy should not coerce change, it should be reluctant to support norms that harm autonomy.

Here we must draw a distinction between those internal norms that limit autonomy in some aspects in order to achieve greater autonomy overall – freedom of religion *within* an organization, for example, would limit the ability of the organization to ensure freedom of religion overall – and those that limit autonomy but may not enhance autonomy for the group overall (eg suppressing the rights of women to participate in the organization). Green suggests that as social groups generally have shared ends different principles apply to them than to the state. For example, it may not be appropriate to apply freedom of conscience to a religious group. This can be contrasted with the wider society, which is made up of a wide

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95 Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 411.

96 Raz (n 95) 411.

range of religions and therefore freedom of conscience may be necessary in order for them to coexist. These differences may not exist in one church and therefore different principles of social organization may be more suitable.[97]

Thus even where a private law claim could potentially be brought based on any agreement to associate, a question arises as to what standards a court should apply to the dispute. Specifically, whether the court should imply standards of fairness into the relationship despite finding that judicial review was inappropriate. This raises questions about the relationship between the internal norms of religious associations and common law standards of natural justice and reasonableness.[98] In *Wachmann*, the third ground for rejecting the application was that the courts were not competent to regulate religious functions. This argument could just as easily apply to implying procedural standards into the rules of religious association as it does to enforcing those same standards by way of judicial review.[99] As will be discussed further in Chapter Six, however, where the court does accept jurisdiction religious bodies must still 'have some discretion as to how they frame their internal procedures' and this includes being allowed some flexibility in how standards of natural justice are expressed.[100] This view accords with UK and Strasbourg jurisprudence interpreting Article 6 (right to fair trial).[101]

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97 Green (n 70) 169. For a similar argument see Mike Dorf, 'God and Man in the Yale Dormitories' (1998) 84 Va L Rev 843.

98 Rivers (n 10)105.

99 ibid 106.

100 ibid.

101 eg *Tyler v UK* App no 21283/93 (Commission Decision, 5 April 1994); *R v The Provincial Court of the Church in Wales, ex parte Williams* (1998) CO/2880/98 (held that there was no breach of natural justice or

There is a further difference, however, between actively intervening in the internal affairs of an organization to prevent illiberalism and refusing to enforce an illiberal internal norm. As we will discuss further in Chapter Seven, the presence of consent and a meaningful exit may justify restraint in the first instance – because to coerce autonomy is inconsistent with autonomy – but they do not necessarily justify the state enforcing illiberal terms of membership or other illiberal internal norms. After all, the state is interested in enhancing or maximising autonomy. Thus, while we have seen that an argument from autonomy may support deference to or even enforcement of internal norms, it may also support not enforcing these norms where they harm autonomy.

So even if the rights of exit ensure freedom of association, do 'they exhaust the fundamental rights of individuals against groups?' Green argues that they do not; even if entry in the group *were* freely chosen that does not necessarily mean that their norms command respect and tolerance in that way that other agreements or choices may. While individual autonomy may be a good reason to endorse agreements that is not 'to suppose that agreement has unlimited power.' That underlying reason 'do[es] not go so far as to validate *every* purported exercise of the power [to make contract].'[102] As with contractual agreements 'even willingly created associations [do not] have unlimited authority over their members.'[103] Thus the fact that someone can exit from a contract does not mean that the state has no interest in the terms of the contract or how the contract is performed. The law can still be concerned about your rights within it – and, indeed, the rights of third parties who may be

Art 6(1) ECHR despite bishop acting as prosecutor and sentencer) cf *Pellegrini v Italy* App no 30882/96 (ECtHR, 20 July 2001).

[102] Green (n 70) 175.

[103] ibid 176.

harmed by the performance of the contract[104] – and the right to exit does not make that concern illegitimate. How this concern ought to be expressed will be discussed further in Chapter Seven.

While the presence of an exit may mean that certain rights can be limited by the group and therefore would provide a reason for non-members not to interfere with internal restrictions, it does not provide validity to these norms or a reason to endorse those restrictions or protect or recognize certain practices.[105] This is because the basis of non-interference is group autonomy not the acceptance or endorsement of the state towards such norms. The state should not interfere or try to actively end the practice, but nor should it use its authority to enforce or uphold such norms.

Conclusion

The issue with internal disciplinary proceedings is not whether the state should intervene to prevent them; where there is consent to the internal norms and no serious harm caused by the proceedings it is hard to see how any intervention would be legitimate. Rather, the issue is whether it is legitimate for the state to defer to the authority of the group in internal disciplinary matters. This chapter concludes that before a court adopts a deferential approach it must be assured that the terms of association have been consented to and that there is a meaningful exit. Deference on this basis is required if we value personal autonomy. This does not mean, however, that the state has no interest in the treatment of members once

[104] Here this thesis is thinking about third parties who may have been harmed by the activity of the organization or its members, as occurs in clergy abuse cases. In such instances, the fact that the organization has complied with its internal disciplinary rules and processes will not obviate the state interest in protecting these parties from harm.

[105] Green (n 70) 179.

admitted or those who choose to remain – the terms of association must be complied with and a court may refuse to recognize or enforce any terms of association that are inconsistent with autonomy.

6. INTERNAL PROPERTY DISPUTES

We have seen that the meaningful exercise of religious freedom requires a certain amount of autonomy to be granted to religious organizations to conduct their internal affairs as they wish. Questions arise, however, regarding the role of the state when internal disputes occur: whether the state should intervene in such disputes and in what manner. We have seen in the previous two chapters that the courts are reluctant to involve themselves in membership disputes; despite this reluctance, they are often called upon to resolve property disputes within religious organizations.

This chapter considers the role (if any) of state law in resolving these property disputes and the relevance and implications of judicial intervention in these disputes for overall religious freedom. Part One of this chapter sets out the current approach United Kingdom courts take to these disputes. Part Two considers the issues that arise from this approach, namely, which standards the courts ought to apply when resolving these disputes.

1. DOCTRINE

Religious property disputes in the UK have arisen most often because of a schism within a congregation. Disputes can also occur because of a schism within a denomination – with the denomination either forming a separate congregation or uniting with another – or where an

individual congregation disaffiliates with its denomination.[1] With the exception of certain aspects of ecclesiastical law and other statutes of specific applicability,[2] no general UK legislation specifically deals with religious property disputes. Any legal doctrine arises solely from the common law.

While this chapter is concerned with property disputes, property claims can arise out of contractual disputes. Property can include real property or intangible property such as livelihood or the possession of a particular status. Claims involving intangible property inevitably involve some overlap with the internal discipline disputes discussed in Chapter Five.

a. The foundation for intervention

As we have seen, the courts have been reluctant to enter into questions concerning the internal affairs of religious organizations. This reluctance is strongest in relation to matters of doctrine[3] or leadership and membership.[4] The courts will, however, accept jurisdiction over conflicts within religious organizations where they consider intervention necessary. Necessary circumstances seem to be where a civil right or interest is at issue and generally involve a financial or property matter.[5] This is provided the determination of such rights does not turn on the interpretation of religious doctrine.

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1 Margaret Ogilvie, *Religious Institutions and the Law in Canada* (Carswell 1996) 208.

2 For example, the legislation arising out of the Free Church of Scotland disputes discussed below.

3 *Gilmour v Coates* [1949] AC 426 cf *Lindo v Belisario* (1795) 1 Hag Con 216, 220.

4 *R v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036.

5 eg *Forbes v Eden* (1867) LR 1 Sc & Div 468 (HL); *Varsani v Jesani (Cy-près)* [1999] Ch 219.

In matters outside property and other civil rights, however, the courts will not ordinarily intervene. As we saw in Chapter Five, traditionally, in the employment of clergy for example, there usually has to be a clear intention to create legal relations such that a contract is created before the court will intervene.[6] Even where there is such an intention to create legal relations, the agreement must also be concerned with legal cognizable matters.

Anomalously, in Scotland, in response to the outcome in the Free Church of Scotland litigation discussed below, the distinction between civil matters and spiritual ones has been formalised by Parliament. The Church of Scotland Act 1921, s 3 reserves 'matters spiritual' for the exclusive jurisdiction of the Church's own courts and preserved the jurisdiction of civil courts 'in relation to any matter of a civil nature.'[7] The Articles preserve the right of the Church to adjudicate finally in all matters of doctrine, worship, government and discipline and declare that a civil authority has no right to interfere in the proceedings and judgments of the Church within the sphere of its spiritual government and jurisdiction.

As we saw in Chapter Five, most case law concerning internal disputes presumes that religious organizations are voluntary associations. While there is a strong tradition of judicial reluctance to intervene in internal disputes, particularly involving matters of doctrine, the courts are more willing to resolve disputes involving civil interests – claims over which the courts ordinarily accept jurisdiction – including through enforcing the internal rules of religious bodies to regulate the disposal and administration of a religious group's property.

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6 *Percy v Church of Scotland National Mission* [2005] UKHL 73, [2006] 2 AC 28 [23]. Although, as we also saw in Chapter Five, the courts may be willing to uphold the organization's 'book of rules' provided the matter is legally cognizable: *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

7 'matters spiritual' are not defined but are dealt with in the Declaratory Articles as set out in the Schedule to the Act, Article IV.

This is usually done through the mechanisms of contract or trust law. Where a church member brings such property claims they are making use of the adjudicative mechanism of the state like any other claimant. Thus the courts are intervening for the same reason as they do with any other dispute: the dispute is within the court's competence and it has a duty to see it peacefully resolved. Indeed, organizations are seen to be under a legally enforceable duty to administer any property in accordance with its internal rules and the courts therefore have jurisdiction over any claim related to it as they would over any civil law claim.[8]

If religious group autonomy is valued, however, it could be argued that the courts should not accept jurisdiction over internal disputes.[9] This could even include disputes regarding property. Group autonomy would be best realized, the argument goes, if such groups resolved the disputes themselves through their own internal mechanisms. This is effectively the "deference approach" adopted by some US courts, which will be discussed below. Unless the dispute is entirely theological with no secular consequences this approach is unsatisfactory. Where the dispute involves property or the group has made use of a secular instrument then to refuse to adjudicate is to 'abdicate … responsibility to administer the law' and deny these groups who use these instruments the same facilities as others.[10] Moreover, such refusal to adjudicate may not in fact realize group autonomy; it would simply preserve the status quo – whoever had the raw power at the time – regardless of whether they conformed to the norms of the group. This would do little to protect the group's autonomous

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8 *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323, 329A–D (HL).

9 Denise Réaume, 'Common-law Constructions of Group Autonomy: A Case Study' in I Shapiro and W Kymlicka (eds), *Ethnicity and Group Rights* (NYU 1997) 260.

10 ibid.

normative system. Thus in some instances the court must intervene to protect autonomy.[11] This will be discussed further below.

Although the courts are reluctant to adjudicate on matters turning on group doctrine, the Church of England's doctrine is viewed differently from the internal rules of other religious organizations 'because its governing instruments are part of the law of the land, directly applicable in the courts.'[12] This means that the courts may be more willing to adjudicate on internal disputes even where they concern doctrine. For example, in *Gill v Davies*[13] the High Court reluctantly granted an injunction to prevent an ordination occurring without sanction of the bishop. Similarly, in the *Church Society* case, McCowan LJ stated – in relation to who would be the arbiter of the 'fundamental' (ie changes in custom, practice, or doctrine) should the enabling Church of England Assembly (Powers) Act 1919 not permit a Measure to deal with a certain matter – that he had 'every confidence that if this task were thrust upon the courts they would find it possible to form a view on what was fundamental, though with very great reluctance, particularly in the area of doctrine.'[14] The comprehensive nature of the Church of England ecclesiastical courts and tribunals does mean, however, that few Church of England disputes appear before the secular courts. Such disputes can include church property disputes – which are dealt with by the consistory courts and the provincial

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11 Réaume (n 9) 260.

12 Mark Hill, *Ecclesiastical Law* (3rd edn, OUP 2007) para 1.44.

13 (1997) 5 Ecc LJ 131.

14 *R v Ecclesiastical Committee of Both Houses of Parliament, ex p The Church Society* (1994) 6 Admin LR 670.

courts of appeal – although they are usually minor disputes[15] and often concern faculty jurisdiction.[16]

b. How the dispute is resolved

Once the court accepts jurisdiction, the central question is which rules or standards should be applied to regulate the property and how they should be interpreted. This raises issues around group autonomy and thus religious freedom.

Intra-group property disputes usually arise because it is claimed that the organization has failed to comply with their own internal rules or norms regarding the administration of the property or there is a dispute as to who has legal or beneficial title to the property. These disputes can have both procedural and substantive aspects – the claimant may dispute the process by which the community made a particular decision concerning property allocation, or the actual substance of the decision. As we shall see, it can be hard to distinguish between these two aspects. These claims are often made with reference to both the internal norms of the organization and legal norms and so the question arises as to which rules or standards the courts should use to resolve the dispute – those of the secular state or those of the organization.

Once a court accepts jurisdiction, it generally has three options in resolving internal property disputes. First, they can apply the internal norms of the organization. This raises the

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15 eg *Re St John's with Holy Trinity, Deptford* [1995] 1 WLR 721 (sale of communion plate).

16 eg *Re St Mary's, Barton upon Humber* [1987] Fam 41. A faculty is a licence from the diocesan consistory court authorising work in a Church of England church or churchyard. The minister or churchwarden must obtain a faculty before making any alterations, additions, removals or repairs to the fabric, ornaments or furniture of the church otherwise the work is illegal.

question whether such norms should still be applied where they conflict with state law or policy. In many instances, the internal norms of the organization may not clearly resolve the dispute and, if it chooses to apply them, the court may have to engage in acts of interpretation. Should the court attempt to interpret internal norms and, if so, how should this be done? Secondly, they could apply state norms which raises the question how such application would impact the organization's religious freedom. Finally, they could adopt one of two middle grounds: apply the norms of the organization as influenced by secular legal principles or apply secular legal principles as influenced by these internal norms.

Traditionally, UK courts used internal religious norms to settle intra-church disputes over authority and property. The earliest House of Lords decision on church property was *Craigdallie v Aikman*,[17] which involved a dispute within the members of a congregation of seceders from the Church of Scotland. The congregation was divided between the majority, who subscribed to the church's original religious doctrine, and the minority, who did not. Here Lord Chancellor Eldon held that where the legal owners were difficult to ascertain – in this case it had been almost a century since the original monetary contributions had been made – the use of the property belongs to those who adhere to the religious principles of those who built it. This was because the members had bound themselves by an implied contract (or "implied trust" as it became known) to adhere to the original principles or doctrines of the church and thus it should be awarded to those who still subscribed to those principles. This test became known as the "departure from doctrine" test or "Lord Eldon's Rule."[18] Property was then awarded to the party that adhered to the original doctrine of the

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17 (1820) 4 ER 435.

18 This test was first laid down in *Attorney-General v Pearson* 36 ER 135 (1817).

church. In effect, the court found that the property was held in an "implied trust" – a concept which 'was clearly a fiction'[19] – for the members who adhered to the original doctrine of the church.

This implied trust approach was applied and elaborated upon in subsequent cases,[20] the most important of which was *General Assembly of the Free Church of Scotland v Overtoun*.[21] Prior to the Free Church of Scotland cases the courts had used various other approaches – including use of a narrow *cy-près* doctrine – to resolve church property disputes but following this decision the courts predominantly used that of the implied trust.

In *Overtoun*, a dispute had occurred between two factions as to which of them was the actual Free Church of Scotland and thus entitled to the Church's trust property. The continuing Free Church argued that it was entitled to the entirety of the property on the basis of the departure from doctrine rule established in *Craigdallie* because the new church had departed from two chapters of the Westminster Confession of Faith that were fundamental to the Free Church.[22] The continuing Free Church argued that the Church could not change its doctrine on these matters as was required to join with the United Free Church and therefore the faction who did join them was not entitled to the property.

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[19] Note, 'Judicial Intervention in Disputes Over the Use of Church Property' (1961-1962) 75 Harv L Rev 1142, 1147.

[20] For a summary of the cases see Margaret Ogilvie, 'Church Property Disputes: Some Organizing Principles' (1992) 42(4) U Toronto LJ 377, 385. For a detailed history of church property disputes in the UK see Harv L Rev note (n 19).

[21] [1904] AC 515.

[22] Ogilvie (n 20) 383.

While the judgments of the House of Lords 'contain a range of formulations'[23] all the members agreed that the trust property should be used in accordance with the intentions of the original donors who founded the trust for the Church. Any deference to the decision-making authority within the church 'is limited by the need to uphold fundamental and essential principles' as determined by these intentions.[24] This meant that the group whose beliefs and actions were most in line with the character of and principles held by the Church at the time of the founding, and for whose purpose the donation was made, were going to be the beneficial owners of the property. Using the "original donors' intention" to resolve the dispute was difficult because there were thousands of donations over a fifty year period and no one clear intention set out in any historical record. To determine the dispute based on original intention, therefore, inevitably meant that the court had to interpret the norms of the Church at the time of its founding by examining the Church's own historical evidence.[25] The most important foundational principle, the court concluded, was the Establishment Principle. They also found that there was no power in the Church to change such foundational principles. The donor intention approach, therefore, froze the Free Church's doctrine at the time of the split from the Church of Scotland.[26] A member who changed his or her mind regarding foundational principles was no longer a member of the church and no longer had a beneficial interest in the Church's property. Those who joined the United Presbyterian Church breached the Establishment Principle and therefore the terms of the trust.

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23 Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 97.

24 ibid 98.

25 Réaume (n 9) 262.

26 Réaume (n 9) 262.

As a result of the decision in *Overtoun*, all the church property, which was substantial, was awarded to the small minority who adhered to the original doctrine. The year after it was decided, Parliament reversed the *Overtoun* decision by statute on the stated ground that it could not practically be implemented. The Churches (Scotland) Act 1905 set up a commission to make an equitable allocation of property between the disputing factions. As a result of this case, future church union plans made express provision for changes to constitutions, doctrinal standards, and church laws. They also made provision for equitable division of property between majority and minority factions so that in event of dispute recourse to the state courts would be unnecessary.[27]

More recent decisions show a move away from this "departure from doctrine" test. Courts are now more reluctant to involve themselves in questions of doctrine. Where the dispute involves property, however, the courts still make every attempt to resolve such disputes largely aided by the expanded *cy-près* doctrine which 'gives the courts considerable discretion in redistributing charitable assets.'[28]

In *Varsani v Jesani (Cy-près)*[29] the Court of Appeal declined to determine a doctrinal dispute within a Hindu sect as to who was the successor to the founder. The two factions felt unable to worship together in the same temple and sought a scheme under the Charities Act 1993 for the administration of the sect's property, together with, inter alia, a declaration as to which of the two groups was the true proponent of the faith and therefore entitled to continue

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27 Ogilvie (n 20) 384.

28 Rivers (n 23) 99.

29 [1999] Ch 219.

to worship in the temple. The court acknowledged the facts of the schism but refused to pass judgment on its content. Instead, it adopted a traditional trust law approach. It held that the original purpose of the charitable gift had ceased to provide a suitable and effective method of using the property and therefore the court had jurisdiction to make a regulatory scheme without having to resolve the religious differences in favour of either party. It ordered the assets to be held on separate trusts for the furtherance of the faith as practised by each group. Similarly, in the related judgment of *Varsani v Jesani*[30] the court stated that when exercising its discretion to make a scheme under the Charities Act 1993 – whereby the assets of a religious charity would be divided between two opposing factions – it should assume 'an agnostic role' and treat both factions as adherents to a branch of faith which justified recognition and support.[31]

Fewer religious schisms have occurred in the UK than in North America, particularly in recent years. In the United States many parishes have reacted against their dioceses' acceptance of homosexual clergy and in Canada breakaway groups have formed to reject their churches' acceptance of same-sex marriage. While similar schisms have not yet occurred in the UK, there have been intra-church debates in the Anglican Church regarding the ordinance of gay and women bishops. Should such disagreements ever result in schisms then it is highly possible that UK courts will look to North America for guidance due to its recent experience.

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30 [2002] 1 P & CR DG 11.

31 See also *Dean v Burne* [2009] EWHC 1250 (Ch).

Case law in the United States in particular demonstrates alternative approaches to religious property disputes. The American courts consciously moved away from the "departure from doctrine" test by rejecting any consideration of church doctrine. If an express trust exists then the American courts will enforce its terms. Where one does not exist, the courts and scholars disagree as to how then to best to resolve church property disputes. Generally speaking, there are two approaches adopted by the American courts – the deference approach and the neutral principles approach. Under both American approaches the court will not resolve disputes on the basis of religious doctrine or practice and will refrain from even considering matters of religious doctrine unless necessary.

While these approaches could be adopted by the UK courts, as we will see below, they can also be problematic. Moreover, the United States has a clearer separation between church and state arising out of its First Amendment, particularly the Establishment Clause. This may explain why the courts are stricter about not considering religious doctrine. [32] While this could mean that US approaches to church property disputes may have limited relevance in the UK context, the normative considerations regarding religious group autonomy are the same regardless of location.

Following *Watson v Jones*,[33] the courts in the United States adopted an approach to property disputes that was not based on religious doctrine but on whether the congregation in question belonged to a denomination that was hierarchical or not. If the congregation

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[32] eg the court in *Watson v Jones* (1871) 80 US 679, 728-29 rejected the implied trust approach used by UK courts because although it might be appropriate in England with its Established church it was not consistent with the principle of non-establishment in the United States, which leaves such doctrinal matters to the church itself to decide.

[33] (n 32).

belonged to a hierarchical denomination then it would be bound by the hierarchy's decisions – including those concerning church property – and the court would not interfere. On the other hand, if the denomination was not hierarchical then the congregation's members could control the property. This is usually done by majority vote. *Watson* was given a gloss in *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*[34] where it was held that 'the civil courts [had] no role in determining ecclesiastical questions in the process of resolving property disputes.'[35] Thus the court could not resolve the dispute by assessing whether one side had deviated from doctrine.

Further schisms in the 1960s and 70s, however, saw the Supreme Court develop an alternative to the *Watson* "deference to hierarchy" approach. *Jones v Wolf*[36] approved the "neutral principles of law" approach, which applies secular legal principles to disputes within religious organizations, the same principles that would be applied to nonreligious organizations. Under this approach the courts do not automatically defer to church hierarchy but will examine those documents of the religious organization that deal with property, such as deeds, contracts, or trusts, to see whether these documents can resolve the dispute. Each state can now choose between these two approaches although most favour the neutral principles approach. These approaches inevitably overlap at points because where the congregation's governing documents clearly state that the national denomination has control over the property then that will be who the court will decide in favour of regardless of the

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34 (1969) 393 US 440.

35 (n 34) 447.

36 (1979) 443 US 595.

approach adopted. It is only where the owner of the property is unclear from the documents that the approach adopted makes a difference.

The Canadian position is similar to the UK's. Where no express trust over the property can be found, the courts in Canada have followed UK case law and, aside from a small number of cases, implied the terms of a trust. Thus it is 'well settled', that the property of religious institutions is held on trust for 'the original purposes for which that institution was founded.'[37] While the Canadian courts have expressed reluctance to determine doctrinal issues they have still gone on to do so.[38]

2. NORMATIVE CONSIDERATIONS

Two main issues arise for religious freedom in the context of internal property disputes. First, which standards the courts should apply in resolving the disputes. Secondly, whether the court should apply the internal norms of the religious organization where they conflict with state law or policy.

This section argues that while a deference approach is often the best approach for protecting and promoting group autonomy, it is not the only approach. Autonomy may be enhanced by judicial interpretation and application of internal rules or norms. The best approach will often depend on the particular dispute and the constitutional structure of the organization. It may also depend on whether the dispute relates to the procedure used for determining property rights or the substantive norms that govern its allocation. How courts

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[37] Ogilvie (n 1) 209.

[38] Ogilvie (n 20) 389.

ought to respond to illiberal internal norms may depend on what approach the court ought to take to the dispute more generally. While it may be inappropriate to intervene in an organization to ensure that it complies with liberal norms, this does not provide a justification for an organization using mechanisms of the state to enforce these norms. Here a distinction can again be drawn between those norms that conflict with state law norms and those that merely differ from them.

a. Which standards apply

As we saw in Chapter Five, it is not inconsistent with autonomy for state courts to adjudicate on private law disputes. Indeed, such adjudication can promote autonomy by holding people to their commitments. Similarly, property law can promote autonomy by providing mechanisms which enable individuals to order their lives in cooperation with others by determining, for example, access to and use of those facilities needed to practise a religion. The real issue is, however, which standards should apply in resolving these disputes.

While these disputes are about property, the effects of adjudication can reach beyond property ownership and civil consequences and impact upon the associational freedom essential to a religious way of life. These disputes are often grounded in disputes about interpretation of religious doctrine and thus the identity of the community can be at stake.[39] This is because freedom to self-define within freedom of association 'implies a level of norm-generating autonomy.'[40] Associational liberty is not simply a liberty to exist as a group

[39] Réaume (n 9) 258.

[40] Robert Cover, 'Nomos and Narrative' (1983) 97 Harv L Rev 4, 32.

but also to create and interpret law or 'the terms of the association's own being.'[41] As a result, every society consists of numerous normative social orders all providing various rules or standards for determining rightness, lawfulness, and validity.[42] We can then be said to 'inhabit a *nomos* – a normative universe'[43] in which these various social orders provide the tools and context for telling us both how something is and how it ought to be; what we have done and what we ought to do. State law – and its rules, standards and institutions – may be just one part of this universe for many people. The standards applied to these disputes can have very real consequences for religious organizations; they potentially impact upon their ability to self-define and thus the ability of an individual to live a religious way of life.

As we saw, there is no settled UK or North American approach as to whether the courts will resolve these disputes by reference to these internal or social norms. The courts in the United States are split between the "hierarchical" and "neutral" approaches but expressly reject applying these norms save for deferring to any norms related to governance in the hierarchical approach. While traditionally UK courts have applied the internal norms of the organization in the context of traditional civil law doctrine, they have also used traditional legal tools to resolve disputes without reference to religious doctrine and without making any judgment on the religious authenticity of either faction. The Canadian courts largely follow the approach in the UK. In both North America and the UK, courts demonstrate some willingness to apply norms that are specific to a particular religious community that would

41 Cover (n 40) 32.

42 ibid.

43 ibid 4.

not be applied to any other party embroiled in a similar dispute. Even the deference approach acknowledges internal norms related to governance.

In all jurisdictions mentioned the courts have three options. First, they could defer to the decision-making authority of the organization on the matter, applying neither state nor internal norms (except in a limited sense). Secondly, the courts may choose to take the neutral principles approach. Thirdly, they could adopt an approach which takes account of the group's internal or social norms. This third approach uses 'interpretive discretion [contained within the vague concepts present in legal doctrine] to apply abstract legal concepts in a culturally-sensitive way.'[44]

i. The Deference Approach

The deference approach, adopted in *Watson v Jones*, expressly rejects the original intention approach of the *Overtoun* case. The intention of the donor is relevant only if the donation had been made to promote some specific form of religious doctrine or belief. If it had not then it is for the general purpose of the congregation. This means that in determining property disputes the court would not inquire into the substantive beliefs or 'common opinion' of the church and instead ascertain the decision-making body and defer to its decision regarding disputes. Its decisions are then deemed consistent with the general purpose of the church.[45] Miller J adopted the deferential approach because he wished to protect the Church's

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[44] Denise Réaume, 'Legal Enforcement of Social Norms: Techniques and Principles' in Cairns et al (eds.) *Citizenship, Diversity, and Pluralism: Canadian Comparative Perspectives* (McGill-Queen's University Press, 2000) 178.

[45] Réaume (n 9) 263.

autonomy by not involving the state in determining substantive religious disputes and thus preventing the Church from determining its own laws.

Identifying the legitimate decision-making body can sometimes be difficult. Generally speaking, however, the courts in the US defer to the highest decision-making authority on the matter in hierarchical churches or the usual decision-making process where the church comprises independent congregations with no allegiance to a higher body. Decisions in the latter category of churches can include those reached by majority vote or church elders.[46] Often disputes over church property, however, come down to who is the legitimate religious authority of that organization. While inquiring into who is the legitimate authority may involve simply applying trust deeds or social rules of association, it may also involve examining religious doctrine. It could also involve the court in shaping the community by declaring who the legitimate authority is.

The claim that the deference approach supports group autonomy and avoids illegitimate state interference in religious affairs is an overstatement. Deferring to the internal decision-maker still means that the State is supporting one side over another. Once a court has agreed to hear a dispute there is no approach that avoids interference. Even the deference approach constitutes interference as it lends the support of the State to the party in agreement with the internal authority. In effect, it means the court always finds in favour of the hierarchy.[47] Not accepting jurisdiction also has impact on the group as it allows the party with the most power to prevail. Refusing to adjudicate upon the dispute may mean that the

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[46] Réaume (n 9) 263.

[47] Ira Ellman, 'Driven From the Tribunal: Judicial Resolution of Internal Church Disputes' (1981) 69 Cal L Rev 1378, 4013.

court abdicates its constitutional role in settling disputes and denies factions of the organization those adjudicative mechanisms of the state available to secular claimants. Freedom of religion does not preclude the freedom to litigate[48] and it should not be presumed that the only way to preserve the former is to deny the latter.

One of the strongest arguments in favour of deference is that it allows for doctrinal change. By deferring to the internal decision-making bodies, the approach in *Watson* allows trusts to change as church doctrines and other norms change in accordance with internal processes. It is not the case, however, that doctrinal change can only be achieved through the deference approach. As we will see below, organizations could provide for doctrinal change in their founding documents or legal instruments concerning the property. Moreover, the original intention is not the only method by which the courts can interpret and apply religious doctrine to determine property allocation. This argument also presumes that internal decision-makers and processes embrace doctrinal change yet these can often maintain the status quo.

The decision in *Watson* was underpinned by the concept of implied consent – the parties to the dispute, by forming or joining the religious community, had agreed to be governed by it. Secular courts would make this consent meaningless and undermine the internal governance system and accordingly the group's autonomy by intervening to overturn its decisions. As we saw in Chapter Five, however, it is difficult to see how implied consent could include consent to *any* actions by the religious authority even where they involve a breach of internal rules, bad faith or procedural irregularity. Consent to be governed must

[48] Ogilvie (n 20) 400.

necessarily extend to governance only within the limits one consents to. The consent must be on the understanding that the authority abides by the internal rules of the organization. Thus, where a church authority acts outside these limits – by breaching its constitution or the rights of its members, for example – that consent can be withdrawn and the civil courts can adjudicate.

The US context has shown how this notion of implied consent can result in injustice for individual claimants. In *Serbian Eastern Orthodox Diocese of America and Canada v Milivojevic*[49] the Supreme Court held that all decisions of the Holy Synod were final and would not inquire into whether the governing body even had power to decide the dispute or had acted arbitrarily in contravention of its own laws. The majority was concerned that to intervene in the dispute would cause the State to become either involved in an essentially religious controversy, which was outside its interest, or to endorse a particular doctrinal belief. Justice Rehnquist gave a strong dissent[50] on the basis that consent to membership in a religious polity does not extend to clerical action in violation of its constitution, and government non-intervention subjects individual members to 'domination by oppressive religious authorities.' He warned that '[i]f the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal they can easily be converted into handmaidens of arbitrary lawlessness.'[51]

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49 (1976) 426 US 696.

50 ibid 725-35.

51 ibid 727.

Thus the effect of the non-interventionist approach of the US courts, particularly the deference approach, has been to effectively deprive members of the protection of state law even in instances extending beyond their consent. As we concluded in Chapter Five, this may promote group autonomy but it is inconsistent with individual autonomy.

Supporters of the deference approach also argue that in addition to the approach supporting church autonomy and allowing for doctrinal change, it avoids the courts engaging in concepts and terminology outside judicial expertise. Chafee argues against judicial intervention in church disputes which involve the courts mastering new concepts and terminology that differ substantially from the general law – even property disputes – on the basis that the courts are not learned in this area. He holds this view despite the risk that the organization may have actually violated their rules and the claimant has suffered a real injury.[52] However, the courts face similar problems with other cases – for example, those which require an understanding of scientific concepts – that appear before them involving subject matter not previously encountered. The judicial system, through evidence and submissions, is well-equipped to come to terms with new subject matters. Moreover, interpreting a religious organization's constitution to determine how a matter should be decided – even determining the constitution itself – is familiar ground for a court.

[52] Zechariah Chafee, 'The Internal Affairs of Associations Not for Profit' (1930) 43(7) Harv L Rev 993, 1023-26.

ii. The Neutral Approach

The "neutral principles approach", expounded in the US decision of *Jones v Wolf,*[53] can also be problematic for group autonomy. Putting aside the question whether any approach can truly be neutral, this approach can only resolve a dispute where the religious organization has some level of formality or quasi-legal standards in its organizational structure, for example formal charters, contracts or bylaws.[54] This 'might inhibit their formation by forcing the organizers to confront issues that otherwise might never arise.'[55] Moreover, the neutral principles test presumes that secular instruments such as formal documentation adequately encapsulate the parties' expectations. Extrinsic writing, words or conduct – including those imbued with a religious concept – could be intended to determine property control and the courts will examine these only in certain limited instances.[56]

Importantly, this approach does not guarantee that it will achieve what it purports to do. It may be difficult for courts to avoid interpreting religious doctrine where internal documents incorporate doctrinal concepts in setting out rights of succession or access. Where the court cannot resolve the dispute without resolving a doctrinal dispute then it must defer to the ecclesiastical body – ultimately adopting the deference approach. Moreover, the approach presumes the courts can identify which provisions are secular and which are infected with religious concepts and leaves the courts free to take a broad or narrow view as to what

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53 *Jones v Wolf* (n 36).

54 Nancy Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton 2000) 81.

55 *Jones v Wolf* (n 36) 613 (dissent).

56 Nathan Belzer, 'Deference in the Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils' (1998-99) 11 St Thomas L Rev 109, 129. See also dissent in *Jones v Wolf* (n 36) .

constitutes a religious word or concept.[57] Finally, this approach may actually result in an outcome that differs greatly from organizational practice or that contemplated by the parties in excluded documents. In this way, the organization's ability to determine property rights is hindered. The court is not neutrally applying previously agreed upon terms but instead imposing a new substantive outcome. Ultimately, the neutral principles approach is problematic because it has the potential to be either too broad – and give the courts too much influence over religious disputes such that they determine ecclesiastical matters – or too narrow and exclude evidence that should be included to resolve the dispute in accordance with parties' expectations.

Neither is it the case that the neutral principles approach allows the courts to resolve the dispute as though it were a secular property dispute. Instead, the court may refuse to inquire into aspects of a religious organization's governance – extrinsic internal documents that indicate the organization's purpose – when it would have with a secular organization.[58] This indicates that secular legal principles and methods for resolving disputes are not (or cannot be) exactly transplanted to religious disputes.

Ultimately, the availability or success of the neutral principles approach depends not on the techniques used by the judge but on the amenability of the dispute to this approach in the first place. Some disputes could quite easily be resolved without reference to religious doctrine – because, for example, the instruments governing property allocation make no reference to religious doctrine or the group entitled to property is relatively clear – while

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[57] ibid 130.

[58] Kent Greenawalt, 'Hands Off! Civil Court Involvement in Conflicts Over Religious Property' (1998) 98(8) Colum L Rev 1843, 1851.

others may involve a complex interconnection between property rights and religious doctrine or practice. It may also be that even where the court professes to adopt a neutral principles approach and exclude reference to religious doctrine it would not make a decision that was wildly at odds with internal documents or practice even where these turned on religious doctrine. Most disputes determined by this approach are broadly consistent with religious doctrine. The neutral principles approach only ever makes sense, however, if it is an effort to give effect to the religious community's attempts to set out the form of its autonomy according to some sort of private ordering.[59]

Implicit in both the deference and neutral principles approach is the assumption that interpretation of internal norms would interfere with the autonomy of religious communities and thus ultimately with religious freedom. This is not necessarily the case.

iii. The Interpretive Approach

An approach to resolving religious disputes that involves the court interpreting the religious or social norms of the community has been termed the "interpretive" approach.[60] This can involve either a court applying a state legal tool in light of the internal norm, or interpreting and applying the internal norm on its own terms. These internal norms may relate to the process by which property is allocated within the community or the substantive merits of the claim. Inevitably there is overlap between the two ways that internal norms can operate because, as we shall see, religious communities themselves may not distinguish between the process and the substance of the dispute because their religious doctrine does not draw such a

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59 Perry Dane, 'Omalous Autonomy'(2004) 5 BY Uni L Rev 1715, 1743.

60 Réaume (n 44).

distinction. Process and substance may both be determined by the same internal norms. The law does, however, generally draw such a distinction and may be more willing to defer to communities on matters of substance than process, although the procedural norms (either legal or internal) that govern a dispute can be more amenable to flexibility.

While internal rules or norms may be declared by a formal internal authority or contained in the organization's constitutional documents, they need not be. Internal norms depend simply on other members of the group performing or accepting them and are normative in that group members feel they ought to comply with them.

The interpretive approach arises where the organisation has provided no clear, authoritative internal statements on the matter, either through its spokespeople or internal documentation. In such instances, the courts may decide, as occurred in the Free Church of Scotland cases, to interpret the standards themselves. This gives rise to the interpretive approach. While imposing state norms on religious organizations may be problematic for autonomy, state courts interpreting the rules and standards of religious organizations may also raise issues which could limit a group's ability to self-define. Judicial interpretation of a group's social norms means the religious community is at risk for having a 'foreign understanding imposed on it in the guise of an interpretation of its own practices',[61] although a court could always test its interpretation against evidence from the religious community. The question is whether judicial interpretation of social norms always harms the autonomy of religious organizations and thus religious freedom.

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[61] Réaume (n 44) 190.

An attempt by the courts to interpret and apply social norms of religious communities could be problematic. This is because the court accepts jurisdiction over the dispute for the same reason it would accept jurisdiction over any dispute – because the matter is legally cognizable; it concerns something which the court would ordinarily adjudicate upon – but it then attempts to apply norms from within that normative system. Trying to incorporate social norms into existing legal doctrine, argues Denise Réaume, can affect the 'integrity' of the group's internal norms.[62] The act of adjudication can also impact religious doctrine either by stagnating it or encouraging (or in some instances forcing) it to change. Decisions regarding doctrine will inevitably do one or the other. Interpreting the norms of the group can affect the content of these norms.

Two Canadian decisions have been put forward by Réaume to show how judicial interpretation of a group's social norms can impact the normative order of the group. Although the underlying claims differed, both cases concerned the expulsion of dissident members from the Hutterite Brethren – who own property communally as part of an agricultural colony – and ultimately their access to the colony's communal property. In this way the cases involved both internal discipline and the determination of property rights. In each case the court took a different approach and thus the consequences for the group's normative order differed.

The first case, *Hofer v Hofer*,[63] involved dissident members who claimed that despite being expelled from the Church they were not expelled from the colony and therefore were

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62 ibid 178.

63 *Hofer v Hofer* (1966) 59 DLR (2d) 723 (Man QB); aff'd (1967) 65 DLR (2d) 607 (Man CA); aff'd (1970) 13 DLR (3d) I (SCC).

still entitled to a share of the assets of the colony. The defendant members claimed that expulsion from the Church meant that the dissidents lost any interest in the colony's property. The claim was presented as one of contract and trust law – the community had used these tools 'to structure [its] life in accordance with its own practices.' Thus the court had to decide the extent to which it could or should apply the normative framework of the community in resolving essentially private law claims.[64]

As we have seen, private law can be used by associations to structure their affairs and manage their assets – they can 'pour such content as they see fit' into the 'relatively empty vessels' of a contract or trust[65] and thus give legal effect to their internal norms. The Hutterite colonies, for example, are established by those articles of association agreed to by baptized adult male members. In this way the Hutterites ensured that their internal requirement of communal property ownership could coexist with the law of contract by being able to demonstrate that any obligations incurred by members were based in consent.[66] Thus the Hutterites' articles of association – viewed either as a contract or setting out the terms of a trust – 'enabled the colony effectively to codify its rules in respect of communal ownership, thereby providing the Supreme Court with a clear and authoritative statement of its internal rules.'[67]

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64 ibid 180.

65 ibid 180.

66 It is not clear whether the Hutterites valued the members' consent independently of its legal significance because it, for example, provided the moral foundation for their way of life. See Réaume (n 44) 181 ftn 11.

67 Réaume (n 44) 181.

The claimants argued that while their consent to the articles of association was freely given, and thus the contract was valid, any term which meant that communal property could not be divided when the relationship under which that property was held was dissolved, was contrary to public policy and should not be upheld by the courts. The court disagreed finding the Hutterites' internal norms relating to communal living and ownership, while different from those of the majority culture, were not contrary to public policy and therefore could be enforced as contractual terms provided that they were consensual.

Similarly, those judges who saw the property as being held under trust saw the internal norm prescribing communal ownership, as set out in the articles of association, as capable of being a trust term. To interpret the terms of the trust, however, the judges had to examine the requirements of the Hutterite religion. This is because those rules governing expulsion or loss of membership, which were crucial to determining who was a beneficiary under the trust, were not explicit in the articles of association. These judges concluded that the colony's purpose was to practise the Hutterite way of life as required by that religion and thus was an extension of the Church. Thus one could only be a beneficiary under the trust if one were a member of the Church. Leaving the Church meant, therefore, that one lost any interest in the colony's property held by that trust. As the rules governing loss of membership were not apparent through the use of conventional legal tools, the court had to 'rely directly on the Church's norms.'[68]

Réaume identifies two different methods that the courts adopt in the *Hofer* decision to discern membership. The first involves the judges inquiring directly into the substantive

[68] Réaume (n 44) 181.

beliefs of Hutterianism to determine whether the plaintiff's beliefs and practices had varied so far from that of the Church that they could be considered to have left it. This method requires the courts to identify and directly apply the substantive rules of the group as the court in the Free Church of Scotland case did. The second method involves identifying and deferring to an authoritative internal decision-maker on the question of whether the plaintiffs were still members. This approach is similar to the deference approach adopted by some United States courts. Under either inquiry the plaintiff was no longer considered to be a member.

Ultimately *Hofer v Hofer* is an example of the so-called neutral approach as the courts use traditional legal tools to resolve the dispute. In this way it is similar to the approach taken by recent UK courts. It demonstrates, however, a willingness by the court to take account of internal social norms where they fit with established legal concepts such contracts or trusts. This is the case even where the contractual or trust terms may involve different relationships and norms from those traditionally adopted in majority society. The social norms applied in *Hofer*, however, were not at odds with fundamental principles of a liberal democracy such as those contained in constitutional rights. As such, they were relatively uncontroversial. They also fit relatively easily within the legal framework before the court – it was easy to frame them as "terms" and consent to them was apparent. Moreover, they were not particularly difficult to discern and the plaintiff's membership status could be determined relatively easily relieving the court of any need to inquire too deeply into the substance of these "terms" or

the community's way of life. Thus it was easy for the court to apply these social norms to the dispute; it did not need 'a highly sophisticated capacity for cultural empathy.'[69]

The second case, *Lakeside Colony of Hutterite Brethren v Hofer,*[70] also concerned the expulsion of dissident members but here the members challenged the validity of the expulsion on the grounds that it lacked procedural fairness. The court was faced with the question of how it could or should 'incorporate Hutterite practices and understandings into the notion of due process.'[71] Here we see how, at least for religious communities, it may not always be possible to distinguish between the procedural and substantive aspects of a dispute as it is the substantive norm that dictates the process. For example, the internal norm that a member of the community must unquestioningly obey the community's religious leaders is both substantive (in that it entails a particular view of religious authority) and procedural. It may also be difficult to distinguish the procedural and substantive aspects of these disputes because the procedural aspects necessarily have substantive implications.

As touched on in Chapter Five, due process, as an abstract legal concept, has the potential to be interpreted in ways that incorporate the practices and understandings of a particular normative community.[72] The meaning given to precepts, including legal precepts, has been seen as coming from material created by social activity not from formal

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69 Réaume (n 44) 182.

70 (1992) 97 DLR (4th) 17 (SCC).

71 Réaume (n 44) 180.

72 See Rehnquist J's dissent in *Milivojevich* (n 49) (religious associations' own procedures need not mirror judicial norms of due process exactly but they must at least accord with their own internal rules). See also Belzer (n 56) 126 (a secular conception of due process is not irrelevant in the context of religious disputes but a conception is needed 'against the backdrop of ecclesiastical authority.')

lawmaking.[73] While this means that common law standards are arguably never 'neutral' and are in effect 'those of the wider society'[74] it also means they can be adapted to respond to the particular context in which they are being applied.

Despite the potential adaptability of the content of the principles of natural justice in light of the context in which it would be applied, however, the court in *Lakeside Colony* found that the expulsion process was not consistent with the legal principle of procedural fairness because the plaintiff had not been given adequate notice of the consequences of defying certain orders and disciplinary measures that had been given to him. Unlike the approach of some of the judges in *Hofer,* here the court refused to defer to the authority of the internal decision-makers. Instead, the court interpreted the concept in a way that was consistent with legal norms and with the interpretations applied in mainstream secular contexts such as employment. In this way it was able to present the group's practices in a way that is recognizable to the state legal system.

Réaume sees the *Lakeside Colony* decision as imposing upon the Hutterite community a conception of procedural justice that did not adequately consider the context in which the internal decision was made and the sort of procedural framework that would suit this kind of community. If it had then it would have seen that the requirements it imposed were unnecessary to ensure natural justice.[75] The Hutterite colonies, she notes, 'are small, close communities in which everyone is required to work and live in harmony with one

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73 Cover (n 42) 18.

74 Réaume (n 9) 259.

75 Réaume (n 44) 185.

another.' For this reason they have 'a very strict code of conduct' and require 'a high degree of uniformity of belief and behaviour.' Members have to obey the rules and leaders of the community. If they have misbehaved then the community will decide on the discipline of that member. Where that member refuses the discipline then they are considered to have expelled themselves because it shows that they do not wish to be reconciled with the community.[76] Despite the context in which the plaintiff was disciplined, the court found that he should not have been considered expelled from the Church when he refused to accept the discipline. Any decision regarding expulsion should have been postponed until another meeting, giving notice to all members of the colony, giving Hofer time to consider his position or defend himself. Holding a second meeting did not remedy this defect because here the community did not reconsider the decision to expel, but merely gave him a chance to repent thus presupposing the validity of the decision to expel.[77]

To Réaume, this analysis of the requirements of due process was 'excessively legalistic' and more appropriate to societies where there are not the 'close social bonds between members and in which there is a great deal of room for misunderstanding between authorities and those subject to authority.'[78] In the Hutterite context, however, such procedural requirements serve little purpose since the community would have had a common understanding that his behaviour was in violation of its substantive norms and would result in discipline and that this would occur at the first meeting. Even knowing this, Hofer did not take the time at this meeting to put forward his case and violated a further community norm

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76 Réaume (n 44) 184.

77 ibid 184-5.

78 ibid 185.

by refusing to accept the discipline offered to him as a chance to be reconciled. As a member of this close-knit community whose norms are uniform and established, Hofer would have known the consequences of his continual defiance of the community's authority.[79]

The court's methodology, argues Réaume, demonstrated a 'lack of openness to diversity in its interpretation of procedural justice [which may] have consequences for the Hutterites' ability to pursue their chosen way of life.'[80] She sees the court as potentially weakening discipline within the community by allowing members to find defects within the communal decision. It also allows members, while waiting for the dispute to be resolved by the state courts, to draw on communal resources while also being relieved of any obligation to abide by the community's norms. This could have 'a serious impact on a way of life that requires close co-operation among members on a daily basis.'[81] If we accept Réaume's claims, then a procedural framework that took into account the social norms of the Hutterite community would be more suitable to the community; it would be more likely to achieve meaningful procedural fairness while also maintaining the autonomy of the community and its way of life.

With regard to religious communities more generally, a flexible approach to the interpretation of abstract legal principles would allow them 'to regulate their own … lives according to a less legalistic ethos.' Réaume's analysis is interesting in that it does not see a conflict between legal norms and the social norms of religious communities. Procedural

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79 see Réaume's discussion of the procedures and norms of the community at (n 44) 184-5.

80 Réaume (n 44) 183.

81 ibid 185-6.

fairness, for example, could still be achieved by allowing for the norms of the particular community at issue to inform its conception. It is not clear what her position would be, however, were the social norms irreconcilable with the legal norms. Or, as McLean observes, the discipline concerned a non-voting woman associate who had not expressly consented to the articles of association.[82]

In the British context, however, judicial interpretation and application of a group's social norms subsequent to the Free Church of Scotland cases have not had such severe impact on the group's autonomy or self-definition. Indeed, the interpretivist approach in the Free Church of Scotland case could be seen as enhancing group autonomy.

The *Overtoun* approach has been extensively criticized in large part because it is seen to both infringe upon church autonomy[83] and prevent doctrinal change.[84] As noted earlier, an interpretive approach does not prevent religious organizations from allowing for doctrinal change in their internal documents or legal instruments.[85] Similarly, interpreting fundamental principles of a church is not necessarily detrimental to church autonomy. This would be a superficial reading of the case. In fact, the judges repeatedly state in that case and in earlier implied trust cases that it is not the place of the courts to pass judgment on the content of the Church's principles. Deciding the case based on their best understanding of these principles,

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82 Janet McLean, 'Intermediate Associations and the State' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 169.

83 Harold Laski, 'Personality of Associations' (1916) 29 Harv L Rev 404; *Harvard Note* (n 20).

84 Ogilvie (n 20).

85 Frank Cranmer notes, however, that with regards to the Churches of England and Scotland this mostly likely would have to be done through legislation: 'Christian doctrine and judicial review: the Free Church case revisited' [2002] Ecc LJ 318, 328.

norms, and practices is different from passing judgment on their soundness or desirability.[86] As the court had no internal body to defer to, respect for the group's normative system meant that it was required to interpret and apply its substantive norms. If there had been secondary rules of change and adjudication then respect for that normative system would have required the court to defer to those.[87] In this way the deference approach and interpretive approach both potentially applies internal norms – although differing on which ones – and realize the autonomy of the group albeit through different methods.

In *Overtoun* the group had substantive internal norms and rules but there were no internal procedures for amending or interpreting these rules. This meant that no mechanisms existed for adjudicating upon these rules and resolving the dispute within the community. It was because of this, argues Réaume, that the House of Lords 'resolv[ed] the dispute by direct reference to who was more faithful to substantive principles like the Establishment principle.' It had no internal decision-making body to defer to.[88] By contrast, in *Watson*, the church had 'formal secondary rules conferring power to change or interpret the church's primary rules establishing duties and entitlement.'[89] Thus Réaume concludes that the distinction between the "interpretivist" and "deferential" approach is 'misleading'; the only difference is in the constitutional structure of the churches, which lead the courts to different approaches. In both cases the court interpreted 'the constitution of the church on its own

86 Réaume (n 9) 270-271.

87 ibid 274.

88 ibid.

89 ibid 273.

terms' and resolved the dispute in a way that best gave effect to that constitution.[90] In *Overtoun*, without the benefit of internal adjudication rules, this meant interpreting and applying substantive principles; in *Watson*, this meant applying the group's secondary rules and identifying and deferring to an internal decision-maker.[91]

Although the House of Lords in *Overtoun* did involve itself in a substantive dispute by examining Church documents, including engaging in a detailed analysis of the Westminster Confession of Faith, and finding that the Establishment Principle was of foundational importance, it is not necessarily the case that this approach inevitably harms church autonomy. Where they are disputed, by seeking to find the best interpretation of the group's internal norms the courts are in fact giving effect to the autonomy of these communities by realizing and upholding their internal norms and their normative system. Réaume concludes, therefore, that 'sometimes … autonomy can only be respected through the judge's efforts to interpret the Church's practices and beliefs according to its own substantive norms.' This exercise is similar to a judge applying foreign law – the court does not inquire into the soundness of the law but simply declares as a matter of fact what that law is. Thus the judge simply determines what the community's religious practice is.[92]

Réaume notes, however, that there is a fundamental difference between a judge applying foreign law and a decision regarding church property disputes. A judge applying foreign law has no impact on the law of that foreign jurisdiction should he or she get it

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90 Réaume (n 9) 274.

91 ibid 274.

92 ibid 275.

wrong. By contrast, a decision which declares what the fundamental beliefs of the church are impacts the constitution of that church and therefore its character.[93] This means that the civil courts can become the group's judicial system. By deciding the church's dispute the court 'creates a secondary rule of adjudication for the group' and this 'makes the courts the ultimate interpretive authority over the group's rules and practices.'[94]

The interpretive approach can therefore impact on the character of the church and thus its ability to define itself. The alternative to the interpretivist approach is to either defer to the group's decision-making processes, through a version of the deference approach, or to apply external, state norms without regard to internal norms. The deference approach in most instances would allow for the greatest degree of group autonomy where it upholds internal decision-making norms and secondary rules of change. Such norms or rules, however, may not be present in all instances. Moreover, as we saw in Chapter Five, deference may not promote individual autonomy where internal rules are not complied with. The second approach would not, however, promote group autonomy.

The deference approach, provided the decision-makers act in accordance with the group's internal norms, would best protect group autonomy because it would allow the group to interpret and apply its own norms. Its autonomy would not be unlimited, however, as the court could still make 'authoritative determination[s] about whether the group's internal decision-making structures have authority over the substantive issue in dispute.'[95]

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93 Réaume (n 9) 275.

94 ibid 276.

95 Réaume (n 9) 276.

As we have seen, however, the deference approach is not the only approach for protecting and promoting group autonomy nor is it always the best approach. The best approach for promoting autonomy will depend on the particular dispute and the constitutional structure of the group. While a greater degree of autonomy is preserved by deference to the internal decision-making processes, this is not the *only* way of preserving autonomy. Indeed, as this discussion has shown, autonomy may be enhanced by judicial interpretation of internal norms to give effect to them. Realizing the constitutional structure of the group may involve interpreting their norms. Réaume argues that deference to internal decision-making 'is not always autonomy respecting.' Her argument is somewhat circular in that she says this is because 'when a fundamental substantive principle of the church's constitution is in issue, protection of group autonomy requires an interpretation of that principle to resolve the dispute.'[96] Presumably this is because autonomy is enhanced through the courts realizing this principle, as she contrasts this approach with the deference approach. It could also be argued, however, that protection of group autonomy is achieved through interpreting *that* principle as opposed to any other principle, for example a putative neutral state law principle. To use another principle to resolve the dispute would not only undermine group autonomy in that instance but weaken the internal norm for future use by the community or the courts.

Where the courts are relied upon to resolve any dispute within the community, however, the community is never going to remain entirely autonomous. This is because the courts must ultimately interpret their rules on their behalf – whether they are primary or secondary rules. Réaume notes that this 'loss of autonomy is exacerbated by … vague and indeterminate rules' because they give the adjudicator more discretion 'to shape them in

[96] ibid 279.

applying them.' Groups who wish for a greater degree of autonomy should 'lay down a reasonably clear set of secondary rules defining the powers of internal decision makers.'[97] A social ordering that consists only of primary rules will inevitably only have disputes over the substantive characteristics of the group.[98] We have seen, however, that this act of adjudication may not in and of itself harm group autonomy, it is getting the group's normative system *wrong* – as we saw in the *JFS* case[99] discussed in Chapter Five – that may do the most harm to autonomy.

b. The modern United Kingdom position

These debates concerning the appropriateness of applying or inquiring into religious doctrine to determine the distribution of property are still relevant in the UK despite the prevalence of corporate structures for preserving property indefinitely for religious purposes – for example, registered charities for the advancement of religion – and the resulting move away from reliance on the implied trust. The modern *cy-près* scheme under the Charities Act 1993, s 13[100] means that a trust's purpose does not have to be either impossible or impracticable before a court can redistribute property. While this means that courts no longer have to determine the precise purpose of a charity before redistribution, it may not allow them to avoid all theological questions. The occasions for applying property *cy-près* include the court satisfying itself that 'the original purposes [have] … ceased ... to provide a suitable and

97 Réaume (n 9) 280.

98 ibid 281.

99 *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728.

100 As first developed in Charities Act 1960

effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.'[101] This implies a doctrinal judgment to the effect 'that neither of the schismatic groups is clearly a successor to the original bodies of worshippers.'[102] Thus either the court inquires into whether the 'spirit of the gift' (ie the doctrinal purpose) can be fulfilled by one of the factions or it avoids any doctrinal judgment with the risk that 'a faction which may genuinely have split away … take[s] with it whatever property it can get its hands on.'[103]

Thus the proportionate distribution and 'agnosticism' shown in the *Varsani* judgments[104] may not necessarily promote autonomy. If the majority were acting in accordance with the proper decision-making procedures of the organization, then not recognizing those decisions denies group autonomy. But if the majority is attempting to turn the organization into something fundamentally different they can deny the minority personal autonomy by changing the organization through which they manifest their religion.

Thus while an approach that interprets religious doctrine, as occurred in *Overtoun*, can be problematic where it impacts on a group's ability to self-define, the so-called agnostic approach of later judgments such as *Varsani* which refused to interpret internal norms could also be problematic. An attempt to be neutral as between different church factions could limit the extent to which courts can support the autonomy and realize the religious freedom of either group. In exercising their freedom of association by joining a religious group an

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101 Charities Act 1993, s 13(1)(e)(iii).

102 Rivers (n 23) 99.

103 ibid.

104 (n 29) and (n 30).

individual expresses willingness to subscribe to the beliefs and practices of that group. It would appear self-evident that property owned by that group be used in accordance with the purpose of the group.[105] It would not be unreasonable therefore for a court to inquire into the beliefs and practices of the group and whether the property was being used for the purpose of the group. It is conceivable that there may be instances where one group is still clearly adhering to the doctrines of the religion and one has completely diverged. This divergence may affect the other group's ability to practise their religion according to their religious doctrine. In such instances there could be some validity in the departure from doctrine test. While such an approach will necessarily involve a certain amount of inquiry into religious doctrine, the ability of the group to manifest their religious belief may require it. Thus a completely "hands off" approach could be inappropriate where the court seeks to support religious freedom.

We have seen that no perfect approach may exist for resolving internal property disputes while also realizing the autonomy of religious organizations. Any approach may depend on the constitutional structure of the organization and the manner in which the property is held by the organization. An approach which best promotes autonomy is one which respects the group's normative system by deferring to its rules of change and adjudication. This may need to be tempered by willingness to protect the interest of dissenting factions where these rules are contested or not consented to. Where these secondary rules are contested or do not exist then the court will best promote autonomy by interpreting or applying substantive internal norms even if this occurs within the framework of 'neutral' legal mechanisms such as the *cy-près* scheme.

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[105] Ogilvie (n 20) 397.

c. Illiberal internal norms

If we accept that it may be appropriate for courts to interpret and apply the internal norms of religious organizations in internal property disputes where this would give effect to their autonomy and thus religious freedom, the second issue is whether the courts should apply these norms where they are inconsistent with state law or values.

This issue particularly relates to the potential enforcement of illiberal internal norms. In the context of internal property disputes there may be instances where determining a property right could involve applying an internal norm that might be illegitimate if it were part of state law because, for example, it unjustifiably limited a constitutional right or otherwise unjustifiably harmed autonomy.

These illiberal norms may be procedural or substantive, although we have noted that there may be difficulties in distinguishing between these two aspects of a dispute. An illiberal procedural norm may result in a decision concerning the distribution of property that does not accord with traditional principles of natural justice, or the illiberal substantive norm may deprive certain members of the community access to property. The rules of association could preclude women from membership, and thus voting, in decisions regarding church property, as occurs within Hutterite communities, or preclude access to church property altogether. Would the courts consider such norms when determining a property claim brought by a female claimant? Alternatively, property may be distributed in a way that discriminates against people on the grounds of sexual orientation. For example, a faction may claim that certain church property could not be used by another faction of the congregation because they support a gay minister, and to appoint such a minister would violate the terms of the

putative trust. If the court were to find that there was a trust, should it then uphold this term of the trust?[106] Would religious freedom in such instances provide a justification for applying a norm that would not be accepted in circumstances involving secular property? Similarly, the internal norms interpreted and applied by the court in the *Overtoun* case could just as easily have encompassed an illiberal principle. Indeed, the requirement that any member of the church subscribes to particular beliefs about Establishment and absolute double predestination limits both freedom of religion and expression. Moreover, not permitting one faction of the church to join with another church without losing property rights arguably limits freedom of association.

Certain state law standards and values – such as those embodied in constitutional principles and traditionally directed at public power – are in many instances unsuitable standards by which to judge the activity of private organizations. While the state has a commitment to religious and associational freedom, the association itself may not share these values.[107] As we noted in Chapter Five, it would not make sense, for example, for the state to attempt to impose religious freedom requirements upon a group organized to advance a particular religion. It may also be that these standards are not just irrelevant to the organization but actually harm its existence if imposed. As discussed in Chapters Four and Five, requiring the organization to accept or readmit anyone for membership would mean that it had little or no associational freedom thus also making it difficult for members to unite around one religion. Similarly, as we saw in the *Lakeside Colony* case, imposing certain

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106 In the New Zealand context see *Akau'ola v President of the Conference of the Methodist Church of New Zealand* HC AKCP 183/SW01 (HC, 5 December 2001).

107 McLean (n 82) 168.

procedural requirements on an organization – such as a conception of due process influenced by employment law – may undermine the group's internal norms and the communal way of life that is central to the group's world view.

We saw in Chapter Five that the justification for state enforcement of certain internal norms of religious organizations is that their members have consented to be governed by these norms when they joined the organization. This could potentially include those norms that diverge from state law and values. It is questionable, however, whether consent can always justify the application of these norms to group members. McLean queries whether that justification would still apply where the organization did not permit a certain group of individuals, such as women, to be full members with voting rights. She suggests that the court in *Lakeside Colony*, for example, would have struggled with their decision more had the claimants been women and thus not entitled to participate in decision-making processes.[108] This dilemma also applies to claims involving those organizations, such as the Hutterite community, where the claimant has been born into the community.

It is arguable, however, that in both these instances consent could manifest in ways other than formal acceptance of membership or the exercise of voting rights and thus intervention to *prevent* the operation of these internal norms and processes may be illegitimate. Judicial intervention to *enforce* those norms, however, may not be consistent with liberal state values such as that of democratic participation. We saw in Chapter Five that while putative consent may justify not intervening in organizational practices, it does not justify the state enforcing illiberal norms. As we will see in Chapter Seven, while

[108] McLean (n 82) 169.

intervention in consensual communities through state coercion may be illegitimate, those members who nonetheless face internal injustices, or who merely have a formal exit, can be encouraged to leave.

Imposing external state values may not therefore be the best way to realize them. McLean argues that the decision in *Lakeside* undermined, rather than enhanced, democratic values. The fact that an association wields power over individuals is not in itself justification for judicial intervention[109] and, in any event, intervention does not automatically promote democratic values. The expulsion process, for example, occurred without the participation of women or unbaptised males; requiring it to be undertaken again does not then enhance democratic participation in the community. Moreover, without judicial intervention, she notes, the Hutterites could not have enforced the expulsion because they eschew all forms of violence. They would have been forced to make some sort of accommodation.[110] Note that Mr Hofer in fact accepted the rules of the church regarding property 'and indeed wished for more strict adherence to them.' He also had both exit and voice.[111]

Thus while it may be inappropriate to intervene in an organization to ensure that its internal norms comply with liberal values, this does not also provide a justification for an organization using mechanisms of the state to enforce its illiberal norms. Applying an internal norm that harms autonomy would involve judges 'lend[ing] the authority of the

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109 McLean (n 82) 160.

110 ibid 169.

111 McLean (n 82) 169.

state' to these norms.[112] When a court develops the common law inconsistently with liberal state values – so as to limit or exclude a constitutional right, for example – it places the coercive power of the state at the disposal of the private party who is harming another's autonomy. It is for this reason that the Canadian courts have 'implicitly adopted' an approach that 'qualif[ies] the acceptance of pluralism with the proviso that internal group norms that are repugnant to some overarching sense of natural justice or morality will not be enforced.'[113] Internal norms are considered in light of other values that inform the legal system and where those norms are 'seriously at odds' with these values they will be labelled 'repugnant to natural justice and equity' and thus unenforceable by state courts.[114] It is for similar reasons that under UK law a court enforcing an internal norm inconsistent with a ECHR right may breach the HRA. The court is a public authority and thus the HRA may have some indirect effect as the common law might be influenced by ECHR rights even in disputes involving private parties. In this way the Act may apply as between religious organizations and their members through 'indirect' or 'weak' horizontalism**.**[115]

How courts ought to respond to illiberal internal norms may depend on the approach the court ought to take to the dispute more generally. If a deferential approach is appropriate then the court is not then required to uphold illiberal substantive norms, although the procedural or secondary rules may be illiberal. Where an organization has enlisted state legal tools to organize their affairs – such as trusts, private act of incorporation or articles of

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112 Janet McLean, 'Personality and Public Law Doctrine' (1999) 49 U Toronto LJ 123, 134.

113 Réaume (n 44) 178.

114 ibid 191.

115 Murray Hunt 'The 'Horizontal Effect' of the Human Rights Act' [1998] PL 423. See generally Sir William Wade 'Horizons of Horizontality' (2000) 116 LQR 217, 217-218.

association – this could be seen as acceptance of state norms as they affect the matter at issue, such as property.[116] Where the organization or individual claimants then seek to use judicial mechanisms to uphold these arrangements, they should then be subject to other principles of state law. They have, by enlisting these tools, accepted those principles and should not then be able to select those that apply and those that do not. As we saw in this chapter and in Chapter Five, however, the content of these principles may vary in light of the internal norms of a community provided that these norms are not *inconsistent* with the values underpinning these principles. In the very least, a court should not allow an organization to use the mechanisms of the state to enforce contracts or uphold trusts which undermine the liberal value of autonomy.

Conclusion

In the context of internal property disputes, an approach that defers to the internal decision-making processes of the group can realize group autonomy by giving effect to its organizational and normative structures and allowing the group to determine its own character. The interpretive approach – interpreting and applying the group's internal rules or norms – can, however, also realize group autonomy by giving effect to the norms themselves. With this approach the courts do not, for the most part, adjudicate on the merit of religious doctrine. Instead, they apply the internal norms of the organization – those norms that the organization uses to order its affairs including those related to its property – in a similar way to how they would apply other principles of law or terms of a contract. This is not a qualitative assessment.

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116 McLean (n 82) 168.

Where, however, the court does engage in an interpretative exercise with regard to these internal rules or norms – such as those contained in articles of association and expressed in customary practice, for example – then the integrity of those norms, and as a result the ability of the community to self-define, can be affected. It is for this reason that the courts can tread a fine line between realizing group autonomy and limiting it.

Thus, while it is not illegitimate for courts to interpret and apply the internal norms of religious organizations in resolving internal property disputes, such application can limit religious freedom particularly where the courts are influenced by state law values when interpreting these internal norms. Such adjudication may, however, be unavoidable in which case the goal of the courts ought to be to maximize group autonomy while avoiding injustice against individuals or factions.

7. FAMILY MATTERS

Previous chapters have examined how the UK – through its legislature or judicial system – has responded to religious freedom concerns in particular contexts and whether these responses are justified. While realizing religious freedom may involve accommodating internal religious norms through exceptions to state laws, as we saw in the employment and goods and services context, or the courts deferring to or applying a religious group's internal norms to resolve internal discipline and property disputes, this chapter considers the application (or not) of state law where religious organizations have established their own dispute resolution systems and bodies to operate in accordance with religious law. These bodies can be termed religious tribunals.[1] As we shall see, the operation of religious tribunals also raises questions for religious freedom. The primary question for this chapter is whether the state ought to permit these tribunals to operate independently of state law and how.

This chapter focuses on matters that ordinarily concern state family law to illustrate how religious tribunals can operate in relation to state law and to illustrate the normative questions this operation raises. While religious tribunals could resolve a wide range of disputes, family matters provide better examples of the complex relationship between state law and religious freedom than, for example, commercial disputes. Both the state and the religious organization, not to mention the individuals involved, have a strong interest in

[1] "religious tribunal" is a general term encompassing all adjudicative bodies within religious organizations. As we will see, these bodies can also advise, not just adjudicate, on religious law.

decisions that affect the family because they often concern matters that have both community and wider public interest such as child custody and welfare, the distribution of marital property, or status (eg marriage or divorce). Family law is also particularly concerned with protecting vulnerable members in family disputes and therefore the state has a strong interest in regulating matters that may affect these members.

While most religions have internal dispute resolution bodies, this chapter will largely refer to Jewish and Muslim religious tribunals. This is because they, with the exception of those of the Christian churches (particularly the Church of England) are used most often within the United Kingdom. While the courts and tribunals of the Church of England**,** such as the consistory courts and Bishop's Disciplinary Tribunals, engage in a significant amount of dispute resolution few of these disputes involve family matters, with the exception of the exercise of certain powers related to the granting of special marriage licences by the Court of Faculties. The matrimonial tribunals of the Roman Catholic Church, while well-established, deal almost exclusively with declarations of nullity and thus are too narrow in scope to serve the purposes of this chapter.

Part One examines the legal position of religious tribunals within the UK – both the extent to which they are permitted to operate and the extent to which their decisions are recognized or enforced by the state. Part Two considers the normative issues raised by these religious tribunals, specifically the justification for non-interference in these tribunals and whether this justification can still apply with regards to internal minorities.

1. DOCTRINE

Religious tribunals – whether they be Jewish batei din or Muslim sharia councils – are organized (often highly so) bodies that consider matters brought to them by persons who subscribe to the tribunal's religious norms. They can operate in a multi-faceted manner both deciding disputes and advising on non-contentious matters. They can provide both civil arbitration and religious rulings. The former involves civil disputes – such as those in contract or tort – and operates within state law but usually imbued with religious norms. The latter rulings are not legally binding and relate to issues of religious law, usually a person's religious, as opposed to legal, status. They can also provide mediation services – an informal, voluntary and non-binding method of dispute resolution which can be informed by religious principles.

The tribunals may have their own regular adjudicators, mediators or scholars and have set procedures and substantive norms. They may even advertise. Still, even though they are a form of governance, these tribunals are unofficial or informal in that they are not part of the state legal system. Nonetheless, they themselves and the parties who appear before them see these tribunals as authoritative.[2] The tribunals themselves often claim they can impose duties upon participants; indeed, they may often expect to be obeyed – this is a claim of authority.[3] The tribunals thus view themselves as authoritative and their participants view

[2] eg 'The Islamic Shari'a Council is an authoritative body' <http://www.islamic-sharia.org/about-us/about-us-3.html> accessed 12 August 2011.

[3] Joseph Raz, *The Morality of Freedom* (Clarendon 1988) 28. An extensive examination of the nature of authority, or its moral legitimacy, is beyond the scope of this thesis. For the purposes of this chapter we can conclude that these tribunals are authoritative in that their rulings are generally obeyed by their members.

them as such, which has important implications for this thesis' question of what their relationship with state law is.

a. The legal status of religious tribunals

This section considers the extent to which religious tribunals are permitted to function alongside UK courts.

With the exception of those of the Church of England, no religious tribunals are statutory tribunals or otherwise possess status as part of the UK justice system. Religious tribunals can, however, sit as arbitral tribunals in respect of civil disputes and thus where the parties have agreed to submit a dispute to them for arbitration, the Arbitration Act 1996 will apply. This means that as with any other arbitration body, religious or otherwise, any decision they make is considered an Arbitration Award and thus legally enforceable in state courts provided it complies with the requirements of the Act. In order for the Arbitration Act to apply the parties must enter into an arbitration agreement which sets out all terms governing the adjudication of the dispute, including who should sit as the adjudicator and what law should govern. The parties can agree to be bound by certain religious norms rather than English law or the rules of a national legal system.[4] Besides certain other requirements in the Act, generally all that is required for enforceability is that the parties have consented to the process. While such arbitrations are founded and governed by private arbitration agreements they are, however, subject to regulation by the state through the operation of this Act. Arbitration agreements will be unenforceable where they are considered by the courts to

[4] Arbitration Act 1996, s 46(1)(b); *Halpern v Halpern* [2008] QB 195 (Jewish law applied to the compromise agreement).

be unreasonable or contrary to public policy.[5] There is also a general duty on arbitrators to comply with principles of natural justice – they must act fairly and impartially and avoid unnecessary delay or expense.[6]

Not all religious tribunals are, however, state-recognized arbitrators. While the Jewish batei din operate under the Arbitration Act 1996, at the time of writing, only one sharia council operated under the Act. The decisions of the rest are non-binding and depend on the parties to implement them. Many sharia council websites are misleading in this regard.[7] It was only in 2008 that the Muslim Arbitration Tribunal came into existence with its decisions, like those of the London Beth Din, for example, being legally binding in accordance with the Arbitration Act. Prior to that, Muslim religious tribunals – generally termed sharia councils – operated unofficially with no legal enforcement of their decisions.[8]

The Arbitration Act does not extend to all areas of law; it is confined solely to civil disputes. It would not replace criminal prosecutions and, despite claims by some religious tribunals to resolve family disputes, matters under the rubric of family law cannot be resolved by contractually binding arbitration agreements. This is because the Act preserves certain matters to be governed by the common law.[9] Moreover, the jurisdiction of state family courts cannot be ousted by contractual agreement.[10] This goes for all family

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5 Arbitration Act 1996, s 81.

6 Arbitration Act 1996, s 33.

7 eg that of the Islamic Shari'a Council (n 2).

8 These decisions may, however, have been 'enforced' through community and social pressure.

9 Arbitration Act 1996, pt 1 and s 81.

10 *Edgar v Edgar* (1980) 1 WLR 1410.

settlements – whether arrived at through a religious tribunal or otherwise. Thus operating under the Arbitration Act would still not enable civil divorces to be granted or child custody to be determined in a manner that would be recognisable or enforceable by the state.

Although family disputes cannot generally be the subject of a binding arbitration award, inheritance disputes could be because they do not come under the jurisdiction of the family court. However, as noted, such decisions would only be enforced if compatible with UK law and public policy.[11] Therefore the unequal division of an estate between male and female children on intestacy, for example, may not be enforceable in the UK courts.

Religious tribunals can, however, assist parties in negotiating agreements outside of the auspices of the Arbitration Act on matters ancillary to a divorce such as custody or financial arrangements. Such agreements are not legally binding until a draft consent order embodying the terms of any agreement reached through the tribunal is approved by the courts. As noted, a tribunal cannot fetter the discretion of the family courts and therefore such agreements are considered as evidence in the exercise of the courts' discretion.[12] The court will question any agreement that appears unfair, including those that are unconscionable or go against English law regardless of how it came about.[13] The courts are under an obligation to ensure any order is consistent with English law. For example, in the case of orders for residence or contact, the court must examine the proposed order in

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[11] See also Prakash Shah, 'A Reflection on the Shari'a Debate in Britain' <http://ssrn.com/abstract=1733529> accessed 12 August 2011.

[12] Matrimonial Causes Act 1973, s 7.

[13] Parliamentary debates also show a firm belief that English law takes precedence over religious law. See Minister of Justice Jack Straw, HC Deb 24 November 2008, vol 483, col 866W; Lord Bach, HL Deb 24 November 2008, vol 705, col WA247 and 06 November 2008 vol 705, col WA81. Such consent 'will not easily be given to any arrangement that is not satisfactory.' Lord Bach, HL Deb 07 June 2009, vol 711, col 297.

accordance with the Children Act 1989 under which the child's welfare is the paramount consideration. In the case of financial orders, the court must apply the relevant provisions of the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004. Such unenforceable agreements would not be confined to those arising from religious tribunals nor are those from religious tribunals necessarily always going to be unenforceable. At present, judges only know whether a draft consent order comes from a sharia council, for example, if the parties bringing the proceedings make it known to them. The Government is considering, however, changing applications for consent orders in ancillary relief proceedings so that the statements of information indicate the means by which agreements were reached.[14] Given, however, that family courts encourage participants to settle their disputes and place great emphasis on ensuring that both parties are satisfied with the outcome then provided the draft consent order 'is not patently unreasonable, the court is likely to "rubber stamp" it.'[15]

b. Legal recognition of decisions

In determining the status of religious tribunals within the UK legal system we also need to consider whether the state recognizes or enforces – either in legislation or case law – their decisions.

i. Legislative recognition

While UK law recognizes many aspects of religious family law, particularly certain religious marriages in the Marriage Act 1949, this chapter is not concerned with legislative or judicial

[14] See Jack Straw, HC Deb 24 November 2008, vol 481, col 866W.

[15] Julian Rivers, *The Law of Organized Religion: Between Secularism and Establishment* (OUP 2010) 102.

recognition of religious norms and practices relating to family life that are not directly related to religious tribunal decision-making. This recognition, however, is sparse as UK law tends to recognize religious norms rather than religious tribunals.

UK law does limit religious tribunal decisions, however, by imposing some rules upon marriage that may conflict with norms that would otherwise be applied by religious tribunals when determining the validity of a marriage. These rules relate to the age of the parties, consent, and the number of parties to a marriage. Where a religious marriage ceremony is not recognized as a marriage under state law, however, then these limitations would have little effect. Some have suggested that such ceremonies are illegal under the Marriage Act 1949, s 75 – which makes it a criminal offence to perform a marriage ceremony which is not registered under the Act – although the section is barely enforced.[16] Despite granting some autonomy to religious communities to regulate marriage, the state does not also recognize divorces granted by them.[17]

The state has, however, adopted measures in response to potentially unequal treatment and coercion of women in the religious divorce process. The Matrimonial Causes Act 1973, s10A (as inserted by the Divorce (Religious Marriages) Act 2002) allows a party to apply for the divorce not to be made absolute until a declaration is made by both parties that they have taken the necessary steps to dissolve the marriage according to their own

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[16] Neil Addison, 'Sharia is not the problem here' *The Guardian* (London, 8 July 2010) <http://www.guardian.co.uk/commentisfree/belief/2010/jul/08/religion-sharia-marriage-registration-islam> accessed 12 August 2011.

[17] Family Law Act 1986, s 44(1); *Maples (formerly Melamud) v Maples* [1988] Fam 14. Similarly, where a religious marriage ceremony is *not* recognized, the family court cannot grant a civil divorce.

religious usages.[18] Thus, as Bradney observes, while 'the religious divorce ... has no legal status in the State's eyes ... whether it exists or not is part of the factual background that is relevant to the State's exercise of its legal jurisdiction.'[19] This legislation means that a wife can prevent her husband from divorcing her under English law. She cannot, however, force him to grant a religious divorce although this legislation may encourage him to. It responds to situations where a husband refuses to grant a religious divorce and it does this by preventing a civil divorce from occurring until the religious one has been obtained.[20] This stops women from being effectively blackmailed into relinquishing entitlements to financial support in order to obtain a religious divorce. The religious community itself decides whether the Act will apply to them. It then asks the Lord Chancellor to prescribe the religious group for that purpose. Currently Jewish communities are the only religious group authorised to make use of the Act. In Orthodox Judaism a woman cannot remarry nor have legitimate children from a remarriage without first obtaining a religious divorce. This limitation does not apply to men who are able to remarry with the approval of a beth din. Of course, this legislation has no effect where a husband does not want or need a civil divorce.

The Arbitration and Mediation Services (Equality) Bill[21] has recently been introduced in response to debates that arose from the Archbishop of Canterbury's speech in February

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18 eg *O v O (Jurisdiction: Jewish Divorce)* [2000] 2 FLR 147.

19 Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge 2009) 47.

20 eg divorce in Jewish law follows from the acts of the parties – the delivery of the *gett* or bill of divorce – not from rabbinical authority, which only ascertains the grounds, ensures consent, and effects certain formalities and has no effective means for ensuring that the husband complies with religious norms confirming a right of divorce upon the wife: Patrick Glenn, 'Where Heavens Meet: The Compelling of Religious Divorces' (1980) 28(1) Am Jnl of Comp Law 3-4.

21 Arbitration and Mediation Services (Equality) HL Bill (2010-11) 72.

2008[22] where he proposed greater recognition for religious tribunals within the state legal system. It proposes amendments to various pieces of legislation to address some of the perceived problems with religious tribunals, which will be discussed further in Part Two.[23] In most instances it clarifies rather than amends the law in relation to the activity of religious tribunals in family matters. In particular, section 4 clarifies that criminal and family law (including domestic violence) matters are not arbitrable. It is not clear what this amendment would add to the current law given that many religious tribunals complement state family law rather than replace it. Parties often seek their rulings because they see them as authoritative statements of religious law rather than because they could subsequently be enforced in a state court. It may, however, discourage religious tribunals from making representations in other instances. Section 5 of the Bill addresses situations where a state court has enforced what appeared to be a settlement agreement but was is in fact a ruling of a religious tribunal that the parties accepted. A court may issue a declaration setting aside any order based on that agreement if it considers on the evidence that one party's consent was not genuine. In assessing the genuineness of the consent, the court should have particular regard to whether the parties were informed of their legal rights or any party was manipulated or put under duress, including through psychological coercion, to induce participation in the mediation or negotiation process. Again, it is not clear what this would add to the current state of the law although it may encourage courts to scrutinize agreements more carefully.

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[22] Rowan Williams, Archbishop of Canterbury, 'Civil and Religious Law in England: a Religious Perspective' (Royal Courts of Justice, London, 07 February 2008) <http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective> accessed 12 August 2011. See also Lord Phillips, 'Equality Before the Law' (East London Muslim Centre, 03 July 2008) <http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-03072008> accessed 12 August 2011.

[23] It does not, however, specifically mention religious tribunals; it would apply to all forms of arbitration.

ii. Judicial recognition

Parties sometimes resort to state courts to have tribunal decisions enforced or vacated. We saw in Chapter Five that UK courts are willing to recognize the decisions of religious bodies in matters of internal discipline through the doctrine of consensual compact. As explained in Part 1(a) above, they are also willing to recognize such decisions in other matters through the operation of the Arbitration Act 1996.

As religious tribunals cannot make binding decisions concerning family matters few of these decisions appear in state courts. This section therefore also considers decisions involving non-family disputes. Of course, a state court's refusal to enforce a decision of a religious tribunal does not mean a tribunal cannot adjudicate upon such matters, simply that its decision will be unenforceable in a state court. Similarly, while the court will not uphold a decision or agreement that conflicts with UK law, this does not prevent these tribunals from making such decisions.

Historically, the ecclesiastical courts had exclusive jurisdiction over matters relating to marriage and English courts were prepared to recognize what was effectively a system of personal laws – a separate system of family law based on religious law that is automatically applicable to those considered members of that religion[24] – in relation to other religious marriages. This was done through either applying religious law in a series of 18th century cases involving Jewish litigants[25] or refusing to recognize non-Christian marriages thus

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[24] Sebastian Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in Chibli Mallat and Jane Connors (eds), *Islamic Family Law* (Graham & Trotman 1990) 147.

[25] *Lindo v Belisario* (1795) 1 Hag Con 216; *Goldsmith v Bromer* (1798) 1 Hag Con 324. See GW Bartholomew, 'Application of Jewish Law in England' [1961] U Malaya L Rev 83.

leaving the regulation of those marriages up to the religious authority concerned.[26] These early cases were, however, concerned with access to the English courts by persons other than Christians rather than the authority of religious tribunals. The authority of these tribunals over Jewish lives was presumed, but in accepting jurisdiction the courts went to lengths to emphasise that Jewish people should have the same access as other English people to English courts.[27] The idea that Jews possessed their own personal laws declined as a matter of historical accident with the transfer of jurisdiction from the ecclesiastical courts to the common law courts in 1857.[28]

In modern times, while the authority of religious tribunals is not presumed as it was historically, state courts are receptive to enforcing the decisions of religious tribunals on the basis set out in earlier chapters: the parties have consented to their authority. In *Al-Midani v Al-Midani*[29] the court saw sharia councils as providing 'a welcome facility to the Muslim community of the United Kingdom to render decisions on Islamic law, particularly in the matrimonial and family sphere.' Here the court held that two of the parties were not bound by the decision of the Islamic Sharia Council of London because its authority rested largely on the consent of parties to submit to its judgments, which had not been forthcoming in their case as they had not been represented at the hearing.[30]

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26 *Hyde v Hyde* (1866) LR 1 P & D 130.

27 *D'Aguilar v D'Aguilar* (1794) 1 Hag Ecc 7730.

28 Bartholomew (n 25) 100, 111.

29 [1999] 1 Lloyd's Rep 923.

30 See also *Bhatti v Bhatti* [2009] EWHC 3506 (Ch).

Thus while numerous cases have arisen involving challenges to arbitral awards granted by religious tribunals – usually Jewish batei din – in most instances they are enforced on the basis that the parties have consented to the tribunal's jurisdiction.[31] However, decisions that go against public policy will not be enforced. In *Soleimany v Soleimany*[32] an award of a beth din was deemed contrary to public policy and could not be enforced because the underlying contract was illegal despite being valid under Jewish law.

The courts do, however, show more willingness to recognise the processes, rather than substance, outlined in arbitration agreements where they would otherwise potentially violate UK law. The recent Court of Appeal decision in *Jivraj v Hashwani*[33] initially found that unless an occupational requirement can be established, arbitration agreements that require arbitrators to come from a particular religious community are void as they violate UK legislation prohibiting religious discrimination in employment.[34] Due to the uniform nature of UK discrimination law protection, this decision would have had the effect of prohibiting discrimination because of *any* protected characteristic in arbitration agreements unless an occupational requirement could be demonstrated. It was reversed, however, by the Supreme Court[35] which found that arbitrators were not 'employed' and therefore not within the scope of the discrimination legislation. Had arbitrators been within the scope of the legislation, then

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31 *Kohn v Wagschal* [2007] EWCA Civ 1022 (24 October 2007) and *Cohen v Baram* [1994] 2 Lloyd's Rep 138.

32 *Soleimany v Soleimany* [1999] QB 785.

33 *Jivraj v Hashwani* [2010] EWCA Civ 712, [2010] ICR 1435.

34 Discussed in Chapter Two.

35 *Jivraj v Hashwani* [2011] UKSC 40 (27 July 2011).

the court would have found that the requirement fell within the occupational requirement exception.

Under the ECHR there is also an obligation upon domestic courts to ensure that religious tribunals have not breached Convention rights before enforcing their judgments.[36] Where a claim to have a religious norm applied in a family law matter would violate public law principles, such as those embedded in the ECHR, the Strasbourg court will not give effect to it.[37]

iii. Recognition of non-legal authority

While these tribunals have no statutory authority and only limited legal authority where they fall under the Arbitration Act, UK courts have acknowledged the authority that these tribunals may still have over individuals' lives. This includes acknowledging the authority of religious norms that are often generated by these tribunals and the communities they serve. The court in *Al-Midani*[38] noted that while '[the sharia council's] authority appears to rest largely on consent, in as much as it responds to the needs of the community it serves' it may also be the case 'that under Shari'a law it has autonomous power, as a religious Court, to promulgate decisions in favour of a claimant even against the will of a respondent.' In *Re A*

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[36] *Pellegrini v Italy* (2002) 35 EHRR 2 (breach of Article 6(1) – the right to a fair trial - because the Italian courts had relied upon judgments from the ecclesiastical courts of the Vatican, which had infringed fair trial provisions).

[37] *Khan v UK* App no 11579/85 (ECtHR, 7 July 1986) (argument that setting legal age of marriage under British law at sixteen was a violation of religious freedom rejected on the ground that the marriage could not be considered as 'merely' a religious practice). See Sebastian Poulter, *Ethnicity, Law, and Human Rights: The English Experience* (OUP 1998) 195-236 (example given at 218).

[38] *Al-Midani* (n 29).

(Security for Return to Jurisdiction)[39] the court accepted the authority that such councils may have by requiring a mother to make a solemn declaration before a sharia judge on the Koran that nothing would be done to prevent the child from returning to the jurisdiction before granting leave for the mother to take her child on holiday to a non-Convention[40] country. It considered that such an oath by a practising Muslim would be binding upon that individual.

The courts have shown some appreciation of how religious family obligations can weigh on individuals even prior to the Divorce (Religious Marriages) Act 2002. In *Brett v Brett*[41] the court found that the wife's inability to remarry under Jewish law, despite being free to remarry under *civil* law, would justify a substantially increased maintenance award. The husband could avoid this increase by granting her a *gett* (bill of divorce) within a certain period of time. This decision shows secular courts awareness of the authority religious norms may have over people's lives and therefore why a solely civil divorce would not be satisfactory to the wife. Rather than simply acknowledging that for the wife a civil divorce, in and of itself, was not an authoritative divorce, the court translated the issue into secular terms by finding that a civil divorce would not ease her financial dependency on her husband as she would be still be unable to remarry within her faith.

While the courts have found religious norms generated and applied by religious tribunals authoritative in the arbitration context outside of family law, they have criticized such norms in the family context and would not apply them should they breach certain

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39 [1999] 2 FLR 1.

40 The Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980).

41 (1969) 1 All ER 1007.

fundamental rights. In *EM(Lebanon) v Home Secretary*[42] the House of Lords allowed an immigration appeal on that basis that on return to Lebanon the mother and child's 'right to respect for their family life would not only be flagrantly violated but would also be completely denied and nullified' due to the application of sharia rules by Lebanon's divorce court.[43] The sharia rules regarding child custody as applied in Lebanon were considered inconsistent with the right of family life as protected under ECHR, Article 8. The court described these rules as 'arbitrary and discriminatory' because the mother would have been required to relinquish custody of her son when he turned seven years of age.[44] Would a UK court, therefore, register and enforce an agreement arising out of a sharia council mediation that gave custody to the father? Presumably it would if there were no evidence that the mother was acting under duress and such arrangement was in the best interests of the child. What if there were no actual duress but the mother simply acquiesced as she considered the sharia council and the rules it applied as authoritative or that she had no alternative? Or there was subtle pressure from her community to submit to the tribunal's ruling? The answer to these questions is still unclear.

Similarly, while most marriages which are celebrated in foreign jurisdictions and are valid according to the law of that jurisdiction (including where that law is religious law) are recognized under English law, the courts have been outspoken in refusing to recognize a foreign religious marriage because it lacked consent. In *KC & NNC v City of Westminster v*

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42 [2008] UKHL 64, [2009] 1 AC 1198.

43 ibid [41].

44 ibid [6].

IC,[45] the Court of Appeal refused to recognize a marriage which was valid under sharia law (and the law of Bangladesh where the telephone marriage was considered to have been celebrated) as also valid under English law. This was because under English law – the law of the man's domicile – the man lacked the capacity to marry and to consent to sexual intercourse due to his severe autism. He could not, therefore, validly consent to marriage. Indeed, the court even went on to suggest that by engineering the telephonic marriage, which was permitted under sharia law, the man's parents were potentially if not actually abusive towards the man.[46] Wall LJ observed that the case showed 'a profound difference in culture and thinking between domestic English notions of welfare and those embraced by Islam.'[47] While under English law the marriage was seen as exploitative, expert witness evidence was given to say that the man's family saw the marriage as a means of protecting him, and of ensuring that he was properly cared for within the family when his parents were no longer in a position to do so.[48] While human rights claims were put forward stating that refusing to recognize the marriage would breach the man's right to marry and to have a family life under the ECHR, only brief reference was made to the rights of the arguably exploited woman who would be brought to a foreign country to be the sole, unpaid carer of a severely disabled man with whom a true partnership was impossible. Any concern for her was dismissed because of evidence she entered into the putative marriage with full knowledge of his disability. Although matters such as this may not directly involve religious tribunals, this decision

45 [2008] EWCA Civ 198, [2009] Fam 11.

46 ibid [32].

47 ibid [44].

48 ibid [44-45].

indicates the limits the courts will place on recognition of religious norms and this could include those generated by religious tribunals.

Legislation and case law show a varied response to the presence of religious tribunals within the UK. Their operation in relation to family matters in particular is still evolving. While the state grants these tribunals little positive legal authority, it tolerates them by not enacting legislation to regulate or limit their activity. Politicians are realistic about the role that these tribunals may have over people's lives and have acknowledged their informal operation.[49] Thus despite the absence of a system of personal laws in the UK, Bradney suggests that personal law systems are already part of the legal culture, albeit unofficially.[50] Without official recognition, religious tribunals have developed and operated informally and with little state accountability. Informal sharia councils, for example, operate extensively within the Muslim community.[51] These tribunals function therefore in the space the liberal state leaves for liberty. In addition to providing for religious freedom through ordinary legislative techniques such as exemptions or judicial attitudes of non-interference, religious

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[49] 'We cannot prevent individuals seeking to regulate their lives through religious beliefs or cultural tradition. Communities and other groups have the option to use religious councils or any other system of alternative dispute resolution and agree to abide by their decisions. Nothing in the law in England and Wales prevents people abiding by Sharia principles if they wish, provided that their actions do not conflict with the law in England and Wales. If they do, the law in England and Wales prevails.' Lord Bach, HL Deb 04 June 2009, vol 711, col 296-297.

[50] Bradney (n 19) 22.

[51] Sonia Nurin Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce, and Sharia* (Nuffield 2001) and Samia Bano, 'Islamic Family Arbitration, Justice, and Human Rights in Britain' 2007 (1) Law, Social Justice & Global Development Journal (LGD) 11 <http://www.go.warwick.ac.uk/elj/lgd/2007_1/bano> accessed 12 August 2011.

freedom is often exercised through the absence of regulation.[52] Religious tribunals are therefore able to operate because state law is silent on the matter.

2. NORMATIVE CONSIDERATIONS

The operation of religious tribunals in relation to family matters raises the question of the extent to which the state should permit alternative justice systems to operate especially in matters that ordinarily have great state interest.

As this thesis is concerned primarily with the extent to which state law should apply to religious organizations, this chapter does not consider the extent to which religious family law norms should be incorporated into state family law,[53] or the extent to which religious tribunals should have state-granted authority to regulate family matters in the UK through, for example, a system of personal laws.[54] It is simply concerned with whether the current position of non-interference in the operation of religious tribunals can be justified.

As we have seen in this chapter and Chapter Six, however, a distinction between non-interference and norm-application may not always be easy to draw. In some instances the state may be called upon to apply the internal norms as generated by self-governing religious tribunals. The application of religious norms by the state has been discussed in Chapter Five. Thus this section focuses largely on non-interference.

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52 Jeremy Waldron, 'Status versus Equality: The Accommodation of Difference' in Omid A Payrow Shabani (ed), Multiculturalism and the Law: A Critical Debate (University of Wales 2007) 144.

53 Questions raised in the high-profile speeches of the Archbishop of Canterbury and Lord Phillips (n 22).

54 As was campaigned for by some British Muslims in the 1970s: Poulter (n 24).

This section considers whether non-interference in the operation of religious tribunals discussed in Part One can be justified. This examination once again raises the question of how the liberal state ought to respond to the position of internal minorities and the operation of any illiberal internal norms and practices that may appear in either the processes adopted by the tribunals or in their substantive decisions.

a. Justification for non-interference

We saw in Part One that religious tribunals in the UK operate in the space that the state has left for liberty. After all, the family has traditionally either not been regulated by the state or has been regulated by religious organizations; state family law emerged in response to social issues. Historically, the secular state did not have authority over matters relating to the family as this jurisdiction resided with the ecclesiastical courts.[55] We saw that there is no official state recognition of these tribunals in relation to family matters. Their operation is not, therefore, what Shachar has termed 'privatized diversity.' While these tribunals offer an alternative to state institutions, they do not seek to opt out or secede from 'the effects of the polity's public laws and norms.'[56] They *supplement* or *complement* rather than *replace* UK family law and its institutions. By supplement, this thesis means that they add to existing family dispute resolution mechanisms by providing services, such as mediation services, in addition to those that already exist and which support the state family law system. This can be distinguished from the Archbishop of Canterbury's reference to 'a scheme allowing for

[55] Bradney (n 19) 96.

[56] Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9(2) Theo Inq L 573, 580-581.

supplementary jurisdiction,'[57] which rather than supplementing would actually substitute the state legal system through delegating certain legal functions to religious tribunals. By complement, this thesis means that they resolve disputes or advise on non-contentious matters that the state is unable to.

We have seen in previous chapters that some measure of self-governance is necessary for religious communities to maintain group identity and enable their members to live religious ways of life.[58] Self-governance requires these communities to have their own dispute resolution and advisory bodies. Religious tribunals can have a 'demarcating function' by regulating membership boundaries through the application or declaration of religious personal laws on marriage, divorce, and lineage.[59] In this way they maintain group identity. We saw in Chapter Four that group autonomy in determining membership is an essential aspect of religious freedom. Non-interference in these tribunals could also be justified on the basis that they are an important aspect of religious freedom and without their operation it would be more difficult to live a religious way of life. For many religious believers, religious adjudication is not just important but necessary in order to live a religious way of life. The London Beth Din, for example, expressly states that '[i]n Jewish law, Jewish parties are forbidden to take their civil disputes to a secular court and are required to have those disputes adjudicated by a Beth Din.'[60] Research also shows that sharia councils have emerged in the

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[57] (n 22) [20] (discussing Ayelet Shachar's proposed accommodation model in *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001)).

[58] See Chapter Five (Internal Discipline) in particular.

[59] Ayelet Shachar, 'Entangled: State, Religion, and the Family' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 121.

[60] <http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/litigation/> accessed 12 August 2011.

UK partly because some 'Muslims do not recognize the authority and legitimacy of western secular law on par with Muslim law and therefore deliberately choose to resolve disputes through [sharia councils].'[61]

Religious tribunals also make rulings and give guidance on aspects of religious practice. Religious tribunals that adjudicate and advise on family matters may therefore be important in ensuring that the option of living a religious way of life is available because they make it possible for members of religious communities to conduct their family life in a way that is consistent with their religion.[62] As we saw in Chapter One, preserving this option is very important for the liberal state because it is part of the adequate range of options necessary to live an autonomous life. A person who is committed to their religion may not therefore wish to engage secular courts in, for example, their divorce process. Religious tribunals who can adjudicate and advise on family matters in accordance with religious doctrine may be especially important given the centrality of family life in most religions. The family is heavily regulated by religion. For example, some see 'family [as] central to the whole scheme of social life envisaged by Islam … the focus of cultural and religious identity.'[63] Indeed, in many religions one cannot exercise all rights as a member unless their family life or personal status is consistent with that religion's family law. For example, as we have already noted, a person who is not divorced in accordance with Orthodox Jewish law cannot remarry under Jewish law and any children that result from a subsequent union will be considered illegitimate and thus not entitled to marry an Orthodox Jew. The supervisory

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61 Bano (n 51) 13.

62 Thank you to Farrah Ahmed for discussing this point with me.

63 Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Ashgate 2005) 58.

role of the London Beth Din in relation to divorce therefore enables Orthodox Jews to better live a Jewish way of life by ensuring that parties divorce each other correctly under Jewish law.[64] It also enables them to exercise further rights as members and ensure that their children can be members of Orthodox Judaism.

In addition to assisting an individual to live a religious way of life by advising them on matters of religious family law, these tribunals can enhance individual autonomy by *complementing* state family law. In this way they are able to provide *more* options to an individual. As such, the state may have little interest in preventing their operation because they are autonomy-enhancing.

These religious tribunals can complement state family law by providing tools for their members to resolve family matters that the state is incapable of resolving. A secular divorce is not the equivalent of a Muslim or Jewish divorce (and, of course, state courts cannot grant religious divorces) and therefore a person who wishes to remarry within either of these faiths – and therefore have further options – may not be able to do so without the assistance of a religious tribunal. Religious tribunals can therefore make it possible to live a religious way of life in a way that state family courts cannot. They are thus also autonomy-enhancing either in terms of making further options available (such as the option to remarry religiously) or in terms of enabling a person to leave an autonomy-reducing situation (for example, that of being bound in an unhappy or abusive marriage where a person could be vulnerable to manipulation and coercion).

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[64] Gillian Douglas, Norman Doe, Sophie Gilliat-Ray, Russell Sandberg and Asma Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff 2011) 38 <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf> accessed 12 August 2011 ('Cardiff Study').

In other instances state law may be incapable of resolving family disputes simply because it does not recognize certain aspects of religious family law or ritual. Where the state family court does not recognize a religious marriage, for example, it cannot then grant a civil divorce. In relation to family matters, the primary reason a religious person would use either a sharia council or beth din would be to obtain a religious divorce.[65] Such persons are usually women as in both Judaism and Islam it is extremely difficult to obtain a religious divorce without the consent of one's husband. Where the husband's consent is not forthcoming the religious tribunals in both communities can assist. In a Jewish divorce, even where the husband consents, a beth din must facilitate and witness the husband granting the *gett* (bill of divorce).[66] Empirical research on the Muslim Law (Shariah) Council notes that the Council 'issued from the religious needs attendant upon a large and fast-growing community of Muslims in the UK' which demanded to be regulated by Islamic norms. The majority of cases come from women seeking a divorce because they have been unable to obtain one from their husbands.[67] The Muslim community has also developed what Pearl and Menski term 'angrezi shariat' – a hybrid legal system whereby they 'have built the requirements of English law into their traditional legal structures.'[68] Muslim marriage practices, for example, can follow both Islamic rituals and English registration requirements and couples divorce under both Islamic and English law. Angrezi shariat can be applied by sharia councils to solve problems which may arise for Muslims when English law is applied to them.[69] These

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65 Cardiff Study (n 64).

66 For a detailed history of the recognition of Jewish and Muslim marriage and divorce in the UK see Bernard Berkovitz, '*Get* and *Talaq* in English Law: Reflections on Law and Policy' in Mallat & Connors (n 54).

67 Shah-Kazemi (n 51) 9-10.

68 David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998) 75.

69 ibid 77.

include so-called 'limping marriages' whereby a husband refuses to give his wife a *talaq* (religious divorce) despite having obtained a civil divorce. Such refusals can create situations of great financial hardship and leave women unable to remarry without violating the tenets of their religion while the husband is free to enter a polygamous union. In response to problems such as these and other difficult marital disputes – which the civil authorities are unable or unwilling to resolve – Muslim leaders became engaged in informal dispute settlement fora aimed at resolving the disputes in accordance with Islamic family law and without breaking English law. These fora ultimately evolved into more organized sharia councils.[70]

Given that these tribunals enhance autonomy and enable individuals to live religious ways of life, the state has little interest in interfering in their activity unless they cause harm. The state has a strong interest in regulating certain matters relating to the family – in particular those concerning status, distribution of property, and child custody – because such regulation can determine access to benefits, uphold obligations, and protect from harm.[71] It has not, however, relinquished its authority in these matters to religious tribunals, although in certain limited instances religious bodies or religious rituals can ensure access to benefits, such as the benefits associated with a particular marital status. The remaining section of this Chapter will therefore focus on activity that potentially causes harm.

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[70] Pearl and Menski (n 68) 397.

[71] For a discussion of state interest in the regulation of the family see Nancy Cott, 'The Public Stake' in Mary Lynn Shanley (ed), *Just Marriage* (OUP 2004) and *Goodridge v Department of Public Health* (2003) 798 NE 2d 941 (Mass).

b. Internal minorities

We have seen that the state's reluctance – either judicially or legislatively – to interfere in the operation of religious tribunals allows individual members to maintain a religious way of life despite potentially differing societal beliefs and practices; in this way the state 'weakly permit[s]' them to operate.[72] The mere existence of religious tribunals may not pose much difficulty for the liberal state. Indeed, as we have seen they may be necessary for religious freedom and to enhance individual autonomy. The difficulty is where the operation of these tribunals deprives vulnerable individuals of protections from injustices that they would ordinarily have under the state court system or otherwise causes harm.

While group autonomy potentially furthers or secures individual religious freedom, it may also deny extending state protection to certain categories of vulnerable individuals – often women – in certain situations. Doctrinal structures created by case law or legislation that enable religious organizations and their members to maintain a religious way of life can potentially operate to allow religious organizations to limit the rights members of these organizations would ordinarily have in wider society and exacerbate intragroup inequalities. As we saw in Chapter Five, this is known as the 'internal minorities' issue.

If we are committed to autonomy then the autonomy of the group – and any special protections that enable that autonomy – should only be promoted if it enhances individual autonomy. While religious tribunals may enhance religious freedom and individual autonomy by making it possible for a person to better live a religious way of life, it is not the

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[72] Joseph Raz, *Practical Reason and Norms* (Princeton 1990) 150.

case that their activity is always consistent with individual autonomy. In some cases their activity may harm autonomy by limiting the range of options available to certain vulnerable individuals or harming their self-respect.

It should be noted here that while authority may limit autonomy through imposing obligations and therefore limiting the choices available to a person, we have seen in previous chapters that religious tribunals may advance autonomy *overall* by enabling religious communities to self-govern and thus ensuring that the option of living a religious way of life is available.[73] An autonomous life depends on 'the general character of one's environment and culture.'[74] Autonomy can also be 'a matter of degree' – a person may live an 'autonomy-enhancing culture' but not wish 'to maximize their degree of autonomy' and live just a basic autonomous life. Their life may be autonomous overall even if aspects of their life are not and even if some decisions along the way diminish their autonomy.

As we identified in Chapter Five, the real difficulty for autonomy can be the treatment of internal minorities. We discussed in that chapter how group autonomy can limit the overall autonomy of internal minorities by depriving them of protections that they would ordinarily have under state law. Religious tribunals may issue rulings that are inconsistent with state family law. Examples of the substantive conflict between UK law and religious law in family matters are most often given in relation to the sharia law applied by some sharia councils. It can include the unequal division of estates between male and female

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73 Thank you to Farrah Ahmed for discussing this point with me.

74 Raz (n 3) 391.

children on intestacy,[75] custody of children (where unlike UK law preset rules rather than individual circumstances determine custody),[76] maintenance (which is also determined by preset rules) and the recognition of polygamous marriages.

We have seen that state courts retain supervisory jurisdiction over decisions issued by religious tribunals in two ways. First, where parties seek to enforce the decisions of religious tribunals in a state court and these decisions come into conflict with state law, the state considers its law authoritative. For example, where the parties have agreed to submit a dispute to arbitration, the Arbitration Act 1996 applies standards of fairness and impartiality to arbitrations.[77] Civil courts also question the legality of a religious tribunal award or the way in which it was procured if it was contrary to public policy.[78] As we have seen, however, this scrutiny occurs with arbitration matters only and these exclude most family matters, with the exception of inheritance disputes.

Secondly, we have seen that the courts will scrutinize settlement agreements before issuing consent orders in family matters. Religious tribunals can also operate a mediation service using religious principles to guide the parties towards a settlement. In mediation, decisions are not supposed to be imposed on the parties, nor is the mediator supposed to rely on the interpretation and application of rules or make rulings. Instead, the parties should arrive at any agreement themselves. This agreement will have legal status only if it is a valid

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75 In the facts related to *Al-Midani* (n 29) the Islamic Sharia Council of London had ruled that as a female the beneficiary was entitled to only half the share of a male heir.

76 See discussion in *EM(Lebanon) v Home Secretary* (n 42).

77 eg ss 1, 4, and 33 and sch 1.

78 *Soleimany* (n 32).

contract and is thus ratified by the courts. There is some concern, however, that religious tribunals can effectively make a determination on the matter in which the parties simply acquiesce and then this determination is presented to the court as a mediated agreement. In relation to family settlements, a consent order would not be issued where the agreement appeared to be manifestly unjust. Thus where parties wish for a mediation agreement arrived at through the assistance of a sharia council to be enforced by the state, the state still retains ultimate authority by subjecting agreements to scrutiny before granting a consent order. This oversight provides some manner of protection against what the state sees to be unjust agreements. Short of manifest injustice, however, the courts will ordinarily not inquire into the circumstances that gave rise to the agreement.

Aside from these two circumstances, much activity of religious tribunals is beyond the scrutiny of state courts either because the disputes concern matters not legally cognizable (eg religious divorces) or because neither party wishes to bring the matter to a state court (eg spousal maintenance or child custody disputes). This leaves a large area of religious tribunal decision-making that is outside the oversight of the state. We have seen that even in the absence of official recognition of religious laws, informal legal pluralism can still exist in the English context to the extent that the state does little to prohibit such laws from operating or interferes with their application. Thus while parliamentarians emphasise that the decisions of religious tribunals on family matters are unenforceable and that other decisions are subject to national law,[79] this is only an issue if a party brings the matter to the state courts. Moreover,

[79] 'Shari'a law has no jurisdiction in England and Wales … we do not accommodate any other religious legal system in this country's laws. Any order in a family case is made or approved by a family judge applying English family law …. Any member of a religious community has the option to use religious courts and to agree to abide by their decisions but these decisions are subject to national law.' Bridget Prentice, HC Deb 23 October 2008, vol 481, col 562W.

it does not apply to those decisions of religious tribunals that are not legally cognizable. The state, except in extreme circumstances, does not actively intervene in these communities and shows little inclination to interfere in the operation of these tribunals. For the most part, the state considers their deliberations and decisions as part of the private sphere. It is a separate question then whether the state should intervene in such instances to prevent decisions that go against liberal state norms or oppress internal minorities.

Unlike commercial or other internal disciplinary disputes we have seen in previous chapters, however, family matters – such as divorce, child custody and maintenance – can often involve a power imbalance with one party to the dispute being more vulnerable to harm or injustices than the other. Collective privacy afforded families can thus exacerbate individual vulnerability and this vulnerability can become even more acute where authority over the regulation of the family is devolved from the state to religious group.[80] The regulation of family life by religious tribunals can have a particular impact on women. As Malik observes, the family is a focus for groups who wish to preserve or transmit their religion because the family embodies the collective identity of the group. Women, who reproduce and socialize future members are thus responsible for collective identity and passing on the group's particular traditions and norms. The group therefore has an interest in ensuring that women behave in a way within the family that 'preserves the membership boundaries and identity of the whole community.'[81] This explains, says Malik, why groups

[80] Shachar (n 59) 124.

[81] Maleiha Malik, 'The Branch on Which We Sit: Multiculturalism, Minority Women and Family Law' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge 2006) 215.

focus on family law when making accommodation demands – family law (and the control of members within the family) is central to group identity and cultural preservation.[82]

Limited material is publicly available on the internal decision-making processes of religious tribunals and the experience of their participants. This chapter does not claim to be an empirical study into how religious tribunals operate.[83] One should be cautious about generalizing as each tribunal is 'styled according to the needs of the faith community in question' and thus there is great variation in structure, processes, and the law applied.[84] It is clear that within the Muslim community, for example, there is no one unified Islamic dispute resolution system. Between and within Muslim communities there may be conflicts over how to resolve particular disputes and how to interpret Islamic principles relating to the family.[85]

Empirical research into how sharia councils, for example, operate does show, however, that the decisions or processes of these councils may be inconsistent with the state-granted rights of individuals with less power in the community, usually women. Women may not be aware of their entitlements under state family law and thus accept decisions or recommendations of their religious tribunal that are inconsistent with these entitlements. Mediation in family law cases can be problematic because it may be conducted in accordance

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82 ibid 215.

83 For detailed consideration of how three religious tribunals – a Jewish Beth Din; a matrimonial tribunal of the Roman Catholic Church; and a Muslim Shariah Council – operate in relation to family matters see the empirical investigation carried out by researchers at Cardiff Law School and the Centre for the Study of Islam in the UK at Cardiff University (n 64). For a major empirical study of sharia councils see Shah-Kazemi (n 51).

84 Cardiff Study (n 64) 24.

85 Samia Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2008) 10 Ecc LJ 283, 296.

with religious principles that prioritize keeping a marriage together even where there are allegations of spousal abuse.[86]

In addition to potential injustices in the substantive norms applied, the processes of religious tribunals can lead to injustices within the community. Procedurally, while sharia councils can provide Muslim women the opportunity to obtain a Muslim divorce without the express consent of her husband, a recent study of the operation of mediation in a divorce context by sharia councils in the UK found that they 'can render some women vulnerable to physical and emotional abuse.'[87] Bano's research reveals that some husbands use sharia councils in order to negotiate more favourable divorce. For example, they may negotiate for increased access to children even in cases where injunctions have been issued by civil law mechanisms to prohibit access.[88] In this way the council can work to deprive applicants of rights or protections they are otherwise entitled to. One finding was that women in the sample 'had been "coaxed" into participating in the reconciliation sessions with their husbands even though they were reluctant to do so.' This included women who had existing injunctions issued against their husbands on the grounds of violence.[89] The study found that 'participation takes place in a space that is preoccupied with reconciling the parties, is male dominated and is often imbued with conservative interpretations regarding the position of

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86 Bano (n 51) and Shah-Kazemi (n 51).

87 Bano (n 85) 300.

88 ibid 301.

89 ibid 303.

women in Islam (as mothers, wives and daughters).'[90] Empirical findings in this study thus confirm the existence of intra-group inequalities for women.[91]

The debate concerning religious tribunal treatment of vulnerable parties in family law matters has become largely one about Islam and women's rights. The controversy following the Archbishop of Canterbury's speech[92] focused on the potential for religious tribunals to harm women by denying them the protections and rights that they would ordinarily have under state law. It would, however, misrepresent how religious tribunals operate to begin any discussion of them with their treatment of women. Indeed, we have seen that religious tribunals can provide greater access to justice for women by supplementing and complementing the state court system.

Moreover, the issues raised by religious tribunal decision-making are not unique to Islam nor are the disadvantages to women. While religious tribunals may be far from perfect – there may be a bias in favour of male participants and inequality in financial awards, for example – injustice is not unique to these tribunals. The state legal system has, at least historically, had similar problems. These are not reasons to prohibit such tribunals but an argument for reform. Similarly, while the operation of religious tribunals may mean that women are reluctant to access the state court system, access to justice by women can be a problem across the board. Women may be reluctant to access the state court system due to pressure from individuals or their community; this is not peculiar to religious communities.

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90 ibid 302.

91 Similar findings were made by Shah-Kazemi (n 51).

92 (n 22).

As we will discuss below, where the state law system offers more just alternatives the solution is to encourage women to access their rights under that system not to prohibit religious tribunals. Short of lack of consent or serious harm, injustice against women cannot be grounds for interference in the decision-making processes of these communities because such interference could cause greater harm to autonomy by limiting their ability to live a religious way of life. It may be a reason for not enforcing such judgments, as this would compound injustices, but it would not be a reason for interference.

In any event then, regardless of whether the state system is just, interfering in the operation of religious tribunals could harm individual autonomy and religious freedom. So how should the state respond to institutions or practices within religious organizations that potentially oppress internal minorities?

The UK government sees compliance with state law as the best way to ensure protection for vulnerable individuals. Parliamentarians have been quite clear, however, that such compliance must come from *within* the communities rather than forced from outside. For example, in responding to a question concerning protecting women from the disadvantage of bigamy Lord Bach stated that:

> [t]he most practical and effective way of ensuring that the vulnerable are protected is to encourage the registration of mosques and imams for the purpose of carrying out marriages that comply with and will be recognized under the Marriage Act. We are working to achieve that and to raise awareness, particularly among Muslim women, of the

> formalities required for a legally recognized marriage in England and Wales [emphasis added].[93]

This attitude of non-interference is consistent with liberal theory. We saw in Chapter Five that under most liberal theories the state should tolerate – in other words not intervene in – a wide range of religious communities provided these groups meet certain minimal conditions. Theorists differ on what these conditions are, but we accepted in that Chapter that provided there is freely given consent and a meaningful exit the state has little legitimate interest in interfering in the internal workings of religious organizations.[94] This interference could limit their ability to self-govern and therefore the ability of their members to exercise religious and associative freedom.

We also saw in that Chapter that this justification can be problematic. Consent may be difficult to gauge from those members who have been systematically subordinated and they may lack an awareness of alternative options to choose differently even if those other options are available.[95] The idea of an exit is also problematic for two reasons. First, leaving a community may not be a realistic option in many instances. Secondly, it is questionable whether an apparent exit obviates all individual rights and justifies not intervening in the

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93 Lord Bach, HL Deb 04 June 2009, vol 711, col 297.

94 United Kingdom case law has accepted consent as a basis for limitations on one's family law rights on occasion. In *Re S (Abduction: Intolerable Situation: Beth Din)* [2000] 1 FLR 454 the mother, an Orthodox Jew, resisted returning her children to Israel on the basis that she would not get justice from the Beth Din in Israel. The court found that as she had chosen to raise her children in the Orthodox faith and submit to the jurisdiction of the Beth Din she could not then claim that the religious jurisdiction breached either her or her children's human rights.

95 The state has a strong interest in the treatment and custody of children because they cannot consent even though parents may have a positive claim that religious freedom protection entitles them to raise their children in their religion. This justifies why religious tribunal decisions relating to child custody should not be automatically enforceable in state courts.

internal affairs of a religious community. It may not be sufficient to justify the state perpetuating injustices within a community by adopting an attitude of non-interference.

For those members born into a particular religious community effecting "exit" may be psychologically and practically extremely difficult. Exit carries with it huge financial, social, and emotional costs. In the context of family matters specifically, this argument may be particularly problematic – more so than in the internal discipline context discussed in Chapter Five – given the power imbalances discussed earlier and the fact that membership in these communities and the application of their family norms are usually ascriptive. In many cases there may be no real prospect for exit and thus internal minorities do not freely choose to adhere to the minority group.[96]

But while the debate is presented as one of whether the option of an exit is sufficient to justify non-interference, it often comes down to the adequacy of the exit rather than the presence of a formal exit. Few theorists would advocate that a mere formal exit – in other words, that the person is not physically restrained – is sufficient to justify non-interference where the individual is deprived of all other necessary tools to leave. The state itself requires religious communities to provide its members with a minimum level of secular education for this very reason. Even Spinner-Halev, who is a staunch defender of tolerating illiberal communities, sets minimum conditions for the exit justification to be sufficient: that people be given minimal education so they develop capacities to be able to consider options and function outside their community and in the larger society, that they be made aware of an

[96] Leslie Green, 'Internal Minorities and their Rights' in Will Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995) 264-267.

adequate range of options, and that they not be coerced to remain within their community.[97] Similarly, Barry notes that 'if the possibility of exit were to be understood as no more than the absence of locked doors or chains, its value as a safeguard against oppression and exploitation would be extremely scant' therefore education is essential in ensuring people can leave.[98]

Even if we identify the conditions necessary to make exit adequate it may be highly unlikely that these can be established for vulnerable members in many illiberal communities. Okin argues that conditions that would make exit adequate are highly unlikely to be met in the case of many women in illiberal communities. She identifies three main reasons: girls are much more likely to be short-changed than boys in education; they are more likely to be socialized in ways that undermine their self-esteem and that encourage them to defer to existing hierarchies; and they are likely to be pushed into early or arranged marriages from which they lack the power to exit.[99] As she puts it, 'many fundamentalist religious schools and other institutions of cultural groups do socialize their children into the inevitability of sex roles and sex hierarchy and the godlessness of any departure from them.'[100] Spinner-Halev's discussion of the conditions necessary for a right of exit would not, therefore, be realistic according to Okin.

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97 Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (John Hopkins 2000) 71.

98 Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (HUP 2002) 239-40.

99 Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in Cohen et al (n 85) 128; '"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit' (2002) 112(2) Ethics 205, 216–22.

100 Okin, 'Mistresses of Their Own Destiny' (n 99) 226.

This criticism does not undermine the argument that exit is sufficient to justify non-intervention but merely sets out why such an exit is difficult to secure. Presumably, on Okin's theory, she would support non-intervention if these conditions were actually secured. However, short of the communities themselves providing the conditions necessary for a realistic exit, securing a realistic exit would require the state to intervene in the community to such an extent that the end result – of providing a realistic exit that would justify non-intervention – would be almost meaningless. Thus the only way for the exit argument to support non-intervention would be for these conditions to be secured by the community itself.

What constitutes a realistic exit and how the state should go about securing it is beyond the scope of this thesis. However, we can accept that the state ought to assure itself that there is one, or assist in promoting one if harmful activity that is nonetheless consented to is occurring within religious communities. In other words, if a realistic exit is available then there is less justification for the state to intervene. Seriously harmful activity will provide a good indication that the activity has not been consented to.

The issue, therefore, is not whether a person should have a right of exit or whether a meaningful exit is a sufficient condition to justify state non-intervention to protect or promote the rights of the individual member, but whether the state should intervene in religious communities to ensure that these internal minorities have the same rights within these communities as they have as members of the liberal state. Or, to put it another way, given the value that underpins liberalism, should the state act to ensure that these individuals

can develop and exercise their autonomy? This tension has given rise to much literature concerning the interaction between feminism and multiculturalism.[101]

Where religious freedom is exercised within the space left for liberty – rather than through ordinary legislative techniques such as exceptions – it may be more complicated for the state to intervene especially where the individual does not come forward to assert such a right. Rather than simply declining to support the practice by granting an exception, protection may require the state to take positive action or intervene into an area usually left unregulated.

If we accept autonomy as the value that underpins liberalism, this will affect how we determine legitimate state action and in turn the appropriate stance the state should take on religious matters. As explained in Chapter One or as this thesis assumes, emphasis on personal autonomy underpins at the very least the negative conception of liberty – a person should be left alone to choose their own life. Being coerced into becoming autonomous would be inconsistent with leading an autonomous life as 'it is the special character of autonomy that one cannot make another person autonomous.'[102] Raz sees the role of the coercive power of the state as 'confined to securing the background conditions which enable a person to be autonomous.'[103] Whether an individual actually makes good of these conditions to become autonomous is her choice.[104] This does not prevent the state from going

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101 Shachar (n 57) and Cohen et al (n 85).

102 Raz (n 3) 407.

103 ibid 407.

104 Raz (n 3) 407-409.

further than simply assuring itself that membership is voluntary (by the presence of an exit) and encouraging a person to leave that community.

Few theorists would advocate actively intervening in illiberal communities.[105] Even an autonomy-based theory of liberty would not support state intervention in illiberal communities. Such intervention would be illegitimate. It would be inconsistent with autonomy to coerce someone into being autonomous and state intervention in these communities would have such an effect. Coercion reduces the options available to a person (and thus is likely to change a person's situation for the worse). It 'invades his autonomy.'[106] Coercion here can be defined as a threat that forces a person's will. The person's will is subjected to the will of another and thereby his autonomy is invaded.[107] A person cannot not be 'a part author of one's world' if they are serving the will of another. Forcing a person invades their autonomy, first, because by serving another's will they are serving the coercers ends (rather than their own) and, second, the coercer restricts their options.[108] Although Raz does concede that a single act of coercion of a not too serious nature makes little difference to a person's ability to lead an autonomous life.'[109] Coercing members of religious organizations to change how they resolve internal disputes would also be inconsistent with autonomy and more than a single act.

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105 cf Okin (n 99).

106 Raz (n 3) 150.

107 Raz (n 3) 154.

108 ibid 155.

109 ibid 157.

While it would not be legitimate for the state to coerce a group into reforming – prohibiting group members from restricting their freedom would undermine their autonomy – the state still has an interest in promoting autonomy. This is because the state *should* promote what is valuable in life to choose if we accept that it ought to be concerned with the well-being of its citizens. Accepting that the state cannot or should not force autonomy does not prevent the state from making other morally acceptable options available to a person. Indeed, under Raz's model, it is required to satisfy the test of adequacy of options.[110] The state can also help create 'the inner capacities required for the conduct of an autonomous life', for example, cognitive capacities such as reasoning abilities.[111] Raz goes further than a negative conception of liberty and advocates autonomy as the source of a conception of positive liberty.

Thus it would not be illegitimate for the state to *encourage* individuals to choose a way of life that better advances their well-being. Encouragement does not harm autonomy. Indeed, this is Raz's argument: advancing individual well-being does not mean the 'coercive imposition of a style of life. Much of it could be encouraging and facilitating action of the desired kind, or discouraging undesired modes of behaviour.'[112] Coercion or intervention can be contrasted with 'offers … made in order to induce people to act against their long-term interests' or 'other methods of encouraging people to act in ways deemed to be socially beneficial by making the alternative less attractive.' It does not involve people imposing their

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110 ibid 379.

111 ibid 408.

112 Raz (n 3) 161.

style of life on others.[113] The state can also 'encourage, and entice others to respect rights' and in this way 'facilitate agreed solutions [rather] than … impose some external judgment on them.'[114]

Thus while the state coercing (or attempting to coerce) a religious community into changing would be inconsistent with autonomy, encouraging communities to change may not be. The state can also provide an organization with the opportunity to direct its own reform – steering the group in a direction suitable for its distinctive history, purposes, and character[115] – rather than relying on the transformative power of exit. When discussing internal minorities we must be mindful not to 'down play … their agency and attribute … to them a fixed position within a system of social power.'[116] Members of groups do challenge internal rules and practices through both formal and informal mechanisms. Accepting the dilemma as one of leading an autonomous life or being a member of a religious community ignores the extent to which internal minorities do assess and reinterpret religious doctrine in a way that is consistent with an exercise of autonomy. The best the state can do is to allow for the group's own internal procedures to operate and hope that encouragement from mainstream society will provide momentum for internal change.

In the context of family law then, it would not be illegitimate for the state to encourage religious group members to have their disputes resolved within the state system by running campaigns to make a person aware of their rights within that system. It would also

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113 ibid 161.

114 Leslie Green, 'Rights of Exit' (1998) 4 Legal Theory 165, 183.

115 ibid.

116 Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (OUP 2008) 16.

not be illegitimate for the state to enact legislation such as that proposed in the Arbitration and Mediation Services (Equality) Bill, s 1 to require public authorities to inform parties in unregistered religious marriages that they have fewer legal rights compared to spouses in a registered marriage. Similarly, measures in the current Matrimonial Causes Act 1973 that provide an incentive for husbands to grant their wives religious divorces is not an illegitimate way of seeking to prevent the undesirable treatment of women in the divorce process. In other contexts it would not be illegitimate to deny groups certain associations with the state, for example the benefit of a contractual relationship in the goods and services context. It is also not illegitimate for the state to impose minimum requirements within the education system to ensure that group members are aware of other available options and have the skills necessary to leave their community if they wish.

The details of the design of such a system that encourages members away from oppressive group mechanisms, or to push for reform within the community, is outside the scope of this thesis. For the purposes of this thesis, this simply means that the state can be justified in trying to promote the autonomy of internal minorities in ways other than intervention.

Conclusion

We have seen that some measure of self-governance is necessary for religious communities to enable their members to exercise their religious freedom and live a religious way of life. This self-governance may involve these communities having their own dispute resolution and advisory bodies. Where the participants have consented to these processes and there is meaningful exit, it should be relatively uncontroversial to permit religious tribunals to play a

role in advising on or resolving family matters in accordance with religious law. This is consistent with both religious freedom and the underlying value of individual autonomy.

Presenting the relationship between the state legal system and religious tribunals as one of irreconcilable conflict ignores the extent to which these systems can supplement and complement, rather than replace, each other. Religious tribunals in the UK can supplement and complement state family law in two ways: first, by facilitating mediation agreements; and secondly, by advising on family matters and resolving disputes that are not legally cognizable. Due to potential power imbalances and particular vulnerabilities, all mediation agreements related to the family require state scrutiny before they are enforceable in state courts.

The status quo reflects a healthy balance between the interests of the liberal state and those of religious communities.[117] Allowing these bodies to operate free from state regulation can, however, permit harm. Where religious tribunals apply norms or engage in practices that potentially undermine individual autonomy and oppress their members but the parties are not requesting that their decisions be enforced in state courts, then the question is how the state should respond. Provided that there is consent to the tribunal's processes, meaningful exit, and no serious harm then the state has no grounds for prohibiting these tribunals. Indeed, prohibiting them would be inconsistent with religious freedom. The solution to any remaining potential injustices – through lack of awareness of state family law rights, for example – would not be to prohibit religious tribunals or to force them to change – this would be inconsistent with autonomy and religious freedom – but to encourage them to adopt

[117] Although these interests are not necessarily mutually exclusive. As this thesis has argued, the liberal state has an interest in ensuring religious freedom.

fairer norms and practices and to make individuals aware of these secular avenues to dispute resolution.

8. CONCLUSION

This thesis has been critically examining the application of UK law to religious organizations in various contexts. These contexts give rise to a range of religious freedom claims from requests for exceptions and non-interference to state application of internal norms in adjudicating internal disputes, all in order to ensure that the option of a religious way of life is available. This thesis has been primarily concerned with the circumstances in which state law ought not to apply to religious organizations.

A central question of this thesis has been how the state ought to respond to the activity and norms of religious organizations that potentially differ from state law and its underlying liberal values. We saw this question addressed in six different factual contexts. Chapter Two looked at discrimination in the employment practices of religious organizations and the exceptions contained in the Equality Act 2010. Chapter Three looked at the religious organization exceptions for discrimination in the goods and services context, also contained in that Act. Chapters Four and Five dealt with state interference in membership admission and internal discipline matters. Chapter Six examined judicial approaches to internal property disputes. Lastly, Chapter Seven considered the operation of religious tribunals in resolving or advising on family matters. In each of these chapters this thesis analyzed the UK law that applies (or not) to religious organizations in that context and considered whether that approach can be justified, examining in detail certain normative considerations that may be relevant when making that determination. This thesis was not able to cover all contexts

where religious organizations and state law interact and therefore the areas considered in detail raise issues that are both under-examined and have wider doctrinal implications. They also illustrate the varying nature of the relationship between the state and religious organizations and the varying responses the state can (and ought to) take to activity that potentially conflicts with state law. These responses can be proactive and forward-looking, in the form of legislation; reactive and responding to disputes that have largely already occurred, in the form of case law; or inactive, in that the state simply does nothing.

While these factual contexts differ they nonetheless give rise to common normative considerations regarding the relationship between religious organizations and state law. This concluding chapter therefore does three things. First, it sets out the main normative considerations and conclusions from the preceding doctrinal chapters. Secondly, it uses these normative considerations to suggest a general approach for determining when state law should apply to religious organizations. Finally, it makes some brief concluding remarks as to whether the current position in the UK is broadly consistent with this approach.

Any consideration of the application of UK law to religious organizations necessarily ought to involve examining the relationship between the state and religious organizations more generally and the legitimate reach of government. This inevitably raises broader issues of governance and political theory that are beyond the scope of this thesis. Compared to the breadth and depth of these issues the recommendations in this final chapter are modest.

1. NORMATIVE CONSIDERATIONS

The preceding doctrinal chapters identify four general themes which inform whether state law should apply to religious organizations: the value of autonomy; the importance of social forms to autonomy and thus the option of a religious way of life; the importance of self-governance to this option of a religious way of life; and the relevance of enforcing these internal norms to enhancing autonomy and thus religious freedom. Within these themes are two interrelated sub-issues: the enforceability of illiberal internal norms and the potential oppression of internal minorities by the organization. While the first sub-theme – illiberal internal norms – is addressed briefly in this part, both of these two sub-themes will be elaborated upon in the second part of this chapter where an approach for determining when state law should apply to religious organizations is suggested.

a. Autonomy

We saw in Chapter One that this thesis views autonomy as the value that best encompasses the concerns of liberal theory; it therefore forms the theoretical foundations of any liberal state. This means that autonomy is also the best liberal normative justification for religious freedom. If we value personal autonomy then we must value autonomy in relation to religious matters too. Protection for religion is essential to this autonomy-based conception of liberalism as it is part of an adequate range of choices that must be available in order to make decisions about how to construct one's life. However, while religion is an option, it is a particular type of option – a fundamental and comprehensive option – that distinguishes it from other exercises of autonomy due to its special importance in people's lives.

b. Social forms

We saw in this thesis that religious organizations have an important role to play in ensuring that the option of a religious way of life is available. Comprehensive options such as religion depend on existing social forms – forms of behaviour which are widely practised in society – in order to be successfully pursued. Participation in these social forms is therefore part of this notion of autonomy – it may be necessary to realize personal autonomy. Without these social forms particular options may not be available.

Religion is a social form and it is through religious organizations that religion can be created, manifested, and sustained. Religious organizations are therefore usually necessary if someone wishes to pursue a religious way of life because they provide the community, norms and practices that make up this comprehensive option. The social form of religion and its accessibility through religious organizations are therefore important to the individual exercise of religious freedom and to the option of a religious way of life.

c. Self-governance

We saw in this thesis that self-governance is crucial to group or institutional autonomy and group autonomy is important for individual autonomy. Group autonomy allows these social forms to exist and it is by participating in these social forms that an individual can live a religious way of life.

As religion is a social form, we saw that religious freedom – the option of a religious way of life – has a strong associational aspect and this necessarily requires individuals to be able to practise their religion together with those holding similar beliefs and according to

similar doctrine. The individual religious believer thus has an interest in the religious organization through which they practise their religion not only existing but functioning in a way that allows them to live that religious way of life. Individuals have an interest therefore in being part of an organization that is self-governing. Membership in a self-governing organization allows them to better exercise their autonomy by collectively exercising their religious freedom in a way that they choose.

Group autonomy therefore enables a group to self-define and self-direct according to religion and thus is necessary for the option of a religious way of life to be meaningful. Without group autonomy an organization ceases to exist in a form which manifests that particular identity. This would compromise religious freedom, and thus personal autonomy, by harming the organization through which it is realized. A burden upon religious group autonomy, therefore, is a burden on individual religious freedom.

This thesis discussed three aspects of self-governance that are essential to group autonomy: the ability to select leaders, determine membership, and manage internal discipline. Each aspect enables a group to define itself and ensure that the option of a religious way of life is available. In Chapter Two we saw that religious organizations have a strong interest in selecting those people who are responsible for sustaining group identity free from state interference. We saw in Chapters Four and Five that an organization and its members have a strong interest in the group determining its own membership and this includes matters of internal discipline which affect membership and determine acceptable group behaviour. Determining membership is essential to group autonomy. A group cannot carry on and determine its own identity if it cannot choose those members who carry that

identity. Moreover, religion, as a social form, cannot exist without a certain number of people subscribing to similar beliefs and engaging in similar practices. It is through religious organizations that these beliefs and practices are maintained because its members subscribe to and engage in them. Group autonomy over religious group membership is therefore essential to ensuring that the option of a religious way of life exists because it involves ensuring that those people who are members of the group and thus responsible for maintaining the religion do in fact subscribe to the religion.

Group autonomy over internal discipline also enables a group to construct or sustain the religious identity needed to enable its members to live a religious life. Discipline or expulsion of members is part of group self-definition – it enables a group to determine who should remain a member and what behaviour is acceptable to the group. As we saw in Chapter Seven, self-governance may also involve religious communities having their own dispute resolution and advisory bodies that make rulings and give guidance on aspects of the group's religious practice. These bodies may ensure that their members are better able to live a religious way of life.

d. The application of internal norms

While the meaningful exercise of religious freedom requires a large amount of autonomy to be granted to religious organizations to conduct their internal affairs as they wish, questions arose in this thesis regarding the role of the state when internal disputes occur: should the state intervene in such disputes and, if so, in what manner?

We saw in Chapters Five and Six that where a legally cognizable interest of a member is at stake it may also be consistent with autonomy for the state to hold either the organization or the individual to any internal rules of the organization. We saw in Chapter Five that holding a group to its internal rules such as articles of association through, for example, recognising a breach of contract claim is consistent with individual autonomy. This may also mean that where those articles of association have been complied with through the organization's own internal processes then the court should defer to those processes. This would be consistent with both group and individual autonomy. Such deference can therefore be justified on the basis of individual autonomy. Individuals should be free to agree to comply with certain rules and undertake certain responsibilities; holding a person to such agreements is to respect their choices and treat them as autonomous human beings. Similarly, as we saw in Chapter Six, property law can promote autonomy by providing mechanisms which enable individuals to order their lives in cooperation with others by determining, for example, access to and use of those facilities needed to practise a religion. It may be consistent with autonomy to determine certain property rights through the application of internal rules.

The real issue is, however, which standards should apply in resolving internal disputes. As we saw in the context of internal discipline in Chapter Five and property disputes in Chapter Six, the courts may be willing to apply the internal rules of religious organizations when resolving disputes between members. They may also interpret legal principles in light of the internal norms of the community. Here the state will intervene in the dispute but apply internal norms rather than state law principles. We concluded in those chapters that it was not illegitimate for the courts to apply these norms. Such application can

be consistent with and advance both individual and group autonomy. This thesis concluded that while a deference approach – an approach which defers to the internal decision-making procedures of the organization – is often the best approach for protecting group autonomy, it is not the only approach for protecting and promoting group autonomy. Autonomy may be enhanced by judicial interpretation and application of internal norms. The best approach will often depend on the particular dispute and the constitutional structure of the organization.

e. Illiberal internal norms

We saw in this thesis that enforcing a group's internal norms can be consistent with group autonomy and therefore may not necessarily inhibit religious freedom by compromising group autonomy.

If we accept that it can be legitimate (and possibly even required) for the state to recognize and enforce the internal norms of religious organizations – either through judicial decision-making or legislative enactment – we then have to consider whether this acceptance extends to those internal norms that are inconsistent with liberal state values, particularly those that are inconsistent with certain public law precepts such as principles of non-discrimination or natural justice. This is a theme that runs through all of the doctrinal chapters of this thesis.

There are four ways that the state can effectively permit internal discriminatory norms to operate instead of state law norms. The first is to positively recognize them by incorporating them into legislation such that they become part of state law. This can give a person a right or impose an obligation by reference to a religious norm. Such instances are

rare for reasons discussed below – the state ought not to lend its authority to measures that illegitimately harm autonomy. The second way is to grant an exception to a generally applicable law for activity that is in accordance with a religious group norm. We saw clear examples of this in the employment context in Chapter Two and the goods and services context in Chapter Three. Here we saw that exceptions can be justified by an appeal to autonomy and religious freedom. The third way is to give effect to these internal norms when resolving an internal dispute. The final way is to refuse to intervene in internal disputes thus effectively permitting religious group norms that are at odds with liberal state values to operate. These methods will be discussed further in the second part of this chapter below.

Below we will see that how the state ought to respond to illiberal internal norms will depend on the approach it ought to take to the matter more generally. In some instances it may be appropriate to grant exceptions for the illiberal norms of religious organizations, while in other instances it may be appropriate for the state to refuse to enforce them. While it may be inappropriate to intervene in an organization to ensure that it complies with more liberal norms, this does not provide a justification for an organization using the mechanisms of the state to enforce these norms.

The conclusions here will inform the recommendations in the next section.

2. A SUGGESTED APPROACH

We have seen that a general commitment to religious freedom tells us little about what this commitment ought to mean in a wide range of situations especially where it may conflict with other commitments of the liberal state. It is axiomatic that an argument from religious

freedom will not justify any exception to any state law that inhibits religious practice; nor will it support a religious organization engaging in any activity it wishes free from state intervention or regulation.

However, if we accept that the option of a religious way of life is valuable then we will not want to burden its exercise unjustifiably. Without certain exceptions or non-application of state law the option of religious way of life may not be possible and this would harm autonomy by removing an important option that is necessary for there to be an adequate range of options. We must then consider carefully the circumstances in which its limitation is justifiable.

As this thesis demonstrates, however, religious freedom claims arise in a wide range of situations and seek a variety of responses. In some instances the question is whether an exception should be provided to a generally applicable law, in others it is whether the courts should adjudicate on a particular dispute and in what manner, and then in others it is whether the state should intervene to prevent a particular activity from occurring. Religious group autonomy – an essential aspect of religious freedom – is, for example, 'a necessarily complicated and contested idea.'[1] It is the 'sheer scope' of possible interactions between religion and government that makes the parameters of religious freedom so difficult.[2]

The general question is, however, whether state law should apply to the activity of religious organizations. In some instances the answer to this question is straightforward. It is

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[1] Perry Dane, 'Omalous Autonomy' [2004] BY Uni L Rev 1715, 1740.

[2] Benjamin Berger, 'Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v Hutterian Brethren of Wilson Colony*' (2010) 52 Supreme Ct L Rev 25, 28.

relatively uncontroversial, for example, that contract law and other forms of private ordering and most aspects of criminal and tort law apply to religious organizations. In others, as we saw in this thesis, it is more complicated.

This section suggests an approach for determining when state law should apply to religious organizations. It does not, however, attempt to formulate a strict test for determining such application. As this thesis has shown, too much depends on the particular context and various factors involved to attempt to articulate such a test in the abstract; issues arising from the relationship between religious organizations and the law are 'deeply contextual.'[3] Each context thus gives rise to particular considerations and concerns and these will influence whether state law should apply and how. There is no conceptual divide between areas of law in terms of the legitimacy of their general application to religious organizations. The issue is usually whether it is appropriate to apply a particular law to the organization in that particular circumstance.

It would therefore be extremely difficult and perhaps unwise to attempt to formulate any strict 'test' – let alone a strict test that would apply to all such conflicts – for when state law should apply to religious organizations. Moreover, new situations constantly arise in which religion and state law interact and established relationships change, and thus formulating a test that could anticipate all future encounters would be impossible. We can, however, make some general observations on what factors should influence its application.

[3] Dane (n 1) 1748.

An approach that suggests factors for consideration – rather than any strict test – is consistent with a 'flexible, contextual' approach to difficult religious freedom cases suggested by Ahdar and Leigh.[4] It is also largely consistent with that proposed by Greenawalt where he states that any approach to religious freedom issues 'cannot be reduced to a single formula … although we can identify major considerations that should guide legislators and judges.'[5] Greenawalt notes that 'a similar range of considerations or factors figure for many problems' such that he can offer some provisionally right or at least useful answers to 'standard' cases.[6] As we have seen during the course of this thesis, there are standard issues or cases about which we can offer provisional answers; where there are more difficult or nuanced cases then these considerations can inform any approach. Greenawalt proposes developing an approach from the 'bottom up' by 'addressing … a range of [discrete] issues.'[7] We should attempt to resolve issues concerning religious freedom not 'in the abstract but by focusing on concrete issues in context.'[8]

This contextual approach is the one taken by this thesis with the qualifier that any examination of discrete issues should be informed by a commitment to the value of autonomy. With this in mind, when considering the applicability of state law to religious organizations this thesis starts from this commitment to autonomy. It accepts that promoting individual autonomy is and should be the underlying commitment of the liberal state.

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4 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 189.

5 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (Princeton 2008) 1.

6 ibid 4.

7 ibid 1.

8 ibid 543.

While this thesis does not claim to be a taxonomic scheme detailing where state law and religious organizations interact, it has identified three broad instances where we must consider whether state law should apply to the activity of religious organizations: the application of generally applicable laws; resolving internal disputes; and activity otherwise left unregulated.

a. Exceptions to generally applicable laws

Most liberal theories adopt some version of the harm principle to explain the limits of state coercive power. The no-harm rule was articulated by John Locke in the seventeenth century and it then became a cornerstone of liberal theory through the work of John Stuart Mill in the 19th century. Mill developed Locke's thinking into what became known as the harm principle. Since then numerous theorists have elaborated upon it and it is widely accepted as the justification unpinning any law than impinges upon individual liberty.[9] Generally speaking, the harm principle asserts that the only purpose for which the law may use its coercive power is to prevent harm.[10]

Defining harm and the limits of the harm principle is difficult. The complexity arises in part from the fact that any conception of harm will be influenced by cultural context. Thus we should avoid 'rigid' definitions.[11] Despite the difficulty in defining harm, we saw in Chapters Two and Three that it may be assessed based on the extent to which the activity

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[9] See HLA Hart, *Law, Liberty, and Morality* (Stanford 1963) 4-5 (Hart saw the line between illegitimate and legitimate laws as turning on this harm principle); John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1. See also Joel Feinberg, *Harm to Others* (New York 1984).

[10] Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 400.

[11] Gardner (n 9).

interferes with personal autonomy. If we accept that personal autonomy is the value that best underpins liberalism, then the coercive power of the state is limited to prohibiting those activities which harm personal autonomy. In other words, by an appeal to an autonomy-based harm principle.[12]

If we accept that preventing harm can justify the coercive power of the state, then the question arises as to when exceptions should be provided to generally applicable laws. We saw in Chapter Two that where exceptions are to "victimless laws", such as uniform regulations, they may not pose exceptional difficulty for liberal theory because such exceptions may relieve a particular burden that the law places on religious freedom without also permitting additional harm. It is harder to justify an exception where the claim conflicts with the rights of another individual, as we saw in Chapter Two in the employment context and in Chapter Three in the goods and services chapters. Here the state must strike a balance between the two claims. The goal is to reach a solution that causes the least harm.

Accepting an autonomy-based harm principle as determining the limits of state coercive power, whether religious organizations should be granted an exception to legislation ultimately depends therefore on balancing the strength of the state interest in the application of the legislation to the organization (which includes its interest in protecting other individuals from harm) and the harm caused to religious freedom that would be caused by

[12] Raz (n 10) 412-420.

applying the law to the organization. The relevant state interest may not simply be its interest in the general law but its interest in it applying to that particular religious organization.[13]

We have seen in this thesis that the harm to religious freedom and hence autonomy may depend on how much the legislation impacts on those aspects of the religious organization that are needed to ensure that the option of a religious way of life exists. This can include organizational aspects – how the organization is structured and operates – or doctrinal aspects – what the beliefs and practices of the organization are. Thus the closer the law comes to the essential aspects of an organization, or the more the law affects a person's ability to live that religious way of life, the harder it may be to justify its application.

By contrast, harm to religious freedom decreases the less important the activity is to ensuring that the option of a religious way of life is possible. Laycock asserts that church autonomy ought to be strongest with respect to internal affairs[14] and Bagni contends that the strength of religious group autonomy should be inversely proportional to the extent that the activity at issue is secular. Group autonomy is therefore greatest at a church's spiritual "epicentre," which encompasses worship, membership policies, and the relationship between the church and its clergy.[15]

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[13] Kent Greenawalt accepts a similar approach: *Religion and the Constitution: Free Exercise and Fairness* (Princeton 2006) 7.

[14] Douglas Laycock, 'Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy' (1981) 81 Colum L Rev 1373.

[15] Bruce Bagni, 'Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations' (1979) 79 Colum L Rev 1514, 1539.

The context in which the legislation would potentially apply therefore carries with it presumptions regarding the potential harm to the organization. In some instances the presumption is that harm to the organization would be great and therefore state law should not apply. A good reason – ie a stronger state interest – is then needed for it to apply. In some instances the presumption is that harm to the organization would be low and therefore state law ought to apply. A good reason – ie one that would justify an exception – would then be needed for it not to. The state has an interest in preventing harm and this can override these presumptions either where there is harm caused by activity related to internal affairs, or little or no harm prevented by applying the law to an organization's external activity. A helpful way to start, therefore, when considering whether state law should apply to religious organizations is to divide the contexts into two categories: internal affairs and external activity.[16]

Determining the application of state law based on these categories, however, may be problematic for two reasons. First, these categories may overlap. For example, employment, which is generally considered an external activity, also involves matters that are related to the internal affairs of the organization such as the appointment of spiritual leaders. The difficulty in separating out these categories is inherent in the nature of these issues which are often multi-faceted; any attempt to maintain a strict separation may be misguided. Secondly, as discussed in Chapter Three, the religious organization and its members may not draw a distinction between internal and external activity. Religion is experienced as a

[16] Lupu and Tuttle adopt a similar approach noting the 'duality of roles' that these groups can have and draws a distinction between the 'internal life and self-governance' of these organizations and those functions that are 'indistinguishable from other segments of the [secular] world': Ira Lupu and Robert Tuttle, 'The Distinctive Place of Religious Entities in Our Constitutional Order' (2002) 47 Vill L Rev 37, 92.

comprehensive world view and thus a religious person may not experience the world as one that involves public/private boundaries.[17] Public or external activity may be an 'expression and extension' of religion.[18] This means that certain external activity may be essential to an organization's mission, particularly where the religion is one that proselytizes or where public service is part of its doctrine. Here the harm to the organization should this activity be limited in some way by the state may be great.

These problems are addressed by treating these approaches as *presumptions*. In each instance either the state or the organization can put forward reasons why the particular presumption is incorrect. The presumptions do, however, help to protect the organization from state interference (by requiring good reasons to be put forward before state law can legitimately apply to internal affairs) and, with regards to external activity, those that may otherwise be harmed by religious organizations not complying with state law.

An approach which balances the strength of the state interest against the harm to the organization is consistent with that proposed by others. Sunstein suggests that an approach such as this that balances 'the strength and nature of the state interest' against 'the extent of the adverse effect' on the organization may be the best approach when determining whether certain state laws should apply to religious organizations. On this approach, at either end of the spectrum would be the easy cases – weak or illegitimate state interests which would not justify an intrusion, overriding interests (eg the prevention of murder) that would justify any

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[17] Adhar & Leigh (n 4) 125 (criticising the distinction in relation to belief and practice rather than internal and external practice).

[18] Alvin Esau, '"Islands of Exclusivity": Religious Organization and Employment Discrimination' (1999-2000) 33 U Brit Colum L Rev 719, 732.

intrusion no matter how severe, and compelling interests that would justify an intrusion depending on its severity (or, in other words, the harm it causes to the organisation). The most difficult cases would be where there was a compelling state interest 'matched by a plausible claim that the interference would seriously jeopardize the continuing functioning' of the organization.[19]

This approach is also broadly consistent with one that takes into account the internal or external nature of the activity when determining the state interest and the harm to the organisation. There would be a weaker state interest if the activity were internal (with a presumption that the severity of or harm caused by the interference would also be greater) and a greater state interest if the activity were external (with a presumption that harm caused by interference would be weaker). Overriding interest in internal affairs or weak interest in external activity could rebut the relevant presumptions of state interest in those spheres. This leaves us with either cases involving a compelling state interest in internal activity, or cases where serious harm is caused to the organization by state regulation of external activity. Here we balance the state interest against the extent and severity of the harm caused by the interference. In assessing the legitimacy of the application of any law to religious organizations that limited religious freedom we would, of course, also have to assess whether its application was a proportionate means of realizing the state interest.

While this approach has been seen as probably the most 'sensible,' it does rely on having a 'high degree of confidence' in those who would administer the assessment.[20] The

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[19] Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' in Debra Satz and Rob Reich (eds), *Towards a Humanist Justice: The Political Philosophy of Humanist Justice* (OUP 2009) 136.

[20] Sunstein (n 19) 137.

courts or the legislature would have to assess not only the strength of the state interest but also the degree to which any intervention would impact upon the organization. However, the courts and the legislature are well-versed in assessing state interest. Moreover, the religious organizations affected can inform them as to the impact of any intervention.

i. Internal affairs

We have suggested that there ought to be a presumption that state law ought not to apply to the internal affairs of religious organization. This is because to do so could compromise group autonomy and thus religious freedom. Group autonomy is important for individual autonomy because it ensures that social forms such as religion can exist and it is through these social forms that an individual has the option of a religious way of life. Group autonomy enables a group to self-define and self-direct according to religion and thus is necessary for the option of a religious way of life to be meaningful. Compromising group autonomy would therefore harm individual autonomy by harming the organization through which the option of a religious way of life is realized.

As noted, however, drawing a distinction between internal affairs and external activity is not always easy. As we saw in Chapter Two, employment discrimination is not simply an internal matter. The interests that need protecting include not just the interests of the organization but those of potential applicants which can include non-members. A balance needs to be struck therefore between the state interest in eliminating unlawful discrimination and preventing harm to those applicants and the interest of religious organization in group autonomy. The closer the position or activity is to ensuring the organization can exist in its

particular form then the greater the harm to the organization should the government interfere in its appointment or practise.

Because the concern with this presumption is with ensuring that organizations can exist through which people can exercise their religious freedom, this presumption applies to those affairs that are essential to the existence of the group in a form that is consistent with that religion. This presumption would obviously include certain religious rituals but, in light of the discussions in this thesis, this presumption applies most notably to group autonomy. We saw in this thesis that those matters that are essential to group autonomy include the appointment of persons responsible for determining or maintaining the identity of the group – leadership positions – and self-governance in relation to membership and internal discipline.

An approach which focuses on those matters that are essential to group autonomy is also not without its difficulties. In the employment context, for example, how do we determine which positions are essential to the organization such that state interference in certain appointments could undermine the character of the organization? As we saw in Chapter Two, determining those positions that are essential to the organization's mission may not always be clear. While spiritual leaders – such as priests, rabbis and imams – are a relatively clear category of persons who are essential to an organization, it may be difficult to determine positions outside of this category. Does this category include, for example, teachers or trainee priests? And should only positions that are deemed 'essential' to the organization be considered part of the organization's internal affairs and thus exempt from state regulation? While administrative staff and other assistants such as cleaners may be a clear example of persons who have a limited role in perpetuating the purpose of

organizations, even these categories are debatable. Esau, for example, argues for an 'organic' view of employment rather than an instrumental one based on a strict separation between religious and secular functions. For many religious organizations, a worker is expected to participate in the mission of the organization more generally rather than just perform their task; they worship together *through* work, not just *at* work. In this way a distinction based on secular and religious roles, for example, would be artificial for many religious organizations.[21] While this may be true, the burden on religious or associational freedom would still be greater with those positions that are essential to promoting the mission of the organization, and it is interference in the appointments to those positions by the state that would bring the greater threat to autonomy.

One of the ways of approaching an inquiry into those matters which should be beyond state interference has been to consider which of them are "central" to the organization. This approach has been criticized. In the US context, for example, the courts have refused to inquire into the centrality of employment positions when considering the application of discrimination exceptions as they have seen such inquiry as excessive entanglement in church affairs, even where the position at issue was that of a cleaner.[22] As this thesis has noted, due to its constitutional context, US jurisprudence generally shows a greater deference to the internal decision-making of religious organizations than in the UK. The UK equality legislation would be considered excessive entanglement in the US where its legislative exceptions, as have been interpreted and applied by the courts, are more generous to the

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[21] Alvin Esau, '"Islands of Exclusivity": Religious Organizations and Employment Discrimination' (1999-2000) 33 U Brit Colum L Rev 719, 734.

[22] *Corp of the Presiding Bishop of Jesus Christ of Latter-Day Saints v Amos* (1987) 483 US 327, 342 (Amos).

organization.[23] While in the UK in the context of religious discrimination claims the courts have been reluctant to determine the validity of a belief,[24] they have not shown the same reluctance regarding the centrality of such beliefs. In *Ladele*[25] the Court of Appeal accepted that the belief regarding marriage was not core, and in *Eweida*[26] the court accepted that the claimant was not required by her religion to wear the cross.

The approach suggested in this thesis, however, would not be concerned so much with the centrality of the *belief* to the religion, but the centrality of the *position* or the *activity* to the existence or functioning of the organization. We are concerned with the importance to group autonomy of non-interference in that particular activity, for example, in employment, membership admissions, or internal discipline. The question is how important state non-interference in that activity is to making sure the option of a religious way of life is available rather than the importance of the particular belief. While this may involve some inquiry into the norms that inform the requirements for the position – as occurs, for example, in the UK discrimination law exceptions – it is possible to assess the centrality of that position to the organization without doing so. For example, we can conclude that a rabbi is a position central to the organization without needing to inquire into what characteristics a rabbi is required to have according to religious doctrine. This avoids some of the concerns identified regarding the courts inquiring into the centrality of the belief for the religion – concerns that the court

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23 (United States) Civil Rights Act 1964, s 702. Eg *McClure v Salvation Army* (1972) 460 F.2d 553, 558 (5th Cir) and general discussion in Caroline Corbin, 'Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law' (2007) 75 Fordham L Rev 1965.

24 *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

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

26 *Eweida v British Airways Plc* [2010] EWCA Civ 80.

may not be competent to make such an assessment or that such inquiry may illegitimately shape or determine religious doctrine.

Inquiring into the centrality of certain roles or activities to an organization can, however, risk compromising group autonomy. Declaring which roles are central to organizational purpose, for example, inevitably carries with it some determination by the state as to internal religious matters even if the determination is that the state should not involve itself in the matter because it is central to the organization. It may involve the court accepting the evidence of one faction of the religious group over another, essentializing aspects of the religion or the group's practice which may prevent the organization from amending the character of the role in the future, or determining for the group how its organization is or should be structured in terms of hierarchy. This was the concern in *Amos*.[27] While this may be a real concern, it is often overstated. After all, any determination by the court would be for the purpose of certain legislative exception discrimination law and the organization is free to view itself as it wishes outside of these. The alternative is either applying the legislation without exceptions (thus avoiding any centrality inquiry) or a sweeping refusal to inquire into *any* practices of the religion (employment or otherwise). As noted in previous chapters, the latter approach can carry with it injustices against individuals who are denied equal access to justice. Neither practice is satisfactory. Moreover, the religious organization is free to present evidence to the court as to the importance of the particular role and why an exception is needed. Sarah Song notes that while there are some risks with the centrality inquiry, it allows the court to consider the nature of the particular burden and thus 'shows greater respect for religious freedom than an approach that dispenses

[27] *Amos* (n 22).

with any such consideration.'[28] Finally, as we saw in Chapter Five, an inquiry by the courts may actually give effect to the autonomy of the group. A declaration by the courts is not necessarily going to be inconsistent with the doctrine of the organization.

Some have also criticized exceptions that turn on the centrality of a particular practice because they see it as encouraging organizations to make a practice central to their organization in order to be granted the exception.[29] In relation to the UK's discrimination law, for example, an organization could avoid the reach of the law by making the criteria for positions stricter and by building religious observance activity into job descriptions. Thus the legislation could be seen as 'at least as likely to [cause] ghettoization as "liberalisation".'[30] This is a cynical view and in any event such doubts could be resolved by the courts through ordinary evidentiary procedures that test for sincerity or by the legislature through parliamentary submissions. Sunstein notes that there will be easy cases where the putative central practice does not fit with usual practice; where there are hard cases, the courts will have to deal with presumptions and burdens of proof that are 'hardly unfamiliar' to them.[31] Finally, a claim that an activity is central will not in and of itself be sufficient to justify not applying state law. It will simply be one factor that will weigh in favour of it not applying. Where there is a stronger state interest because, for example, serious harm is caused by the practice, the centrality of the practice will not support an exception. Song also notes that Okin's concerns regarding this inquiry may be 'more to do with whose voices would be

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28 Sarah Song, 'Religious Freedom v Sex Equality' (2006) 4 Theory and Research in Education 23, 32.

29 Susan Moller Okin, 'Reply' in Joshua Cohen, Matthew Howard, and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women?* (Princeton 1999).

30 Julian Rivers, *The Law of Organized Religious: From Establishment to Secularism* (OUP 2010) 133.

31 Sunstein (n 19) 137.

included in determining centrality.' She responds that the inquiry could draw upon a range of voices which, while making it a more difficult inquiry, would not be impossible.[32]

While an inquiry into the essential or central nature of a position or activity carries with it certain risks, it is crucial when attempting to strike a balance between the state interest in preventing harm to individual applicants and the harm to institutional autonomy and religious freedom. It is important, and even necessary, because it indicates the level of harm that would be caused to the organization by interference. The alternative of making no such inquiry would result in either no inquiry into the harm to the organization or overly broad exceptions that disregard harm to other individuals.

ii. External activity

While a presumption should exist that the internal affairs of religious organizations should generally not be subject to state law, there should also be a presumption that state law, most notably discrimination law, should more readily apply to religious organizations where they are engaging in the public sphere – in activity that is external or outside the essential function of the organization.

Activity in this area usually involves engaging with non-members. The state has an interest in protecting individuals from harm that may be caused by the activity of others. Thus state interest is strong with regard to public or external activity. Moreover, as we discussed in Chapter Six, where an organization engages in external activity by, for example, engaging the mechanisms of the state – such as the market – it may be demonstrating a

[32] Song (n 28) 33 fn 18.

willingness to operate in accordance with state norms.[33] This indicates first that there may be consent for these norms to apply to them and, secondly, that such engagement will not harm its organizational purpose or function. Thus the harm to the organization through the application of state law in these instances may be less than with internal affairs.[34] This does not prevent the organization from seeking exceptions for certain activities, but the presumption is that the state has a strong interest in the activity and that the harm to the organization is less than it would be if the matter were internal. The organization must then give a good reason for the law not to apply.

Some exceptions will, of course, be necessary in activity that overlaps with internal affairs. We saw in Chapters Two and Three, for example, that the harm to non-members caused by certain goods and services activity may be minimal whereas the harm to the organization by not being able to engage in the activity in a particular way may be great. In such instances there may be a case for an exception, but the presumption still is for state law to apply and for a good reason to exist for it not to. The presumption is that state law should apply because the state has an interest in the activity and the harm to the organization would be minimal.

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[33] Christopher Eisgruber and Lawrence Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 U Chi L Rev 1245, 1313: '[c]ommercial transactions … are a quintessentially public mode of interaction. When churches enter the commercial arena, they take advantage of a market made possible by the government and specifically entrusted to its care.'

[34] See a similar point made in the discussion of the specific situation rule in Article 9 jurisprudence in Chapter Two.

b. Interference in internal disputes

The second main instance where we must consider the relationship between state law and religious organizations is with regard to the adjudication of internal disputes. Here the issue is not so much whether the organization should be granted an exception to a generally applicable law but whether the state should intervene in the dispute. The manner in which the state intervenes, however, may involving considering whether an otherwise generally applicable law or legal principle should still apply. We saw in this thesis that these questions often arises in the context of internal discipline and property disputes. These contexts can overlap as internal disciplinary measures can determine property rights within the organization. While we concluded that the state may have little legitimate interest in determining membership, it may have an interest in how members are treated once admitted.

The balancing test identified above applies principally when determining whether an exception should be granted to a generally applicable law. This is because there are competing interests that need to be balanced against each other. We saw in the context of internal disputes in Chapters Five and Six that the considerations that must be taken into account when determining whether state law ought to apply may differ. The question is not so much one of balancing interests (whether of the state or another individual) against the harm to the religious organization through the application of the law; rather, it is whether to adjudicate upon the internal dispute and in what manner. No exception may be needed to relieve a particular burden on the organization or religious freedom. While an individual claimant may have an interest that differs from that of the organization, these instances of adjudication are less about balancing two potentially valid claims than deciding whether

there is a legally cognizable interest and then resolving the disputes in a manner that determines which claim is valid. This involves considering whether a court ought to enforce or even interpret an internal norm to resolve a dispute. Moreover, in the internal dispute context, where there is a legally cognizable interest, the state interest in intervening will largely be irrelevant as the organization (or a faction of it) will have requested intervention in the very same way that other secular parties request the state's assistance in resolving disputes. Adopting a position of non-interference can leave the parties involved in a dispute that has any religious aspect without any legal remedy.

We saw in Chapters Five and Six that despite these disputes being internal to the organization, because they involve members or factions of the organization, not all state intervention in such disputes is inconsistent with group autonomy and therefore religious freedom. While these disputes are internal they may involve legally cognizable interests such as contract or property rights, matters on which the state ordinarily adjudicates. Thus they may not fall into the clear categories of internal affairs or external activity and any attempt to categorise them as such may be artificial.

While a balancing test and categorising activities into their internal and external components may be inappropriate when determining whether to accept jurisdiction over an internal dispute (although not necessarily when determining what principles apply to those disputes), the state is still concerned with promoting individual autonomy and therefore minimizing harm to the religious organization and the exercise of religious freedom. To this end, when determining whether the matter is legally cognizable the court ought to consider the extent to which it would be resolving a religious question for the organization rather than

a legal one; the former would harm religious group autonomy. Then, after accepting jurisdiction, resolving the dispute by applying internal norms (or secular concepts interpreted in light of internal norms) would cause the least harm to group autonomy while also realizing individual autonomy.

In an attempt to respect the autonomy of religious organizations, adopting a position of complete deference or non-interference can leave the parties involved in a dispute that has any religious aspect without any legal remedy. On the other hand, simply 'filter[ing] out the religious dimensions of a dispute, leaving a residue of legally-cognizable fact' may provide some remedy but be 'a form of blindness to social reality and the expectations of the parties' that does not fully represent the interests of either side.[35]

With these concerns in mind, an approach which best promotes autonomy is therefore one which defers to the processes of the organization provided they have complied with internal procedural rules such as rules of adjudication or constitutional change. This approach allows for both group and personal autonomy by preserving the autonomy of the organization over its internal affairs and interpretation of its internal substantive norms while holding both the institution and the individual to freely undertaken responsibilities.

While a deference approach is often the best approach for protecting group autonomy it is not, however, the only approach for protecting and promoting group autonomy. We saw in Chapter Six how autonomy may be enhanced by judicial interpretation and application of internal rules or norms. The best approach will often depend on the particular dispute and the

[35] Rivers (n 30) 73.

constitutional structure of the organization. This may need to be tempered by willingness to protect the interest of dissenting factions where these rules are contested or not consented to. Where these procedural or secondary rules are contested or do not exist then the court will best promote autonomy by interpreting or applying substantive internal norms.

While these disputes are about allocating property or determining other civil law rights, the effects of adjudication can reach beyond property ownership and civil consequences. Giving effect to internal social norms can involve the court in determining not just allocation of property but membership and leadership. Moreover, these disputes are often grounded in disputes about interpretation of religious doctrine or other internal norms and thus the identity of the community can be at stake. Interpreting and applying a group's internal norms can impact on the character of the group and thus its ability to define itself. We have seen, however, how the act of adjudication may not in and of itself harm group autonomy; it is getting the group's normative system *wrong* – as occurred in the *JFS* case[36] discussed in Chapter Four – that may do the most harm to autonomy. It is for this reason that the courts can tread a fine line between realizing group autonomy and limiting it. While involving the judiciary in determining matters central to the organization raises some of the concerns identified earlier regarding group autonomy, such concerns can be alleviated if the court is mindful that its role is to give effect to the norms of the organization rather than to impose state norms.

[36] *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728.

A final question arises as to whether a court should enforce illiberal norms (or norms that otherwise differ from state law values) in resolving an internal dispute. Here we may have to engage in a balancing test similar to that for exceptions to generally applicable laws. After all, when resolving such disputes the organization may claim that certain legal principles that the court would ordinarily use to resolve a dispute ought not to apply to their activity, or at least apply in a different manner. We saw in Chapters Five and Six that the application of these different norms may give effect to group, and even individual, autonomy. In the context of internal property disputes in Chapter Six we saw that there may also be instances where determining a property right might involve applying an internal norm that would be illegitimate if it were part of state law because, for example, it violated certain liberal state values such as non-discrimination or due process.

We saw in those chapters that it may not be illegitimate for courts to enforce internal norms that *differ* from state law – indeed such enforcement may be consistent with autonomy. Cultural difference can be accommodated through interpreting 'relatively abstract' legal standards – such as due process – in light of a group's internal norms; there are 'different ways of conforming to a given goal.'[37] It may be illegitimate, however, to apply these norms where they *conflict* with state law norms by, for example, harming autonomy. Here we must draw a distinction between those internal norms that limit autonomy in some aspects in order to achieve greater autonomy overall – freedom of religion *within* an organization, for example, would limit the ability of the organization to ensure freedom of religion overall – and those that limit autonomy with little connection to enhancing autonomy

[37] Jeremy Waldron, 'Status versus Equality: The Accommodation of Difference' in Omid A Payrow Shabani (ed), Multiculturalism and the Law: A Critical Debate (University of Wales 2007) 150.

for the members of the group overall. Applying internal norms in the first instance would not be nearly as objectionable as applying them in the second. Similarly, as discussed in Chapter Four, the application of certain state law values to religious organizations may be inappropriate because it would undermine the very reason for the organization. Requiring the organization to accept anyone for membership, for example, would mean that it had little or no associational freedom thus also making it difficult for members to unite around one system of beliefs. As we saw in Chapter Six, imposing a particular conception of due process may undermine the group's internal norms and the communal way of life that is central to the group's world view. Where these principles apply, this may need to be done in a way that accounts for the character of the community.

We also noted in Chapter Six that an argument that the courts should not impose state law values on religious organizations does not support a claim that the state should enforce illiberal internal norms. It may be inappropriate to intervene in an organization to ensure that it complies with liberal values, but this does not provide a justification for an organization using the mechanisms of the state to enforce these norms. Applying an internal norm that harms autonomy would involve judges lending the authority of the state to these norms. Thus while the Equality Act 2010 exceptions discussed in Chapters Two to Four in the context of employment and goods and services may be justifiable, state enforcement of illiberal internal norms when determining property rights in an internal dispute may not be. After all, the state is interested in promoting, not harming, autonomy. Thus, while we have seen that an argument from autonomy may support deference to (or even in some instances the enforcement of) internal norms, it may also support not enforcing these norms where they harm autonomy.

c. Other activity

The final instance where we must consider whether state law should apply to religious organizations is activity that is otherwise left unregulated by the state. We saw in Chapter Seven in the context of family matters, for example, that religious tribunals are permitted to operate because the law is generally silent regarding them. Thus no exception to a generally applicable law is needed for their operation. Moreover, much activity of religious tribunals is beyond the scrutiny of state courts either because the matter is not legally cognizable or because neither party wishes to bring it to court. This leaves a large area of religious tribunal decision-making that is outside the oversight of the state. The more contentious issue is therefore whether the state should intervene in religious communities to prevent activity that is otherwise not prohibited by the general law. This would most likely involve enacting new, specific laws that apply to that specific community activity. We saw in Chapter Seven that legislation has been proposed to regulate religious tribunals although it is questionable how it much it changes or adds to existing law.[38]

Where religious freedom is exercised within the space left for liberty – rather than through ordinary legislative techniques such as exceptions – it can be more controversial for the state to then regulate that activity. Rather than simply declining to support the practice by providing an exception, the state would have to take positive action into an area previously left unregulated. This explains why, as Greenawalt notes:

> [l]egislators rarely discriminate overtly among religions or target religious practices. Rather, they adopt laws that are uncontroversial in most of their

[38] And even then, the proposed law is couched in general terms.

> applications; the crucial issue then becomes whether legislatures or courts should create ... exceptions.[39]

In determining, however, whether any proposed state law is a legitimate limitation on religious freedom we would, as with exceptions to generally applicable laws, also have to identify the relevant state interest and then balance that interest against the harm the law would cause to religious freedom. Any legislation would have to be a proportionate means of achieving a legitimate aim. Once again, the more essential that activity is to ensuring the option of a religious life is available, the greater the state interest must be.

Intervention in the form of passing a specific law to prohibit a religious activity could harm personal autonomy because it would amount to coercion in an area of life where autonomy is valued. Given that religious tribunals, for example, enhance autonomy and enable individuals to live religious ways of life, the state has little interest in interfering in their activity unless they cause harm and the activity is not consented to. We concluded in Chapters Five and Seven that the state should therefore tolerate – in other words not intervene in – the activity of a wide range of religious communities provided these groups meet certain minimal conditions. Theorists differ as to what these conditions are, but we accepted in those chapters that provided that there is no serious harm and there is freely given consent and a meaningful exit, the state has little legitimate interest in interfering in the internal workings of religious organizations. This interference could limit their ability to self-govern and therefore the ability of their members to exercise religious and associative freedom.

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[39] Greenawalt (n 13) 2.

This does not mean, however, that the state has no interest in the treatment of members once admitted. While consent may be difficult to gauge and exit unrealistic or difficult to secure, we can accept that the state ought to assure itself that these two factors exist if harmful activity that is nonetheless consented to is occurring within religious communities. In other words, if a realistic exit is available then there is less justification for the state to intervene. Seriously harmful activity will provide a good indication that the activity has not been consented to.

The solution to any remaining potential injustices – through lack of awareness of state family law rights, for example – would not be to prohibit religious activity or religious tribunals or to force them to change – this would be inconsistent with autonomy and religious freedom – but to *encourage* fairer norms and practices and to make individuals aware of these state alternatives. We saw in Chapter Seven in the context of family matters that where the state law system offers more just alternatives, the solution is to encourage members to access their rights under that system not to prohibit religious tribunals. The most appropriate response to oppression within the group is to enhance the conditions for exit – for example, by imposing minimal education requirements – or encourage exit by raising the profile of state options rather than coercing the group to change. It would do greater harm to the organization (and thus individual religious freedom) to force the group to change than to simply encourage members to leave. The best the state can do is to allow for the group's own internal procedures for change to operate and hope that encouragement from mainstream society will provide momentum for this internal change.

3. THE UNITED KINGDOM APPROACH

We have seen throughout this thesis that there is an overall scheme of religious freedom in the UK resulting from various protections given to religious organizations. These protections range from exceptions to generally applicable laws (most notably discrimination laws), non-interference in internal disputes, and non-regulation. The position of the Church of England differs slightly from other religious organizations because its governing instruments are part of the law of the land and its courts are courts of the realm.[40]

The suggested approaches outlined above accord roughly with those taken in the UK. A contextual approach that balances the various interests involved, paying special attention to the importance of the particular activity to ensuring that the option of a religious way of life is possible, is largely consistent with that currently taken in the UK. The courts in the UK have approved 'a nuanced and contextual approach'[41] noting that religious freedom 'is an area in which a rigidly analytical approach, dividing the case into watertight issues, to be decided *seriatim*, may not always be the best way forward.'[42] While an observation that the UK takes a certain approach to the relationship between state law and religious norms is not an argument for it being that way, the normative approach set out above largely aligns with the current position in the UK. It is helpful here, therefore, to reflect briefly on that position.

Chapters Two and Three considered the exceptions granted to religious organizations from discrimination legislation, namely the Equality Act 2010. Chapter Two examined

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40 eg *Gill v Davies* (1997) 5 Ecc LJ 131. Mark Hill, *Ecclesiastical Law* (3rd edn, OUP 2007) para 1.42.

41 Lord Walker in *R (Williamson) v Secretary of State for Education and Employment* (n 24) [68].

42 *R (Williamson) v Secretary of State for Education and Employment* (n 24) [66].

whether the exceptions in the employment context could be justified and concluded that they strike an appropriate balance between the interests of the organization and the individual applicant by finding the solution that causes the least harm to autonomy. It avoids the problems of the broad exception approach which would see positions exempted even where they were not necessary for protecting the character of the organization. Chapter Three examined whether the broad exceptions contained in the Equality Act for goods and services provision could also be justified. It concluded that they could be justified, although the qualifier to these exceptions, which limits their operation where the organization has a commercial purpose, is difficult to justify. By contrast, the qualifier that limits the exceptions where the organization has contracted with a public authority can be justified. While there may be good grounds for exempting religious organizations from the legislation, there is no justification for the state positively supporting discrimination by funding discriminatory practices.

Chapters Four and Five considered the law that relates to the regulation of membership within religious organizations. In Chapter Four we saw how traditionally the UK has adopted an almost completely hands-off approach to membership admission decisions. This approach has been confirmed in the exceptions provided for discrimination in the Equality Act. As we saw in Chapter Five, in the context of internal discipline, and in Chapter Six, in the context of internal property disputes, this principle of non-interference is relaxed where the dispute concerns matters that are legally cognizable, such as contractual or property matters, provided that they do not turn on determining matters of religious doctrine. Thus while the state considers itself to have very little interest in membership admission it has some interest over the treatment of members and the determination of their legally

cognizable rights once admitted. This is broadly consistent with the approach set out above which supports group autonomy to the extent that it is consistent with personal autonomy. We saw in Chapter Six that while deferring to the decision-making processes of the organization can realize group autonomy, it is not the only approach. Group autonomy can also be promoted by the court applying the internal norms of the organization to resolve the dispute.

Finally, Chapter Seven demonstrated in the context of family matters that the UK accepts that some measure of self-governance is necessary for religious communities to enable their members to exercise their religious freedom and live a religious way of life. This self-governance may involve these communities having their own dispute resolution and advisory bodies. These bodies can supplement and complement UK law by providing for additional dispute resolution options or resolving disputes that the UK courts are unable to. We saw that the courts maintain some level of scrutiny over the activity of these organizations by examining settlement agreements in family matters or arbitration decisions in non-family matters before issuing consent orders or enforcing those decisions. While this provides some measure of protection for vulnerable parties, it still leaves much of the activity of these bodies beyond the scrutiny of the state and to this extent these vulnerable parties ought to be encouraged to access their rights under state law.

This thesis provided specific criticisms of the position in the UK in earlier chapters where the particular approaches were discussed in detail. It will not repeat them all here. Instead, it concludes by summarising the three main problematic aspects of the current UK approach towards the activity of religious organizations. Here the law could be improved to

realize the values underpinning religious freedom more effectively. First, the differing approach to racial discrimination protection compared to that for sex and sexual orientation discrimination protection may not be justifiable. Secondly, judicial determination of religious group membership risks undermining group autonomy. Thirdly, some inquiry into religious doctrine may be necessary in the context of internal property disputes.

a. Discrimination exception asymmetry

This section argues that it is difficult to justify the greater protection from discrimination given to race over other protected characteristics. We saw in Chapters Two and Three that greater protection from discrimination is given to individuals because of the protected characteristic of race than because of religion, sex, or sexual orientation. Under the Equality Act 2010, religious organizations are granted certain exceptions that permit them to discriminate because of the latter group of characteristics that are not granted for discrimination because of the former characteristic. This distinction is consistent with much liberal theory, which rarely attaches the same weight to principles of sex equality as to racial equality; racial equality is often ranked ahead of religious freedom whereas sex equality is not.[43] This has been termed the 'hierarchy of equalities'; in European and UK discrimination law, race and ethnicity receive the greatest protection overall, followed by sex and gender, and then other characteristics at the bottom.[44] The exceptions for religious organizations in the Equality Act generally follow this hierarchy.

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[43] Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton 1999) 128; '"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit' (2002) 112(2) Ethics 205, 216–22.

[44] Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 European LJ 290, 308. In the UK context see Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging

No satisfactory justification for this hierarchy – particularly in relation to that which results from those exceptions granted to religious organizations – exists. Schiek notes that non-discrimination on the grounds of nationality and sex in European law is as much motivated by economic concerns as human rights. Equal treatment on the grounds of race, for example, allows for economic progress, free movement, and unity.[45] This would explain why this characteristic is given greater protection but, given that prohibitions on religious organizations discriminating because of this characteristic would contribute little to addressing these concerns, the distinction is not justifiable if we otherwise accept the arguments for these exceptions.

Bell and Waddington put forward another explanation for the distinction. They suggest that this hierarchy and the differing levels of protection is because:

> [s]ome of the covered characteristics can directly affect an individual's ability or availability to perform a job (or use a service or good), whilst others have no such impact …. Furthermore, some characteristics are more likely to lead to discrimination and disadvantage, measured in terms of income, employment or educational attainment, than others.[46]

While this may explain why the general level of protection amongst characteristics differs, it does not explain why this protection differs at the more specific level of the exceptions granted. The availability of exceptions does not depend on the factors that Bell and Waddington identify. Arguably neither a person's race, sex nor sexual orientation affect a person's *ability* to perform a particular job within a religious group. What makes them

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Hierarchy?' [2010] Ecc LJ 280.

[45] Schiek (n 44) 292-3.

[46] Mark Bell and Lisa Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 EL Rev 349, 350.

unsuitable for the job (and forms the justification for the exception) is not the nature of that characteristic but the religious belief of the organization (its congregation or doctrine) that the person should not perform the job. Thus it should not matter whether that belief relates to race, sex, sexual orientation or any other characteristic. If religious belief is a good reason for an exception for sex discrimination, why is it not for race? Moreover, if we take a group justice approach to equality – which Bell and Waddington suggest may explain the greater protection against racial discrimination[47] – with some exceptions, there has been no history of pervasive discrimination by religious organizations against people of a particular race that needs remedying.

Thus if we consider that the religious organization's claim is strong enough to justify exceptions to religious, sex or sexual orientation discrimination legislation, it is difficult to see why that claim is not strong enough to justify an exception to racial discrimination protection. One would have to argue that somehow the harm to autonomy is greater with racial discrimination. Some implicitly argue that the harm is greater with racial discrimination than with, for example, religious discrimination. They do so by drawing a distinction between those characteristics that are chosen and those that one is born with. The harm is greater, the argument goes, where one is discriminated against due to a characteristic that one is born with because it is directed at who they *are* as opposed to what they *do*. One's self-respect therefore suffers greater harm when one is discriminated against because of who they are because it is directed at one's essential being. One's range of options is also limited more when the discrimination is because of who they are because such discrimination cannot be avoided by effectively concealing that characteristic. Schiek – who draws a distinction

[47] Bell & Waddington (n 46) 353-356

between ascribed (race and gender), biological (sex, age, and disability), and chosen lifestyle (religion and sexual orientation) characteristics – suggests that with characteristics that reflect a chosen lifestyle the person must have 'convey[ed] information which allows for their characterization. This means that it can be more easily avoided than discrimination on the grounds of sex or 'race'.'[48] Racial discrimination, by contrast, strikes at the heart of who they are – race is an essential characteristic. To permit racial discrimination 'attacks the common humanity and birthright of the human being' which is 'fixed and immutable' whereas one could argue religious practices and beliefs should be open to strong criticism because they are chosen.[49] Sedley LJ in *Eweida* offers this as a reason why religion may differ from other protected characteristics: these other characteristics are 'objective characteristics' whereas 'religion and belief alone are matters of choice.'[50]

This distinction based on chosen and unchosen characteristics is not sustainable. Aside from the fact that race is arguably a socially-constructed category and thus not fixed and immutable, nor something one is born with, the argument that religious identity is chosen and therefore deserves lesser protection is weak for the reasons given for its protection argued in this thesis – it is an important option and thus we do not want to burden its exercise unjustifiably. Moreover, for many it is an essential part of who they are. Thus if an argument based on harm to autonomy is sufficient to justify an exception for religious organizations to discriminate because of religion, it is difficult to see how that argument could not justify an

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48 Schiek (n 44) 310.

49 Lord Anthony Lester, 'Free Speech and Religion – The Eternal Conflict in the Age of Selective Modernisation' in András Sajó (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International 2007) 151, 153 and 158 (discussing the distinction between race and religious hatred speech). See also *E v Governing Body of JFS* [2008] EWHC 1535 (Admin), [2008] ELR 445 [157].

50 *Eweida* (n 26) [40].

exception for racial discrimination on the same basis – that the harm to autonomy would be greater if the exception were not granted. Moreover, a distinction based on choice does not justify lesser protection for sex than for race in the UK exceptions.

However, at least with regard to the UK exceptions for employment and membership discrimination – as opposed to the differing levels of protection granted to different protected characteristics at a more general level – there may be a relatively straightforward justification as to why exceptions are granted on the basis of religion but not race. The harm to a religious organization if it is not permitted to discriminate on the grounds of religion in those circumstances would be fatal – it could no longer be organized around that religion. This may not be the case with race discrimination. Exceptions to permit discrimination because of religion are relatively easy to justify because without such exceptions the organization could not exist in a form that would allow its members to practise their religion collectively. This does not, however, explain the exception for sex and sexual orientation discrimination which, by contrast, simply relates to one specific belief and like racial discrimination relates to an unchosen characteristic. We should note, however, that the sexual orientation exceptions are directed at activity not identity which, proponents argue, is chosen and within control of the employee. But even where discrimination is based on a lifestyle or activity it can still constitute a 'disempowering attack' on the identity that lies beneath that activity.[51] It may also cause people to hide their identity in ways that others do not have to and lead to a 'terror of silence.' Moreover, the psychological effects of negatively stereotyping someone because

[51] Schiek (n 44) 310.

of a chosen lifestyle 'may be as harmful as the effects of forcibly grouping persons according to outer appearance.'[52]

The argument for asymmetry is even less sustainable when we compare sex and sexual orientation discrimination with racial discrimination. All such discrimination may be compelled by religious doctrine but yet again only the former discrimination is granted exceptions. Moreover, all these characteristics are innate to a person. As we have argued in this thesis, if we are committed to personal autonomy, then this commitment includes allowing a person to make decisions about with whom they associate. Autonomy over membership admission and the appointment of certain positions in an organization is essential to religious freedom and its underlying value of autonomy, even where granting such autonomy means allowing for discriminatory norms to operate. Where this commitment to autonomy forms the foundation for exceptions then there is no justification for allowing decisions based on sex or sexual orientation but not on race. Hamilton notes the incongruity of distinguishing between characteristics particularly when determining leadership of the organization. She notes that 'the identity of the religious leader lies at the heart of any religious identity, regardless of the required characteristics.'[53]

The absurdity of this asymmetry was apparent in the *JFS* case where, if we accept that the membership criterion was racial discrimination, the court refused to allow the group's internal norm, in which religious group membership was based on race, to operate to determine membership thus potentially affecting group autonomy and religious freedom. By

[52] Schiek (n 44) 310.

[53] Edward Becker and Marci Hamilton, *God v the Gavel: Religion and the Rule of Law* (CUP 2005) 189.

contrast, the very same criterion affecting the very same individuals in the very same way would have been permissible if it were considered as relating to a religious characteristic. Interestingly, the court in the *JFS* case saw racial discrimination as harming individual autonomy. If this is the reason for the differing protection, it presumes that religious discrimination does not harm autonomy. It would seem from the judgment that this is because religion is seen as a choice. However, as argued throughout this thesis, religious freedom is essential to individual autonomy and thus while religious discrimination may harm individual autonomy (by making it harder to be religious) interference with group autonomy (and that group's ability to determine its own membership) can harm individual autonomy more.

This discussion shows that it is difficult to identify a clear justification as to why this asymmetry should exist in the UK discrimination exceptions for religious organizations outside the relatively straightforward case of discrimination because of religion in membership admission and employment decisions. Where the claim of the religious organization is strong enough to justify an exception, it should be extended to discrimination because of all protected characteristics.

b. Judicial determination of group membership

We saw in this thesis that there is an increasing willingness by the courts to inquire into religious doctrine. This can be problematic for religious freedom if such inquiry is not consistent with group autonomy. This was most notable in the *JFS* case.[54] In Chapter Four

[54] (n 36).

we saw that the Supreme Court was willing to directly adjudicate on the substance of who was to be considered Jewish. Its decision shows the problems inherent in judicial intervention in internal membership disputes. The Supreme Court adjudicated upon an internal disagreement within the Jewish community which resulted in it imposing upon the community an external view as to who their group members ought to be and how they ought to be determined. The difficulties inherent in the JFS litigation could have been avoided if the court had simply deferred to the decision of the community or been more willing to actually grapple with or apply the group's internal norms for the determination of membership. This decision may have serious implications for religious freedom, beyond that which affects religious education, by placing restrictions on the criteria that religious congregations can use to determine membership

c. Religious group doctrine and internal property disputes

While the recent *JFS* case shows the courts' emerging confidence in their ability to grapple with the substantive validity of any membership determination, there is still a modern reluctance to apply a group's internal norms, or consider religious doctrine, when resolving property disputes even where to do so would determine property rights in a manner that was more consistent with autonomy. Courts prefer to remain 'agnostic' as between disputing parties and not pass judgment on the content of religious group disputes. Where the property is held in a charitable trust for the advancement of religion, for example, and there is a dispute over ownership a court will distribute the property through a regulatory *cy-près* scheme without resolving the religious differences in favour of either party.

The modern *cy-près* scheme, however, ought not to allow the courts to avoid all theological questions. The occasions for applying property *cy-près* include the court satisfying itself that the original purposes have ceased to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift. This implies a doctrinal judgment to the effect that neither of the schismatic groups is clearly a successor to the original bodies of worshippers. Thus either the court inquires into whether the spirit of the gift can be fulfilled by one of the factions or it avoids any doctrinal judgment. The latter approach carries with it the risk that a faction which may now have fundamentally differing religious views is still entitled to the property, thus causing it to be distributed in a way that may make it extremely difficult for the remaining members adhering to the original doctrine to practise that religion. Thus while an approach that interprets religious doctrine can be problematic where it impacts a group's ability to self-define, an agnostic approach which refuses to interpret internal norms could also be problematic. As we saw in Chapter Six, the interpretation and application of a group's internal norms can be consistent with autonomy. The concern is with the courts getting those norms wrong, as we saw in the *JFS* case, rather than with them applying them at all. This risk can be alleviated by the court taking the time to try to truly come to terms with the internal norms and context of the organization.

4. CONCLUSION

This thesis has critically considered how the law in the UK operates in relation to religious organizations in a variety of contexts and made some recommendations regarding when and how state law should apply to them. While there is much literature on religious freedom, so

far it has paid insufficient attention to religious organizations and to UK doctrine. This thesis thus contributes to the literature by examining the justifiability of the state's treatment of religious organizations while paying close attention to the legal doctrine relating to these organizations in the UK.

We saw in this thesis that whether state law should apply to religious organizations and in what manner is highly context-dependent. There may not be an ultimate solution as to how to resolve all conflicts that might potentially emerge between state law and the activity of religious organizations. The best that this thesis can do is suggest a general approach that carries with it certain presumptions. The approach in the UK is broadly consistent with that accepted by this thesis.

This thesis concludes that robust protection for the internal affairs of religious organizations with limited exceptions for external activity strikes the right balance between religious freedom and other state interests. Given the liberal state's commitment to religious freedom, most changes to religious group doctrine or activity should occur internally and not be coerced by the state. State coercion can deprive these organizations of the ability to change from within while also harming autonomy. The approach supported by this thesis aims to avoid any direct confrontation between government and religion so that any changes to the activity of religious organizations are more likely to be enduring, meaningful, and legitimate.

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