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Between Religious Freedom and Equality: Complexity and Context

Carolyn Evans and Beth Gaze*

I. INTRODUCTION

The tension between religious freedom and non-discrimination principles is becoming increasingly acute. International human rights treaties usually affirm the importance of both equality and of religious freedom, often with little guidance as to how the two are to be reconciled in the many contexts in which they come into conflict.[1] Questions about the appropriate way to balance the two rights arise with particular regularity around discrimination on the basis of sex, sexuality and religious discrimination. Should patriarchal religions be forced to admit women clergy – or at least lose their tax exemptions if they do not?[2] Should religious employers be able to give preference to co-religionists or to dismiss those who do not uphold the teachings of the employer religion?[3] Should religious schools that receive state funding be

[1] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg, U.N. Doc A/810 (Dec. 12, 1948), arts. 2 (discrimination in application of rights), 7 (equality before the law) and 18 (freedom of religion); International Covenant on Civil and Political Rights, arts. 2, 3 (discrimination in the application of rights), 18 (freedom of religion), 26 (prevention of discrimination), and 27 (minority and cultural rights), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

[2] *See* Susan Moller Okin, *Multiculturalism and Feminism: No simple question, no simple answers, in* MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 67, 87 (A. Eisenberg and J. Spinner-Halev eds., 2005); Susan Moller Okin, *"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 203, 205, n. 68 (2002).

[3] *See, e.g.*, Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

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required to admit all students regardless of their religion, sex or sexual orientation?[4] These questions have become more urgent with the increasing reliance on religious groups to provide services such as education, health, assistance with employment, welfare, adoption and a myriad of other schemes, often as part of government policies that rely on private provision of government services.[5]

These questions about the intersections between equality and religion are complex ones which are all too often given simple answers. On one side, some religious groups and scholars make a case for strong autonomy: religions should be given a wide scope of freedom over the full range of their activities – whether publicly or privately funded and no matter how economically or socially significant their scope. On the other side, there is an increasingly powerful movement to subject religions to the full scope of discrimination laws, with some scholars now suggesting that even core religious practices (such as the ordination of clergy) can be regulated in the name of equality.[6] At present, exemptions are given to religious organiz`ations in many non-discrimination laws,[7] but the scope of those exemptions is being reduced in many liberal democracies.[8]

In this article, we first explore and reject the idea that either non-discrimination or religious autonomy should always be the dominant value in deciding on conflicts between these internationally protected rights. We draw on examples from a range of countries (such as the United States, the United Kingdom, Australia and Canada)

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[4] *See, e.g.*, the following anti-discrimination laws: Equality Act 2006, § 50 (U.K.); Equal Opportunity Act 1995, § 38 (Austl., Vict.); Equal Opportunity Act 1984, § 73(3) (Austl., W.A.); Anti-Discrimination Act 1991, § 41(a) (Austl., Qld.); European Union Directive: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation: *Official Journal* L 303 , 02/12/2000 P. 0016–0022, requiring that "any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community": preamble [12].

[5] *See generally* David Cole, *Faith and Funding: Toward an expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559 (2003); Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103 (2006-2007); *Symposium*: *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

[6] *See* Pru Goward, Address at the Ordination of Catholic Women Annual Conference, Melbourne: Women, Human Rights and Religion (Nov. 5-6, 2005), *available at* http://www.ocw.webcentral.com.au/articles.htm; Cass R. Sunstein, *On the Tension between Sex Equality and Religious Freedom*, PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 167 (2007), *available at* http://www.ssrn.com/abstract_id=995325; *Cf.* Reid Mortensen, *Rendering to God and Caesar: Religion in Australian Discrimination Law*, 18 U. QUEENSLAND L. J. 208, 219 (1994-1995).

[7] *See, e.g.*, anti-discrimination laws in the U.S. and the U.K.: Civil Rights Act of 1964 §§ 702 and 703, 42 U.S.C. § 2000e-1 and 2000e-2; *Equality Act 2006* (U.K.), §§ 50 and 57-60; *Employment Equality (Religion or Belief) Regulations 2003* (U.K.) §§ 7 and 25.

[8] For example, in 2000 a European Directive (Council Directive 2000/78/EC of 27 November 2000) was issued that created quite strict limitations on the ability of EU member states to grant exemptions from anti-discrimination laws to religious employers.

which share a common law heritage and have ratified major international human rights treaties that protect both religious freedom and equality. Despite their different constitutional and legal orders, and some significant cultural differences, each of these states has struggled with similar difficulties in balancing the competing demands of religious freedom and equality and none has yet developed a coherent, principled account of the competing interests at stake and how they should be resolved. In the final section of the paper, therefore, we then explore several factors that need to be taken into account in order to ensure that decisions regarding exemptions of religious practices from non-discrimination laws give sufficient emphasis to the complex and contextualised nature of these decisions. The factors are not prescriptions for identical outcomes in all liberal democracies or even all common law countries. The weight that will be given to the various factors in a given case, for example, will depend on a range of legal and non-legal factors that differ between states. Nonetheless, the purpose of this article is to begin a discussion about the features that any principled resolution of these issues should take into account, even if the legal and political processes for so doing will depend on the particular state in question.

II. The Equality Model

The notion that religious organizations should be subjected to the same discrimination laws as all other organizations is increasingly gaining support. Over time, from its beginnings in prohibiting race and sex discrimination, domestic anti-discrimination law in the common law countries under discussion has extended to an ever broader range of attributes or features, including religion,[9] disability,[10] age and sexuality.[11] Similarly, international treaty law has placed greater emphasis on the rights of groups that have traditionally faced discrimination.[12] As the scope of non-discrimination has expanded, however, the sites of potential conflict with the practices of religious organizations have increased.

In a recent working paper, Professor Cass Sunstein addressed the question of when it was legitimate for the law to impose sex discrimination laws on religious institutions.[13] He started from the position that religions are usually required to adhere to law and then described an approach that he called an "important commonplace of democratic theory and practice."[14] This approach, which he named the 'Asymmetry Thesis' holds that it is "unproblematic to apply ordinary civil and criminal law to

[9] Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2.

[10] Americans with Disabilities Act of 1990 § 102 42 U.S.C. § 12112.

[11] Canadian Human Rights Act 1967-1977, § 3; Employment Equality (Sexual Orientation) Regulations 2003 (U.K.); Discrimination Act 1991 (Austl. Cap. Terr.), § 7; Anti-Discrimination Act 1977 (Austl., N.S,W.), Pt 4C.

[12] Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611.

[13] Sunstein, *supra* note 6.

[14] *Id.* at 2.

religious institutions, but problematic to apply the law forbidding sex discrimination to those institutions." Sunstein convincingly argued against this thesis and made serious inroads into the idea that religious groups should be routinely exempt from non-discrimination laws. [15] Much of his argument rests on the idea that discrimination is the only area where religions are exempted from general and neutral laws. This is a common claim among those who seek to subject religious organizations to non-discrimination laws.

However, this argument in favor of the application of non-discrimination laws to bring them in line with general legal practice is problematic. There are many areas where the general law does not apply or does not apply in full force to religious institutions or religiously motivated individuals. While Sunstein refers to animal cruelty statutes a number of times as an example of general laws that apply to religious groups, in many liberal democracies there are concessions made to the need to slaughter meat in a manner that is kosher or halal, or at very least a debate over whether such slaughter should be allowed even if it contradicts the normal animal welfare statutes regulating slaughter.[16] Tax exemptions are given to religious institutions usually without the need to demonstrate public benefit as non-religious institutions are forced to do.[17] In both Australia and the United Kingdom, statutory bills of rights give exemptions to religious bodies for a wide variety of purposes.[18] In the United States, the dispute over the *Smith* case, in which the Supreme Court rejected the notion that the religious freedom of Native Americans who used peyote for religious ritual required some exemption from general drug laws led to the Religious Freedom Restoration Act,[19] which attempted (unsuccessfully) to increase the justificatory burden on general laws that interfered with religious freedom. The particular constitutional context of each country determines the outcome of the particular cases (Australia, for example, has constitutional protection for religious freedom but has always rejected the idea that this required exemptions for religions from general and neutral laws; the United Kingdom courts have no power to strike down or disapply a general law that interferes with religious freedom, and the United States has shifted over time in the extent to which the Supreme Court has held that exemptions must sometimes be given to general and neutral laws for religious groups). Nonetheless, in each of these countries, the extent to which general laws should appropriately be applied to religious groups has been a matter of on-going controversy.

Thus, while Professor Sunstein is correct to say that it would diminish the significance of discrimination law if religions were given a general exemption from it

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[15] *Id.*

[16] *See generally* Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175 (2007); Lorna Edwards, *Halal Meat Slaughter 'Obeys Laws'*, The Age, Aug. 7, 2007, *available at* http://www.theage.com.au (search for "Halal and Slaughter").

[17] *See, e.g.*, Internal Revenue Code § 501(c)(3).

[18] Charter of Human Rights and Responsibilities Act 2006 (Austl., Vict.) § 38(4). *See also* Human Rights Act 1998 (U.K.), § 13(1).

[19] *See* Employment Division, Department of Human Services v. Smith, 494 U.S. 872 (1990); Religious Freedom Restoration Act § 3, 42 U.S.C. § 2000bb.

but not from other areas of general law, it is not enough to say that religions must obey the same laws as everyone else, including non-discrimination laws, when there are on-going contests about the extent to which many such general laws are compatible with freedom of religion. Rather, the tensions between non-discrimination and equality need to be tackled substantively and the potential dangers that at least some religions pose for these principles need to be explained.

One area where a considerable scholarship has developed in this regard is in relation to the rights of women. The most common and visible conflict between non-discrimination and freedom of religion is in the area of sex discrimination and the role of women in religious beliefs and communities. Many cultural groups, including the Western mainstream, tend to regard behavior and roles within the private sphere of the family and church as the location of culture and, especially for immigrant and minority groups, as the site of preservation. As a result, women's distinctive family roles are laden with cultural significance and often with religious restrictions not faced by men. Feminist scholars have convincingly demonstrated the historical and on-going role of religion in perpetuating gender stereotypes and undermining women's equality.[20] If religious organizations are given wide exemptions from non-discrimination laws in the name of religious freedom and autonomy, then powerful cultural, economic and political actors are given legal immunity from important claims of equality at women's expense (and the expense of other minority groups such as gays and lesbians). This may have both symbolic and practical effects in undermining movement towards greater equality.

Exempting religious groups from non-discrimination laws can influence the cultural acceptability of discrimination or inequality. Religious groups therefore cannot be completely excluded from legal accountability in relation to fundamental rights of non-discrimination, whether arising from domestic or international law. Powerful institutions such as religious organizations, which often aim to govern cultural, personal, moral and political actions and behavior, can be influential in perpetuating gender stereotypes that form a basis for sex or sexuality-based discrimination, or promoting inter-religious hostility that gives rise to religious discrimination. A society that has a serious commitment to principles of non-discrimination cannot, therefore, lightly grant exemptions to non-discrimination laws. The Convention on the Elimination of All Forms of Discrimination Against Women recognizes the importance of active government intervention to change "existing laws, regulations, customs and practices which constitute discrimination against women,"[21] recognizing that perpetuating stereotypes of women undermines the cultural change that is essential to achieving gender equality.[22]

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[20] *See generally* SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? (1999); FUNDAMENTALISM AND GENDER (John Stratton Hawley ed., 1994); RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN (Courtney W. Howland ed., 1999).

[21] Convention on the Elimination of all Forms of Discrimination against Women, art. 2(f), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[22] In CEDAW, art. 2, governments undertake to "(b) adopt appropriate legislative and other measures, … prohibiting all discrimination against women; (c) … ensure … the effective

III. The Autonomy Model

Despite the significant and compelling claims of the equality model, if it is applied in an absolute fashion, it has the potential to undermine the important international law right of religious freedom. In contrast to the equality model, a number of scholars and religious organizations begin from the proposition that religious institutions should have a high degree of autonomy and that religious freedom requires that every intrusion into that autonomy by the state to be justified.[23] Professor Peter Schuck, for example, argues that legislatures and the courts "should endeavour to accommodate deviant religious practices and claims … unless they genuinely threaten compelling state interests because, absent such a threat, such accommodations 'tend to benefit secular society in many important ways.'"[24]

These benefits include the notion that individuals are entitled to develop and live out their own conceptions of the good life and that this entitlement is an important bulwark against deadening social conformity and, at the extreme, totalitarianism. Religious organizations, it is argued, can play socially valuable roles, sometimes provide higher quality services than the public sector, and allow individuals to flourish within particular communities and cultures rather than requiring everyone to conform to a homogenous, mainstream culture.[25] Religious freedom and autonomy can be particularly important for religious minorities whose interests may not be well understood and protected in the mainstream.[26] If religious organizations cannot stand at least a little aside from prevailing social and legal norms, then their distinctive (and distinctively valuable) role is lost.

Nonetheless, strong claims for autonomy which argue for the complete immunity of religious organizations from non-discrimination laws are overly broad. Religions are powerful social and economic actors in most societies. They play a significant role in creating culture and public morality and some actively seek political influence. In some countries they are significant employers and service providers. If religious organizations are excluded, in all their many manifestations, from non-discrimination laws, then the goal of equality is undermined and non-discrimination laws run the risk of being treated as trivial, optional or – at worst – illegitimate.

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protection of women against any act of discrimination; (e) take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and (f) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

[23] *See, e.g.*, REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE (2005).

[24] PETER SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 308 (2003).

[25] On the value of religion in a liberal society, *see* AHDAR AND LEIGH, *supra* note 23, at 52-57; JIMMY CARTER, FAITH AND FREEDOM: THE CHRISTIAN CHALLENGE FOR THE WORLD (2005).

[26] On the need to accommodate minority cultures, *see* SARAH SONG, JUSTICE, GENDER AND THE POLITICS OF MULTICULTURALISM 41-85 (2007).

IV. Key Principles for Resolving Particular Claims for Exemptions from Non-discrimination Laws by Religious Organizations

If neither religious autonomy nor non-discrimination should always prevail in liberal democracies, then it is necessary to identify some of the principles that will assist in determining when it is appropriate for exemptions to non-discrimination laws to be given. The list of factors is not comprehensive and the weight that might be given to each will depend on the context of a particular state. All of them, however, could be usefully taken into account in the common law, liberal democracies which are grappling with how to deal with the tension between religious freedom and equality.

Factors in Favor of Applying Discrimination Law

When public funding is used by religious organizations to fund their activities, there should be a presumption that non-discrimination laws apply to those activities. Religious organizations are not obliged or coerced to take public money and can exercise their autonomy by refusing it (even if refusing makes carrying out certain functions more difficult). Public money is raised from all members of a society and should not usually be expended in a manner that deliberately excludes some members of that society. This need not be an inflexible principle and may be limited if there is a strong reason for allowing for exceptions in particular cases. In the case of an institution such as a religious school that discriminated in favor of co-religionists, for example, limited government funding for particular schemes such as assistance for disabled students or providing buses to remote schools might not be sufficient to displace the fact that the overwhelming majority of funding comes from parents or religious groups. There may sometimes also be an argument to allow for some discrimination by organizations catering to minority groups that face serious difficulties in accessing appropriate mainstream services.[27] Even if some exceptions may be permissible, however, the onus should be on the religious organization that accepts public funding to demonstrate a good public (rather than religious) reason why it should not comply with non-discrimination principles.

Similarly, the more significant the social or economic impact of the activity being undertaken, the greater the argument in favor of applying non-discrimination laws. A hospital that discriminates against patients or employees affects more people in a more significant manner than does a small sporting group or cultural event.

A related but distinct consideration in determining claims to exempt the activities of religious organizations from discrimination laws is the seriousness of the impact on those people affected. If only minor inconvenience results from the exemption, then it may more readily be accepted. But if its impact on those excluded is severe, for example in allowing for termination of employment or exclusion from an educational institution, then it would require a stronger justification to exempt the activity from

[27] Differential treatment of minority groups may also be supported by direct and indirect discrimination and historical injustice. *See id.* at 52-61.

regulation. This factor requires consideration of impact in terms of both the range of people excluded (for example, women or non-members of the religion), and also the severity of the impact on particular individuals.

Factors in Favor of Exemptions from Discrimination Law

The centrality of a particular activity to a religion is a key factor that needs to be taken into account when assessing whether non-discrimination laws should apply to that activity.[28] This is a fraught issue because it requires legislatures or courts to make an assessment of religious practices, but it is still of crucial importance if religious freedom is to be respected. The hiring of staff in religiously run hospitals, schools and other institutions may well be important to many religions, but it usually does not have the central place of activities such as the selection and training of clergy, the language and symbolism of ritual, and the determination of membership of the religious community. Such core religious activities have a greater claim for freedom from regulation (including from the imposition of non-discrimination laws) than activities that are more peripheral. The imposition of non-discrimination law in those core areas also has more serious implications for religious freedom than does regulation of service provision. While a religion may simply withdraw from providing schools or hospitals (a danger that the state needs to be aware of when deciding how much to regulate a particular organization), a religion cannot stop ordaining clergy or conducting worship if regulatory burdens on these activities become oppressive.

Another factor that makes it easier to justify exemptions from discrimination laws is the availability of good quality secular or non-discriminatory services that are available to the public. Exemptions from discrimination laws by publicly funded services carried out by religious organizations could only be justified if there were easily available, high quality secular services available in the same area. In these cases, exemptions create more diverse service provision that may better cater to a range of people than a one-size-fits-all government provision. However, it is important to ensure that the publicly provided services are of at least the same quality as the religiously provided services, so that people are not pressured to utilize religiously provided services in order to be assured of quality.

Finally, one factor that many legal regimes use as the touchstone of the appropriate scope for legitimate application of discrimination law is that private activities fall outside the scope of discrimination law and public activities are subject to it. Thus public sphere activities such as education, employment, supply of goods and services, and accommodation are subject to the law but private activities are not.[29] While this dichotomy has some relevance in the context of religious organizations, it is only one factor to be taken into account rather than a bright line between permissible and impermissible application of discrimination laws. As a general rule, the more private functions of religions (such as worship) should be immune from discrimination laws, but the public activities (such as operating a school or hospital)

[28] *See* Sunstein, *supra* note 6.

[29] *See, e.g.*, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2.

should not be. But that does not answer all the complicated questions about the importance of respecting some degree of autonomy and freedom, even in the public activities of religions. Moreover, religious functions often do not neatly track the public/private divide – the holding of a prayer vigil to oppose the war in Iraq or the appointment of a bishop who will sit in the House of Lords in the British Parliament are just two examples of the limited value of the private/public divide as providing a definitive answer to the questions raised in this article. Nonetheless, as a factor to be taken into account, the divide may have some utility.

V. CONCLUSION

Developing a better understanding of the conflict between freedom of religion and non-discrimination is an important challenge in liberal democratic states. This understanding must be one that can take account of the multiplicity and complexity of both individual and group experience. Neither the atomistic liberal individual who in theory exists in secular isolation, nor the religious believer whose beliefs and practices are entirely determined by the authorities within her religion provides a sure basis for advancing. The process of human development leads to contested interpretations from which different and newly developed perspectives form, and the change over time in authority both within and between different cultural groups cannot be ignored. Struggle for change can occur within as well as outside religions, and it cannot be taken for granted that one voice speaks for all.

At the same time, we must acknowledge the reality that individuals live within their own specific cultural context, including that of the seemingly neutral Christian west, and theories which fail to take this into account are unlikely to provide valuable answers. In the process of reconciling non-discrimination and freedom of religion it is important to hear the views both of those who seek to preserve traditions, and of those who bear the costs of such traditions and may seek protection. No general answer can be given to reconciling these principles in every context, but it is necessary to begin to articulate the principles that should guide decision-making in particular contexts. The principles briefly described in this article are not comprehensive and some will be controversial, but they provide a better starting point for reconciling religious freedom and non-discrimination than do the approaches that argue for the dominance of one or other of these values in all contexts.

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