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Freedom of Religious Association: The Case for a Principled Approach to the Employment Equality Exceptions

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**Submitted in fulfilment of the requirements for the degree of Doctor of
Philosophy**

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Abstract

This thesis addresses the question how best to interpret the exceptions to the equality in employment principle afforded in Great Britain to religious employers. There is significant ambiguity surrounding the application of these exceptions, aggravated by a paucity of case law and a divergence in understanding as to the relative significance of job function, context and organisational ethos. The exceptions lack any clear foundational principle and therefore norms to guide their interpretation are urgently needed.

The thesis begins by seeking a modern justification for safeguarding the autonomy of religious groups in an era that may be characterised by a decline in the ‘religiosity’ of the British public and an increase in the influence of human rights and equality narratives. Such a justification is located in the human dignity and autonomy rationale for religious freedom. Against this background, I argue that, by applying a particular understanding of freedom of association to their interpretation, the exceptions could helpfully be regarded as permitting discrimination to preserve an employer’s ethos for the benefit of members of a religious group. At present, the significance of employer ethos is underdeveloped in the jurisprudence on the exceptions. A purposive approach which treats the exceptions as derogations from the equality principle, justified by freedom of religious association, could encourage a deeper insight of employers’ needs and an assessment of claims on the exceptions in the context of the interests protected by rights of association. Fuller engagement with balancing religious association and equality rights could be achieved through recognising that the exceptions derive from *qualified* rights and through requiring employers to act proportionately. Including the concept of ‘accommodation’ in the proportionality analysis could, moreover, assist with fostering an environment in which due regard is given to the dignity interests affected by discrimination.

My argument is informed by comparative study of the equivalent law in Canada and the USA. Attention is drawn to the ambiguity in the British employment exceptions by consideration of the equivalent US and Canadian models. Whereas in these models, church and state relations and freedom of association, respectively, have been recognised as significant, the introduction of the British

employment exceptions has been influenced by a patchwork of factors. My argument is further informed by a series of interviews with religious employers, which revealed mixed opinions on the exceptions and offered a valuable insight into the importance of ethos to employment practices and relationships.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Catriona Morag MacRae Cannon

Signature: _____

1 Introduction

1.1 Research aim

Religion in the workplace is widely considered to be an interesting and important field of study. This is shown in the large and growing volume of academic studies in the field, in the United Kingdom and elsewhere. To date, however, research in the UK has focused primarily on the equality rights of the religious employee in the secular workplace. Questions, such as, whether employers should be obliged to ‘reasonably accommodate’ their employees’ manifestations of religion in the workplace (for example, by granting exceptions to dress codes) and, whether employees ought to have the right to ‘conscientiously object’ to certain work tasks, have featured heavily in the academic debate and literature.¹ Interest in these questions has, of course, been influenced by the well-publicised complaints of religious discrimination brought by four particular employees (Eweida, Chaplin, Ladele and MacFarlane) against their employers. Eweida, a British Airways worker and Chaplin, a nurse, wanted to wear a cross at work in breach of their employers’ policies, whilst Ladele, a civil registrar and MacFarlane, a relationship counsellor, refused (or were deemed to have refused) to provide registration and sexual counselling services, respectively, to same sex couples. Their complaints of religious discrimination, initially heard by the domestic courts in the UK, were considered by the European Court of Human Rights (the ‘ECtHR’) in 2012. The ECtHR’s judgment, issued under the name of *Eweida and others v the United Kingdom*,² continues to inspire interest in the efforts an employer should make to meet the

¹ See, for example, Mark Hill and Russell Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ [Aut 2007] PL 488; Andrew Hamblen, ‘A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace’ (2008) 3 Religion and Human Rights 111; Andrew Hamblen, ‘A No-Win Situation For Public Officials With Faith Convictions’ (2010) 12 EccLJ 3; Gwyneth Pitt, ‘Taking Religion Seriously’ (2013) 42 ILJ 398; Matthew Gibson, ‘The God “Dilution” Religion, Discrimination and the Case For Reasonable Accommodation’ (2013) 72 CLJ 578; Erica Howard, ‘Reasonable Accommodation of Religion and Other Discrimination Grounds in EU Law’ (2013) 38 ELRev 360; and Veit Bader, Katayoun Alidadi and Floris Vermeulen, ‘Religious Diversity and Reasonable Accommodation in Six European Countries: An Introduction’ (2013) 13 IJDL 54.

² *Eweida v the United Kingdom* (2013) 57 EHRR 8.

religious needs of employees in the workplace and in the suitability of the legal protections available in the UK to this end.³

In contrast, comparatively little attention has been given to the application of employment equality laws to religious workplaces in the UK.⁴ This is despite the considerable number of organisations with a religious ethos which employ a significant number of staff in a variety of sectors including in organised religion, education, welfare and leisure. The Equality Act 2010 (the ‘EA’) contains exceptions to the principle of equal treatment in employment which can be relied on by employers with an ethos based on religion or belief, or in respect of employment for the purposes of an organised religion.⁵ These exceptions are supplemented by specific provisions in the Education (Scotland) Act 1980 (the ‘EScA’) and the School Standards and Framework Act 1998 (the ‘SSFA’), permitting differential treatment of teachers on religious grounds in schools with a religious character.⁶ Together, these ‘employment exceptions’ permit employers an element of religious autonomy in the manner in which they organise their employment affairs.

When the employment exceptions which now appear in the EA were considered in Parliament, there was significant discussion and debate on their scope.⁷ Insofar as they engage competing norms of freedom and equality, group and individual, and church and state, the potential for conflict and controversy in their application was rife. Given this, it might have been expected that the employment exceptions (including those in the EScA and the SSFA), would have

³ In a recent report which addressed the question ‘Does the law sufficiently protect employees wishing to manifest a religion or belief at work?’ the Equality and Human Rights Commission recommended that no changes were made to the current legal framework. Equality and Human Rights Commission, ‘Religion or Belief: Is the Law Working?’ (Equality and Human Rights Commission, December 2016) 30-40.

⁴ Though contributions include Russell Sandberg and Norman Doe, ‘Religious Exemptions in Discrimination Law’ (2007) 66 CLJ 302; Lucy Vickers, ‘Religion and Belief Discrimination and the Employment of Teachers in Faith Schools’ (2007) 4 Religion and Human Rights 137; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 122-37; Russell Sandberg, ‘The Right to Discriminate’ (2011) 13 EccLJ 157; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 358-73; and Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 174-86.

⁵ Equality Act 2010 (EA 2010) sch 9, para 2 and 3.

⁶ Education (Scotland) Act 1980 (E(Sc)A 1980) s 21(1); School Standards and Framework Act 1998 (SSFA 1998) s 60(5)(a), s 60(5)(b), s 58(2), s 58(3), s 60(3), s 58(5), s 58(6) and s 60(4).

⁷ See chapter 3 at 3.3.2, 3.3.3 and 3.4.

engendered more academic interest since their introduction. The low incidence of cases on the employment exceptions, or perhaps the lack of appellate authority other than decisions of the Employment Appeal Tribunal, might be partly responsible for the seeming lack of concern.

It would be a mistake, however, to underestimate the significance of the employment exceptions. As derogations from the basic equality principle that individuals should not be treated less favourably because of their personal characteristics, the employment exceptions require a weighty justification, as well as clarity in their application and scope. As a consequence of the lack of academic literature in this area, however, fundamental questions on the normative rationale for protecting the religious autonomy of employers, and on the principles guiding the application and interpretation of the exceptions, have not been fully explored or answered.

It is therefore the primary aim of this thesis to explore how best the employment exceptions can be understood, and interpreted. To be clear, this enquiry takes the employment exceptions in their present form and seeks a better understanding of their rationale and a principled approach to their interpretation. It does not assess the case for reform of the employment exceptions.⁸ Focusing on how best the employment exceptions can be understood and interpreted is especially relevant given the recommendations of the most recent report on religion or belief in the workplace issued by the Equality and Human Rights Commission (the ‘EHRC’) and entitled ‘Religion or belief: is the law working?’⁹ This report was the final product in a three year project by the EHRC on religion or belief in the workplace and in service delivery, and followed a call for evidence and a review of the legal framework.¹⁰ The EHRC specifically addresses in the report the question of whether the

⁸ The predominant aim of this thesis is not to challenge the existence of the exceptions to equality norms or to challenge the idea of giving legal recognition to some religious groups. In considering how best to understand and interpret the exceptions, the focus has been on the most dominant forms of religion in the UK.

⁹ EHRC, ‘Religion or Belief’ (ch 1, n 3).

¹⁰ Martin Mitchell and others, ‘Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence’ (Equality and Human Rights Commission 2015); Peter Edge and Lucy Vickers, ‘Review of Equality and Human Rights Law Relating to Religion or Belief’ (Equality and Human Rights Commission 2015).

employment exceptions are, ‘sufficient and appropriate’.¹¹ Although the EHRC makes recommendations that the exceptions in the EScA and the SSFA are reviewed for compatibility with the European Union directive on equal treatment in employment, Directive 2000/78/EC (the ‘Equal Treatment Directive’), it reaches the conclusion that there should be no change to the employment exceptions in the EA. The status quo (at least for the employment exceptions in the EA) looks set therefore to continue. In light of this, it is all the more important that there is clarity around how best the employment exceptions are to be understood and interpreted.

1.2 Methodology

With a view to addressing the question, how best the employment exceptions can be understood and interpreted, I explore the models of exceptions to employment equality norms in the jurisdictions of the United States of America (the ‘USA’) and Canada and compare these to the employment exceptions in Great Britain, paying particular regard to the historical, constitutional and political influences on each jurisdiction’s approach. The benefits of a comparative approach in the field of religious autonomy are often attested to in light of the ‘shared concerns and the similarity of underlying problems’.¹² Because the jurisdictions of the USA and Canada have recognised religious freedom in their constitutions and religious equality in their anti-discrimination laws for much longer than Britain, they offer a rich collection of case law and body of academic comment to assist the enquiry into how the employment exceptions can best be understood and interpreted. The comparative approach will be used to call attention to the nature and scope of the employment exceptions in Britain and as a source of ideas for their future development.

¹¹ EHRC ‘Religion of Belief’ (ch 1, n 3) ch 3.

¹² Cole Durham Jr observes that, ‘because of shared concerns and the similarity of underlying problems, the field of religious autonomy is one in which comparative studies are likely to yield fruitful results for years to come’ in W Cole Durham Jr, ‘The Right to Autonomy in Religious Affairs: A Comparative View’ in Gerrard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang 2001) 711. See also Patrick Lenta, ‘Taking Diversity Seriously: Religious Associations and Work-Related Discrimination’ (2009) 126 SALJ 827, 840 where Lenta comments, ‘I believe that a study of the approaches adopted in other jurisdictions can help us to discover arguments for or against exemptions to laws that prohibit work-related discrimination that might otherwise be overlooked but are worthy of consideration.’ More generally see Christopher McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499.

I then undertake an empirical study of the influence of a religious or faith ethos on employment practices. In order to gain a deeper understanding of the interaction between employment and an organisation's religious or faith ethos, as well as an insight into whether and why religious autonomy in employment is perceived as important, I analyse qualitative data collected from interviews held with employers associated with different religions and operating in a range of sectors in Glasgow and the surrounding areas. Full details of the empirical methodology and its use in this thesis are given in chapter 7.¹³

1.3 Definitions and territorial scope

The ECtHR has interpreted the freedom of thought, conscience and religion guaranteed by article 9 of the European Convention on Human Rights (the 'ECHR') as encompassing a variety of beliefs, including traditional as well as alternative religions, and beliefs such as humanism, which are not deemed by their holders to be in their nature 'religious' at all. The terms 'freedom of religion' and 'religious freedom' will be used in this thesis to refer generally to the wider category of belief protected by article 9.

The employment exceptions purport to cover, in varying guises, organised religion, schools with a religious character, and other organisations with an ethos based on religion or belief. Except in chapter 7, the thesis will use the terms 'religious employer', 'religious workplace', 'religious group' and 'religious organisation' to refer collectively to these types of association. Although the term 'religious organisation' can infer, to some, an association which proselytises religion, it is not to be interpreted so restrictively in this thesis.¹⁴ The scope of the empirical study which is reported in chapter 7 is somewhat narrower, as it does not cover organisations with an ethos based on belief (as opposed to religion). References are also made throughout chapter 7 to 'religious' or 'faith' ethos organisations, in sensitivity to views expressed by

¹³ See chapter 7 at 7.2

¹⁴ The description in the EA 2010 of the bodies covered by particular provisions on religion or belief could be criticised for lacking in coherence. The employment exceptions in the EA 2010, for example, refer to 'organised religion' and to employers with 'an ethos based on religion or belief' (sch 9, paras 2 and 3) whilst the exceptions to the equality principle in service provision refer to 'organisations relating to religion belief' defined more precisely by reference to organisational purpose (sch 23, para 2).

some of the participants of the study as to how they wished their organisations to be described.

As the employment exceptions explored in the thesis are those in the EA, the EScA and the SSFA, the territorial scope of the enquiry embraces Scotland, England and Wales. The EA applies to Scotland, England and Wales, the EScA only to Scotland and SSFA only to England and Wales. The EA does not apply to Northern Ireland. Employment equality laws in Northern Ireland derive from separate legislation implementing the Equal Treatment Directive.¹⁵ The position in Northern Ireland is specifically outside of the scope of this thesis. In light of the history of religious violence in Northern Ireland, its employment equality laws, insofar as they pertain to religious discrimination and religious schooling, ought to be considered separately in the context of the political environment in which they exist.¹⁶

1.4 Argument and structure

Over the next nine chapters, the question is addressed of how the employment exceptions can best be understood and applied. As a prelude to considering the nature and extent of the employment exceptions, a sense of how the religious group relates to the political and social environment and to the right to religious freedom, is sought in the next chapter. Chapter 2, therefore, reflects on the nature of the special status enjoyed by the religious group in Britain. By examining the remaining incidents of establishment in Scotland and England, and the role of religion in the provision of education and social welfare, the continuing significance of the religious group in the political and social order is illustrated. How the status of the religious group has been affected in recent years by the reported decline in ‘religiosity’ and the increasing dominance of equality and human rights discourses, is then explored, and I argue that if the religious group is to continue to have importance, a modern interpretation of its special status is desirable. Against this background, justifications for the right

¹⁵ Fair Employment and Treatment (Northern Ireland) Order 1998, art 70 and art 71; Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, reg 8.

¹⁶ For a useful comparison of the employment exceptions in Northern Ireland, Ireland and Great Britain, see Mark Coen, 'Religious Ethos and Employment Equality: a Comparative Irish Perspective' (Sep 2008) 28 LS 452.

to religious freedom are considered. I argue here that a rationale for religious freedom rooted in human dignity and autonomy offers a convincing justification for regarding the religious group as having a special status, which is consistent with prevailing narratives in law and culture relating to the importance of the individual and individual interests.

Having set the context for the enquiry, I explore in chapter 3 the nature and extent of the autonomy enjoyed by the religious group in its capacity as employer. I assess the extent to which the Human Rights Act 1998 (the ‘HRA’) and implementation of the Equal Treatment Directive have restricted the ability of the religious group to organise its employment affairs autonomously. The employment exceptions, which leave the religious group with a measure of autonomy, are examined in some detail to reveal significant ambiguity surrounding their application, legitimacy and scope. I argue here that instead of providing clarity on the employment exceptions, relevant Parliamentary and related materials disclose a divergence in understanding as to how to interpret the employment exceptions. Whereas some policy-makers appear to regard job functions as the most important determinant of when the exceptions are to be engaged, the context of the work and the ethos of the employer are regarded by others as more significant. The ambiguity surrounding the employment exceptions is also exacerbated, I argue, by a paucity of relevant case law: a fact which, I suggest, can be explained without admitting their redundancy. Ambiguity in the application of the employment exceptions, aggravated by conflicting interpretations and a lack of case law puts the rule of law at risk. There is thus a strong case for uncovering the principle which underpins them.

Before I consider the extent to which clear principle underpinned the introduction of the employment exceptions, chapter 4 and chapter 5 consider the approach taken in the USA and Canada to exceptions from equality in employment. The reason for such comparative analysis at this juncture is twofold. Firstly, a doctrinal analysis of the US and Canadian models highlights and underlines aspects of the British employment exceptions, leading to a better understanding of their nature and scope. Thus, in chapter 4, the wide model of exemptions and exceptions to the employment equality principle in the USA draws attention to the relatively narrow parameters within which employers can rely on the employment exceptions in Britain. The more developed nature of

the jurisprudence on the exemptions and exceptions in the USA, moreover, calls attention to the paucity of case law on the British employment exceptions. Whereas the exemptions and exceptions in the USA permit less scope than the employment exceptions in the EA for ambiguity and uncertainty in their interpretation and application, I argue that they fail to afford sufficient regard for the equality interests affected by their use. In chapter 5, meanwhile, case law on the Canadian model reveals that the Canadian judiciary, when interpreting its exemptions and exceptions, has particular regard to the nature of the employer (including its purpose and mission) and to the context of the employment. This, I argue, calls attention to the narrow focus on job functions adopted by several policy makers involved in the legislative history of the employment exceptions in Britain.

There is a second benefit to considering the models adopted in the USA and in Canada. The norms influential on these models will be identified, so that the employment exceptions in Britain can be measured against them in chapter 6. In this way, the comparative analysis provides a useful starting point for assessing whether clear principle informed the introduction of the employment exceptions in Britain. I argue in chapter 4 that constitutional church and state relations based on the notion of positive religious freedom guide the approach taken in the USA. Freedom of association, by comparison, is revealed in chapter 5 to be the clear principle underlying the employment exceptions and exemptions directed at the religious group in Canada.

Chapter 6 considers the influence, if any, of the norms prevailing in the USA and Canada on the introduction of the employment exceptions in Britain. I will argue that church and state relations, positive religious freedom and freedom of association had little influence on British law and that the employment exceptions were introduced instead in a piecemeal fashion, shaped in many ways by political compromise. As a result, I argue, the employment exceptions in Britain lack a clear and principled underpinning. This, I contend, is not only detrimental to the rule of law, but also renders the legislature and judiciary susceptible to criticism for championing a secular agenda and prioritising certain protected characteristics, such as sex and sexual orientation, over religion.

In the quest for guiding principle, the views of employer stakeholders are then sought. Chapter 7 reports on the findings of an empirical study investigating the perspective of employers on the ways in which (and reasons why) an organisational ethos based on religion or faith impacts on employment relationships and practices. What makes a workplace with a religious or faith ethos different to one without? What do employers really think of the employment exceptions? The findings of the study are enlightening. Many of the employer participants laid emphasis on the importance of ethos and values to their work and in their employment relationships. A curious interdependency between an organisation's ethos and its employees was revealed in some of the participants' accounts. Not only were employees often considered essential for the maintenance of the employer's ethos, organisational ethos was often considered essential for the employees' own faith journeys. Narrowly defined job functions were rarely given as the reason by participants for deeming religion to be an occupational requirement. Organisational purpose or ethos, staff relationships and worship in the workplace were cited instead as factors relevant to the participants' reliance on the employment exceptions.

In light of these findings on the associative life of a religious organisation, the case is made in chapter 8 for interpretation of the employment exceptions to be based on the principle of freedom of association. The employment exceptions, I argue, ought to be understood as affording the employer autonomy to protect the associational interests of the 'members' it serves. The relevant 'members' will vary from one organisation and context to the next, and may include, for example, the foundational members or trustees of the employer's organisation, the community which the organisation serves, or, in certain narrow circumstances, the employees themselves. I will argue, on this understanding, that the members are best served by retention of their associative identity and that the employment exceptions therefore permit discrimination, within limits, to safeguard the employer's ethos. An identity-protecting interpretation of the employment exceptions with roots in religious and associational freedoms is thus offered as a principled basis for development of the law in this area.

In chapter 9, I argue that an identity-protecting understanding of freedom of association could be applied to interpretation of the exceptions in their current form and could explain the hierarchy of protection that the three distinct bases

of exceptions afford. Unlike in Canada, however, concepts of ‘associative’ rights, ethos and identity are, I argue, underdeveloped in the British jurisprudence on the employment exceptions. The British jurisprudence (this time, like its Canadian equivalent) further evidences, I argue, a lack of engagement with the discriminatory impacts of an exercise of the exceptions.

Drawing on the analysis in the previous chapters, I conclude in chapter 10 that an approach to interpretation of the employment exceptions which regards the employment exceptions as derogations from the equality principle with their rationale in fundamental rights of religious association could improve judicial reasoning and lead to fair and balanced decisions. A purposive approach to the employment exceptions of this kind could encourage the judiciary to take an internal perspective on issues relating to the needs and interests of religious employers and to engage fully with the interests they protect: particularly, the relationships among an employer’s ethos, its ‘members’ and its employees. Understanding the rationale for the exceptions as deriving from a *qualified* right could also encourage more active engagement with the need to balance rights of religious association with competing interests in equality. Extending proportionality to all of the exceptions, moreover, and considering norms of ‘accommodation’ in the proportionality analysis could, I argue, facilitate this engagement and assist the judiciary to balance the dignity interests on both sides.

2 The religious group: context, themes and justifications

2.1 Introduction

In any country, the relationship which the religious group enjoys with wider society and the state is likely to evolve in response to legal and cultural change. In Great Britain, certain aspects of the religious group's historical influence in the political and social order remain relevant today; nonetheless, it is instructive to consider the importance of the religious group in light of more recent narratives of change in law and culture. Strong evidence of a decline in the 'religiosity' of the British public, and the ever-greater dominance of human rights and equality discourses, in particular, provide a helpful context for examining the status of the religious group in Britain today.

It is the aim of this chapter to consider how, if the religious group is to have a special standing in the contemporary order, its importance should be understood. Such an enquiry is a useful preliminary to a thesis which explores the employment exceptions, and which is premised on the belief, contested by some, that there are benefits to be gained from safeguarding the existence and activity of the religious group. This chapter will begin by examining three particular aspects of the religious group's historical involvement in the political and social spheres which remain relevant today: establishment of the Church of England, and to a lesser extent the Church of Scotland; the role of the religious group in the provision of education; and the involvement of the religious group in social welfare projects. Narratives which have become dominant in recent years, pertaining to the level of 'religiosity' of the British public, individual (human) rights and equality, will then be described and consideration given as to how these may have affected how the religious group fits and is perceived within wider society.

If the religious group is to continue to have importance, a modern interpretation of its special status is, I will argue, desirable. It is against this background that the justifications commonly offered for the right to religious freedom guaranteed by the European Convention on Human Rights (the 'ECHR') will be examined. I will argue that there is one rationale commonly offered for

religious freedom which provides a particularly strong justification for the religious group. According to this rationale, the religious group is instrumental in the protection of human dignity and autonomy. Not only does this rationale for religious freedom provide weighty grounds for regarding the religious group today as having a special status, I will argue that it offers a justification for the current and future role of the religious group which is consistent with prevailing narratives regarding the pre-eminence of the individual and individual interests in law and culture.

2.2 Religious groups in the political and social order: some historical and current perspectives

2.2.1 Establishment

Since the English Reformation, the Church of England's close relationship with the state could be regarded as affording it a special place in the political order. The effect of the Reformation statutes of the 1530s was to bring to an end the reign of the Pope in England.¹ Under the new authority of the King of England, the Church of England was considered to be the established, and, for a time, the only lawful religion in England.² The 'Kingdom of England' was, according to Russell Sandberg, considered then to be, 'synonymous with the Church of England'.³ Although the legal disadvantages imposed, following the English Reformation, on adherents to other religions have, in the main, now been repealed,⁴ examples of 'establishment' of the Church of England survive, affording it a special relationship with the state. The monarch is the Supreme Governor of the Church of England, and responsible for appointing all of its bishops and archbishops,⁵ 26 of whom have seats in the House of Lords (and therefore responsibility for passing legislation).⁶ Each new session of the Church's governing body (the General Synod) is also officially opened by the

¹ Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 24.

² ibid 25-26.

³ ibid 24.

⁴ ibid 26-27 (although it is still the case that the monarch may not be a Roman Catholic (The Act of Settlement 1700)).

⁵ Appointment of Bishops Act 1533.

⁶ Manchester Bishopric Act 1847.

monarch,⁷ and whereas the Church has a role in the coronation of new monarchs,⁸ a commitment is made by the monarch in the coronation oath to maintain the Anglican Protestant religion.⁹ Unlike the laws of other religions, Church of England legislation, in the form of Measures, requires parliamentary approval, and, like Church of England Canons, royal assent.¹⁰ In addition to the ‘secular’ courts’ jurisdiction over many aspects of Church of England law, church tribunals and courts determine, subject to judicial review by the High Court, matters relating to clergy discipline, and the licensing of works to church buildings, their contents and churchyards.¹¹ The Church of England, moreover, is obliged to perform marriages for and permit the burials of all parishioners and is prevented from prohibiting parishioners from attending public worship.¹² Thus, the close connection between the Church of England and the state can be observed in the Church’s relationship with the monarch, Parliament, the courts and the public.¹³

The nature of the relationship between the Church of Scotland and the state is less clear. Although the Scottish Reformation in 1560 brought the Pope’s authority in Scotland to an end, and marked the intention (reiterated in the 1707 Treaty of the Union) that the Protestant religion would be established in Scotland,¹⁴ many continue to debate whether the Church of Scotland can really

⁷ BBC, ‘Church of England: An Explanation of the Church of England, Established or State Church in England and Part of the Worldwide Anglican Communion; its Structure, History and Current Issues’ (BBC, Last Updated 30 June 2011)

<www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml> accessed 28 December 2017.

⁸ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 101.

⁹ The Coronation Oath Act 1688; Lucinda Maer and Oonagh Gay, ‘The Coronation Oath’ (SNPC0043, House of Commons Library 27 August 2008) 2.

¹⁰ Church of England Assembly (Powers) Act 1919, s 4; Synodical Government Measure 1969, s 1. Commenting on this in Sandberg, *Law and Religion* (ch 2, n 1) 29, Sandberg remarks, ‘The legal position of the Established Church thus continued to differ from other religious groups.’

¹¹ Sandberg, *Law and Religion* (ch 2, n 1) 64-65 referring to tribunals established under the Clergy Discipline Measure 2003 and to courts established under the Ecclesiastical Jurisdiction Measure 1963.

¹² *Argar v Holdsworth* (1758) 2 Lee 515; Burial Law Amendments Act 1880; *Cole v PC* [1937] 1KB 316. For comment on this and the relationship between the Church of England and the public see Sandberg, *Law and Religion* (ch 2, n 1) 65-66.

¹³ Sandberg has opined that, ‘the incidents of establishment can be understood as involving four interlocking constitutional relationships: between Church and Monarch, Church and Parliament, Church and the courts and Church and the public’ in Sandberg, *Law and Religion* (ch 2, n 1) 60.

¹⁴ Callum Brown, Thomas Green and Jane Mair, *Religion in Scots Law: Report of an Audit at the University of Glasgow* (Humanist Society Scotland 2016) 38.

be described as the or an ‘established’ church,¹⁵ with some describing it as having a ‘milder’¹⁶ or ‘lighter’¹⁷ form of establishment than the Church of England. Unlike the Church of England, the monarch is not the Supreme Governor of the Church of Scotland¹⁸ and has no authority to approve ecclesiastical appointments.¹⁹ The Church of Scotland does not hold any seats in the House of Lords and its legislation does not require to be approved in Parliament or to receive royal assent. Instead, the Articles Declaratory of the Church of Scotland, recognised by the Church of Scotland Act 1921, provide that the state must not interfere ‘with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction’.²⁰ As such, Church of Scotland courts retain exclusive jurisdiction over spiritual affairs, without their determinations normally being subject to judicial review in the secular courts.²¹ Though the exact relationship between the Church of Scotland and the state remains unclear, there is little doubt that the Church of Scotland is treated specially in law. A representative is sent by the monarch to attend meetings of the General Assembly²² and a vow is taken by the monarch in the Oath of Accession particularly to, ‘maintain and preserve the Protestant religion and Presbyterian Church Government’.²³ Unlike other religious institutions, the relationship between the Church of Scotland and the state is set out in an Act of

¹⁵ For an excellent summary and discussion of the different opinions on the question of whether the Church of Scotland is an ‘established’ church see *ibid* 37-50.

¹⁶ Sandberg, *Law and Religion* (ch 2, n 1) 70.

¹⁷ Colin R Munro, ‘Does Scotland Have an Established Church?’ (1997) 4 EccLJ 639, 645.

¹⁸ Sandberg, *Law and Religion* (ch 2, n 1) 70.

¹⁹ Ahdar and Leigh (ch 2, n 8) 100.

²⁰ Church of Scotland Act 1921 (COSA 1921), Articles Declaratory, art IV. On the Articles Declaratory generally see, *Laws of Scotland: Stair Memorial Encyclopedia* (June 1994) vol 3, paras 1501-04. Lord Justice-Clerk Aitchison opined in *Ballantyne v Presbytery of Wigton* 1936 SC 625 (IH), 654 that the civil courts could not determine that matters which fell within the Articles were not spiritual.

²¹ Sandberg, *Law and Religion* (ch 2, n 1) 71 referring to *Lockhart v Presbytery of Deer* (1851) 13 D 1296, *Wight v Presbytery of Dunkeld* (1870) 8 M 921 and Frank Cranmer, ‘Judicial Review and Church Courts in the Law of Scotland’ [1998] Denning Law Journal 49. Cranmer compares the Court of Session’s approach in these cases with its approach to the decisions of the tribunals of non-conformist churches and comments on the potential impact of the Human Rights Act 1998 on judicial review and church courts.

²² Munro (ch 2, n 17) 644.

²³ The Church of Scotland, ‘How We Are organised’ (The Church of Scotland, Undated) <http://www.churchofscotland.org.uk/about_us/how_we_are_organised> accessed 28 December 2017. See discussion of the legislative background to the Oath in Munro (ch 2, n 17) 644.

Parliament,²⁴ and the courts of the Church of Scotland are recognised as, ‘courts of the realm’.²⁵

It would seem, then, that the instances of establishment of the Church of England facilitate for it a reasonable measure of influence in the political sphere. Though the same may not be said about the instances of establishment of the Church of Scotland, its historical, and continuing role as Scotland’s ‘national Church’²⁶ with a ‘distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry’,²⁷ would seem to support its continuing significance in the social, if not the political, order.

2.2.2 Education

It is not, however, only the established Churches which can claim to have a special status in the social order. Groups of various religious affiliations have had, and continue to have, significant involvement in the provision of education. Religious groups historically led the way in education, with all schools in England and Wales prior to 1902 being, ‘subject to ecclesiastical oversight’ at common law.²⁸ Although state involvement in education provision began in 1833 with funding grants,²⁹ there was no state-provided education until the Elementary Education Act of 1870.³⁰ Although voluntary schools in England and Wales were subsumed within the state-maintained sector by the Education Act 1902,³¹ the framework of education legislation enacted since then has facilitated the continuance of schools founded by religious groups.³² Schools with a religious

²⁴ COSA 1921.

²⁵ Munro (ch 2, n 17) 645.

²⁶ For comment on the concept of the Church of Scotland as a ‘national’ church see Marjory MacLean, ‘The Church of Scotland as a National Church’ (2002) 149 Law and Justice 125.

²⁷ COSA 1921, Articles Declaratory, art III.

²⁸ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 234 referring to Cox’s Case (1700) 1 P Wms 29, 24 ER 281 (though Rivers observes this may not have been the case for elementary schools).

²⁹ *ibid* 236.

³⁰ *ibid* 237.

³¹ Rivers, *The Law of Organized Religions* (ch 2, n 28) 238-39.

³² The current legislative provisions are contained in the School Standards and Framework Act 1998 (SSFA 1998).

character in the state-maintained sector in England and Wales are now considered to be, ‘voluntary aided’, ‘voluntary controlled’, or ‘foundation’. Voluntary aided schools are afforded more independence by the state in respect of membership of their governing body, the appointment of staff and in the delivery of religious education, but remain responsible, in the main, for the financial costs of maintaining the school premises.³³ In 2010, schools with a religious character accounted for as many as 33.78% of state-maintained schools in England.³⁴

In Scotland, nationalisation of church schools did not begin until 1872,³⁵ when parochial school boards took over responsibility for the church schools of the old ‘established’ Church of Scotland and the Free Church of Scotland.³⁶ Notwithstanding this and the term ‘non-denominational’ which was and is used to describe the schools, it has been claimed that the influence of the Protestant churches on these schools continued:

Although formal legal ties between the Protestant churches and the nationalised non denominational schools were severed, those churches continued to exercise a strong degree of control over the transferred schools by virtue of their *de facto* presence on school boards, and by virtue of the statutory recognition of the ongoing custom of religious observance and instruction in such schools.³⁷

Nationalisation of church schools was completed in 1918,³⁸ when the responsibility for schools of other denominations, mainly Roman Catholic, was passed to local education authorities.³⁹ These schools were termed, ‘denominational schools’. In contrast to the old Church of Scotland schools, denominational schools were granted statutory privileges to safeguard their religious character. These privileges included the right to approve staff as to their religious beliefs and character, as well as the right to decide the content of

³³ Rivers, *The Law of Organized Religions* (ch 2, n 28) 239-40.

³⁴ Department for Education, 'Maintained Faith Schools' (FOI Release, *Department for Education*, 20 July 2010) <www.gov.uk/government/publications/maintained-faith-schools/maintained-faith-schools> accessed 28 December 2017.

³⁵ Education (Scotland) Act 1872

³⁶ Brown, Green and Mair (ch 2, n 14) 138-39.

³⁷ Brown, Green and Mair (ch 2, n 14) 138.

³⁸ Education (Scotland) Act 1918

³⁹ Brown, Green and Mair (ch 2, n 14) 139.

religious education.⁴⁰ In 2013, there were 370 state-funded faith schools in Scotland (366 Roman Catholic, 1 Jewish and 3 Episcopalian), amounting to 14.4% of all state-funded schools.⁴¹ In a comprehensive review of religion in Scots law published in 2016, the authors comment on the present-day role of religion in education provision in Scotland thus:

As education has been secularising in some ways, the Church of Scotland, the Roman Catholic Church and other religious bodies have increased the legal safeguards for their former rights and privileges and greater explicit protection for what they have perceived as their place in the overall system of education.⁴²

So, as in England and Wales, religious groups appear to have retained significant influence in the provision of education in Scotland.

2.2.3 Social welfare

In addition to its continuing role in providing education, the religious group has been, and continues to be, important in the field of social welfare. The role of the church in social welfare provision in Britain can be traced back to the 11th century.⁴³ From this time, until the Reformation of the 16th century, it has been reported that the churches were the main sources of care for the poor.⁴⁴ Post Reformation, church involvement in social welfare provision continued, though the care became subject to more institutional control by local government with the introduction of the Poor Laws.⁴⁵ It has been claimed that Christian social welfare provision in Britain reached its peak in the early 20th century⁴⁶ and thereafter declined in part in response to falling church membership and resources.⁴⁷ By the end of World War II, responsibility for social welfare

⁴⁰ The statutory privileges are now contained in the Education (Scotland) Act 1980, s 21(1); see further Brown, Green and Mair (ch 2, n 14) 139.

⁴¹ Scottish Government, 'Frequently Asked Questions' (*Scottish Government*, December 2013) <www.gov.scot/Topics/Education/Schools/FAQs> accessed 28 December 2017.

⁴² Brown, Green and Mair (ch 2, n 14) 187.

⁴³ Rana Jawad, *Religion and Faith-Based Welfare: From Wellbeing to Ways of Being* (Policy Press 2012) 35-39.

⁴⁴ ibid.

⁴⁵ ibid 52 (referring to the Poor Law of 1601 in England).

⁴⁶ ibid 53.

⁴⁷ For a discussion of the factors contributing to the decline see ibid 44-52.

provision had been transferred to government with the emergence of the modern welfare state.⁴⁸ Notwithstanding this shift in responsibility, religious groups continued to play an important role in the delivery of social welfare and today, groups of various religious affiliations across Britain are involved in a wide variety of social welfare services: social work, health, social care, poverty reduction and housing.⁴⁹ The role of faith-based charities in the provision of welfare ‘crisis’ provision has been well publicised and was highlighted in a report published in 2013, in which it was claimed that a fifth of local authorities in England had given funds to faith-based charities to provide food banks, healthcare and counselling.⁵⁰

The theological roots of religious group participation in social welfare provision are often attested to. In a report on health care and the church’s mission, the Mission and Public Affairs Council of the General Synod of the Church of England, for example, claimed that ‘Throughout the history of the Church, healing has been an integral part of the proclamation and application of the Gospel.’⁵¹ The General Synod has further asserted that, ‘the churches’ numerous public contributions to the common good are an enormously effective advocacy for Christian faith in national life’.⁵² Many religious groups consider it a central part of their mission to help those in need. This, in conjunction with the increasing pressures on the Government in the field of welfare provision renders it likely that religious groups will retain significant involvement in social welfare provision in the future.

⁴⁸ Jawad (ch 2, n 43) 53; Francis Lyall, *Church and State in Scotland: Developing Law* (Routledge 2016) 214.

⁴⁹ Jawad (ch 2, n 43) chs 4-8.

⁵⁰ See Patrick Butler, ‘Welfare: the State Outsources Welfare Provision to the Church’ *The Guardian* (London, 7 June 2013) <www.theguardian.com/society/patrick-butler-cuts-blog/2013/jun/07/welfare-state-outsources-welfare-provision-to-religiousgroups> accessed 28 December 2017.

⁵¹ Michael Bristol, *Health Care and the Church’s Mission: Report by the Mission and Public Affairs Council* (GS 1857, General Synod of the Church of England, January 2012) para 1.

⁵² Philip Fletcher, *The Common Good - the Church and Politics Today* (A Paper from the Mission and Public Affairs Council, GS 1956, General Synod of the Church of England, 2013) para 12.

2.3 Changing landscape: ‘religiosity’, human rights and the equality agenda

The relationships that the religious group has with state and society through the Church of England and Church of Scotland, and its involvement in education and social welfare provision, are illustrative of the special status and importance, or at least influence, of the religious group in Britain. It is instructive, however, to consider the continuing role of the religious group, if there is to be one, in light of recent narratives of change: in particular, the reported decline in ‘religiosity’ and the increasing dominance of human rights and equality as commonly held conceptions of justice.

2.3.1 ‘Religiosity’

The 2011 UK census for England and Wales reported that 14.1 million, or 25%, of the population, identified with no religion: an increase from 6.4 million, or 15%, since the last census was conducted in 2001.⁵³ The 2011 census data for Scotland showed a similar trend, with 37% of the population reported to have no religion, a 9% increase from 2001.⁵⁴ This UK census data was collected by asking the question, ‘What is your religion’, a question designed to refer to religious affiliation rather than actual religious practice. Whilst the census data reported that 59% of the population of England and Wales and 54% of the population of Scotland were affiliated with Christianity, other empirical studies suggest that the number of the population attending church on a regular basis is much lower. In a report published in 2007 by Christian charity, Tearfund, it was reported that only 15% of the UK population attend church at least once a month.⁵⁵ Even the number of people who consider themselves as religious may not be as high as the census results suggest. In the 2013 British Social Attitudes survey, for example,

⁵³ ONS, 'What Does the Census Tell Us About Religion in 2011?' (*The National Archives*, 16 May 2013)
<<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/census/2011-census/detailed-characteristics-for-local-authorities-in-england-and-wales/sty-religion.html>> accessed 28 December 2017.

⁵⁴ National Records of Scotland, 'Summary: Religious Group Demographics' (*Scottish Government*, Scotland Census 2001 and 2011)
<www.gov.scot/Topics/People/Equality/Equalities/DataGrid/Religion/RelPopMig> accessed 28 December 2017.

⁵⁵ Jacinta Ashworth and others, *Churchgoing in the UK: a Research Report from Tearfund on Church Attendance in the UK* (Tearfund, 2007) 6.

over half of the UK population (50.6%) identified themselves as having no religion.⁵⁶ Statistics have been collected from countries across the globe to prepare a table of the top 50 countries with the largest percentage of population who are agnostic, atheist or who do not believe in God. Notably, in 2007 Britain was ranked at number 15, followed by Canada at number 20 and the United States of America at number 44.⁵⁷

There is, it would seem, strong evidence to suggest that the number of individuals associating with a religion has declined in recent years.⁵⁸ Of particular interest is the reported discrepancy between the number who identify with Christianity and the much lower number who attend church. The phrase, 'believing without belonging' has been coined by one academic to describe the modern day approach to religion in Britain and captures the phenomenon that many of those who consider themselves to be believers have no relationship with a religious institution.⁵⁹ There are now reportedly a significant number of people who consider themselves as, 'spiritual but not religious'⁶⁰ and beliefs or belief systems, other than the traditional religions, have gained in popularity, leading to the emergence of newer groups such as the Humanists UK. The number of Humanist wedding ceremonies conducted in Scotland, for example, increased from fewer than 100 in 2005 when they were first legalised, to over 4000 ceremonies in 2016.⁶¹ Although belief, whether or not traditionally

⁵⁶ See Humanists UK, 'Religion and Belief: Some Surveys and Statistics' (*Humanists UK*) <<https://humanism.org.uk/campaigns/religion-and-belief-some-surveys-and-statistics/>> accessed 28 December 2017.

⁵⁷ Phil Zuckerman, 'Atheism: Contemporary Numbers and Patterns' in Michael Martin (ed), *The Cambridge Companion to Atheism* (University of Cambridge 2007) 56-57.

⁵⁸ Linda Woodhead, for example, has conducted a study on the growth of individuals recorded in surveys as having 'no religion' and found that they are 'not straightforwardly secular' with only a minority being 'convinced atheists' and a quarter partaking in some form of personal spiritual or religious practice in the course of a month. Linda Woodhead, 'The Rise of 'No Religion' in Britain: The Emergence of a New Cultural Majority' (2016) 4 *Journal of the British Academy* 245, 249-50.

⁵⁹ Grace Davie, *Religion in Britain: A Persistent Paradox* (2nd edn, Wiley Blackwell 2015) 78-81; see also Grace Davie, 'Believing Without Belonging: Is this the Future of Religion in Britain' (1990) 37 *Social Compass* 455.

⁶⁰ Tom de Castella, 'Spiritual, But Not Religious' *BBC News Magazine* (3 January 2013) <<http://www.bbc.co.uk/news/magazine-20888141>> accessed 28 December 2017.

⁶¹ Simon Usborne, 'Increasingly Popular Humanist Weddings "To Overtake Church of Scotland Ceremonies Within Two Years"' *The Independent* (London, 21 April 2013) <www.independent.co.uk/news/uk/this-britain/increasingly-popular-humanist-weddings-to-overtake-church-of-scotland-ceremonies-within-two-years-8581924.html> accessed 28 December 2017; Humanists UK, 'Humanist Weddings Continue to Surge in Number, Bucking

characterised as religious, may still be important to many individuals, it would appear that the significance of religious groups or institutions for the exercise of these beliefs has declined, or at the very least, changed.⁶²

2.3.2 Human rights discourse

There has also been a growth in human rights discourse in the last 20 years, encouraged, perhaps, by the incorporation of the ECHR into the law of the UK by the HRA. Although the UK has been a signatory to the ECHR since 1951, prior to the HRA, the rights guaranteed by the ECHR were only binding on member states and could not be enforced in the domestic courts. If a person considered the UK had acted incompatibly with the ECHR, he had to pursue his complaint in the European Court of Human Rights (the ‘ECtHR’). The HRA effected a significant change in the UK’s legal landscape. The UK courts could, for the first time, determine breaches of ECHR rights and provide remedies to affected parties. Not only does the HRA oblige all public authorities to comply with the ECHR, it compels the courts to interpret domestic legislation, so far as possible, in a manner which is compatible with ECHR rights.⁶³

Although natural persons are not the only persons who can claim to be ‘victims’ under the HRA (so too can non-governmental organisations and groups of individuals who can claim to be affected by a violation),⁶⁴ the discourse on rights generated by the HRA often adopts an individualistic tone. So, article 9(1) of the ECHR, for example, which declares the right to freedom of religion, provides that:

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

National Trend' (*Humanists UK*, 28 April 2016) <<https://humanism.org.uk/2016/04/28/humanist-weddings-continue-to-surge-in-number-bucking-national-trend/>> accessed 28 December 2017.

⁶² In a study conducted by Linda Woodhead, findings were made that although some of those who recorded having ‘no religion’ may engage in some form of personal religious or spiritual practice, they did not join religious groups nor join in communal religious practices. Woodhead (ch 2, n 58) 250.

⁶³ Human Rights Act 1998 (HRA 1998), s 3 and s 6.

⁶⁴ European Convention on Human Rights (ECHR), art 34. The Commission held in *X and the Church of Scientology v Sweden* (1979) 16 DR 68 that religious groups could be non-governmental organisations’ under art 34 and bring art 9 claims; see Rivers, *The Law of Organized Religions* (ch 2, n 28) 54.

or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom of religion is also enshrined in other international instruments protecting human rights, including the Universal Declaration of Human Rights 1948 (the ‘UDHR’),⁶⁵ and the International Covenant on Civil and Political Rights 1966 (the ‘ICCPR’).⁶⁶ The language used in all of these instruments to describe the right is framed from an individual perspective: all three instruments use the possessive pronoun ‘his’ before references to ‘religion’ and the preamble to the UDHR refers to, ‘a world in which *human beings* shall enjoy freedom of speech and belief’.⁶⁷

Despite this tendency of the language of fundamental rights to focus on the individual, freedom of religion is at least recognised as having a collective dimension, with each of the ECHR, the UDHR, and the ICCPR guaranteeing the individual the right to manifest his religion or belief, ‘either alone or in community with others and in public or private’.⁶⁸ The question of whether this does or should afford religious groups a primary collective or derivative right to religious freedom is the subject of academic debate.⁶⁹ It is also a question to which the ECtHR has not provided a consistent answer: at times the ECtHR appears to recognise that groups enjoy rights of religious freedom independently of their members and, at other times, groups are regarded by the ECtHR for the

⁶⁵ Universal Declaration of Human Rights 1948 (UDHR 1948), art 18 provides ‘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 teaching, practice, worship and observance.’

⁶⁶ International Covenant on Civil and Political Rights 1996 (ICCPR 1996), art 18 (1) provides ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’

⁶⁷ Emphasis added.

⁶⁸ UDHR 1948, article 18; ECHR, art 9; and ICCPR 1996, art 18(1) (where the word ‘individually’ is substituted for the word ‘alone’).

⁶⁹ See, for example, Julian Rivers, ‘Religious Liberty as a Collective Right’ in Richard O’Dair and Andrew Lewis (eds), *Law and Religion: Current Legal Issues*, Vol 4 (OUP 2001); Bhikhi Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (MacMillan Press Ltd 2000) 214; and Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 51.

purposes of article 9 claims as representing the interests of their individual members.⁷⁰

Evidence has been gathered by Julian Rivers to support his claim that in the field of international law there was an increasing recognition of the ‘collective’ aspect of freedom of religion during the 1980s and 1990s.⁷¹ Among the evidence offered to support this proposition was the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 which identifies nine religious rights, most of which involve collective action, and some of which, Rivers argues, require religious organisations to be acknowledged as legal entities and rights holders.⁷² Principle 16 of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (now the Organisation for Security and Cooperation in Europe) adopted on 17 January 1989 was also cited for setting out several rights to the advantage of religious groups.⁷³ Other activity at the international level presented as evidence to support the claim that a more collectivist approach to religious freedom was being adopted during these years and into the 21st century included: (i) comments in the Concluding Observations to the State Reports issued by the Human Rights Committee of the ICCPR since 1992 concerning the law of religious associations;⁷⁴ and (ii) the holding of a seminar of the Office for Democratic Institutions and Human Rights in 2001 which had a special emphasis on religious communities.⁷⁵

Notwithstanding recognition in international law of the ‘collective’ aspect of religious freedom, it has been observed that the fundamental rights approach to freedom of religion emphasises the separation of the state and the individual, overlooking the many ‘intermediate structures’ which exist in ‘the social

⁷⁰ Rivers, ‘Religious Liberty’ (ch 2, n 69) 227-31.

⁷¹ Rivers, *The Law of Organized Religions* (ch 2, n 28) 37-50.

⁷² Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, art 6; see discussion in Rivers, *The Law of Organized Religions* (ch 2, n 28) 42-43.

⁷³ Rivers, *The Law of Organized Religions* (ch 2, n 28) 46.

⁷⁴ *ibid* 41-42.

⁷⁵ *ibid* 47.

reality'.⁷⁶ This presents a risk, then, that the prevalence of an individual human rights discourse, may serve to marginalise the perceived status of the religious group in society. Though there is a community aspect to the right to religious freedom, it is expressed from the perspective of the individual,⁷⁷ and criticisms have been levelled that the collective dimension of the right to religious freedom is, 'under-emphasised within any given legal system'.⁷⁸

2.3.3 Equality agenda

A second discourse which has gained prominence in recent years and which may impact on how the religious group fits and is perceived in society today is the discourse on equality. In law, many of the provisions relating to equality have their origins in the European Union. The founding and subsequent treaties of the European Union (the 'EU'), which the UK joined in 1973 (then, the European Economic Community), all contain guarantees of equality principles. The Treaty on European Union provides that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁷⁹

The Treaty on the Functioning of the European Union, meanwhile, provides that, 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.⁸⁰ These equality principles have driven EU directives to outlaw gender and race discrimination in goods and services,⁸¹ and

⁷⁶ Sophie C van Bijsterveld, 'Freedom of Religion: Legal Perspectives on Religion' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion: Current Legal Issues*, Vol 4 (OUP 2001) 300-301.

⁷⁷ van Bijsterveld observes in ibid 300 that this has the effect that, 'Religion, then, tends to be approached as a mere personal characteristic, rather than as a social phenomenon as well.'

⁷⁸ ibid 231.

⁷⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016) OJ C 202, art 2.

⁸⁰ ibid, art 10.

⁸¹ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2004/113/EC

to prohibit discrimination in employment connected with gender, race, religion or belief, disability, age and sexual orientation.⁸² In Britain, these directives were implemented by various statutes and regulations, which have now all been consolidated in the Equality Act 2010 (the ‘EA’). In important respects, the EA goes further than the current EU directives and prohibits discrimination because of religion or belief, disability, age and sexual orientation in the provision of goods and services and education (as well as in employment).⁸³ In addition to these equality protections in the areas of employment, goods and services, and education, marriage equality was, most recently, furthered in 2014 by legislation in Scotland and England (though not Northern Ireland) permitting same-sex marriage.⁸⁴

Although non-discrimination legislation has sought particularly to protect those groups which have historically suffered disadvantage (women and ethnic minorities, for example), recent developments in the judicial approach to religion or belief discrimination under the EA suggest a growing recognition by the judiciary of the importance of meeting the needs of the individual. For example, although the judiciary has determined that a ‘belief’ must satisfy certain minimum criteria in order to be protected it has been held that the belief need not necessarily be shared by others.⁸⁵ The ECtHR, moreover, has upheld a complaint that a Christian employee’s article 9 right was breached by a uniform policy which did not have an adverse effect on Christian employees as a group.⁸⁶

implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

⁸² Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 (EC Directive 2000/78); Council Directive 2006/54/EC 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 L 204/23.

⁸³ A 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) is still being discussed within the Council of the European Union. Its scope covers social protection (including social security and health care), social advantages, education, as well as access to and supply of goods and services, such as housing and transport.

⁸⁴ Marriage (Same Sex Couples) Act 2013; Marriage and Civil Partnership (Scotland) Act 2014.

⁸⁵ *Grainger plc v Nicholson* [2010] ICR 360 (EAT) [24] and [27].

⁸⁶ *Eweida v the United Kingdom* (2013) 57 EHRR 8.

The rapid pace at which equality principles have been implemented in law in the areas of employment, goods and services, education and marriage, has not been met with universal support from religious groups, some of whom consider that the application of certain equality principles is incompatible with their religious doctrines.⁸⁷ This conflict most often manifests itself in the context of gender equality, to be understood in its widest sense as including considerations of sexual identity, sexual orientation, marriage and sexual behaviour.⁸⁸ The Church of England's refusal to permit its priests to enter same-sex marriages, and the controversy over the requirement that Roman Catholic adoption agencies, provide their services to homosexual couples, have, for example, been well publicised.⁸⁹ Gender equality (understood in its widest sense) is now a significant aspect of law and culture in Britain. Although gender equality laws contain limited exceptions for religious groups in respect of certain aspects of the new protections,⁹⁰ the obligation to comply with gender equality principles may restrict the autonomy of certain religious groups to organise their affairs in a manner they consider to be compatible with their religious beliefs.⁹¹ Difficulties experienced by some religious groups with operating within the bounds of new gender equality principles has led to a withdrawal from the public sphere. After changes to the law in 2007 requiring adoption agencies to offer their services to homosexual couples, for example, many Roman Catholic adoption agencies considered that they had to cease providing their services.⁹² The impact of the recent developments in gender equality on attitudes to

⁸⁷ See, for example The Christian Institute, 'EU Directive on Goods and Services' (*The Christian Institute*, Winter 2008/09) <www.christian.org.uk/wp-content/uploads/eu-discrimination-directive-on-goods-and-services.pdf> accessed 28 December 2017; Simon Caldwell, 'EU Equality Law is an "Instrument of Oppression" Roman Catholic Bishops Warn' *The Telegraph* (London, 3 August 2009) <www.telegraph.co.uk/news/religion/5960817/EU-equality-law-is-an-instrument-of-oppression-Roman-Catholic-bishops-warn.html> accessed 4 October 2017.

⁸⁸ For an excellent summary of the development of gender equality law see Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 EccLJ 24.

⁸⁹ Harriet Sherwood, 'C of E Bishops Refuse to Change Stance on Gay Marriage' *The Guardian* (London, 27 January 2017) <www.theguardian.com/world/2017/jan/27/church-of-england-bishops-marriage-doctrine-talks> accessed 28 December 2017; Riazat Butt, 'Catholic Adoption Agency Loses Gay Adoption Fight' *The Guardian* (London, 26 April 2011) <www.theguardian.com/society/2011/apr/26/catholic-adoption-agency-gay-lesbian> accessed 28 December 2017.

⁹⁰ For details of the exceptions to equality principles applicable in the employment field see chapter 3.

⁹¹ Rivers identifies eight 'potential problems' arising from the 'conflict between the Church's sexual ethic and the law' in Rivers, 'Law, Religion and Gender Equality' (ch 2, n 88) 38-42.

⁹² See The Christian Institute (ch 2, n 87).

religion and religious groups, however, has perhaps been even more profound and has been described thus:

It is clearly observable in the context of international and European human rights that religions are now seen not primarily as beneficiaries of rights of protection from the state, as subjects enjoying religious freedom, but as potential sources of human rights breaches. Religion is a problem.⁹³

An appreciation of the status of the religious group in society today should take account of this not uncommon negative perception of the religious group in the context of the drive to achieve gender equality.

2.4 A modern approach to the status of the religious group: the right to religious freedom

In light of these dominant narratives of change, the continuing importance of the religious group might appear open to question. How, then, might a new understanding of the special status of the religious group be constructed, which takes account of the decline in ‘religiosity’ and of widely held views regarding the importance of human rights and equality? An answer to this, I will argue, may be found in the right to religious freedom enshrined in article 9 of the ECHR, which provides for the manifestation of religion or belief, whether alone or in a group. Various rationales have been offered for the right to religious freedom. Some of these rationales are explored below, and in the context of each rationale, the role or significance of the religious group is afforded particular consideration. On the basis of this survey of alternative rationales, I conclude that the most compelling justification for religious freedom supports a particular understanding of the role of the religious group which focuses on the individual, and is therefore consistent with cultural and legal norms that promote individual interests.

2.4.1 Civil Peace

In the past, conflict resolution and avoidance were understood to provide a rationale for protecting religious interests.⁹⁴ In 1689, for example, Locke

⁹³ Rivers, 'Law, Religion and Gender Equality' (ch 2, n 88) 35.

⁹⁴ Vickers, *Religious Freedom* (ch 2, n 69) 41-42; see also Ahdar and Leigh (ch 2, n 8) 70-72.

advocated that religious intolerance was the reason for civil unrest.⁹⁵ This is recognised today in several international human rights instruments, which acknowledge in their preambles that religious intolerance has been the source of civil conflict. The preamble to the UDHR, for example, states:

Disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between people and nations.

This ‘civil peace’ rationale for religious freedom need not, of course, be understood only in the context of civil war: the social exclusion of minorities which can arise from a failure to protect religious interests may also lead to instability in society.⁹⁶

Yet, there are difficulties with accepting that tolerance of religious interests is always necessary for the avoidance of civil unrest. Civil peace, after all, could potentially be achieved by maintaining a national religion and repressing opposing beliefs.⁹⁷ In any event, the utility of the civil peace rationale is closely tied to the status of particular religious groups in the country in question.⁹⁸ In a country where one religion dominates and minority faiths are pacifist and without powers, failure to tolerate the minority and accord rights is unlikely to lead to conflict.⁹⁹ Moreover, the civil peace rationale fails to recognise religion as having any independent value: different religions ought to be tolerated, not because they are inherently good but because failure to accord them respect

⁹⁵ John Locke, 'A Letter Concerning Toleration (translated by W. Popple)' (*Constitution Society*, 1689) <www.constitution.org/jl/tolerati.htm> accessed 28 December 2017.

⁹⁶ Vickers, *Religious Freedom* (ch 2, n 69) 42; see also Ahdar and Leigh (ch 2, n 8) 71.

⁹⁷ Ahdar and Leigh (ch 2, n 8) 72.

⁹⁸ *ibid* 71.

⁹⁹ Ahdar and Leigh (ch 2, n 8) 71.

might lead to civil unrest.¹⁰⁰ Without any real value of its own, freedom of religion would seldom win in a battle of competing rights.¹⁰¹

2.4.2 Democracy

Could the contribution of religion, and particularly religious groups, to democracy offer a stronger rationale for religious freedom? The contribution of religious groups to democracy is often cited as a possible justification for religious freedom.¹⁰² Religious groups have been claimed to act as, ‘mediating structures’ between the individual and the state,¹⁰³ capable of providing an important check on state power.¹⁰⁴ Religion may be the source of new ideas, values and means of reasoning¹⁰⁵ and religious groups can aid the development of our understanding of, ‘what is truly beneficial and what is harmful’.¹⁰⁶ By providing different perspectives and challenging existing ways of thinking, religious groups serve an important function in any liberal democratic society. The ECtHR has emphasised the essential role played by religious groups in the democratic process and the importance of religious group autonomy. In *Hasan v Bulgaria*¹⁰⁷ the applicants complained, that the state of Bulgaria had breached their article 9 rights by *inter alia*, interfering in the determination of who would lead the Muslim community. Finding that article 9 was engaged and was to be interpreted in light of the right to freedom of association under article 11 of the

¹⁰⁰ Lucy Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 OJLS 197, 202.

¹⁰¹ *ibid* 202.

¹⁰² See, for example, Rex Ahdar, 'Religious Group Autonomy, Gay Ordination, and Human Rights Law' in Rex Ahdar and Andrew Lewis (eds), *Law and Religion: Current Legal Issues*, Vol 4 (2nd edn, OUP 2001) 278-79.

¹⁰³ See comment on the use of the term in *ibid* 278. Ahdar explains that the term ‘mediating structures’ originated in works of Prefer Berger and Richard John Neuhaus reproduced in Michael Novak (ed), Pefer Berger, and Richard John Neuhaus, *To Empower People: From State to Civil Society* (2nd edn, Washington 1996).

¹⁰⁴ Paul Horwitz, 'The Sources and Limits of Freedom of Religion in a Liberal Democracy' (1996) 54 UToront FacLRev 1, 52-53; see also comments in Richard J Garnett, 'Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses' (2008) 53 Villanova LRev 273, 295.

¹⁰⁵ Horwitz (ch 2, n 104) 52-53.

¹⁰⁶ Kathleen A. Brady, 'Religious Group Autonomy: Further Reflections about What Is at Stake' (2006-2007) 22 JL&Relig 153, 162. Brady argues further that religious group autonomy is important to allow religious groups to develop ideas about truth, including political and social truth and to share these ideas with the wider community.

¹⁰⁷ *Hasan v Bulgaria* (2002) 34 EHRR 55.

ECHR, the ECtHR opined that ‘the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords’.¹⁰⁸

What makes religious groups particularly suited to participation in the democratic process? There are, after all, many other types of groups representing particular interests, which could add value to policy formation. One argument is that religions can provide an important safeguard against an otherwise oppressive government because, as Stephen Carter has put it, ‘Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members, claims that exist alongside, are not identical to, and will sometimes trump the claims to obedience that the state makes.’¹⁰⁹ Still, it is not true that all religious groups can or want to provide a check on state power. Some religious groups, such as the Old Order Amish, for example, may have no interest in fulfilling a mediating function.¹¹⁰

2.4.3 Civic virtues

A third justification commonly offered for religious freedom is the contribution of religion to the nurturing of civic virtues. George Washington was of the view that religion was indispensable for morality, remarking when he left office:

let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.¹¹¹

¹⁰⁸ ibid [62].

¹⁰⁹ Stephen L Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Anchor Books, Doubleday 1993) 35. For comment on Carter’s thesis see Ahdar, ‘Religious Group Autonomy’ (ch 2, n 102) 278.

¹¹⁰ Scott C Idleman, ‘The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief’ (1994) 142 UPaLRev 1313, 1348-49. For comment on the weakness of the democracy rationale see Ahdar, ‘Religious Group Autonomy’ (ch 2, n 102) 278-79.

¹¹¹ Matthew L Harris and Thomas S Kidd (eds), *The Founding Fathers and the Debate over Religion in Revolutionary America* (OUP) 121.

Religious groups, meanwhile, have been described as, 'a powerful force in creating a climate in which civic virtue can survive'.¹¹² Not only do religious groups present opportunities for individuals to think of others, they also provide a source of teachings on the common good.¹¹³

Whilst there is no doubt that many religions do promote civic virtues, it is difficult, nonetheless, to sustain an argument that all religious beliefs, regardless of substance, contribute to an, 'orderly, good and democratic society'.¹¹⁴ In support of an argument that the rule of law should be applied to religious groups, it has been claimed that, 'the widespread cultural presupposition that religion is inherently and always good for society is baseless'.¹¹⁵ The harm caused by religious groups responsible for the sexual abuse and medical neglect of children and the undermining of civil rights laws are cited as examples in defence of this position.¹¹⁶ Indeed, rather than promote civic virtues which are valued in a democratic society, some extremist religious groups use their religious beliefs to defend acts of violence. The daily news reports of violence by religious groups in the Middle East supports the claim that religion is not always 'good'.¹¹⁷ Concerns have been expressed that the present day dominance of secularism is to blame for the association of religion with war in recent times: 'distance from the surrounding culture' is one of the things that 'nurtures fanaticism'.¹¹⁸ If this is correct, violent religious disputes will continue and intensify if societies are to become increasingly secular.

¹¹² Timothy L Hall, 'Religion and Civic Virtue: A Justification of Free Exercise' (1992) 67 Tulane Law Review 87, 112.

¹¹³ ibid 110-12.

¹¹⁴ Alan Brownstein, 'Protecting the Religious Liberty of Religious Institutions' (2013) 21 JContempLegalIssues 201, 209.

¹¹⁵ Marci A Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (Cambridge University Press 2005) 274.

¹¹⁶ ibid 274.

¹¹⁷ See comments by Giles Fraser on 'bad' religion, in Giles Fraser, 'If this is Real Religion, You Can Count Me as an Atheist' *The Guardian* (London, 22 August 2014) <www.theguardian.com/commentisfree/belief/2014/aug/22/this-real-religion-count-me-atheist> accessed 28 December 2017.

¹¹⁸ Andrew Brown, 'Why are Religion and Violence Now So Closely Linked?' *The Guardian* (London, 25 April 2013) <www.theguardian.com/commentisfree/andrewbrown/2013/apr/25/religion-violence-why-closely-linked> accessed 28 December 2017.

A further difficulty with the civic virtues rationale for religious freedom is that it fails to differentiate between religious beliefs and practices which are considered fair and just by the majority in society, and those that are not. After all, ‘religious liberty requires protection in those circumstances in which the majority views religious doctrine as unimportant, unnecessary, or even wrongful’.¹¹⁹ If religious freedom were to guarantee the right to believe only those doctrines considered worthy by the state it would be of very little value to the individual: the ‘freedom’ in ‘religious freedom’ would be severely curtailed.

A common theme in the analysis of rationales for religious freedom based on ideas of civil peace, democracy and civic virtues, is that none can explain why religious freedom is afforded universally to all, regardless of the nature of their religious belief or practice. Religious freedom protects religious interests whether or not the religion or religious group promotes civic virtues, contributes effectively to the democratic process, or is capable and willing to cause civil unrest. It is notable that each of the rationales focuses on the benefits which religion or religious groups can provide to society: in promoting civil peace, nurturing civic virtues and enhancing democracy. Could a focus instead on the benefits of religion and religious groups to the individual provide a stronger and more universal justification for religious freedom?

2.4.4 Human dignity and autonomy

The argument has been made by Lucy Vickers and others that human dignity and the related concepts of autonomy and equality provide the strongest rationale for religious freedom.¹²⁰ Whilst dignity is difficult to define precisely,¹²¹ it has been said that it is a status which humans bestow on humans,¹²² ‘in acknowledgement of their uniquely shared capacities’,¹²³ including their ability

¹¹⁹ Brownstein (ch 2, n 114) 209 referring to John H Garvey, *What are Freedoms For?* (1st edn, Harvard University Press 1996) 52-53.

¹²⁰ Vickers, *Religious Freedom* (ch 2, n 69) 45-49.

¹²¹ David Feldman, ‘Human Dignity as a Legal Value: Part 1’ [1999] PL 682, 682.

¹²² Vickers, *Religious Freedom* (ch 2, n 69) 45.

¹²³ Parekh (ch 2, n 69) 130-31.

for ‘higher-level consciousness’¹²⁴ and to ‘form visions of the good life’.¹²⁵ It has also been described in one sense as being about an individual’s feelings of self-worth.¹²⁶ Guarantees of freedom of thought, conscience and religion in international human rights law safeguard the autonomy of the individual to determine his own idea of the good life, contributing to his sense of self-worth.¹²⁷ Freedom of conscience has even been described as, ‘the most intimate and somehow the profoundest of all human freedoms’ and, ‘really where the autonomy of the human being starts’.¹²⁸ Equality, meanwhile, has been said to require, ‘minimally, that we should acknowledge the equal dignity and worth of all human beings, accord them equal respect, and give equal consideration to their claims to the basic requirements of the good life’.¹²⁹

The human dignity and autonomy rationale for religious freedom has, however, not been spared from criticism.¹³⁰ It has been argued, for example, that it fails to appreciate that religion is, ‘as much about duty as choice’.¹³¹ Whether religion is a belief which is chosen or one into which an individual is born is subject to its own literature.¹³² Still, the criticism can be addressed without taking one side of the debate or the other. According to Vickers, the rationale simply requires that, ‘one remain free to live according to one’s conscience’.¹³³ Thus whether religious conscience is chosen by the individual or consigned to

¹²⁴ Vickers, *Religious Freedom* (ch 2, n 69) 45.

¹²⁵ Parekh (ch 2, n 69). Vickers observes that another view on Christian teaching is that humans are unique because God created man in his image, in Vickers, *Religious Freedom* (ch 2, n 69) 37.

¹²⁶ Feldman (ch 2, n 121) 685.

¹²⁷ Vickers (ch 2, n 69) 47.

¹²⁸ Mr Peter Leuprecht, Director of Human Rights, Council of Europe in his opening speech at a seminar held in Leiden (Netherlands) organised by the Council of Europe on 12-14 November 1992. See Council of Europe (ed), *Freedom of Conscience: Proceedings of a Seminar Held in Leiden (Netherlands) Organized by the Council of Europe on 12-14 November 1992* (Council of Europe Press 1993) 19.

¹²⁹ Parekh (ch 2, n 69) 133; see also Vickers, *Religious Freedom* (ch 2, n 69) 47-49.

¹³⁰ For example, Farrah Ahmed argues that autonomy cannot justify the protections afforded by religious freedom to beliefs which are resistant to revision and to some ‘manipulative proselytism’, in Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’ (2017) 80 MLR 238.

¹³¹ Ahdar and Leigh (ch 2, n 8) 80-83.

¹³² See for example, Michael J Sandel, ‘Religious Liberty - Freedom of Conscience or Freedom of Choice’ [1989] Utah LRev 597; Jeffrey M Anderson, ‘Conscience in the Court, 1931-1946: Religion as Duty and Choice’ (2001) 26 JSupCtHist 127.

¹³³ Vickers, *Religious Freedom* (ch 2, n 69) 48.

him at birth, it is expected that he should be free to have and abide by the normative standards required by it.¹³⁴

A second criticism of the human dignity and autonomy rationale for religious freedom is that it fails to justify affording religion special treatment: religion should be treated in the same manner as the other aspects which make up an individual's identity. As Ahdar and Leigh explain:

Religion is no longer special or distinctive but is simply lumped into a category along with other things important to personal identity such as political affiliations, racial or ethnic background, profession, occupation, or marital status. ... If religion is not special then there is no need to single it out for separate mention or protection. The general constitutional freedoms of conscience, expression, and association would seem to do the job.¹³⁵

There can, however, be limits to the aspects of identity which require protection on human dignity and autonomy grounds. Vickers suggests that, 'if one is to protect practices or beliefs on grounds of dignity, it is only those which feed into an individual's ability to make sense of the world, and through which they develop a sense of the good, that require protection'.¹³⁶ On this view, a person who is an avid supporter of his national football team cannot claim that this aspect of his identity requires protection on human dignity grounds. A person who holds a philosophical belief in the higher purpose of public service broadcasting¹³⁷ or in the sanctity of life and anti-fox hunting,¹³⁸ on the other hand, could argue that his dignity and autonomy interests require that his beliefs are protected. In prohibiting discrimination on the grounds of 'religion or belief',¹³⁹ the EA recognises that certain beliefs which are not traditionally characterised as 'religious' can be of similar value to individual identity as more orthodox religious beliefs.

¹³⁴ ibid.

¹³⁵ Ahdar and Leigh (ch 2, n 8) 79 referring to S D Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140 UPaRev 149, 202 and 204.

¹³⁶ Vickers, *Religious Freedom* (ch 2, n 69) 49.

¹³⁷ *Maistry v BBC* [2014] EWCA Civ 1116.

¹³⁸ *Hashman v Milton Park (Dorset) Ltd* ET/3105555/09.

¹³⁹ EA 2010, s 10.

If the human dignity and autonomy rationale provides the most compelling justification for religious freedom, what does it imply about the significance, if any, of the religious group? The ECtHR has recognised that, ‘participation in the life of the community’ is a ‘manifestation of one’s religion’.¹⁴⁰ Religious groups, then, are of instrumental value to the individual in his exercise of religious freedom. Protection of the collective dimension of religion is essential for the individual’s freedom of religion. According to the ECtHR, ‘Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.’¹⁴¹

Although collective religious worship is reportedly on the decline in the UK,¹⁴² the importance of the community aspect of religion should not be understated. Religious practice might include individual prayer or meditation, but often it is communal in nature, in joint worship or in teaching, for example.¹⁴³ Religious groups provide a supportive environment for individuals to learn, explore and express their beliefs. Perhaps more significantly, humans are ‘social beings’ and religious groups provide the opportunity for individuals to exercise this human characteristic.¹⁴⁴ Religious groups, among others, provide, ‘contexts for personal expression, development and fulfilment’.¹⁴⁵ They impact on the development of individual personality and provide, ‘a source of loyalty and solidarity’.¹⁴⁶ Participation in a religious group can help an individual to develop his identity by supporting him as he forms, understands and develops his religious beliefs, and

¹⁴⁰ Hasan (ch 2, n 107) [62].

¹⁴¹ ibid.

¹⁴² For example, see Ashworth and others (ch 2, n 55) 6.

¹⁴³ W Cole Durham Jr, ‘The Right to Autonomy in Religious Affairs: A Comparative View’ in Gerrard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang 2001) 708.

¹⁴⁴ Gerry Whyte, ‘Protecting Religious Ethos in Employment Law: A Clash of Cultures’ (2005) 27 DULJ(NS) 169, 169.

¹⁴⁵ Frederick Mark Gedicks, ‘Toward a Constitutional Jurisprudence of Religious Group Rights’ [1989] WisLR 99, 116. See also Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (1st edn, Eerdmans 1984) 92 where Neuhaus remarks ‘Private conscience too is communal; it is shaped by the myriad communities from which we learn “to put the world together” in an order that is responsive to our understanding of right and wrong.’

¹⁴⁶ Gedicks (ch 2, n 145) 116.

by providing him with opportunities to practise his beliefs.¹⁴⁷ The importance of the religious community to the individual believer has been described thus:

Religious communities protect the seedbeds of religious thought and belief. They provide the environment in which religious ideas and experience can be formed, crystallised, developed, transmitted and preserved. Individual belief would lack its richness, its connectedness, and much of its character-building and meaning-giving power if it were cut off from the extended life of religious communities.¹⁴⁸

In addition to the instrumental role which religious groups play in enhancing individual religious freedom, it has been argued that, ‘the community dimension may be part of the religion or belief one has’.¹⁴⁹ That the collective aspect may be of, ‘intrinsic value’ to one’s religious beliefs¹⁵⁰ is reflected in the following interpretation of Christian doctrine, which describes the collective nature of Christian belief and practice thus:

To be a follower of Christ has meant from the very beginning to join the community of disciples he draws together around himself ... The Bible was not written for and about isolated individuals; it was written for and about a community of people - Israel in the Old Testament, the church in the New Testament. You cannot be a Christian by yourself; you can only be a Christian together with other Christians who serve God in the world.¹⁵¹

The most persuasive justification for religious freedom, then, should be its essential contribution to the equality and dignity inherent in each human being. On this understanding, the role of the religious group is to enhance the dignity

¹⁴⁷ Denise Reaume remarks, ‘Both identity development and formulation of a conception of the good are undertaken by individuals but they are undertaken in large part with and through relations with others. For this reason, involvement in communities of various sizes and scopes can be crucial to the individual enjoyment of self-worth. That dependency must be recognised by any account of what respect for the dignity of others requires.’ Denise G Reaume, ‘Discrimination and Dignity’ (2003) 63 LaLR 645, 678.

¹⁴⁸ W Cole Durham Jr (ch 2, 143) 709.

¹⁴⁹ Merilin Kiviorg, ‘Collective Religious Autonomy under the European Convention on Human Rights: The UK Jewish Free School Case in International Perspective’ EUI Working Paper, MWP 2010/40, 3
http://cadmus.eui.eu/bitstream/handle/1814/15236/MWP_2010_40.pdf?sequence=1>
accessed 28 December 2017.

¹⁵⁰ ibid 3.

¹⁵¹ Shirley G Guthrie, *Christian doctrine* (Westminster John Knox Press 1994) 15. Citing this passage in Guthrie, Brownstein observes that the collective nature of Christian belief and practice is ‘undisputed’ in Brownstein (ch 2, n 114) 216, fn 41.

and autonomy interests of its individual members, by providing opportunities for them to share their religion or belief with others and, in so doing, to develop and mature their identities. Understanding religious freedom as protective of individual interests and religious groups as instrumental in the realisation of these interests is, moreover, consistent with the individual rights discourses promoted by the HRA¹⁵² and the individual trends which have been observed in religious practice, and belief.¹⁵³

2.5 Conclusion

Whereas the continuing involvement of the religious group in education and social welfare provision together with the remaining examples of ‘establishment’ of the Church of England and Church of Scotland evidence the continuing influence of the religious group in the political and social spheres, dominant narratives of cultural and legal change now form part of the context in which the importance of the religious group ought to be evaluated. As traditional forms of organised religion ponder the challenges arising from reports of a decline in levels of religious affiliation and practice, beliefs and belief systems which are less reliant on institutional form are gaining in popularity. Paralleling these cultural developments are the individual rights and equality discourses supported by the incorporation of the ECHR and the European equality directives into UK law. The value and worth of the religious group is perhaps, in light of these changes, more open to question now than ever before. I have argued here that the human dignity and autonomy rationale for religious freedom provides a modern interpretation of the importance of the religious group which regards it as instrumental in the individual exercise of religion or belief. By aligning the *raison-d’être* of the religious group with a justification for religious freedom which is rooted in individual values, a convincing case can be made for supporting the existence and continuance of the religious group in the contemporary social and political order.

¹⁵² See 2.3.2 above.

¹⁵³ See 2.3.1 above.

3 Religious group autonomy in employment: nature and scope

3.1 Introduction

I concluded the preceding chapter by arguing that a modern interpretation of the special status of the religious group could be found in the human dignity and autonomy rationale for religious freedom. Having made the case for safeguarding the existence and activity of the religious group, I explore, in this chapter, the autonomy it is afforded in its capacity as employer.

I will consider, firstly, the extent to which developments in equality and human rights law have impacted on the autonomy of the religious employer. The law in Great Britain pertaining to religious group autonomy in employment was transformed in the early years of this century. The autonomy previously enjoyed by religious employers in their employment practices became restricted, initially by the Human Rights Act 1998 (the ‘HRA’) and then, by implementation in the UK of Council Directive 2000/78/EC which established a general framework for equal treatment in employment and occupation (the ‘Equal Treatment Directive’). Although there are exceptions to the principle of equal treatment in employment which permit religious employers to retain a measure of autonomy in their employment affairs, I will argue that there is significant ambiguity surrounding their interpretation and their application. Instead of providing clarity, Parliamentary debates (and related consultations, explanatory notes and guidance) on the exceptions, reveal divergent opinions as to how the exceptions ought to be interpreted. The ambiguity in the exceptions is, then, further exacerbated by the paucity of reported case law since they came into force, a phenomenon for which possible explanations will be explored. Ambiguity in the exceptions, aggravated by conflicting interpretations and a lack of case law, breeds uncertainty for religious employers in how they ought to organise their religious affairs. It, further, puts the consistency in judicial decision-making, on which the rule of law relies, at risk. For these reasons, a clear understanding of the principle underlying the provisions, I will argue, is urgently required.

3.2 The impact of the HRA and Equal Treatment Directive on religious group autonomy in employment

3.2.1 Religious autonomy in employment prior to the year 2000

Prior to the turn of the century religious employers in Britain had a considerable measure of freedom to recruit employees sharing their religion and to require standards of behaviour from their employees (both at, and away from the workplace) which accorded with the teachings of their religion. Although the employment decisions of religious employers were, like any other employer, subject to the law on unfair dismissal and to legislation prohibiting discrimination on the grounds of sex, race and disability, the extent to which these laws regulated their activities was limited. Unfair dismissal law would not protect an unsuccessful applicant for a job and was only available as a remedy for employees who satisfied a minimum qualifying service with their employer. Even then, dismissals would be fair if they were, for example, on ‘conduct’ grounds or for ‘some other substantial reason’ provided they were procedurally fair and did not fall outwith the ‘range of reasonable responses’ by an employer (making it difficult for the judiciary to substitute its own view of appropriate treatment in any case).¹ Meanwhile, an applicant or employee who was adversely affected by an employment decision which was religiously motivated would only be able to complain of unlawful discrimination if the treatment inflicted on him amounted to sex, race² or disability discrimination. This was the case in *O'Neill v Governors of St Thomas More Voluntary Aided Upper School*.³ In *O'Neill*, a Roman Catholic school constructively dismissed a religious education teacher because she had become pregnant by a Roman Catholic priest and the relationship had become public. Although the school was motivated by concerns that the teacher’s position in the Roman Catholic school as a religious education teacher had become untenable due to the publicity surrounding her relationship and pregnancy, the teacher was nevertheless successful in a sex

¹ See discussion in Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 222-25 of the limited protection which the legal provisions on unfair dismissal provide to employees with religious interests.

² Sikhs and Jews were recognised as an ethnic group under the Race Relations Act 1976 (RRA 1976) (*Mandla v Lee* [1983] 2 AC 548 (HL)) whereas Muslims were not (*Tariq v Young ET* 247738/88).

³ *O'Neill v Governors of St Thomas More Voluntary Aided Upper School* [1997] ICR 33 (EAT).

discrimination claim against the school. The employment appeal tribunal (the ‘EAT’) disregarded the school’s motives, finding that the dismissal for pregnancy was on a ground of sex.⁴ Still, *O’Neill* is the only reported case decided at appellate level prior to 2000 in which a discrimination complaint against a religious employer arising from treatment alleged to have been on religious grounds has been successful.⁵ Discrimination by a religious employer (like any other employer), moreover, was permitted on sex or race grounds if the employer could demonstrate an occupational requirement which was proportionate to a legitimate aim.⁶

In addition to the lack of legal constraints on religiously motivated employment decisions, schools with a religious character in Scotland, England and Wales in the state maintained sector enjoyed (and, indeed, continue to enjoy) additional protections against interference in their employment affairs. In Scotland, the Education (Scotland) Act 1980 (the ‘E(Sc)A’) provides that any teacher appointed to a post on the staff of a denominational state school must be approved as regards his religious belief and character by representatives of the relevant church or denominational body.⁷ The protections afforded to schools with a religious character in England and Wales are more complex, and vary according to whether the school is a foundation school, a voluntary controlled school or a voluntary aided school.⁸ Under the School Standards and Framework Act 1998

⁴ *ibid* [25(4)].

⁵ In *Board of Governors of St Matthias Church of England School v Crizzle* [1993] ICR 401 (EAT) the EAT determined that there had been no indirect race discrimination in the requirement of an Anglo-Catholic school for applicants for a head teacher post to be ‘committed communicant Christians’. Although the requirement had an adverse effect on the claimant’s Asian race, it was in pursuance of a legitimate and reasonable objective and justifiable: the head teacher was required to lead the school in spiritual worship and administer the sacrament to confirmed pupils at a weekly school mass.

⁶ Exceptions for genuine occupational requirements were contained in the RRA 1976, s 4A and the Sex Discrimination Act 1975 (SDA 1975), s 7. In addition, a further exception in respect of employment for the purposes of organised religion was contained in the SDA 1975, s 19. Note also that s 6 of the Priests (Ordination of Women) Measure 1993 (repealed in 2005 by the Employment Equality (Sex Discrimination) Regulations 2005) permitted the Church of England to discriminate against women in ordination to the office of priest and in relation to certain other appointments and licensing decisions.

⁷ Education (Scotland) Act 1980 (E(Sc)A 1980), s 21(2).

⁸ See generally Lucy Vickers, ‘Religion and Belief Discrimination and the Employment of Teachers in Faith Schools’ (2007) 4 Religion and Human Rights 137, 151-53; Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 164-65.

(the ‘SSFA’), ‘voluntary controlled’⁹ and ‘foundation’¹⁰ schools with a religious character can, when appointing the head teacher, consider the applicant’s religion and ‘ability and fitness to preserve and develop the religious character of the school’.¹¹ They are also entitled to reserve up to one fifth of their teaching staff (including the head teacher) who can be ‘selected for their fitness and competence’ to give religious education in accordance with the tenets of the school’s specified religion.¹² In respect of reserved teachers, the school can give preference in appointment, remuneration or promotion decisions to persons who hold religious opinions, attend religious worship or who give (or are willing to give) religious education, in accordance with the tenets of the school’s religion.¹³ The school is also entitled to have regard to any failure on the part of a reserved teacher to comply with the tenets of the religion in taking decisions on termination.¹⁴ All other teachers and non-teaching staff in such schools are protected against disqualification from being a teacher or from being employed on grounds of their religious opinions, or their attending or failure to attend religious worship.¹⁵ There is no obligation on non-reserved staff to give religious education¹⁶ and the school cannot award a teacher any less remuneration or deprive or disqualify him from any promotion or other advantage on the grounds that he does or does not give religious education, or by reason of his religious opinions or attendance, or failure to attend religious worship.¹⁷ ‘Voluntary aided’¹⁸ schools which have a religious character, by contrast, can give preference in their appointment, remuneration or promotion decisions concerning any teaching post on the basis of religious opinions, attendance at

⁹ In voluntary controlled schools, the land and buildings are owned by the church but the local education authority employs the staff, controls admissions and funds the school (Vickers, ‘Religion and Belief Discrimination’ (ch 3, n 8) 150).

¹⁰ In foundation schools, funding is provided by the local education authority, but the buildings are owned by the governing body, and the governing body employs the staff (*ibid* 150).

¹¹ School Standards and Framework Act 1998 (SSFA 1998), s 60(4).

¹² SSFA 1998, s 58(2) and s 58(3).

¹³ *ibid*, s 60(3) and s 60(5)(a).

¹⁴ *ibid*, s 60(3) and s 60(5)(b).

¹⁵ *ibid*, s 59(2).

¹⁶ *ibid*, s 59(3).

¹⁷ *ibid*, s 59(4).

¹⁸ In voluntary aided schools, the land and buildings are owned by the church, the governing body employs the staff and controls admissions, but the funding for the school comes, in the main, from the local education authority (Vickers, ‘Religion and Belief Discrimination’ (ch 3, n 8) 150).

worship and/or whether the individual gives (or is willing to give) religious education.¹⁹ Importantly, conduct on the part of any teacher which is ‘incompatible with the precepts, or with the upholding of the tenets of the religion’, can also be taken into account in decisions on termination.²⁰ The aforementioned provisions pertaining to state maintained schools in Scotland, England and Wales applied prior to 2000 and continue to apply today. They will hereafter be referred to collectively as, the ‘faith schools exception’.

3.2.2 The Human Rights Act 1998

The first significant piece of legislation to change the legal landscape in which religious employers operated was the HRA which came into force in 2000 and incorporated the European Convention on Human Rights (the ‘ECHR’) into UK law. The ECHR provides the right to freedom of thought, conscience and religion,²¹ prohibits discrimination on religious grounds²² and recognises that parents have the right to ensure the education and teaching provided to their children conforms to their religion and their philosophical convictions.²³

The HRA impacts on religious employers in a number of ways. Religious employers can, themselves, be ‘victims’ under the HRA and claim the right to freedom of thought, conscience and religion in legal proceedings against public authorities or bring infringement action against the state.²⁴ In addition, religious organisations performing public functions are ‘public authorities’ for the purposes of the HRA²⁵ and thus any failure on their part to comply with the ECHR in their employment practices could lead to claims being brought under the HRA against them by their employees. Those religious organisations which are not ‘public authorities’ still need to be mindful of the ECHR since the judiciary is a

¹⁹ SSFA 1998, s 60(5)(a). SSFA 1998, s 124A contains a similar provision for independent schools with a religious character.

²⁰ ibid, s 60(5)(b). SSFA 1998, s 124A contains a similar provision for independent schools with a religious character.

²¹ European Convention on Human Rights (ECHR), art 9.

²² ibid, art 14.

²³ ibid, protocol 1, art 2.

²⁴ Human Rights Act 1998 (HRA 1998), s 7. Only those ‘persons’ who are ‘victims’ under art 34 of the ECHR will be able to bring a claim (HRA 1998, s 7(7)). See also chapter 22 at n 64.

²⁵ HL Deb 24 November 1997, vol 583, col 800 (The Lord Chancellor).

‘public authority’ and required by the HRA to interpret legislation, where possible, in a manner consistent with it.²⁶

When it became apparent that religious organisations were to be regarded as ‘public authorities’ when carrying out public functions, and therefore subject to the HRA,²⁷ religious organisations voiced concerns that human rights principles would be prioritised over ecclesiastical law and interfere with religious doctrine²⁸ and that the employment practices of denominational schools would be affected.²⁹ In an attempt to alleviate these concerns, section 13 was inserted into the HRA.³⁰ Section 13 is triggered when the courts determine a question which might affect the exercise by a religious organisation of its article 9 right to freedom of thought, conscience and religion. It requires the courts in these circumstances to have ‘particular regard’ to the importance of the organisation’s article 9 right.³¹ ‘Religious organisation’ is not defined in the HRA but, according to the then Home Secretary, it includes ‘organisations with religious objectives’,³² as well as churches. Despite the assertion by the then Home Secretary, at the time the HRA was being considered in Parliament, that section 13 would offer ‘significant protection’ to religious believers,³³ predictions were made when the HRA came into force that section 13 would seldom be utilised.³⁴ Indeed, 17 years on, only a handful of reported cases make any reference to section 13³⁵ and there is only one case in which section 13 plays

²⁶ HRA 1998, s 3 and s 6(3)(a).

²⁷ See HL Deb 24 November 1997, vol 583, col 800 (The Lord Chancellor); HC Deb 20 May 1998, vol 312, col 1017 (The Home Secretary, Jack Straw).

²⁸ Peter Cumper, ‘The Protection of Religious Rights under Section 13 of the Human Rights Act 1998’ [2000] PL 254, 255-57.

²⁹ HC Deb 20 May 1998, vol 312, col 1021 (The Home Secretary, Jack Straw).

³⁰ Cumper (ch 3, n 28) 255; Ahdar and Leigh in Rex Ahdar and Iain Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 379.

³¹ HRA 1998, s 13 provides, ‘If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.’

³² HC Deb 20 May 1998, vol 312, col 1023 (The Home Secretary, Jack Straw). For comment on the use of the term ‘religious organisation’ in the HRA see Cumper (ch 3, n 28) 260.

³³ HC Deb 20 May 1998, vol 312, col 1023 (The Home Secretary, Jack Straw).

³⁴ E.g. see Cumper (ch 3, n 28) 265.

³⁵ A search performed in Westlaw case database on 7 June 2017 using “section 13” AND “Human Rights Act” AND “religious organisation” as search criteria returned only 20 results.

a significant part in the court's decision.³⁶ This is perhaps unsurprising given the limits on the reach of section 13. It does not require that an organisation's article 9 rights are given, 'greater weight ... than they would otherwise enjoy under the Convention'³⁷ and the ECHR does not permit any one article to 'trump' another.³⁸ The effect of section 13 has been described aptly as more 'symbolic' than 'real',³⁹ reminding the courts that any interference with article 9 rights must be with good cause and reassuring religious believers and organisations that the state acknowledges the importance of their beliefs.⁴⁰

3.2.3 The Equal Treatment Directive

The second piece of legislation which was to be significant for religious employers was the Equal Treatment Directive. The Equal Treatment Directive required the member states of the European Union to prohibit discrimination in employment and occupation on the grounds of religion or belief, sexual orientation, disability and age. It was implemented in Scotland, England and Wales in 2003 by the Employment Equality (Religion or Belief) Regulations 2003 (the 'ROB Regulations'), the Employment Equality (Sexual Orientation) Regulations 2003 (the 'SO Regulations'), the Disability Discrimination Act 1995 (Amendment) Regulations 2003, and, in 2006, by the Employment Equality (Age) Regulations 2006.⁴¹ These Regulations were subsequently repealed and replaced almost in their entirety by the Equality Act 2010 (the 'EA'), which consolidates these, and other pieces of non-discrimination legislation in one Act prohibiting unlawful discrimination on the grounds of nine protected characteristics.⁴²

³⁶ *H (Article 9: Freedom of Religion) also known as Mr KH v Secretary of State for the Home Department* [2016] UKUT 286 (IAC), [2016] Imm AR 1111. See comment on the lack of impact of s13 in Ahdar and Leigh (ch 3, n 30) 380.

³⁷ *R (on the application of Amicus) v The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176 [41].

³⁸ HC Deb 20 May 1998, vol 312, col 1025 (The Home Secretary, Jack Straw).

³⁹ Cumper (ch 3, n 28) 265.

⁴⁰ ibid.

⁴¹ Discrimination in employment on the grounds of disability was already prohibited by the Disability Discrimination Act 1995, which was subsequently extended by the Disability Discrimination Act 2005.

⁴² The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The UK sought several amendments to the draft Equal Treatment Directive, some with the intention of preserving the ability of religious organisations and denominational schools to discriminate in employment on the grounds of religion or belief.⁴³ The final draft of the Equal Treatment Directive contains two exceptions from the principle of equal treatment. The first exception, which is contained in article 4(1), provides that different treatment based on a protected characteristic will not constitute unlawful discrimination by any employer, whether religious or secular, if ‘by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided the objective is legitimate and the requirement is proportionate’.⁴⁴ As Rex Ahdar and Ian Leigh observe, this tightly drawn exception has, ‘no fewer than six qualifying terms’, which is indicative of the ‘extreme sensitivity surrounding the exception’.⁴⁵ The second exception, which is contained in article 4(2), is only available to churches and other organisations with an ethos based on religion or belief and relates only to treatment which is based on a person’s religion or belief and not any other protected characteristic. It provides that different treatment based on a person’s religion or belief will not constitute unlawful discrimination if, ‘by reason of the nature of the activities or of the context in which they are carried out, a person’s religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’.⁴⁶

It was expressly provided in the implementation of the Equal Treatment Directive, that the privileges previously afforded to denominational schools by the SSFA and the E(Sc)A⁴⁷ would not be prejudiced.⁴⁸ Denominational schools in

⁴³ See Timothy Edmunds and Julia Lourie, ‘Employment Equality Regulations: Religion and Sexual Orientation’ (House of Commons Research Paper 03/54, 9 June 2003) 9-16.

⁴⁴ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303 (EC Directive 2000/78), art 4(1).

⁴⁵ Ahdar and Leigh (ch 3, n 30) 370.

⁴⁶ EC Directive 2000/78, art 4(2).

⁴⁷ Discussed above at 3.2.1.

⁴⁸ Employment Equality (Religion or Belief) Regulations 2003 (ROB Regulations), reg 39; Equality Act 2010 (EA 2010), sch 22, para 4. Note that sch 22, para 4 of the EA 2010 only makes reference to the relevant provisions of the SSFA 1998. As the explanatory notes to the EA 2010 at para 985 provide that para 4 of sch 22 is intended to replicate reg 39 of the ROB Regulations,

the state maintained sector, thereby, retain a significant measure of autonomy in relation to their employment decisions. In particular, the relevant provisions of the SSFA and the E(Sc)A do not require schools to demonstrate that religion is an occupational requirement, or that discriminatory measures taken by the school are proportionate to any legitimate aim pursued. Lucy Vickers opines that the lack of any proportionality requirement in the SSFA provisions on the employment of staff potentially renders the provisions incompatible with article 4(1) of the Equal Treatment Directive⁴⁹ and that the far reaching exceptions to the principle of equal treatment which are permitted under the SSFA for voluntary aided schools may be too broad to be legitimate and justified under article 4(2).⁵⁰ A formal complaint was made to the European Commission in 2012, alleging that the SSFA provisions were incompatible with the Equal Treatment Directive.⁵¹ The Commission said its initial enquiry 'raises questions' about the compatibility of some of the provisions of the SSFA with the Equal Treatment Directive and committed to contacting the UK Government for further clarification.⁵² A similar investigation was undertaken by the Commission in relation to the equivalent provisions in Scotland under the E(Sc)A.⁵³ The Commission closed both of its investigations in 2014, declining to uphold the

it is assumed that the omission of reference to the relevant provisions of the E(Sc)A 1980 in para 4 is an error.

⁴⁹ Vickers, 'Religion and Belief Discrimination' (ch 3, n 8) 154-55.

⁵⁰ *ibid* 154-55.

⁵¹ Andrew Copson on behalf of British Humanist Association, 'Complaint to the Commission of the European Communities Concerning Failure to Comply with European Law' (*British Humanist Association* 16 April 2010) <<https://humanism.org.uk/wp-content/uploads/bha-complaint-to-the-european-commission-on-employment-in-faith-schools.pdf>> accessed 28 December 2017.

⁵² Letter from Andreas Stein of the European Commission to Ms Richy Thompson of the British Humanist Association, 'Subject: Your Complaint EU Pilot 3800/21/JUST - CHAP (2010) 1206' (17 July 2012) <<https://humanism.org.uk/wp-content/uploads/european-commission-response-to-bha-complaint-on-employment-in-faith-schools.pdf>> accessed 28 December 2017; see also the following comments by The Joint Committee on Human Rights of the UK Parliament in its first report on the Equality Bill, published in November 2009: 'We consider that substantial grounds exist for doubting whether sections 58-60 of the School Standards and Framework Act 1998 (SSFA) as currently framed are compatible with the requirements of Article 4(2) of the Framework Equality Directive 2000/78/EC. We also consider that the provisions of section 60(5) SSFA permit Voluntary Controlled and Voluntary Aided Schools to impose wide-ranging requirements upon employees to adhere to religious doctrine in their lifestyles and personal relationships which may go beyond what is permitted under Article 4(2).' Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (Twenty-Sixth Report of Session 2008-2009)' (TSO 12 November 2009) 96.

⁵³ National Secular Society, 'European Commission to Investigate Complaints Concerning Employment Discrimination in "Faith" Schools' (National Secular Society 17 January 2013) <www.secularism.org.uk/news/2013/01/european-commission-to-investigate-complaints-concerning-employment-discrimination-in-faith-schools> accessed 28 December 2017.

complaints.⁵⁴ In a letter to the National Secular Society, the European Commission opined that the UK Government had provided it with ‘sufficient clarification’ on the interpretation of the relevant sections of the SSFA, which it said, ‘merely enables faith-based education and is limited to ensure the maintenance of the religious character of the school’.⁵⁵ Notwithstanding this response, the European Commission decided to re-open its investigation in 2015 following submissions from the British Humanist Association,⁵⁶ and doubts remain as to the compatibility of the SSFA and E(Sc)A with the Equal Treatment Directive,⁵⁷ with the lack of express proportionality criteria in the SSFA provisions attracting particular criticism.⁵⁸

3.3 Exceptions to equal treatment in employment under the EA

The domestic law which implemented the Equal Treatment Directive in Britain was drafted to include exceptions purportedly based on articles 4(1) and 4(2) of the directive. These exceptions (which do not prejudice the protections available to denominational schools in the SSFA and E(Sc)A) afford religious employers a measure of autonomy in their employment decisions. Certain of the exceptions mirror those which were contained in the domestic sex and race discrimination legislation. Prior to the consolidation of all non-discrimination legislation in the EA, the exceptions were included in various separate instruments. They now appear in schedule 9 of the EA.

⁵⁴National Secular Society, 'European Commission Dismisses NSS Complaint over Employment Discrimination in Faith Schools' (*National Secular Society* 23 October 2014) <www.secularism.org.uk/news/2014/10/european-commission-dismisses-nss-complaint-over-employment-discrimination-in-faith-schools> accessed 28 December 2017.

⁵⁵ibid.

⁵⁶Humanists UK, 'European Commission Re-opens Investigation into Whether UK "Faith" School Laws Break European Employment Laws as UK Government Shifts Position' (*Humanists UK*, 20 February 2015) <<https://humanism.org.uk/2015/02/20/european-commission-re-opens-investigation-whether-uk-faith-school-laws-break-european-employment-laws-uk-government-shifts-position/>> accessed 28 December 2017.

⁵⁷The EHRC has recommend that the Department of Education and Scottish Government should review the relevant provisions ‘to ensure their compatibility with’ EC Directive 2000/78 in Equality and Human Rights Commission, ‘Religion or Belief: is the Law Working?’ (Equality and Human Rights Commission, December 2016) 25-29.

⁵⁸ibid.

3.3.1 The OR exception

The first exception is available to all employers and provides that it is not unlawful for an employer to require an applicant or employee to have a particular characteristic if, having regard to the nature or context of the work, it is an occupational requirement and it is a proportionate means of achieving a legitimate aim.⁵⁹ This exception for occupational requirements is hereafter referred to as the ‘OR exception’.

In *Glasgow City Council v McNab*,⁶⁰ a Roman Catholic school sought to rely on the OR exception to defend its decision to restrict applicants for the post of Assistant Principal of Pastoral Care to those of the Roman Catholic faith. The EAT upheld the decision of the employment tribunal (the ‘ET’) to reject the school’s defence. As only a small part of the role of Assistant Principal of Pastoral Care actually required advice to be given to pupils on matters in which the doctrines of the church would be relevant, and the successful applicant could arrange for another staff member to give the advice, the school had failed to demonstrate that it was an occupational requirement for applicants to belong to the Roman Catholic faith.

The OR exception in the EA is not an exact mirror of the OR exception in the ROB and SO Regulations, both of which it replaced. Whereas the OR exception in the ROB and SO Regulations provided that the particular characteristic required by the employer had to be both a ‘genuine’ and ‘determining’ occupational requirement,⁶¹ these express stipulations were not included when the OR exception was drafted in the EA. Whilst there is little doubt that an employer must still demonstrate that its stated needs are ‘genuine’, the omission of the requirement that the particular characteristic is to be ‘determining’ raises the question of whether or not the OR exception in the EA sets a less demanding standard. The picture is then clouded further by the explanatory notes to the EA which provide that the OR exception requires the

⁵⁹ EA 2010, sch 9, para 1.

⁶⁰ *Glasgow City Council v McNab* [2007] IRLR 476 (EAT) (*McNab*).

⁶¹ ROB Regulations, reg 7(2)(a); Employment Equality (Sexual Orientation) Regulations 2003 (SO Regulations), reg 7(2)(a).

particular characteristic to be ‘crucial’ to the post.⁶² Do stipulations that the particular characteristic must be a ‘determining’ occupational requirement or ‘crucial’ to the post add anything to the condition that the particular characteristic must be a proportionate means of achieving a legitimate aim? The answer to this may depend (at least in part) on how the courts interpret proportionality. Despite European Court of Justice (‘ECJ’) authority stipulating that indirect discrimination cannot be justified unless the discriminatory provision, criterion or practice deployed by the employer ‘corresponds to a real need’ and is ‘necessary’,⁶³ the UK courts have in the past been reluctant when assessing proportionality to require employers to demonstrate that the discriminatory provision, criterion or practice is the least restrictive means available to achieve its aim.⁶⁴ Instead, courts in the UK have purported to balance the needs of the employer against the discriminatory effects of the provision, criterion or practice.⁶⁵ The effect of this approach to proportionality is that even discriminatory measures taken by employers which are not, strictly speaking, ‘necessary’ may be justified if the employer can demonstrate cogent reasons for its actions.⁶⁶ Whilst this interpretation of proportionality is closer to the approach taken by the ECtHR to proportionality under the ECHR, criticisms have been levelled at the UK courts for failing to engage fully with the ECtHR standard.⁶⁷ In particular, the UK courts are poor at considering discriminatory impacts as part of the balancing exercise and do not recognise the possibility that discriminatory impacts can outweigh a measure which is ‘necessary’.⁶⁸ Thus the UK courts’ approach to proportionality in the past has been found to be inconsistent with both ECJ and ECtHR authority. All this serves to heighten the ambiguity surrounding the interpretation and application of the OR exception.

⁶² Explanatory Notes to the EA 2010, para 787.

⁶³ Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607 [36].

⁶⁴ Aaron Baker, ‘Proportionality and Employment Discrimination in the UK’ (2008) 37 ILJ 305 308-10. However, see now *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15, [2012] ICR 74 [19]-[20] and [22]-[23] in which the Supreme Court has held that to justify indirect age discrimination the employer must have a ‘real need’, the means deployed to meet that need must be ‘reasonably necessary’ and, further, that the need must be weighed against its discriminatory effects.

⁶⁵ Baker (ch 3, n 64) 308-310.

⁶⁶ *ibid* 311.

⁶⁷ *ibid* 315-28.

⁶⁸ *ibid* 311-15 and 321-23.

3.3.2 The ethos exception

The second exception relies on article 4(2) of the Equal Treatment Directive and permits employers with ‘an ethos based on religion or belief’ to apply a requirement to be of a particular religion or belief where, having regard to the ethos and the nature or context of the work, being of a particular religion or belief is an occupational requirement and the application of the requirement is a proportionate means of achieving a legitimate aim.⁶⁹ This exception, which permits discrimination on the grounds of religion or belief and not on the grounds of any other protected characteristic, is hereafter referred to as the ‘ethos exception’.

There are several hurdles which an employer must overcome to rely successfully on the ethos exception. First the employer must demonstrate that it has an ethos based on religion or belief. It would seem that it is not only organisations proselytising religion or belief that can rely on the ethos exception, but so too can organisations with values rooted in or inspired by religion or belief.⁷⁰ Still, ‘ethos’ has been described as a, ‘fluid and indeterminate concept’⁷¹ and it is not difficult to foresee disputes over whether or not a particular employer has the required ethos. A question was posed by Baroness Miller of Hendon in the House of Lords debate on the SO Regulations as to whether the ethos exception could be relied on by, ‘ordinary commercial concerns as well as religious or environmental charities’.⁷² She had in mind at the time family orientated businesses operated by the Brethren. Disappointingly, no answer was provided to the Baroness in the debate. The explanatory notes to the EA provide that, ‘it is for an employer to show that it has an ethos based on religion by reference to such evidence as the organisation’s founding constitution’.⁷³ What level of importance, however, must religion or belief have in an organisation’s founding

⁶⁹ EA 2010, sch 9, para 3.

⁷⁰ It was not disputed in *Hender v Prospects for People with Learning Disabilities* ET 2902090/2006 and *Sheridan v Prospects for People with Learning Disabilities* ET 2901366/2006 that Prospects, a charity which provided housing and care services to people with learning disabilities, had an ethos based on Christianity.

⁷¹ Mark Coen, ‘Religious Ethos and Employment Equality: a Comparative Irish Perspective’ (Sep 2008) 28 LS 452, 458.

⁷² HL Deb 17 June 2003, vol 649, col 791.

⁷³ Explanatory Notes to the EA 2010, para 795.

constitution and to its ongoing internal and external activities? Further, do organisations which are not affiliated with any one religion or belief but which instead work across a number of religions or beliefs, such as Interfaith Scotland⁷⁴ or Faith in the Community,⁷⁵ have a qualifying ethos based on religion or belief? A denominational school might be considered the quintessential example of an organisation with an ethos based on religion or belief. Yet, if the employing entity is the local authority (as is most often the case in Scotland), and not the religious organisation itself, it will not be able to demonstrate it has the required ethos. In *McNab* (discussed above), the ET (with which the EAT concurred) held that the local authority that employed Mr McNab could not rely on the ethos exception to defend its decision: notwithstanding its role as an employer of teachers in a denominational school, the ET held that the local authority did not have a religious ethos.⁷⁶

Some consider that it is unlikely the courts will become embroiled in debates over whether an employer has a ‘religious ethos’ on the basis that in most, if not all, cases in which an employer wishes to rely on the ethos exception, the OR exception will also be available.⁷⁷ This, of course, begs the question why Parliament considered it necessary to legislate for the ethos exception at all? Its presence in the EA might suggest a recognition that employers with an ethos based on religion or belief have a particular claim to autonomy in employment affairs, though the precise nature of this claim is not immediately clear from the ethos exception itself. Certainly, there are important features of the ethos exception which distinguish it from the OR exception. Firstly, only the ethos exception requires regard to be had to the ‘ethos’ of the organisation in determining whether religion or belief is an occupational requirement and a proportionate means of achieving a legitimate aim. In *Muhammed v The Leprosy Mission International*,⁷⁸ the ethos exception was successfully deployed by a Christian charity which argued that being Christian was a genuine occupational

⁷⁴ <www.interfaithscotland.org/>.

⁷⁵ <www.faithincommunityscotland.org/>.

⁷⁶ *McNab* (ch 3, n 60) [61].

⁷⁷ See Gwyneth Pitt, ‘Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination’ (2011) 40 ILJ 384, 401. Speaking of the ethos exception Pitt says ‘It is frankly difficult to imagine cases where this would apply where the standard occupational requirement (in Schedule 9 paragraph 1) does not.’

⁷⁸ *Muhammed v The Leprosy Mission International* ET/2303459/2009.

requirement for the position of finance administrator because employing a non-Christian would have a significant adverse effect on the Mission's ability to maintain its ethos. In this case, the ET was satisfied that the respondent's Christian beliefs were reflected in its day-to-day operations:

It is clear to us that the Respondent's Christian belief, and in particular belief in Jesus Christ and the power of Christian prayer to achieve its goals, is central to its work and activities. The ethos based on the Christian religion permeates the Respondent's work, and daily life and activities in the workplace.⁷⁹

In *Sheridan v Prospects for People with Learning Difficulties*, meanwhile, the respondent sought unsuccessfully to rely on the ethos exception to defend its decision to apply a blanket rule that all support worker posts of a particular grade in the organisation should be held by Christians.⁸⁰ Of relevance to the decision was the ET's finding that the organisation's stated ethos did not, 'accurately reflect the actual ethos of the organisation'.⁸¹ It would seem from these two cases that, if the asserted ethos is reflected in the organisation's day-to-day operations, the employer will have a stronger claim that religion or belief is an occupational requirement. Still, this does not fully explain why or in what way the ethos of an employer is relevant to its claim for autonomy in employment, and it remains uncertain whether having regard to the ethos of the employer makes it more or less difficult for the employer to demonstrate an occupational requirement.

Vickers identifies particular difficulties with having regard to the employer's ethos when there are different, 'shades of religious opinion' within the one religion.⁸² She gives the example of an Anglican church which does not believe that women should be ordained and considers whether its refusal to employ an Anglican applicant who is in favour of the ordination of women would be proportionate having regard to the ethos of the church. As Vickers explains, on the one view, the appointment of a Christian is sufficient to protect the ethos of the employer but, on the other, it could be said that the applicant has a

⁷⁹ ibid [28].

⁸⁰ *Sheridan* (ch 3, n 70).

⁸¹ ibid [4.2.11].

⁸² Vickers, *Religious Freedom* (ch 3, n 1) 185.

different religious ethos to the employer. As Vickers observes, ‘Which approach is taken will depend on how many shades of religious opinion tribunals are prepared to recognise.’⁸³ A further ambiguity arises in relation to the obligation to regard the ‘nature’ of the work and the ‘context’ in which the work is carried out. Can the ‘nature’ of the work be easily separated from the ‘context’ in which it is carried out? Further, what counts as ‘context’, and how does it differ from the ‘ethos’ of the workplace?

The second difference between the OR exception and the ethos exception is that, unlike the OR exception, there is no similar stipulation in the explanatory notes to the EA in respect of the ethos exception that the requirement pertaining to religion or belief must be ‘crucial’ to the post. Might this render the ethos exception somewhat wider than the OR exception? Unlike the OR exception, the ethos exception has never stipulated that the occupational requirement must be ‘determining’. In its guidance on the ROB Regulations the then Department for Trade and Industry commented that this made the ethos exception ‘slightly broader’ than the OR exception.⁸⁴ Yet when the word ‘determining’ was removed from the OR exception when it was included in the EA there were no similar assertions that its scope had been broadened. Of course, the ethos exception is also subject to the same issues of uncertainty with the proportionality assessment as the OR exception: must, for example, the requirement that the applicant or employee be of a particular religion or belief be the least restrictive means of achieving the employer’s legitimate aim, or is it sufficient that the benefits to the employer outweigh the disadvantage suffered by the applicant or employee?⁸⁵

A further ambiguity in the ethos exception is the extent to which it permits an employer to require its employees to abide by standards of behaviour which accord with the tenets of its religion. It would certainly appear from the terms

⁸³ ibid.

⁸⁴ Department of Trade and Industry, ‘Explanation of the Provisions of the: Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003’ (DTI, Undated) para 86, available at <<http://webarchive.nationalarchives.gov.uk/20090224132034/http://www.berr.gov.uk/whatwedo/employment/discrimination/emp-equality-reg-2003/page21856.html>> accessed 28 December 2017.

⁸⁵ See comments above at 3.3.1.

of article 4(2) that the ethos exception will not be engaged when detrimental treatment implicates a ground of discrimination other than religion or belief (sexual orientation or sex, for example): the religious motives for the treatment will likely be considered irrelevant.⁸⁶ It is less clear, however, whether the ethos exception could permit employers to take action on the basis of an employee's behaviour when it is contrary to religious tenets but does not implicate another protected characteristic, such as the dismissal of an employee because he has engaged in non-marital sexual relations contrary to the tenets of the employer's religion, for example. In its second consultation on the ROB Regulations, the Government stated that, 'where an employee of a religious organisation conducted him or herself in a manner that was inconsistent with the organisation's ethos, disciplinary action against the employee might be appropriate where it was clear that the conduct would undermine the ethos'.⁸⁷ Yet, when the ethos exception was considered by the Joint Committee on Human Rights in 2009, the committee reached a different conclusion:

We consider that substantial grounds exist for doubting whether the "religious ethos" exception provided for in Schedule 9(3) permits organisations with a religious ethos to impose wide-ranging requirements on employees to adhere to religious doctrine in their lifestyles and personal relationships, by for example requiring employees to manifest their religious beliefs by refraining from homosexual acts. We agree with the Government that it is "very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than ministers of religion" (which is covered by a different exception). This should put beyond doubt the position that the exemption in Schedule 9(3) cannot be used to discriminate on the basis of sexual conduct linked to sexual orientation.⁸⁸

Although the committee contextualises its comments with reference to treatment on the basis of sexual conduct linked to sexual orientation, on a wider reading, its comments could be taken to rule out the imposition of any requirements relating to lifestyle and personal relationships, contrary to the

⁸⁶ Art 4(2) expressly stipulates, 'This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.'

⁸⁷ Cabinet Office, 'Towards Equality and Diversity: Implementing the Employment and Race Directives' (Cabinet Office December 2001), para 13.13.

⁸⁸ Joint Committee on Human Rights (ch 3, n 52) para 175.

view expressed by the Government in its first consultation on the ROB Regulations in 2002.

3.3.3 The organised religion exception

The third exception in the EA to the principle of equal treatment is only available when the employment is, ‘for the purposes of an organised religion’.⁸⁹ If employment is for the purposes of an organised religion, and two additional criteria are satisfied, employers may apply a requirement in relation to employment: (i) to be of a particular sex; (ii) not to be a transsexual person; (iii) not to be married or a civil partner; (iv) relating to the circumstances in which a marriage or civil partnership came to an end; (v) not to be married to, or the civil partner of, a person who has a living former spouse or civil partner; or (vi) related to sexual orientation.⁹⁰ The two additional criteria which require to be satisfied refer to the reason for imposing the requirement. The reason must be either: (i) so as to comply with the doctrines of the religion (the ‘compliance principle’); or (ii) because of the nature or context of the employment, to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers (the ‘no-conflict principle’).⁹¹ This exception will hereafter be referred to as the ‘organised religion exception’. The origins of the organised religion exception can be traced to the original Sex Discrimination Act 1975 (the ‘SDA’), which provided that employment for the purposes of an organised religion could be limited to one sex to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.⁹² The exception in the SDA was later extended to permit certain discrimination on grounds of gender reassignment, marriage and civil partnership. Following lobbying by church representatives, including the Archbishops’ Council of the Church of England, a similar provision was included in the SO Regulations to permit sexual orientation discrimination.⁹³

⁸⁹ EA 2010, sch 9, para 2.

⁹⁰ ibid.

⁹¹ ibid.

⁹² SDA 1975, s 19 discussed in *Amicus* (ch 3, n 37) [90].

⁹³ The Archbishops’ Council was keen that reg 7(3) of SO Regulations was included to permit the application of occupational requirements relating to sexual behaviour. The ordinary genuine occupational requirement may permit an employer to require a post-holder to be of a particular

Before the organised religion exception will apply, it must be established that employment is, ‘for the purposes of an organised religion’ and that the ‘compliance’ and ‘no conflict’ principles are satisfied. As Russell Sandberg has observed, there is a significant measure of uncertainty surrounding the application of these conditions.⁹⁴

It would seem the condition requiring that employment is ‘for the purposes of an organised religion’ is to be interpreted narrowly, though there remains some ambiguity over its exact reach.⁹⁵ The term ‘organised religion’ is neither defined in the EA, nor used in the Equal Treatment Directive. During the House of Lords debate on the SO Regulations, the then Minister of State, Lord Sainsbury of Turville, expressed the view that in drafting the exception, they, ‘had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion’.⁹⁶ Lord Sainsbury further emphasised the narrow scope of the exception by drawing a distinction between ‘organised religion’ and ‘religious organisation’ thus:

A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque.⁹⁷

According to Lord Sainsbury, demonstrating that employment is for the purposes of an organised religion is a ‘significant hurdle’⁹⁸ and would not be satisfied by

sexual orientation but would not permit the employer to insist on requirements relating to sexual behaviour. The Secretary General of the General Synod and the Archbishops’ Council commented, ‘The difficulty is that regulation 7(2) applies only where being of a particular sexual orientation is a genuine and determining occupational requirement. As explained above, we have no posts or offices where there is a requirement to be heterosexual (or indeed homosexual). Our requirements are in relation to behaviour, not sexuality itself. That is why the new regulations 7(3) and 16(3) refer to a ‘requirement related to sexual orientation’ Letter from the Secretary General of the General Synod and the Archbishops’ Council to the Clerk of the Parliamentary Joint Committee on Statutory Instruments dated 9 June 2003 at para 13, referred to in *Amicus* (ch 3, n 37) [92].

⁹⁴ Russell Sandberg, ‘The Right to Discriminate’ (2011) 13 EccLJ 157, 173-77; Sandberg *Law and Religion* (ch 3, n 8) 119-22.

⁹⁵ Sandberg, ‘The Right to Discriminate’ (ch 3, n 94) 174-76.

⁹⁶ HL Deb 17 June 2003, vol 649, col 779 (Lord Sainsbury of Turville).

⁹⁷ *ibid.*

⁹⁸ *ibid.*

teachers in faith schools or nurses in care homes run by religious foundations, whose employment is more properly characterised as being for the purposes of education and health care.⁹⁹

In *R (on the application of Amicus) v The Secretary of State for Trade and Industry*¹⁰⁰ a number of trade unions unsuccessfully sought an annulment of the organised religion exception as it applied in employment to a requirement relating to sexual orientation on grounds that it was incompatible with the Equal Treatment Directive and with articles 8 and 14 of the ECHR. Finding against the trade unions, Richards J described the requirement that employment is ‘for the purposes of an organised religion’ as an ‘important initial limitation’.¹⁰¹ Agreeing with Lord Sainsbury, he opined that employment ‘for the purposes of an organised religion’ is narrower than employment ‘for purposes of a religious organisation’ or the expression ‘where an employer has an ethos based on religion or belief’ and that it is unlikely to include employment in a faith school.¹⁰²

Notwithstanding the clarification provided by Richards J in *Amicus*, the exact scope of ‘employment for the purposes of an organised religion’ still generated considerable discussion during the debates on the Equality Bill 2010,¹⁰³ suggesting there remained (at that time) a measure of uncertainty surrounding exactly which posts it entailed. Whilst most appear to be comfortable distinguishing an ‘organised religion’ from a ‘religious organisation’, the former including churches, mosques and temples, and the latter including religious charities and schools, the main ambiguity appears to surround the question of when employment will be ‘for the purposes of’ an organised religion.

An amendment to the exception which would have clarified that it was to apply to employment which, ‘wholly or mainly involves leading or assisting in the observation of liturgical or ritualistic practices of the religion, or promoting or

⁹⁹ *ibid.*

¹⁰⁰ *Amicus* (ch 3, n 37).

¹⁰¹ *ibid* [116].

¹⁰² *ibid.*

¹⁰³ See for example HC PBC (Equality Bill) 9 June 2009, col 67-80; PBC Deb (Equality Bill) 23 June 2009, col 442-461; HL Deb 25 January 2010, vol 716, col 1211-40.

expanding the doctrine of the religion' was proposed by Government and modified after concerns were expressed that it would require jobs to be analysed in terms of percentage time spent on particular tasks and might not permit the exception to apply to those whose role it is to represent the religion.¹⁰⁴ Ultimately even a modified amendment which would have defined employment for the purposes of an organised religion as 'employment as a minister of religion or employment in another post that exists (or, where the post has not previously been filled, that would exist) to promote or represent the religion or to explain the doctrines of the religion (whether to followers of the religion or to others)' was rejected when the Equality Bill was considered in the House of Lords.¹⁰⁵ No definition was included in the final draft of the Bill and the explanatory notes to the EA repeat the comments made by Lord Sainsbury during the debate in the House of Lords on the SO Regulations, providing that, 'the exception ... is intended to cover 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'.¹⁰⁶ As Sandberg observes, whilst the rejection of the Government's proposed amendment might suggest that the exception is not to be read in its restrictive terms, Government members maintained that the amendment had only sought to clarify the existing position.¹⁰⁷ It remains unclear whether the wording of the proposed amendment ought to be 'read in' to the exception.¹⁰⁸

In the only two widely reported cases on the organised religion exception, the ET and EAT has had to grapple with the definition of employment for the purposes of an organised religion. In the first of these cases, *Reaney v Hereford*

¹⁰⁴ HL Deb 25 January 2010, vol 716, col 1214 (Baroness Royall of Blaisdon). See also HL Deb 15 December 2009, vol 715, cols 1432-34 (Archbishop of York); HL Deb 15 December 2009, vol 715, cols 1432-34 (Baroness Cumberlege).

¹⁰⁵ HL Deb 25 January 2010, vol 716, col 1211-40. When the revision was considered in the House of Lords, it provided as follows: 'Employment is for the purposes of an organised religion only if- (a) the employment is as a minister of religion, or (b) the employment is in another post that exists (or, where the post has not previously been filled, that would exist) to promote or represent the religion or to explain the doctrines of the religion (whether to followers of the religion or to others).'

¹⁰⁶ Explanatory Notes to the EA 2010, para 790.

¹⁰⁷ Sandberg, 'The Right to Discriminate' (ch 3, n 95) 174-75. The Chancellor of the Duchy of Lancaster (Baroness Royall of Blaisdon) commented that the Government's proposal sought to 'clarify, not to change', HL Deb 25 January 2010, col 1214 (Baroness Royall of Blaisdon).

¹⁰⁸ Sandberg *Law and Religion* (ch 3, n 8) 120.

Diocesan Board of Finance,¹⁰⁹ the ET held that employment as a Diocesan youth worker was for the purposes of an organised religion. The ET judge directed himself to the relevant Parliamentary material on the organised religion exception and to the comments of Richards J in *Amicus*,¹¹⁰ before analysing the role of the Diocesan Youth Officer. In holding that the employment of Diocesan Youth Officer was for the purposes of an organised religion, the ET judge was greatly influenced by his findings that the primary purpose of the role was to represent the Diocese in the field of youth work and that it was, ‘one of a small number of jobs closely associated with the promotion of the Church’.¹¹¹ Insofar as the ET judge made findings of fact that the role existed to ‘promote’ and ‘represent’ the church, the decision that the employment was for the purposes of an organised religion is consistent with the guidance given by Lord Sainsbury, and reflected in the explanatory notes to the EA.

*Pemberton v Inwood*¹¹² was the second case to consider the organised religion exception. The Reverend Pemberton entered into a same sex marriage against the wishes of his church. The church accordingly revoked his ‘Permission to Officiate’ and refused to grant him an Extra Parochial Ministry Licence (‘EPML’) which he required for employment as chaplain to an NHS Trust. The ET (with which the EAT agreed) held that, although the refusal to award Reverend Pemberton the EPML fell within the terms of the prohibition against discrimination by qualifications bodies in the EA,¹¹³ the organised religion exception applied to excuse the church’s actions. The EAT acknowledged there was a ‘certain attraction’ to the argument that employment as chaplain to an NHS Trust was not ‘employment for the purposes of an organised religion’.¹¹⁴ After all, the NHS Trust’s appointment of a chaplain was not part of the Church of England’s ‘holistic provision of healthcare’.¹¹⁵ The Church of England further had no input into the job description or selection of candidates.¹¹⁶ Still, the EAT

¹⁰⁹ *Reaney v Hereford Diocesan Board of Finance* ET 1602844/2006.

¹¹⁰ *ibid* [71]-[72] and [74]-[82].

¹¹¹ *ibid* [101].

¹¹² *Pemberton v Inwood* [2017] IRLR 211 (EAT).

¹¹³ EA 2010, s 53.

¹¹⁴ *Pemberton* (ch 3, n 112) [110].

¹¹⁵ *ibid*.

¹¹⁶ *ibid*.

concluded fairly quickly that the organised religion exception was not restricted to those jobs ‘within’ the organised religion: what mattered was the ‘purpose’ of the employment, not the ‘nature’ of the organisation.¹¹⁷ As an ‘essential requirement’ of the chaplain role was to minister as a Church of England priest, and this was the purpose of the EPML which Pemberton sought,¹¹⁸ the EAT reached the somewhat convoluted conclusion that, ‘The purpose of the EPML was thus for the purpose of employment for the purpose of an organised religion (here, the Church of England), albeit carried out whilst employed by a secular body.’¹¹⁹ Lord Sainsbury’s assertions on the narrow scope of the organised religion exception must now be considered in light of the EAT’s wider interpretation, which focuses on the purpose of the employment and not on the nature of the employing entity.

The compliance and no-conflict principles are a further source of ambiguity.¹²⁰ When considering them in the context of the challenge to the exception brought by the trade unions in *Amicus*, Richards J opined that the compliance and no-conflict principles created, ‘very real additional limitations’¹²¹ and that their tests were to be objectively applied.¹²² Noting that the no conflict principle only required that a ‘significant number’ of ‘the religion’s followers’ strongly held views’ are affected, and not a ‘majority’, and that this could permit the exception to apply when a significant minority of followers’ beliefs were affected, Richards J opined this was nevertheless appropriate as it recognised that there are sometimes different opinions held within the one religion and it avoided the need to apply a statistical analysis.¹²³

Yet practical difficulties with both the compliance and the no conflict principles have been identified: the application of the no conflict principle is hindered by

¹¹⁷ ibid.

¹¹⁸ ibid [110]-[111].

¹¹⁹ ibid [111].

¹²⁰ Sandberg opines, ‘Even putting to one side the effect of the absence of an explicit reference to proportionality; the scope of the ‘compliance’ or non-conflict’ principles remains unknown.’ Sandberg, ‘The Right to Discriminate’ (ch 3, n 95) 177.

¹²¹ *Amicus* (ch 3, n 37) [117].

¹²² ibid.

¹²³ ibid [118].

the absence in some religions of any definition of membership,¹²⁴ making it difficult to determine whether a significant number of followers may be adversely affected and the application of the compliance principle is hindered by the variety of views as to the content and interpretation of doctrine¹²⁵ and, as Sandberg points out, the courts' disinclination to determine matters of doctrine.¹²⁶

It is also notable that only the no conflict principle expressly requires that regard is to be had to the nature of the work or the context in which it is carried out. Although the compliance principle contains no similar requirement, the Minister for Employment Relations, Competition and Consumers indicated in the House of Commons committee debate on the ROB and SO Regulations that considerations of the nature and context of the role were implied, asserting, 'When the religious doctrine requires a post to be filled by persons of a particular orientation, it does so because of the nature of the post and the context in which it is to be carried out.'¹²⁷

When the organised religion exception was considered during the House of Commons and committee stages of the Equality Bill, it was proposed that the compliance and no conflict principles should be qualified by an express requirement on the employer to act proportionately. This is somewhat surprising given the observations of Richards J in *Amicus* that in drafting the organised religion exception, the legislature had already struck the balance between competing rights. Richards J opined, 'It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field.'¹²⁸ As Sandberg observes, those in favour of

¹²⁴ Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 CLJ 302, 312. Dicta in Reaney (ch 3, n 109) [104] suggests that it is the national rather than the local membership which is relevant (Sandberg, 'The Right to Discriminate' (ch 3, n 95) 177).

¹²⁵ Sandberg and Doe (ch 3, n 124) 312.

¹²⁶ Sandberg, 'The Right to Discriminate' (ch 3, n 95) 177-78.

¹²⁷ HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 31.

¹²⁸ *Amicus* (ch 3, n 37) [123]; see also HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 48, where Mr Gerry Sutcliffe opines that 'there is proportionality in the drafting of the regulations'.

the insertion of a proportionality qualification when the Equality Bill was being considered argued that they were not changing the exception, but merely clarifying its scope, arguing that proportionality had always been implied in the exception.¹²⁹ Those who opposed the proportionality qualification, meanwhile, voiced concerns that it was an additional hurdle which made the exception more restrictive.¹³⁰ In the end, the proportionality qualification was removed when the Bill reached the House of Lords¹³¹ and does not appear in the final wording of the EA. Nonetheless, reference is made to it in the explanatory notes to the EA which stipulate that the exception will apply when appointing or employing a person who meets the requirement is a proportionate way of complying with the doctrines of the religion or avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.¹³² It remains unclear, therefore, whether the reference to proportionality in the explanatory notes is an administrative error or whether proportionality should be read into the two principles.¹³³ The observations of Richards J were quoted with approval by the EAT in *Pemberton*.¹³⁴ No proportionality assessment was carried out in that case and the EAT opined that there was no proportionality test in the organised religion exception.¹³⁵

In addition to these ambiguities in the interpretation and application of the exceptions, concerns continue to be expressed that the organised religion exception may be incompatible with the Equal Treatment Directive and the ECHR. When the organised religion exception was initially debated in Parliament in the context of the SO Regulations, the Joint Committee on Human Rights

¹²⁹ See, for example, HL Deb 25 January 2010, vol 716, col 1225 (Lord Lester of Herne Hill), 'It does not change anything in existing law, since it was always the case, as the Amicus case demonstrates, that any exception must be strictly construed in accordance with European law.' See also Sandberg, 'The Right to Discriminate' (ch 3, n 95) 177 and fn 140.

¹³⁰ See, for example, HL Deb 25 January 2010, vol 716, cols 1219-20 (Baroness Butler-Sloss); see also Sandberg, 'The Right to Discriminate' (ch 3, n 95) 176 and fn 139.

¹³¹ Vincent Keter, Manjit Gheera and Lucinda Maer, 'Equality Bill 2008-09: Sexual Orientation and Religious Employment' (SN/BT/5132, House of Commons, 9 February 2010) 12; HL Deb 25 January 2010, vol 716, col 1211-40.

¹³² Explanatory Notes to the EA 2010, para 791.

¹³³ Commenting on this inconsistency between the EA and its explanatory notes, and the ambiguities in the Parliamentary debates on proportionality, Sandberg observes 'This again suggests that there is an unhelpful air of confusion as to the scope of these exceptions' Sandberg (ch 3, n 95) 176-77.

¹³⁴ *Pemberton* (ch 3, n 112) [90].

¹³⁵ ibid [78].

questioned whether the exception was *intra vires* with regard to the Equal Treatment Directive.¹³⁶ The Government maintained at the time that the exception was compatible with the Equal Treatment Directive and subsequently successfully defended a challenge on this ground (and on the ground of incompatibility with the ECHR) in *Amicus*. Richards J examined the exception and drew support for a narrow interpretation from the fact it derogated from the principle of equal treatment and needed to be construed purposively in accordance with the Equal Treatment Directive.¹³⁷ The issue was raised again, however, when the European Commission wrote to the UK Government in 2009, apparently to advise that the exception was overly broad and therefore incompatible with the Equal Treatment Directive.¹³⁸ Notwithstanding this, the exception was included in the EA without amendment, and it is understood the European Commission closed its investigation into the UK's transposition of the Equal Treatment Directive on 21 June 2012.¹³⁹ Yet doubts as to compatibility with the Equal Treatment Directive remain. Sandberg, for example, opines, to the extent the exception as drafted in the EA may not insist that the requirement is 'a proportionate way of meeting the criteria', it could be too broad to be compatible with the Equal Treatment Directive.¹⁴⁰ Questions have also been raised as to the rationale for the decision to apply the exception only to employment 'for the purposes of an organised religion' and particularly whether this might breach section 13 of the HRA which recognises the importance of article 9 rights to the wider category of 'religious organisation'.¹⁴¹

3.3.4 The exceptions and perceived characteristics

Each of the three exceptions in the EA is engaged not only in circumstances where the persons, to whom the otherwise discriminatory treatment is applied, do not meet the requirement but also where the employer is not reasonably

¹³⁶ HL Deb 17 June 2003, vol 649, col 752-56 (Lord Lester of Herne Hill).

¹³⁷ *Amicus* (ch 3, n 37) [115].

¹³⁸ Pitt (ch 3, n 77) 402.

¹³⁹ Accord Coalition, 'European Commission to Investigate Legality of Faith School Employment Law' (*Accord Coalition*, 24 July 2005) <<http://accordcoalition.org.uk/2012/07/24/european-commission-to-investigate-legality-of-faith-school-employment-law/>> accessed 28 December 2017.

¹⁴⁰ Sandberg, *Law and Religion* (ch 3, n 8) 122.

¹⁴¹ Sandberg and Doe (ch 3, n 124) 310.

satisfied that they meet the requirement. An argument by the trade unions in *Amicus* (in relation to the OR exception in the SO Regulations) that the Equal Treatment Directive does not permit this extended coverage was unsuccessful. Richards J opined it had a, ‘sensible rationale’, avoiding the employer having to take what it is told ‘at face value’ whilst limiting ‘the risk of unduly intrusive inquiry’.¹⁴² According to Richards J, article 4(1) of the Equal Treatment Directive refers to treatment ‘based on a characteristic related to ...’ and therefore encompasses perceived characteristics in its scope.¹⁴³ The same argument, however, cannot apply to the ethos exception, which is based on article 4(2) of the Equal Treatment Directive. Article 4(2) refers to ‘a difference in treatment based on a person’s religion or belief’. It would seem there is no scope in article 4(2) for a difference in treatment based on a perceived characteristic. Notwithstanding this, the ethos exception in the EA applies both where the person does not meet the requirement to be of a particular religion or belief and where the employer has reasonable grounds for not being satisfied that the person meets it. It is likely that if this aspect of the provision were to be tested in the courts, a challenge would be made that it was incompatible with the Equal Treatment Directive.

3.3.5 Ambiguity and uncertainty

There is, I would argue, thus a considerable measure of uncertainty surrounding the interpretation and application of the three exceptions to equal treatment in employment in the EA. When the Joint Committee on Statutory Instruments considered the SO Regulations in 2003 it reported its concerns about the uncertainty surrounding the application of the OR exception and the organised religion exception.¹⁴⁴ Similar concerns were voiced in the House of Commons committee debate on the SO and ROB Regulations in respect of the ethos exception.¹⁴⁵ Almost 15 years on, little clarity has been provided. Questions remain unanswered in relation to whether the OR exception requires the

¹⁴² *Amicus* (ch 3, n 37) [80].

¹⁴³ *ibid* [83].

¹⁴⁴ Joint Committee on Statutory Instruments, ‘Twenty-First Report of Session 2002-03’ (House of Lords and House of Commons 13 June 2003), para 118-20.

¹⁴⁵ See for example comments by Mr Leigh in HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, cols 021-25.

occupational requirement to be ‘determining’, whilst difficulties arise in relation to identifying and verifying an employer’s religious ethos for the purposes of the ethos exception and predicting how ‘regard’ for a particular ethos, as well as the nature and context of work, should impact on decisions. It is also ambiguous whether the ethos exception could ever be used to defend a requirement pertaining to lifestyle or personal relationships and how proportionality in both the OR and ethos exceptions should be assessed. The greatest degree of uncertainty, however, surrounds the organised religion exception, with doubts over which jobs will be considered as ‘employment for the purposes of an organised religion’, and ambiguity over the evidence required to satisfy the compliance and no conflict principles (including whether application of the criteria should be proportionate). There are question marks over the compatibility of the organised religion exception with the HRA. There are also doubts whether the organised religion exception and the faith schools exception are compatible with the Equal Treatment Directive and an argument that the Equal Treatment Directive does not permit the ethos exception to apply where treatment is based on the employer’s perception of the person’s religion or belief.

3.4 Parliamentary material and conflicting interpretations

Instead of providing clarity in respect of the points of ambiguity identified above, Parliamentary debates on the ROB Regulations, the SO Regulations and the Equality Bill (together with related consultations, explanatory notes and guidance) disclose a divergence in approach to interpretation of the employment exceptions in the EA directed at the religious group (the ethos exception and the organised religion exception). Two different and conflicting attitudes to construing the exceptions are apparent. The first interpretation considers the nature of the work performed in any post to be the key determinant in whether religion or another protected characteristic is an occupational requirement. Understood thus, the functions of each post assume particular importance. The second interpretation, by contrast, places more emphasis on the context in which the work is performed than the nature of the work itself. On this interpretation, the post is not reduced to its particular functions. Instead, all aspects of the post assume relevance in the determination of whether there is an occupational requirement.

Significantly it is those who spoke in Parliament in support of the Government's proposals on the drafting of these exceptions who appear in the main to adopt the first approach to interpretation, focusing primarily on the nature of the work in any post, and particularly the job functions. Several of those who expressed concerns in relation to the Government's proposals, as well as certain religious representatives, meanwhile, emphasised instead the importance of the context in which work is performed in determining whether the exceptions should apply in any given factual scenario.

So, in presenting the ethos exception in the ROB Regulations to the fourth standing committee on delegated legislation, the then Minister for Employment Relations, Competition and Consumers, Mr Gerry Sutcliffe, explained the Government's decision not to prescribe particular posts to which the occupational requirement will apply by stating that, 'it makes more sense for employers to consider whether the post's *functions* require someone to have a particular faith'.¹⁴⁶ Notwithstanding his acknowledgment that, 'the ethos and the nature of the job' were both relevant to the exception,¹⁴⁷ by making specific reference to the 'functions' of the post, the Minister could be criticised for prioritising the nature of the work over the context in which it is performed. A similar approach to the ethos exception is taken by Lord Sainsbury of Turville who presented the Government's proposals in the House of Lords debate on the ROB Regulations. Echoing Mr Sutcliffe, Lord Sainsbury emphasised that the onus is on employers to decide whether the 'functions' of the post require its holders to be of a particular religion or belief.¹⁴⁸ Whilst there is recognition from the Government in the relevant materials that the ethos of the employer is important in determining whether there is an occupational requirement,¹⁴⁹ rarely does it discuss or explain its implications. Certainly job functions are an important and a more tangible consideration than the requirements of an

¹⁴⁶ ibid col 008 (emphasis added).

¹⁴⁷ ibid col 008.

¹⁴⁸ HL Deb 17 June 2003, vol 649, col 787.

¹⁴⁹ Department of Trade and Industry (ch 3, n 84) para 85 'The employer must also establish that the GOR applies, having regard to its ethos. This means that the ethos should be taken into account when considering what the functions of the job and its context are, and the skills and attributes required to perform them, so as to assess whether it is a GOR for the person doing the job to be of the particular religion or belief. It also means that the GOR should not be inconsistent with that ethos.'

employer's ethos or the wider context in which the work is performed, but the lack of any detailed explanation from the Government in the materials as to how ethos and context are relevant undermines their significance.

The relevance of the context in which work is carried out to the application of the organised religion exception (and particularly the engagement of the no conflict principle) is also downplayed by some supporters of the Government's proposals on this exception in Parliament.¹⁵⁰ In answer to whether a gardener, secretary or cleaner might fall within the organised religion exception, Lord Sainsbury of Turville in the House of Lords debate on the SO Regulations advised that, 'Only in very limited circumstances would a requirement imposed on someone whose job does not involve participation in *religious activities* be justified under Regulation 7(3)'.¹⁵¹ Contributions to the same debate by Lord Lester of Herne Hill, who also supported the Government's proposals, further emphasise the importance placed by the Government on the nature of the work, and particularly job functions. Lord Lester asserted that the organised religion exception should not be applied to, 'a person in an administrative or ancillary role' and that requiring a church cleaner to be heterosexual, 'has absolutely nothing to do with whether he or she can wield a mop and bucket'.¹⁵²

This tendency to characterise the jobs which engage the relevant exceptions by virtue of the nature of the work they involve rather than the context in which they are performed was similarly evident when the Equality Bill was considered in the House of Lords and the House of Commons. In the House of Lords debate on the Equality Bill, the Chancellor of the Duchy of Lancaster identified with apparent ease administrative staff, accountants, caretakers, cleaners, bookkeepers, and most staff working in press or communications offices as roles to which the organised religion exception would not apply.¹⁵³ Harriet Harman MP, meanwhile, asserted confidently in the House of Commons that, 'there is an

¹⁵⁰ Though Lord Pilkington of Oxenford recognises the importance of 'identity' to faith communities in his support of the Government's proposal to include the organised religion exception in the SO Regulations. HL Deb 17 June 2003, vol 649, col 757.

¹⁵¹ HL Deb 17 June 2003, vol 649, col 781 (Lord Sainsbury of Turville) (emphasis added).

¹⁵² ibid, col 754 (Lord Lester of Herne Hill).

¹⁵³ HL Deb 25 January 2010, vol 716, col 1216.

exemption for religious jobs but not for non-religious jobs'.¹⁵⁴ Of course Harman's distinction is only easy to make if the functions of the job are the only determining criteria as to when a job is 'religious' or 'non-religious': once the context in which the work is performed is taken into account, the picture becomes much more complex. It is perhaps the belief that the organised religion exception exists, at least in part, to safeguard religious doctrine from interference by the secular courts which has led to the focus on job titles and functions: as Lord Sainsbury said in relation to the posts of cleaner, gardener or secretary, 'Religious doctrine rarely has much to say about posts such as those.'¹⁵⁵

The narrow focus on the nature of the work is ultimately reflected in the explanatory notes to the EA. In the examples given on when the ethos exception might be engaged, the absence of any recognition that the context of the work might be relevant is noteworthy. The explanatory notes suggest that a religious organisation might be permitted to require that the head of their organisation shares their faith because he needs to have an 'in-depth understanding of the religion's doctrines' but that other posts which do not require the same 'in-depth understanding such as administrative posts' should not be restricted to co-religionists.¹⁵⁶ Interestingly this contrasts somewhat with the position put forward by the Government in its first consultation on the ROB and SO Regulations that, 'a religious organisation may be able to demonstrate that it is a genuine requirement that all staff - not just senior staff or people with a proselytising function - should belong to the religion concerned so as to ensure the preservation of the organisation's particular ethos'.¹⁵⁷ A similar focus on the nature of the work over the context in which it is carried out is evident in the explanatory notes on the organised religion exception which state that the exception will not apply to a church accountant or to a youth worker who

¹⁵⁴ HC Deb 4 February 2010, vol 505, col 468.

¹⁵⁵ HL Deb 17 June 2003, vol 649, col 780 (Lord Sainsbury of Turville); Department of Trade and Industry (ch 3, n 84) para 95, 'Where there are such doctrines they are likely to apply to ministers of religion, rather than to other employees whose work is not of a spiritual nature (e.g. cleaners).'

¹⁵⁶ Explanatory Notes to the EA 2010, para 796.

¹⁵⁷ Cabinet Office, 'Towards Equality and Diversity' (ch 3, n 87) para 13.12.

primarily organises sporting activities but may apply to a youth worker who mainly teaches Bible classes.¹⁵⁸

By contrast, it was often maintained in the contributions to the debates from those who raised concerns with the Government's proposals on the exceptions and in contributions from religious stakeholders that the nature of the work activities could not be separated from the context in which they were carried out. Commenting in a Memorandum submitted to the Public Bill Committee considering the Equality Bill, the Catholic Bishops' Conference of England and Wales asserted that the Government's proposal to limit the organised religion exception to those jobs that wholly or mainly involved leading or assisting in the observation of liturgical or ritualistic practices of the religion, or promoting or expanding the doctrine of the religion, 'fails to understand the nature of religious life'.¹⁵⁹ According to the Bishops' Conference, 'The ethos of the Catholic Church should permeate every aspect of its activities: religion is about the whole of life and the whole person; it is not limited to formal worship and instruction.'¹⁶⁰ A similar sentiment is echoed by the Archbishop of York in the House of Lords debate on the Equality Bill when he said that, 'churches and other religious organisations cannot draw the same clear cut distinction between who we are and what we do; between what we believe and how we conduct ourselves; between work life and private life'.¹⁶¹ In the House of Commons' Public Bill Committee debate on the Equality Bill, Richard Kornicki, Parliamentary Co-ordinator for the Catholic Bishops Conference, complained that the Government's proposed definition of employment for the purposes of an organised religion, 'represents a misunderstanding of how religion works'. He explained, 'It is not simply an activity that takes place once a week in a

¹⁵⁸ Explanatory Notes to the EA 2010, para 793. Pitt speculates that the decision in *Reaney* (ch 3, n 109) which was issued prior to the EA, may have driven Parliament to state in the explanatory notes to the EA that the exception is 'unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if he is gay, but it may apply if the youth worker mainly teaches Bible classes'. Pitt opines that this may suggest the exception could apply to those whose role is only to teach religious doctrine, rather than to promote and represent it and that this is difficult to reconcile with the Government's submissions to the court in *Amicus* which quoted Lord Sainsbury's assertion in Parliament that teachers in faith schools would not be covered by the exception (Pitt (ch 3, n 77) 402-03).

¹⁵⁹ Catholic Bishops' Conference of England and Wales, 'Memorandum submitted by the Catholic Bishops' Conference of England and Wales to the Public Bill Committee considering the Equality Bill (E14)' (June 2009), para 5.

¹⁶⁰ *ibid*, para 5.

¹⁶¹ HL Deb 25 January 2010, vol 716, col 1217 (Archbishop of York).

particular place; it is about the whole of life. Important functions will be carried out that will be relevant to religious activity that might be more than, or different from simply leading liturgical worship.’¹⁶²

Those who had concerns about the Government’s proposals on the exceptions also often cited the need to maintain the character or ethos of the employer as the reason for the exceptions. John Mason MP explained his view that:

There is something fundamental about working for an organisation with a strong ethos. This could apply to any of the protected characteristics, whether it is age, disability, LGBT status or anything else. There is an expectation that all staff should be signed up to and enthusiastic about an organisation’s direction. That affects the mood when staff come to work in the morning, how they chat in the staff room and so on.¹⁶³

Although content with the Government’s proposals, certain religious stakeholders emphasised the importance of the exceptions for the maintenance of an employer’s ethos. William Fittal, Secretary-General of the General Synod of the Church of England, claimed in a committee debate that the state needed to permit faith schools to, ‘preserve their ethos’.¹⁶⁴ The Bishop of Blackburn meanwhile asserted in the House of Lords debate on the SO Regulations that the Equal Treatment Directive, ‘recognises that Churches and faith communities need to maintain their character and identity and sometimes to be able to set requirements which should not arise in the case of a secular employer’.¹⁶⁵

Although not all of the Government’s proposals on the exceptions were ultimately accepted it is nonetheless significant that they triggered a divergence in approach to interpretation. Whereas several of those in support of the Government’s proposals appeared to adopt a narrow focus on job function in their interpretation, many with reservations and certain religious stakeholders seemed to place a much greater emphasis on the context in which work is performed, including the ethos of the employer. The different approaches can

¹⁶² HC PBC (Equality Bill) 9 June 2009, col 68.

¹⁶³ HC PBC (Equality Bill) 23 June 2009, col 444.

¹⁶⁴ HC PBC (Equality Bill) 9 June 2009, col 78.

¹⁶⁵ HL Deb 17 June 2003, vol 649, col 758. Lord Pilkington of Oxenford stated in the same debate that ‘corporations within the state have a fundamental right to their own identity and we must support that’ (col 757).

be described in another way. By prioritising the nature of the work over the context in which it is carried out, it could be said that several in support of the Government's proposals approached the exceptions from an 'instrumental' perspective whereas others advocated a more 'organic' approach which allowed the context in which the work is carried out to be taken into account. The distinction between an 'instrumental' and 'organic' approach to employment was devised by Alvin Esau in the context of his research on the exceptions to the principle of equality in employment in Canada. Esau explains:

The *instrumental* view of employment is that the person is given a defined task to do and the duty of the employee is to do that task and no more. ... But under the organic view of employment the employee is expected to participate in the mission of the organization as a whole, and is expected to join the whole community, the whole body, in a way that transcends any narrowly defined job description.¹⁶⁶

Articles 4(1) and 4(2) of the Equal Treatment Directive, which the exceptions purport to implement, quite clearly stipulate that both the nature of the work or the context in which it is performed are relevant to determining whether religion, or another protected characteristic, is an occupational requirement. This is reiterated in the wording of the ethos exception and in the organised religion exception (expressly in the no conflict principle, and arguably implicitly in the compliance principle). Concentrating on the nature of the work as the main determinant for when the exceptions will be engaged, and side-lining the context in which the work is carried out, is not only contrary to the expressed interests of key stakeholders but also to the express terms of the Equal Treatment Directive and the exceptions. All of this, of course, only serves to aggravate the uncertainty which surrounds the application of the exceptions.

3.5 Paucity of case law

Commenting on the Government's proposed definition of 'employment for the purposes of an organised religion' in the House of Lords debate on the Equality Bill, the Archbishop of York remarked, 'When I heard the Leader of the House describing what may be exempt, I said to myself, "My gosh, here comes a

¹⁶⁶ Alvin Esau, "'Islands of Exclusivity": Religious Organisations and Employment Discrimination' (1999-2000) 33 UBC LawRev 719, 734-35.

barrage of endless tribunals'.'¹⁶⁷ Sandberg meanwhile, in a comment on the exceptions in the EA for religious groups including employers, predicted in 2011 that 'The likelihood of further litigation and rebukes from the European Commission means that the current text of the Equality Act 2010 is unlikely to be the last word on the matter.'¹⁶⁸

Despite these predictions, there have only been two cases on the organised religion exception¹⁶⁹ and only three cases on the ethos exception,¹⁷⁰ which have been widely publicised. Further, there is no readily available evidence of employment discrimination cases in which an employer has sought to rely on the privileges for denominational schools contained in the SSFA and the E(Sc)A. Of the five widely publicised cases on the exceptions, only two were heard by the EAT, and none were considered by a higher appellate court. It is possible that there have been other cases on the exceptions (including cases which invoke the statutory protections for denominational schools) which have been decided by the ET but which have not been widely publicised. The searchable database of ET decisions was only introduced in 2017 and it does not include many judgments of cases decided prior to its introduction. Still, even allowing for this, the number of cases on the exceptions can be described as low. The apparent lack of judicial consideration of the exceptions, particularly at appellate level, is surely to be a factor in the continued ambiguity which surrounds their scope and application. Why is it that the provisions, many of which provoked heated debate in Parliament and criticism from a number of academics on account of their ambiguity¹⁷¹ appear to have been very rarely tested in the courts?

One possible explanation is that the exceptions are never, or rarely, required by religious employers. There are various possible reasons for this. First of all, the number of applications received by religious employers from applicants who do

¹⁶⁷ HL Deb 25 January 2010, vol 716, col 1218 (Archbishop of York).

¹⁶⁸ Sandberg, 'The Right to Discriminate' (ch 3, n 95) 179.

¹⁶⁹ Reaney (ch 3, n 109); Pemberton (ch 3, n 112).

¹⁷⁰ Muhammed (ch 3, n 78); McNab (ch 3, n 60); Hender (ch 3, n 70); and Sheridan (ch 3, n 70).

¹⁷¹ For example, on the lack of definition of 'employment for the purposes of an organised religion' see Sandberg and Doe (ch 3, n 124) 304-12; Sandberg, 'The Right to Discriminate' (ch 3, n 95) 173-80; and Pitt (ch 3, n 77) 402.

not meet their preferred criteria may be low. It is likely that religious organisations will, in the main, attract job applicants who are affiliated with the religion and who may consider it a religious ‘calling’ to deploy their skills working for a religious organisation. Job seekers, further, might be deterred from applying for a job in a religious organisation, perhaps because they are uncomfortable working in an environment with overt displays of religious symbols, or for an employer that incorporates religious practices, such as prayers, into daily workplace routines.¹⁷²

A second reason why religious employers might not seek to rely on the exceptions is the difficulty they may experience in recruiting individuals who are appropriately qualified and who meet the desired belief criteria.¹⁷³ In one of the few ET cases on the ethos exception the difficulties experienced with recruiting Christian staff was given as part explanation for why the support workers in the organisation were not predominantly of the Christian faith.¹⁷⁴ A Church of England report on teaching needs in its schools, moreover, has reportedly recorded that the national shortage of school leaders was, ‘... felt even more acutely by the Church of England’s network in education’.¹⁷⁵ Some employers might feel compelled to recruit the best qualified candidates for posts notwithstanding they may not meet the desired religious criteria in order that they can continue to provide efficient and effective services to their clients or customers.

Alternatively, excluding an individual on the basis of a personal characteristic might be contrary to the teachings of the religion of some employers, or at least contrary to the beliefs of the person responsible for making the recruitment

¹⁷² Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 The University of Notre Dame Australia Law Review 107, 122.

¹⁷³ ibid 123.

¹⁷⁴ Sheridan (ch 3, n 70) [2.10]-[2.11], [2.34].

¹⁷⁵ The Church of England Education Division, Training and Development Partnerships Project: Needs Analysis Report referred to in Accord Coalition, 'Religious Discrimination in Teacher Employment Questioned as More Church of England Schools Operate Without a Christian Head Teacher' (*Accord Coalition*, 28 September 2015) <<http://accordcoalition.org.uk/2015/09/28/religious-discrimination-in-teacher-employment-questioned-as-growing-number-of-church-of-England-schools-operate-without-Christian-head-teacher/>> accessed 28 December 2017.

decisions.¹⁷⁶ It has been claimed that empirical evidence gathered from a study of the employment practices in religious schools in Australia supports these contentions.¹⁷⁷ Some of the schools interviewed in the study, for example, explained that because they supported diversity, they would not necessarily seek to rely on the exceptions to equality norms which were available to them.¹⁷⁸

Another reason why religious employers might be deterred from using the exceptions is a belief that the exceptions are simply too narrow to be of any real benefit. Sandberg predicted that persistent emphasis on the ‘narrowness’ of the exceptions in the EA would in time cause the exceptions to ‘narrow to the extent that they cease to exist’.¹⁷⁹ Indeed, the perception that the exceptions in the EA are too narrow in scope is evidenced in the findings of a study by the Equality and Human Rights Commission (the ‘EHRC’), published in 2015, that there were Christian employers across the sectors who considered the current model of exceptions to be ‘overly restrictive’.¹⁸⁰

There are, thus, reasonable grounds to argue that religious employers do not readily rely on the exceptions and that this is the reason for the lack of reported case law. As tempting as this conclusion is, however, there are several cogent reasons why it should not be accepted. For one, the volume of representations made by religious organisations to the consultations on the ROB and SO Regulations is suggestive of a belief by religious organisations that exceptions to equality norms are necessary to meet their needs as employers. In a consultation on the ROB Regulations, as many as 263 religious organisations commented on the religious ethos exception, with 67% supporting the approach proposed.¹⁸¹ This positive response to the current framework of exceptions is reflected in a study of stakeholders commissioned by the EHRC in 2012, which

¹⁷⁶ Walsh (ch 3, n 172) 122-23.

¹⁷⁷ ibid 122-123 referring to Carolyn Evans and Beth Gaze, ‘Discrimination by Religious Schools: Views from the Coal Face’ (2010) 34 MULR 392.

¹⁷⁸ Evans and Gaze (ch 3, n 177) 411.

¹⁷⁹ Sandberg, ‘The Right to Discriminate’ (ch 3, n 95) 179.

¹⁸⁰ Martin Mitchell and others, ‘Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence’ (Equality and Human Rights Commission, 2015) 57.

¹⁸¹ Cabinet Office, ‘Equality and Diversity: The Way Ahead’ (Cabinet Office, October 2002) 46 referred to in Edmunds and Lourie (ch 3, n 43) 21.

reported that, ‘Most interviewees representing religion or belief groups were broadly happy with the exceptions model, even if they regretted the lack of clarity surrounding the text of the exceptions.’¹⁸² This support for the current model of exceptions in the EA appears at odds with a finding that religious employers consider the exceptions are not required.

Further, evidence of the use of the exceptions can be found by perusing the job advertisements posted online for religious organisations. Many, for example, stipulate that it is an occupational requirement pursuant to the EA for the post-holder to be of a particular religion.¹⁸³ News reports and personal testimonies have, moreover, been collected attesting to ‘exclusive practices’ in denominational schools.¹⁸⁴ These indicate that religious motivations influence the employment practices of schools at various stages of the employment relationship.

If, as I have argued, religious employers do need the exceptions, it is prudent to consider why there has apparently been so little case law on their use. As litigation is more likely to arise when employers are, or are at least perceived to be, acting outside of the terms of the exceptions, the lack of reported case law might indicate that religious employers are exercising the exceptions in a legally compliant manner. Yet, in a 2012 study commissioned by the EHRC, there were interviewees who considered that the exceptions in the EA were being interpreted too widely in practice.¹⁸⁵ The study records Stonewall (a lobbying group for lesbians, gay men and bisexuals) as commenting that the employment exception in the EA has been, ‘flagrantly abused by some organisations that have used it to unfairly discriminate against gay employees in a way which was

¹⁸² Alice Donald and others, ‘Equality and Human Rights Commission Research Report 84: Religion or Belief, Equality and Human Rights in England and Wales’ (Equality and Human Rights Commission, Summer 2012) 97.

¹⁸³ For example, in an advertisement placed on 24 June 2014 for a Christian worker to develop a Youth Ministry it is stipulated that the post holder must be ‘a practising Christian who lives its ethos and teachings in order to teach the Christian Faith with conviction and integrity’. The advertisement makes reference to the occupational requirement provisions in part 1 of schedule 9 to the EA. See Undeb Bedyddwyr Cymru, ‘Job advertisement’ <www.buw.org.uk/job-advertisement-youth-worker-gower/> accessed 28 December 2017.

¹⁸⁴ Accord Coalition, ‘Testimonies and Media Reports of Discriminatory and Exclusive Practices by Faith Schools’ (Accord Coalition, August 2017) <<http://accordcoalition.org.uk/research/>> accessed 28 December 2017.

¹⁸⁵ Donald (ch 3, n 182) 97-98.

certainly not envisaged when it was introduced'¹⁸⁶ though, as the study acknowledges, Stonewall's views cannot be verified because of the lack of empirical evidence. The more recent EHRC study published in 2015 also found evidence of potential unlawful conduct by some religious employers.¹⁸⁷

Why is there a reluctance to litigate these matters in the tribunals? The EHRC study published in 2015 contains findings that one of the reasons employees were deterred from raising complaints of discrimination was because they did not know what the legal requirements were or how to pursue complaints.¹⁸⁸ The lack of certainty surrounding the practical application of the exceptions may further deter individuals from raising claims with no certain prospects of success, particularly in the period during which fees were charged for claimants bringing claims in the ET. One participant in the EHRC study published in 2012 commented that some (but not all) equality and diversity forum members consider that religious organisations are applying the exceptions in the EA too widely in practice and that those affected are not always litigating because they do not know their legal rights, or do not have the resources.¹⁸⁹ The financial costs of litigation will not be the only deterrent: pursuing tribunal or court cases can be a lengthy and involved process, with emotionally draining effects for some. In addition, many employees might be unwilling to litigate against an employer or former employer out of concern that it will adversely affect their future employment prospects.¹⁹⁰

An alternative reason for the apparent lack of case law might be a preference of religious employers for resolving any disputes which arise internally within the organisation. In the UK, the Accord Coalition has reported difficulties in obtaining information on the treatment of teachers. It believes that, 'staffing matters are generally dealt with behind closed doors' and makes reference to the use of 'confidentiality agreements' in some cases.¹⁹¹ The aforementioned

¹⁸⁶ ibid 98.

¹⁸⁷ Mitchell and others (ch 3, n 180) 57.

¹⁸⁸ ibid 47 (also cited at 46-47 were fear of repercussions, lack of confidence and pressure from others not to respond).

¹⁸⁹ Donald (ch 3, n 182) 98.

¹⁹⁰ Walsh (ch 3, n 172) 114.

¹⁹¹ Accord Coalition, 'Testimonies and Media Reports' (ch 3, n 184) 2.

study on the impact of Australia's anti-discrimination laws on religious schools also supports the proposition that disputes in religious organisations are often dealt with internally.¹⁹² The study considered what would happen if a staff member left his religion. In those schools where staff were required to belong to a particular religion, the study found evidence that the schools would try to persuade the staff members to return to their religion. If this failed, 'there was an informal discussion during which the person in question was either asked to leave or concluded that it would be in their best interests to leave'. It was reported that, 'These cases were dealt with informally by agreement between the principal and staff member and did not lead to litigation or contention.'¹⁹³ The Australian study did not explore further the reason why disputes were dealt with internally without recourse to the courts but it could be because the individuals concerned did not wish to subject aspects of their private life to the scrutiny of the secular courts or their religious community. Alternatively, it could even be because some religious beliefs or cultures dictate that disputes should be resolved internally. Research by Alvin Esau on the Hutterites (a part of the Anabaptist Christian sect) has found evidence of community rules which provide that individual members can be forced to leave the community should they bring legal action against it.¹⁹⁴ Indeed, in the United States Supreme Court case of *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission et al.*,¹⁹⁵ an Evangelical Lutheran Church and School and member of the Lutheran Church Missouri Synod sought to justify its decision to dismiss an employee on the ground that she had indicated her intention to assert her legal rights in a discrimination complaint contrary to the Synod's belief that Christians should seek an internal resolution to their disputes.

¹⁹² Evans and Gaze (ch 3, n 177) 405.

¹⁹³ ibid 405.

¹⁹⁴ Alvin Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (UBC Press 2004) 31-49 referred to in Alvin Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (UBC Press 2009) 113.

¹⁹⁵ *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission et al* 132 SCt 694 (2012).

3.6 Conclusion

It is, I have argued, unconvincing to maintain that the lack of case law on the exceptions is evidence of their redundancy. There are, rather, several credible reasons why reliance on the exceptions is not being litigated in the courts. If, as I have argued here, the exceptions are both needed and used by religious employers, the paucity of reported case law considering their interpretation and application is a problem. The scope of the exceptions in the EA is ambiguous and related Parliamentary material highlights that several supporters of the Government's proposals on the ethos and organised religion exceptions adopt an approach to their interpretation which is at odds with the stated interests of certain religious representatives as well as the terms of the exceptions in the EA and the Equal Treatment Directive. The question of whether the faith schools exception is compatible with the Equal Treatment Directive, meanwhile, remains unanswered. Without judicial clarification, religious employers and their advisers will be unable to determine with reasonable certainty whether or not desired employment practices are lawful. Potential litigants, meanwhile, may be deterred by the ambiguities from testing their employers' decisions in the tribunals or courts. The lack of precedent for the judiciary tasked in the future with determining cases on the exceptions may also lead to inconsistent results. The implications of all of this for the rule of law hardly need to be explained. In the absence of more available case law at this time, a clear understanding of the principle underlying particularly those employment exceptions directed at the religious group, is urgently required to guide those tasked in the future with their interpretation.

4 Religious group autonomy in employment: United States of America

4.1 Introduction

I concluded the preceding chapter by observing that there was an urgent need to identify the principles underlying or informing the employment exceptions so as to aid their interpretation. I now turn to consider the exemptions and exceptions to equality in employment in the USA to gain a greater insight into the nature and scope of the employment exceptions in Great Britain and to assist in the search for the principles underlying the British model.

Such a comparative approach, highlights, for example, the relatively narrow parameters within which religious employers in Britain can exercise autonomy in their employment affairs, and the underdeveloped nature of the British jurisprudence. The exemptions and exceptions in the USA, I observe, afford less scope than their British equivalents for the judiciary to exercise its judgment in their interpretation. Although the scope for ambiguity and uncertainty in the application of the exemptions and exceptions in the USA is thereby reduced, I argue that this has a detrimental impact on fairness and equality.

Of particular interest to the search for underlying principle in the British case are the principles which have underpinned the development and interpretation of the exemption and exception model in the USA. The constitutional church and state divide and the long history of positive religious freedom on which the divide is predicated have had significant influence and, I will argue, afford clear principles to guide future development of the law in this area. By uncovering these principles, a point of departure is identified for examining, in chapter 6, the underlying basis of the employment exceptions in Britain.

4.2 Federal model of exemptions to equality in employment for religious employers

4.2.1 Overview of the legislative framework

In the USA, Title VII of the Civil Rights Act 1964¹ ('Title VII') prohibits discrimination (including harassment) in employment by employers with 15 or more employees on the grounds of race, colour, religion, sex and national origin.² Also prohibited is victimisation of an employee or applicant who complains of discrimination or participates in an investigation by the Equal Employment Opportunity Commission (the 'EEOC').³ Employers, moreover, have a duty to reasonably accommodate an applicant or employee's sincerely held religious beliefs or practices unless to do so would cause undue hardship to the conduct of the business.⁴

In addition to a general exception from the prohibition of discrimination in employment for *bona fide* occupational qualifications (the 'BFOQ exception'),⁵ Title VII contains two further exemptions: one which can be relied on by religious corporations, associations, educational institutions and societies (the 'religious entity exemption');⁶ and, the other, which can only be relied on by religious schools, colleges, universities, educational institutions or institutions of learning (the 'religious education exemption').⁷ A judicial exception, moreover, has been created which applies to the employment of members of the clergy and other lay employees performing a similar role (the 'ministerial exception'). The

¹ The Civil Rights Act 1964, 42 USC (CRA 1964) § 2000e – 2000e-17. Title VII is federal legislation. Most US states additionally have state legislation prohibiting discrimination in employment on various grounds, including religion.

² *ibid* § 2000e-2 (section 703(a)). Age and disability discrimination are also prohibited by federal law under, respectively, The Age Discrimination in Employment Act 1967 29 U.S.C. §621 and 1990 42 U.S.C.S. §12101 et seq.

³ CRA 1964 § 2000e-3(a) (section 704(a)).

⁴ *ibid* § 2000e(j) (section 701(j)).

⁵ *ibid* § 2000e-2(e)(1) (section 703(e)(1)). The Supreme Court has described the BFOQ exception as, 'an extremely narrow exception to the general prohibition of discrimination' (*Dothard v Rawlinson* 433 US 321, 334 (1877)).

⁶ CRA 1964 § 2000e-1(a) (section 702(a)).

⁷ *ibid* § 2000e-2(e)(2) (section 703(e)(2)).

religious entity exemption, the religious education exemption and the ministerial exception will each be discussed in turn below.

4.2.2 Religious entity exemption

The religious entity exemption permits qualifying employers to exercise preferences in their employment practices on the basis of the applicant's or employee's religion. It is expressly provided in Title VII that the prohibition of discrimination in employment does not apply to:

a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.⁸

The religious entity exemption does not permit discrimination on any ground other than religion. Thus, in *Equal Employment Opportunity Commission v Fremont Christian School*,⁹ a religious school was unable to rely on the religious entity exemption to escape liability in a complaint of sex discrimination for providing health insurance benefits to married male employees but not to married female employees. The school was a member of the Assembly of God Church which believed that the husband is the head of the household in a marriage and should provide for that household.

Whereas there is a reasonable element of doubt over which organisations will qualify for the ethos exception in the EA,¹⁰ jurisprudence of the courts in the USA provides some guidance on which organisations may rely on the religious entity exemption. According to the United States Court of Appeals for the Ninth Circuit in *Equal Employment Opportunity Commission v Townley Engineering and Manufacturing Company*,¹¹ the religious entity exemption applies to those institutions with a 'purpose and character' that is 'primarily religious' and to determine this, 'all significant religious and secular characteristics must be

⁸ *ibid* § 2000e-1(a) (section 702(a)).

⁹ *Equal Employment Opportunity Commission v Fremont Christian School* 781 F2d 1362 (9th Cir 1986).

¹⁰ On the ethos exception, see chapter 3 at 3.3.2.

¹¹ *Equal Employment Opportunity Commission v Townley Engineering and Manufacturing Company* 859 F2d 610 (9th Cir 1988) (*Townley*).

weighed'.¹² A multi-factored approach was later also endorsed by the Court of Appeals for the Third Circuit in *LeBoon v Lancaster Jewish Community Center Association*.¹³ The court in *LeBoon* identified the particular characteristics which courts in the past had considered relevant to determining whether the purpose and character of an organisation was primarily religious, as:

- (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.¹⁴

According to the court in *LeBoon*, the weight to be given to each characteristic will vary depending on the particular facts of the case and not all characteristics will be relevant in every case.¹⁵ Still, the guidance issued by the courts in *Townley* and *LeBoon* is nonetheless instructive to employers and advisers tasked with determining whether the exemption is engaged. Applying it to the case before it, the court in *LeBoon* accepted that the Lancaster Jewish Community Center Association (the 'LJCC') qualified for the religious entity exemption. There were a number of factors relevant to its finding that the purpose and character of the LJCC was 'primarily religious': the LJCC considered itself to be, 'a center for the local Jewish community'; it had a mezuzah at its door; it received finances from co-religionists; it provided, 'instructional programs with a Jewish content'; its activities were timed in accordance with the Jewish religious calendar; the three rabbis from the area were consulted on

¹² *ibid* 618.

¹³ *LeBoon v Lancaster Jewish Community Center Association* 503 F3d 217 (3rd Cir 2007); see also comment by Evans and Hood that *LeBoon* 'represented a further widening in the scope of protection' because it applied the exemption to an institution which was not owned by or affiliated to a religious entity, in Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of Jurisprudence of the United States and the European Court of Human Rights' (2012) 1 OJLR 81, 86-87.

¹⁴ *LeBoon* (ch 4, n 13) 226.

¹⁵ *ibid* 227.

management decisions; and the Board of Trustees who were, ‘acutely conscious of the Jewish character of the organization’ included Biblical readings at their meetings.¹⁶ The court was not dissuaded in its finding by the secular nature of some of the LJCC’s activities (in particular, allowing non-kosher food on its premises, recruiting personnel who were not Jewish and permitting Hindu groups to use its premises), nor by the fact the LJCC was not affiliated to any synagogue.¹⁷

The multi-factored approach to interpretation of the religious entity exemption, however, has been the subject of some judicial criticism. In *Spencer v World Vision Inc*¹⁸ all three judges of the United States Court of Appeals for the Ninth Circuit considered it was, ‘inherently too indeterminate and subjective’.¹⁹ Each judge in *Spencer* sought to formulate an alternative test for determining whether an organisation could rely on the religious entity exemption. Judge O’Scanlainn advocated that the organisation needed to be non-profit and establish that it:

- 1) is organised for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.²⁰

Critical of the ‘inclusive’²¹ nature of this test, Judge Kleinfield advocated a modified version, which removed the requirement that the organisation should be non-profit, and added a stipulation that the institution must not ‘engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts’.²² Judge Berzon, meanwhile, formulated a much narrower test, arguing that, ‘Congress used the terms religious corporation, association ... or society ... to describe a church or other group organised for worship, religious

¹⁶ ibid 229.

¹⁷ ibid 229-230.

¹⁸ *Spencer v World Vision inc* 633 F3d 723 (9th Cir 2010).

¹⁹ ibid 741.

²⁰ ibid 734.

²¹ ibid 742.

²² ibid 748.

study, or the dissemination of religious doctrine.²³ Applying their own tests in *Spencer*, Judges O'Scannlain and Kleinfield considered that World Vision, a Christian humanitarian organisation which received substantial government funding, was entitled to rely on the exemption, whilst Judge Berzon dissented.

Notwithstanding the criticisms advanced in *Spencer*, the EEOC compliance manual continues to advocate a multi-factored test to determine whether a particular organisation qualifies for the religious entity exemption.²⁴ Though this approach is admittedly ‘indeterminate’ to an extent, it nevertheless provides a useful checklist of pertinent considerations for employers and advisers tasked with determining whether the exemption is engaged. Although the jurisprudence has not clarified every ambiguity in the scope of the exemption (it remains unclear, for example, the extent to which Government funding might disqualify an organisation),²⁵ its value in providing relevant precedent can be contrasted with the absence of judicial guidance on which organisations qualify for the ethos exception in the EA.

Once an organisation has demonstrated that its purpose or character is primarily religious, it is permitted by the religious entity exemption to discriminate on grounds of religion in respect of all posts in its organisation.²⁶ There is, unlike

²³ *ibid* 752.

²⁴ US Equal Employment Opportunity Commission, *Compliance Manual Section on Religious Discrimination (C(1))* <<https://eeoc.gov/policy/docs/religion.html>> accessed 28 December 2017 notes that the following factors are relevant in determining whether an entity is ‘religious’: whether the articles of incorporation state a religious purpose; whether the day-to-day operations are religious; whether it is not-for-profit; and whether it is affiliated with, or supported by, a church or other religious organisation. These factors are derived from *Townley* (ch 4 n 11) 619.

²⁵ In *Spencer v World Vision Inc* the Court of Appeals for the 9th circuit did not, in its original judgment (19 F3d 1109 (9th Cir 2010) explore the significance or otherwise of the substantial government funding received by World Vision. Dissatisfied with the decision, the plaintiffs requested that the Court of Appeals clarify its ruling and reserve the question of whether the US Constitution permits organisations which are funded by Government to rely on the religious entity exemption. The Court of Appeals subsequently issued its amended decision (633 F3d 723 (9th Cir 2011)), but did not within that decision consider the relevance of Government funding to the question of whether a religious institution qualifies for the exception or expressly reserve the question. See comment in Kerry O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press 2014) 319–320.

²⁶ For example see, *Feldstein v Christian Science Monitor* 555 FSupp 974 (DMass 1983) in which the District Court of Massachusetts upheld a religious affiliation requirement on the news reporting staff of a newspaper associated with the Christian Science Church and *Killinginger v Samford University* 113 F3d 196 (11th Cir 1993) in which the Court of Appeals for the 11th circuit held that the religious entity exemption applied to the decision of a University to remove a teacher from a post in its Divinity School because his religious beliefs conflicted with those of the School's Dean.

the ethos exception in the EA, no requirement on the organisation to demonstrate that being of a particular religion is an occupational requirement which is reasonably necessary. When the religious entity exemption was first included in Title VII, it only applied to excuse discrimination in respect of post-holders carrying out the ‘religious’ activities of the organisation. It was unlawful, therefore, to advance religious preferences in posts which involved activities deemed to be ‘secular’ in nature. The scope of the exemption was extended by the United States Congress in 1972 to apply to any of an organisation’s activities. Dismissing a challenge to this extension in *Corp. of the Presiding Bishop v Amos*,²⁷ the United States Supreme Court observed that it was difficult to separate the secular activities of a religious organisation from its religious activities and that the extension to the scope of the religious entity exemption was therefore necessary to minimise governmental interference with the exercise of religion. Per Justice White of the Supreme Court:

it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.²⁸

Justice White was clearly concerned about the impact on religious organisations of a legal provision which only excepted discrimination in respect of activities interpreted as ‘religious’ by the judiciary. Similar concerns were expressed by Justice Brennan who warned that such a provision was in ‘danger of chilling religious activity’ because of the risk that religious organisations would only classify as religious those activities which they believed a court would consider to be religious.²⁹ Although there is not the same distinction between ‘religious’

²⁷ *Corp of the Presiding Bishop v Amos* 483 US 327 (1987) (Amos). Amos argued that applying the religious entity exemption to non-religious jobs would breach the establishment clause of the first amendment to the United States constitution which provides that ‘Congress shall make no law respecting an establishment of religion’.

²⁸ *ibid* 336.

²⁹ Per Justice Brennan in *Amos* (ch 4, n 27), ‘What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. ... Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an

and ‘non-religious’ activities in the employment exceptions contained in the EA, the judiciary is still required in its interpretation of the exceptions to determine whether religion, or (in the case of the OR exception)³⁰ another protected characteristic, is an occupational requirement having regard to the nature or context of the work. In arriving at their determinations, the judiciary will likely become involved (if not explicitly then implicitly), in distinguishing ‘religious’ from ‘secular’ activities, which is what Justices Brennan and White were so keen to avoid, primarily for fear of its impact on the self-definition of religious organisations.³¹

Further, whereas there is significant doubt as to whether the ethos exception would ever permit an employer to impose personal lifestyle requirements on its employees,³² the United States judiciary has held that the religious entity exemption can be relied on by employers who subject employees to standards of conduct that are consistent with their religions’ teachings. In *Little v Wuerl*,³³ for example, the court held that a Catholic school could rely on the religious entity exemption to refuse a renewal of a teacher’s employment contract because the teacher (who was not Catholic) had remarried without first obtaining an annulment of her first marriage, contrary to the religious principles of the Catholic church. It has been claimed, moreover, that the courts readily accept a religious organisation’s view of the conduct that is mandated and prohibited by its religious doctrine.³⁴

incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.’

³⁰ On the OR exception see chapter 3 at 3.3.1.

³¹ Ahdar and Leigh remark that the comments by Justice White and Justice Brennan ‘are pertinent to fears expressed in the United Kingdom about the risk and inherent cost to religious organizations when faced with complainants backed by well-funded state equality and human rights commissions with an interest in sponsoring test legislation’ in Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 364.

³² See chapter 3 at 3.3.2.

³³ *Little v Wuerl* 929 F2d 944 (3rd Cir 1991).

³⁴ Evans and Hood (ch 4, n 13) 85-86, referring to *Ganzy v Allen Christian School* 995 FSupp 340 (District ED New York 1998) 348.

The religious entity exemption certainly affords religious employers significant opportunity to discriminate in employment on the basis of religion.³⁵ It is wider in scope than the ethos exception in the EA, permitting discrimination in respect of any post in a religious organisation, regardless of the nature of the work or the context in which work is undertaken, and regardless of the adverse impacts of the discrimination. Not only does this make the religious entity exemption wider in scope than the ethos exception, it also makes its practical application by the courts much easier to predict. Unlike the ethos exception, the religious entity exemption does not require judicial inquiry into the secular or religious nature of the employment. Nor does it ask the judiciary to engage in any attempt to balance the needs of the religious employer with the interests of the individual subjected to the discriminatory treatment.

4.2.3 Religious education exemption

The second exemption in Title VII which is specifically directed at religious employers provides that:

it shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.³⁶

Insofar as this exemption permits religious preference in the hiring and employment of any posts in any religious educational establishment, whether in teaching or support, its scope is significantly wider than the employment exceptions contained in the E(Sc)A and the SSFA.

³⁵ Evans and Hood (ch 4, n 13) 84.

³⁶ CRA 1964 2000e-2(e)(2) (section 703(e)(2)).

4.2.4 Ministerial exception

The exception to the principle of equality which provides religious employers in the USA with the most latitude to apply employment criteria of their choosing is the so-called, ‘ministerial exception’. The ministerial exception is not laid down in legislation but is, rather, a judicial creation. Its historical roots are in early cases concerning church property disputes, including *Watson v Jones*³⁷ in which the United States Supreme Court held that the separation of church and state required by the first amendment to the United States constitution prevented it from interfering in the decisions of church bodies on, ‘questions of discipline or of faith or ecclesiastical rule, custom or law’.³⁸ This doctrine of ‘church autonomy’ inherent in the first amendment was later held by the courts to apply to the appointment of clergy³⁹ and to other personnel choices,⁴⁰ thus rendering decisions pertaining to such appointments immune from court scrutiny. It was subsequently applied in *McClure v Salvation Army*,⁴¹ a case concerning alleged sex discrimination in employment. Mrs McClure was a minister in the Salvation Army who claimed she was dismissed from employment because she made a complaint about being remunerated on a less favourable basis than her male colleagues. The Court of Appeals for the Fifth Circuit refused to hear her complaint on the basis that the separation of church and state arising from first amendment principles precluded it from applying the non-discrimination provisions in Title VII to the employment relationship between a church and its minister. According to the court, determination of Mrs McClure’s complaint would require it to consider a minister’s salary, duties and assignment which were ‘matters of church administration and government and thus, purely of ecclesiastical cognizance’.⁴² It was feared that if ecclesiastical matters became the domain of the state, the church would lose the ability to deal with matters

³⁷ *Watson v Jones* 80 US (13 Wall) 679 (1871).

³⁸ ibid 727. For comment on the historical roots of the ministerial exception see Jerold Waltman, ‘Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission: Defining the Ministerial Exception in US Employment Law’ (2012) 169 Law and Justice: Christian Law Review 210, 211-15; Nicholas Hatzis, ‘The Church-Clergy Relationship and Anti-Discrimination Law’ (2013) 15 EccLJ 144, 146-51.

³⁹ *Kedroff v St Nicholas Cathedral* 344 US 94 (1952).

⁴⁰ *Serbian Eastern Orthodox Diocese v Milivojevich* 426 US 696 (1976).

⁴¹ *McClure v Salvation Army* 460 F2d 553 (5th Cir 1972).

⁴² ibid 560.

of church government and administration itself and the ‘wall of separation’ between church and state required by the first amendment would be violated.⁴³

The principle established in *McClure* that courts cannot determine discrimination complaints under Title VII which are brought by ministers against their churches has become known as the ministerial exception. Its rationale is not based on an assumption that religion, sex or other protected characteristic is or may be an occupational requirement of the ministerial role, but rather on the belief that autonomy in employment relations with ministers is essential to the constitutionally protected operation of churches. In the decades following *McClure*, the ministerial exception was applied by the District Courts and the Courts of Appeal to bar discrimination complaints, not only under Title VII, but also brought pursuant to legislation outlawing age and disability discrimination.⁴⁴ It was successfully used to rebut complaints brought by clergy as well as by lay persons whose positions were, ‘important to the spiritual and pastoral mission of the church’.⁴⁵ Thus, the ministerial exception was held, for example, to apply to the employment of an Associate in Pastoral Care internship in the administrative body of the Seventh-day Adventist church,⁴⁶ a faculty member of the Catholic University of America,⁴⁷ and a Hispanic communications manager for the Catholic Diocese of Chicago.⁴⁸

It was not, however, until 2012, that the United States Supreme Court affirmed the use of the ministerial exception in *Hosanna Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*.⁴⁹ In this significant decision, the United States Supreme Court had to consider whether an Evangelical Lutheran church and school could rely on the ministerial exception to defend a disability discrimination complaint brought by an employee who held the title, ‘called’ teacher. The teacher had been absent

⁴³ ibid.

⁴⁴ The Age Discrimination in Employment Act 1967 29 U.S.C. § 621 et seq; Americans with Disabilities Act 1990 42 U.S.C. §12101 et seq.

⁴⁵ *Rayburn v General Conference of Seventh-Day Adventists* 772 F2d 1164, 1169 (4th Cir 1985).

⁴⁶ ibid.

⁴⁷ *EEOC v Catholic University of America* 83 F3d 455 (DC Cir 1996).

⁴⁸ *Alicia-Hernandez v The Catholic Bishop of Chicago* 320 F3d 698 (7th Cir 2002).

⁴⁹ *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 132 S Ct 694 (2012).

from work for a period due to suffering from narcolepsy, and when she refused, on the school's request, to resign from her position, her employment was terminated. The Supreme Court confirmed that it was prevented by the first amendment to the United States constitution from adjudicating on a religious group's decision to dismiss one of its ministers. On the facts before it, the teacher was found to be a minister for the purposes of the exception and therefore the Supreme Court refused to consider her complaint. Delivering the leading opinion, Chief Justice Roberts said:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁵⁰

Chief Justice Roberts of the Supreme Court declined to put forward a 'rigid formula' for determining which personnel would be covered by the exception.⁵¹ Of particular importance in the case before it was the title of 'called' teacher assigned to the employee, including her own use of the title and the religious training and formal process of commissioning that it entailed. Although it was relevant that lay teachers (who, unlike called teachers, were not required to be Lutheran) performed the same job functions, this was insufficient to persuade the Supreme Court that the ministerial exception did not apply. The proportion of the teacher's working hours allocated to secular duties (being the majority, aside from 45 minutes of each working day which was allocated to religious duties) was also relevant but was to be considered in the mix with all of the other facts, the religious functions of the post and that the teacher had a role in, 'conveying the Church's message and carrying out its mission'.⁵²

⁵⁰ ibid 706.

⁵¹ ibid 707.

⁵² ibid 707.

The Supreme Court's judgment has been assessed as providing 'only limited guidance' on how the courts should determine in future which employees are covered by the exception.⁵³ Whilst Justice Thomas considered that a religious group's 'good faith understanding of who qualifies as its minister' should prevail,⁵⁴ Justices Alito and Kagan suggested the functions of the person in question should be the key focus and that the ministerial exception should be triggered when the employee, 'leads a religious organization, conducts worship services or important religious ceremonies or rituals or serves as a messenger or teacher of its faith'.⁵⁵ What is clear is that whichever Justice's approach is followed, the ministerial exception will apply to a much wider range of employment positions than the organised religion exception in the EA.⁵⁶ Whereas the explanatory notes to the EA provide that the organised religion exception 'will cover 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',⁵⁷ the ministerial exception has been applied by the courts to prevent discrimination complaints being brought by clergy and a wide variety of lay employees undertaking similar roles against both churches and other religious organisations, such as universities.

It is not only the range of personnel covered by the ministerial exception which renders its scope wider than the organised religion exception. The organised religion exception, it will be recalled, permits discrimination on only a few prescribed grounds, and only where it is necessary for compliance with religious doctrine or to avoid conflict with a significant number of the religion's followers. The effect of the ministerial exception, by contrast, is to permit discrimination on any ground whether or not required by religious doctrine or the religion's membership. Indeed, in *Hosanna-Tabor*, the Supreme Court suggested that the ministerial exception would apply even in circumstances

⁵³ Dominic McGoldrick, 'Religion and Legal Spaces - In Gods We Trust; in the Church We Trust, But Need to Verify' (2012) 12 HRLRev 759, 765-66. For a discussion of the different approaches taken by the circuit courts to this question see Evans and Hood (ch 4, n 13) 90-91.

⁵⁴ *Hosanna-Tabor* (ch 4, n 49) 710.

⁵⁵ *ibid* 712.

⁵⁶ On the organised religion exception, see chapter 3 at 3.3.3.

⁵⁷ Explanatory Notes to the Equality Act 2010, para 790.

where no religious basis for the employer's actions is evidenced.⁵⁸ The absence of any qualifying conditions for application of the ministerial exception (other than that the employee is deemed to be a 'minister') not only renders its scope wide, but reduces the uncertainty surrounding its application in the courts.

Once it has been established that the claim of discrimination is by a minister, no further enquiry by the court is permissible.

4.2.5 Certainty at the expense of fairness and equality?

There is little doubt that consideration of the religious entity exemption, religious education exemption and ministerial exception in the USA highlights the relatively narrow parameters of the employment exceptions in the EA, the E(Sc)A and the SSFA.⁵⁹ Of more significance for this thesis, however, is the attention called by the analysis of the model in the USA to the ambiguity which surrounds the application and interpretation of the employment exceptions which are contained in the EA. The greater certainty in the scope and application of the Title VII exemptions and the ministerial exception can be attributed in part to the larger and more developed jurisprudence of the US courts in this area. However, it is also derived in significant measure from the nature of the Title VII exemptions and the ministerial exception, which does not involve the judiciary in the same 'searching case-by-case analysis'⁶⁰ as the EA equivalents which ask the courts to determine questions of occupational need, proportionality, doctrinal compliance and/or membership conflict.

Esau, who has written on the Canadian approach to religious autonomy in employment, is an advocate for the USA model, which he considers to be more protective of religious freedom than an approach which asks whether religion or

⁵⁸ Per Chief Justice Roberts in *Hosanna-Tabor* (ch 4, n 49) 709, 'The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful ... is the church's alone.' C.f. *Bollard v The California Province of the Society of Jesus* 196 F3d 940 (9th Cir 1999) in which the Court of Appeals for the Ninth Circuit held that because there was no asserted religious reason for the actions of the religious organisation, the ministerial exception could not apply (discussed in Evans and Hood (ch 4, n 13) 92).

⁵⁹ The broad discretion which religious employers in the USA have in respect of their employment practices is contrasted with the narrower scope for religious employers to discriminate in the UK in Jerold Waltman, 'Churches and Equal Employment Policy in the United States and the United Kingdom' (2011) 166 *Law and Justice: Christian Law Review* 37.

⁶⁰ Justice Brennan in *Amos* (ch 4, n 27) 343-44 remarked that determining whether an activity is religious or secular required a 'searching case-by-case analysis'.

another protected characteristic is a *bona fide* occupational requirement. He is particularly critical of the use in some of Canada's provinces of exceptions for *bona fide* occupational requirements and argues that the scope they allow for the judiciary's own values to influence its determinations is unacceptably wide.⁶¹ Gillian Demeyere provides a convincing rebuttal to Esau's claim and argues in favour of exceptions to equality in employment which require the employer to demonstrate that any discriminatory criterion amounts to an occupational requirement that is reasonably necessary.⁶² Demeyere argues persuasively that exceptions of this kind do not require the judiciary to make a value judgment as to whether equality or freedom of religion should prevail in any case. Nor do they allow the judiciary discretion as to whether to apply an 'organic' or 'instrumental' interpretation of the employer's needs. Instead, they ask simply that the judiciary considers 'the requirements of the contract of employment'.⁶³ The judiciary will, moreover, be led to an 'organic' rather than 'instrumental' interpretation of these requirements, if it can demonstrate that this is necessitated by the contract of employment.⁶⁴

Demeyere's view is to be preferred. Although it is true that the model of exemptions and exceptions in the USA affords employers and advisers a greater level of certainty, this, I argue, comes at far too great a sacrifice. The Title VII exemptions and the ministerial exception fail to ensure sufficient regard for the individual interest in not suffering discrimination on grounds of personal characteristics. They excuse discrimination whether or not religion (or another personal characteristic) is an occupational requirement. No recognition, meanwhile, is given to the harm caused by discrimination, and no attempt is made to balance this with the needs of the religious employer. This affords insufficient regard for the competing equality interests affected by any exercise of an exemption or exception to the principle of equality in employment and for

⁶¹ Alvin Esau, "'Islands of Exclusivity': Religious Organisations and Employment Discrimination' (1999-2000) 33 UBC LawRev 719. For example, Esau asserts at 750 in relation to 'the BFOR standard' that 'the application of the test involves a case by case consideration of the circumstances and the result is subject to a high degree of uncertainty depending on the values of the person who applies the test'.

⁶² Gillian Demeyere, 'Discrimination in Employment by Religious Organizations: Exemptions, Defences, and the Lockean Conception of Toleration' (2009-2010) 15 CanLab&EmpLJ 435.

⁶³ *ibid* 460.

⁶⁴ *ibid* 461.

the significant harm which discrimination on grounds of a personal characteristic can inflict.⁶⁵ Clarity is (and should not be) at the expense of fairness and equality. To an extent, some ambiguity and uncertainty in the exceptions to equality must be accepted as inevitable to accommodate the interplay of competing interests in the myriad of factual scenarios in which religious autonomy issues arise. Still, the level of uncertainty can be managed to tolerable levels if there is a shared and clear understanding of the principle which underlies any exceptions. It is only then, that employers and advisers will be able to more easily predict judicial outcomes. To assist in the quest for uncovering principles to underpin the exceptions in the EA, the E(Sc)A and the SSFA, I will now examine the principled basis for the approach taken in the USA to provide a basis for comparison.

4.3 Principle underpinning the USA model

4.3.1 Church - state relations and positive religious freedom

It was intended, since at least the end of the 18th century, that the constitutional relationship between church and state in the USA would entail a separation between the two institutions. An early proponent of the concept of separation, James Madison, was initially influential in securing laws in Virginia in the late 18th century which sought to guarantee religious freedom and forbid its establishment in the state.⁶⁶ Madison's subsequent efforts to achieve the separation of church and state nationwide were thereafter manifested in the first amendment to the federal constitution of 1787 which came into effect in 1791. Providing *inter alia* that, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof', the religion clauses of the first amendment have famously been described by Thomas

⁶⁵ See chapter 10 at 10.3.1.

⁶⁶ Particularly, the Virginia Statute of Religious Freedom 1786. This followed a Memorial and Remonstrance, Against Religious Assessments, written by Madison in 1775, which set out Madison's objections to individuals being required by the state to give money to religious institutions. See Frank S Ravitch, 'Religion and the Law in American History' in Paul Harvey and Edward J Blum (eds), *The Columbia Guide to Religion in American History* (Columbia University Press 2012) 156. See also comment in Elisabeth Zoller, 'Laicite in the United States or the Separation of Church and State in a Pluralist Society' (2006) 13 Industrial Journal of Global Legal Studies 561, 567-70 on Madison's influence in amending article 16 of the Virginia Declaration of Rights in 1791 to record a firmer commitment to the right to religious liberty than in the original version which was written in 1776 and which could be read as merely recognising the need to 'tolerate' religious belief and practice.

Jefferson as, ‘building a wall of separation between Church & State’.⁶⁷ The last state in the USA to disestablish its state church was Massachusetts in 1833, although it was not until almost a hundred years later (in 1940 and 1947) that individual states became bound by the first amendment, through the doctrine of incorporation.⁶⁸ Until then, the application of the first amendment was restricted to federal government.

It has been claimed that a historical perspective is required to determine the original meaning of the religion clauses.⁶⁹ A commonly held view is that Madison was influenced by his experiences in Virginia⁷⁰ where he disagreed with the historical practice of taxing individuals’ income to pay for the churches. One view is that the religion clauses were intended to improve individual religious freedom and that their purpose was to create an equal playing field where individuals were not obstructed from pursuing their chosen religion and to prevent religious conflict.⁷¹ The first amendment has been described as marking the end of a period of religious tolerance in the USA and the beginning of a period of positive religious freedom:

Between article VI and the religion clauses, the national government put the capstone on the movement that had become more and more evident on this side of the Atlantic. This movement began with the religious intolerance that clearly marked the beginnings of government in New England, continued with the consistently expanding religious tolerance for nonmajority sects that marked later colonial and state governments, and culminated in the right to religious freedom embodied in the first amendment.⁷²

⁶⁷ Thomas Jefferson, 'Letter to Danbury Baptist Association dated 1 January 1802' (Information Bulletin, Library of Congress, June 1998) <<https://www.loc.gov/loc/lcib/9806/danpre.html>> accessed 28 December 2017.

⁶⁸ In *Cantwell v Connecticut* 310 US 296 (1940) and *Everson v Board of Education* 330 US 1 (1947), the Supreme Court interpreted the due process clause of the fourteenth amendment of the United States Constitution as requiring that the individual states be bound by the free exercise clause and the establishment clause. For comment on ‘incorporation’ see Ravitch (ch 4, n 66) 159-60.

⁶⁹ Philip B Kurland, 'The Origins of the Religion Clauses of the Constitution' (1985-1986) 27 Wm & Mary LR 839, 845.

⁷⁰ See for example ibid 853-55.

⁷¹ ibid 860.

⁷² ibid 856-57.

Remarkably, such a turning point did not, as Russell Sandberg claims, occur in the UK until over two hundred years later.⁷³ Positive religious freedom in the USA, at least as an ideal recognised by law, therefore, could be said to date at least from the date the first amendment to the United States constitution in 1791 came into effect. Even prior to this, most states in the USA provided for religious freedom in some form in their bills of rights, albeit often with discriminatory coverage: some only providing the benefit to Protestants, for example, whilst others excluded certain religious groups, such as the Quakers.⁷⁴

4.3.2 Impact of the religion clauses on the Title VII exemptions and the ministerial exception

The religion clauses consist of ‘establishment’ and ‘free exercise’ principles. The establishment principle (‘Congress shall make no law respecting an establishment of religion’) has frequently been interpreted more widely than conveying only a prohibition on the existence of an ‘established’ or ‘state’ church. Instead the courts have interpreted the establishment clause as a safeguard against excessive ‘entanglement’ by the state in the affairs of religion.⁷⁵ Modern interpretations of the establishment principle capture the idea that the state must remain neutral towards religion:⁷⁶ it must not promote one religion over another or indeed any religion over none.⁷⁷ Broadly, the free exercise principle (‘Congress shall make no law respecting ... religion or the free exercise thereof’) was initially deemed to protect individuals against actions by the state which impacted negatively on their ability to follow their religious conscience. More recent jurisprudence has interpreted the clause somewhat more tightly as expressing a duty on the state not to discriminate on grounds of religion.⁷⁸

⁷³ See Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 36.

⁷⁴ Kurland (ch 4, n 69) 852.

⁷⁵ *Lemon v Kurtzman* 403 US 619, 612-13 (1971) sets out a three stage test for verifying whether a statute is in breach of the establishment clause. The third requirement is that, ‘the statute must not foster an “excessive government entanglement with religion”’.

⁷⁶ Zoller (ch 4, n 66) 570-81.

⁷⁷ Though see comments in Kurland, (ch 4, n 69) 856 that there is nothing to suggest that the religion clauses were originally intended to protect ‘freedom of irreligion’.

⁷⁸ Zoller (ch 4, n 66) 581-85. Caroline Mala Corbin, ‘Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law’ (2007) 75 Fordham LRev 1965, 1994-1995.

There is compelling evidence that the approach in the USA to religious autonomy in employment has been heavily influenced by the constitutional norm of ‘separation’ between church and state, which, at least historically, prevailed in the USA. Firstly, the ministerial exception, which prevents the courts from adjudicating on discrimination complaints brought by ministers, is frequently cited by the courts and academics as necessitated by the first amendment.⁷⁹ In *McClure*, the Court of Appeals for the Fifth Circuit grounded its decision that Title VII did not apply to the employment relationship between the Salvation Army and one of its ministers in the notion of church autonomy and the requirements of the first amendment. Delivering the judgment, Circuit Judge Coleman opined:

Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. ...

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.⁸⁰

Since *McClure*, the courts have continued in the most part to cite the religion clauses (or one or other of them) to justify the application of the ministerial exception to the employment relationship between ministers and their employers.⁸¹ In *Hosanna-Tabor*, the first and only case on the ministerial exception to reach the United States Supreme Court, Chief Justice Roberts asserted that the ministerial exception was required by the free exercise and establishment principles:

⁷⁹ Corbin (ch 4, n 78) 1969

⁸⁰ *McClure* (ch 4, n 41) 560.

⁸¹ Corbin (ch 4, n 78) 1969.

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.

According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁸²

The first amendment was also influential in the crafting of the religious entity exemption. In *Little* the Court of Appeals for the Third Circuit had to determine whether a Protestant teacher could be dismissed by her Catholic employer for conduct which did not accord to the teachings of the Catholic church. The court surveyed the legislative history of the religious entity exemption and recorded that congress had, 'recognized that religious groups have a constitutionally protected interest in applying religious criteria to at least some of their employees'.⁸³ In other words, the legislative intention behind the religious entity exemption was to recognise the rights of religious organisations which were guaranteed by the religion clauses.⁸⁴ The court further assessed that applying Title VII's prohibition of discrimination on grounds of religion to the employer in the case before it would, 'be constitutionally suspect because it would arguably violate both the free exercise clause and the establishment clause of the first amendment'.⁸⁵ Similar sentiments have been expressed by the judiciary in other cases which have considered the Title VII religious exemptions. In its decision in *Amos*, the United States Supreme Court held that permitting religious preference in appointments for roles consisting solely of secular activities was not a violation of the establishment clause. According to the court, rather than involving an excessive entanglement of church and state, the religious entity exemption, 'effects a more complete separation of the two'.⁸⁶

It is difficult to dispute that in creating and interpreting the religious entity exemption and the ministerial exception, Congress and the judiciary have been heavily influenced by the constitutional relationship between church and state in

⁸² *Hosanna-Tabor* (ch 4, n 49) 188-89.

⁸³ *Little* (ch 4, n 33) 949.

⁸⁴ *ibid* 950.

⁸⁵ *Ibid* 947.

⁸⁶ *Amos* (ch 4, n 27) 339.

the USA as manifested in the religion clauses of the first amendment, and the ideal of religious freedom on which they are based.⁸⁷ That said, not everyone agrees that the ministerial exception remains justified by modern interpretations of the free exercise and establishment principles.⁸⁸

In the first significant cases on the free exercise principle, it was accepted that a ‘compelling state interest’ was required to impose a burden on the exercise of religion.⁸⁹ There was held to be no such interest in requiring Amish children to attend school once they had completed ‘8th grade’, or in preventing a Seventh-day Adventist, who was dismissed from her employment for refusing to work a Saturday, from accessing unemployment benefits. The free exercise clause of the first amendment was therefore deemed in the absence of a ‘compelling state reason’ to burden religion, to place a positive duty on the state to grant religious exceptions to rules of otherwise general applicability. Since *Employment Division v Smith*,⁹⁰ however, more recent jurisprudence on the free exercise clause has held that there should be no presumption that laws which are neutral in application breach the free exercise clause on account of their having an adverse effect on religious exercise.⁹¹ Given that the free exercise principle is no longer interpreted by the courts as entailing any positive duty to exempt religious individuals or organisations from laws of general applicability⁹² and instead only protects religion against laws which are discriminatory,⁹³ it has been argued that it cannot be a convincing account of the ministerial exception.⁹⁴

⁸⁷ See, however, Ira C Lupu, 'Free Exercise Exemption and Religious Institutions: the Case of Employment Discrimination' (1987) 67 BULRev 391.

⁸⁸ See for example, Corbin (ch 4, n 78) c.f. Douglas Laycock, 'Hosanna-Tabor and the Ministerial Exception' (2012) 35 HarvJL&PubPol'y 839.

⁸⁹ *Sherbert v Verner* 374 US 398 (1963) and *Wisconsin v Yoder* 406 US 205 (1972).

⁹⁰ *Employment Division v Smith* 494 US 872 (1990).

⁹¹ ibid 879; see discussion in Zoller (ch 4, n 66) 585. But, note that the Religious Freedom Restoration Act of 1993 has been held to apply *Sherbert* principles to federal statutes.

⁹² In Zoller (ch 4, n 66) 585 Zoller remarks, ‘The Constitution does not obligate the state or its subdivisions either to grant these dispensations or religious exemptions from its laws or to establish accommodations to facilitate religious exercise.’

⁹³ See Corbin (ch 4, n 78) 1995.

⁹⁴ ibid 1998-2004.

The establishment principle has also been criticised for providing a weak basis for the ministerial exception. Commonly the ministerial exception was justified by the establishment principle because it avoided excessive entanglement by the state in the doctrinal and spiritual affairs of religious organisations. Yet doubts have been expressed as to whether such entanglement would actually ensue were courts to adjudicate in the discrimination complaints of ministers.⁹⁵ In the case of *Rosati v Toledo, Ohio Catholic Diocese*⁹⁶ a nun was unable to pursue a disability discrimination complaint after she was dismissed from her religious order following a diagnosis of breast cancer. The religious order argued successfully that the dismissal concerned the selection or rejection of ministerial personnel and that the first amendment prevented the courts from hearing the nun's complaint. Unsurprisingly, this case has attracted some criticism⁹⁷ and it is difficult to see what 'entanglement' in doctrinal and spiritual matters would have ensued had the court investigated whether the nun's ill health influenced the religious order's decision to dismiss. If it had carried out such an investigation and found in the affirmative, then it would still have been open to the religious order to assert that its doctrinal or spiritual teachings prevented it from continuing to engage a nun in ill-health. It is surely only if the courts were then to question or dispute such teachings, that a question of 'excessive entanglement' would arise.

The reluctance of the courts to consider, in the application of the ministerial exception, whether there is a religious basis for the discrimination could also be criticised for being inconsistent with a proper interpretation of the religion clauses. If an employer's decision is not made on religious grounds, it is difficult to fathom how judicial scrutiny of the decision can jeopardise the free exercise and establishment principles. Even the early church autonomy cases recognised the limits of a first amendment argument to shield the decisions of church bodies from court scrutiny, acknowledging that it was only effective where the

⁹⁵ ibid 2004-26.

⁹⁶ *Rosati v Toledo, Ohio Catholic Diocese* 233 FSupp 2d 917 (District ND Ohio 2002).

⁹⁷ See, for example, Raymond F Gregory, *Encountering Religion in the Workplace: The Legal Rights and Responsibilities of Workers and Employers* (Cornell University Press 2011) 170-76.

subject matter of the dispute was, ‘strictly and purely ecclesiastical in its character’.⁹⁸

Persuasive arguments have also been made that the jurisprudence of the first amendment no longer reflects a strict concept of ‘separation-ism’ where the church and state operate in separate spheres without one intruding on the other. In the last few decades a shift in the jurisprudence of the first amendment towards ‘neutrality’ and the idea that the state should treat all religions equally and on an equal basis with non-religion has been detected.⁹⁹ This shift is reflected in the more limited interpretation applied to the free exercise clause by *Smith*, as well as in decisions which relax the prohibitions of state aid to religious organisations.¹⁰⁰ It has been argued that the ministerial exception, particularly, cannot be sustained in current form in this age of neutrality.¹⁰¹

Although convincing arguments have been made by academics that present interpretations of the free exercise and establishment principles no longer support the ministerial exception in the USA, it must be remembered that the religion clauses of the first amendment were instrumental in the crafting of the ministerial exception as well as the Title VII exemptions and continue to be used by the courts and some academics to justify their application in employment cases. The church and state relationship, as it is expressed in the first amendment, and the notion of positive religious freedom which the first amendment embodies, have historically been prominent driving forces in the law relating to religious autonomy in employment. Though disagreement among academics, on whether a modern interpretation of the first amendment provides sufficient justification for its approach to religious autonomy in employment, is likely to continue, the relationship between church and state, as it evolves and is re-interpreted in the USA, can, I argue, nevertheless provide the legislature

⁹⁸ Watson (ch 4, n 37) 733.

⁹⁹ Corbin (ch 4, n 78) 1990-2004.

¹⁰⁰ See *ibid* 1992-94. See also comment in Ravitch (ch 4, n 66) 163-64 on the shift in approach to state aid based on principles of formal neutrality.

¹⁰¹ Corbin (ch 4, n 78) 1998-2001 and 2004-28.

and judiciary with a strong basis for the future principled development of the law in this area.

4.4 Conclusion

The Title VII exemptions and the ministerial exception offer religious employers considerably more latitude to discriminate in their employment practices than the British employment exceptions contained in the EA, the E(Sc)A and the SSFA. The lack of judicial authority on these latter exceptions, moreover, is highlighted by the more developed US jurisprudence in this area. Whereas the Title VII exemptions and the ministerial exception permit less scope than the employment exceptions in the EA for ambiguity and uncertainty in their interpretation and application, I argued in this chapter that they fail to afford sufficient regard for the equality interests affected by their exercise and the harm inflicted by discrimination on grounds of a personal characteristic. If the competing interests which are affected by an exercise of the employment exceptions are to be accommodated, some measure of ambiguity or uncertainty in their application is, I argued, desirable. Still, the judgment exercised by decision-makers can and should be applied in accordance with clear principles. Church and state relations, as well as positive religious freedom in the USA inspired the introduction of the Title VII exemptions and ministerial exception and offer, I argued, relatively clear principles to guide their future development. The extent to which constitutional church and state relations and positive religious freedom influenced the introduction of the employment exceptions in the EA, the E(Sc)A and the SSFA, will be considered in chapter 6. Before this, consideration will be given in chapter 5 to the model of exemptions and exceptions to equality in employment adopted by the Canadian provinces and territories.

5 Religious group autonomy in employment: Canada

5.1 Introduction

In this chapter, I consider the Canadian approach to religious autonomy in employment because it underlines and highlights important aspects pertaining to the nature and scope of the employment exceptions in Great Britain and assists with the search for underlying principle in the British case.

Despite different approaches being taken by the Canadian provinces and territories, I argue that there is, still, commonality. In determining cases under each approach, the judiciary has, in the past, considered the nature of the organisation (including its purpose and mission) and/or the context in which the employment is carried out, to be significant. This, I argue, calls particular attention to the functional approach advanced by certain policy makers to interpretation of the employment exceptions in the EA.¹

I examine in the final section of this chapter, the historical and constitutional influences in Canada on religious autonomy in employment. The influence of church and state relations and positive religious freedom, I argue, has been less pronounced in Canada than in the USA. Freedom of association, I suggest, has been more influential, and offers a principled basis for future development of the law in this area. The extent to which freedom of association influenced the introduction of the British employment exceptions will be considered in the next chapter.

5.2 Canadian models of exceptions / exemptions to equality in employment for religious employers

5.2.1 Overview of the legislative framework

All employers in Canada are prohibited from unlawful discrimination in employment but the precise scope of the prohibition and any exception or exemption from it varies depending on the type of employer and/or the

¹ See chapter 3 at 3.4.

jurisdiction. Federal government, first nations governments and employers regulated by federal Government (banks, for example), are required to comply with the provisions of the Canadian Human Rights Act, passed by Parliament in 1977.² The employment equality protections available in all other workplaces are governed by the human rights legislation of the province or territory in which the workplace is situated. There are, therefore, as many as fourteen human rights acts or codes prohibiting discrimination in employment in Canada: one federal statute, together with one human rights statute for each of Canada's ten provinces and three territories.

Given that religious employers in Canada are unlikely to be federally regulated, an examination of the provincial and territorial legislation is crucial to an understanding of the nature and scope of religious autonomy in Canada. All of the provincial and territorial legislation provides that it is unlawful to discriminate in employment on prohibited grounds, which in each case includes religion (and/or religious beliefs, creed), as well as sex and sexual orientation. There is, however, variance in the nature and extent of exceptions or exemptions to this rule of general applicability for religious employers.

Broadly speaking, it is possible to identify three different approaches taken by the provinces and territories.³ In the first approach, adopted by three of the provinces (Alberta, New Brunswick and Manitoba) and by the federal legislation, there is no special exception to the principle of equality in employment for religious employers: if religious employers want to discriminate in their employment practices they must rely instead on the general exception from the prohibition of discrimination for *bona fide* occupational requirements, available to all employers. The second approach, which is adopted by five of the provinces (Prince Edward Island, Newfoundland, Saskatchewan, Nova Scotia and Ontario), is to have a tailored exception for certain (including religious) organisations permitting discrimination when there is a *bona fide* occupational requirement. The third approach is taken by the remaining two provinces and

² Canadian Human Rights Act RSC, 1985, c H-6.

³ This tripartite classification is also adopted by Alvin Esau in Alvin Esau, "Islands of Exclusivity": Religious Organisations and Employment Discrimination' (1999-2000) 33 UBC LawRev 719 and by Gillian Demeyere in Gillian Demeyere, 'Discrimination in Employment by Religious Organizations: Exemptions, Defences, and the Lockean Conception of Toleration' (2009-2010) 15 CanLab&EmpLJ 435.

the three territories. Religious organisations (as defined in the relevant legislation) are exempted from the ambit of discrimination legislation, either in their entirety (as in Yukon), or more narrowly in circumstances where discrimination is solely related to the special objects of the organisation (as in Northwest Territories, Nunavut), justified by the nature of the organisation (as in Quebec), or restricted to preferring employees of the same group as those whose interests and welfare the organisation exists to promote (as in British Columbia). Each of these three approaches will be examined in more detail below.

5.2.2 General exception: Federal, Alberta, New Brunswick, Manitoba

Section 14(1) of the Manitoba Human Rights Code⁴ is typical of the provisions contained in the federal legislation⁵ and in the human rights legislation of New Brunswick⁶ and Alberta.⁷ It provides that:

No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

In the case of *Schroen v Steinbach Bible College*,⁸ a Manitoba Board of Adjudication considered the extent to which this provision permitted a Mennonite Bible College to withdraw an offer of employment on grounds that

⁴ The Human Rights Code CCSM c H175.

⁵ Canadian Human Rights Act RSC, 1985, c H-6, s 15(1)(a) ‘It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.’

⁶ Human Rights Act, RSNB 1973, c H-11, s 4(5) ‘Despite subsections (1), (2) (3) and (4), a limitation, specification or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity shall be permitted if the limitation, specification or preference is based on a bona fide occupational qualification as determined by the Commission.’

⁷ Human Rights Act, RSA 2000, c A-25.5, section 7(3) ‘Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.’ In addition, s11 provides that, ‘A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.’

⁸ *Schroen v Steinbach Bible College* 1999 MHRBAD No2, 1999 Carswell Man 634 (WL Intl) (cited to CarswellMan).

the successful applicant was, unbeknown to the employer at the time the offer was made, a Mormon. The complainant in that case, Esther Schroen, was of Mennonite ancestry and formerly of Mennonite faith but had converted to the Mormon faith by the time she was offered the position of accounting clerk for the college. She did not disclose her faith at interview, and signed her agreement on request to the college's 'Statement of Faith' notwithstanding its content contradicted her Mormon faith and beliefs. The college subsequently discovered that Ms Schroen was affiliated to the Mormon faith and withdrew its offer of employment. Ms Schroen complained that this constituted discrimination on the grounds of religion, contrary to Manitoba's Human Rights Code. Finding in the affirmative, the Board of Adjudication then considered whether the discrimination was based on a *bona fide* and reasonable requirement or qualification for the employment. The Board of Adjudication stated that this involved two considerations: firstly, whether there was a *bona fide* requirement and, secondly, whether the discrimination was based on reasonable requirements or qualifications for the employment.

As to the first consideration, reference was made by the Board of Adjudication to the statement of the Supreme Court of Canada in *Ontario Human Rights Commission v Etobicoke*:⁹

To be a bona fide occupational qualification and requirement a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the Purpose of *The Code*.¹⁰

Classifying this part of the test as the subjective element, the Board of Adjudication found it was met¹¹ and turned its attention to the second part of the test which, on the authority of *Etobicoke*, it described as objective. Noting

⁹ *Ontario Human Rights Commission v Etobicoke* [1982] 1 SCR 202 (CanLII), (1982) 132 DLR (3d) 14 (*Etobicoke* cited to SCR)

¹⁰ *ibid* [208].

¹¹ *Schroen* (ch 5, n 8) [50].

that the ‘nature of the employment’ needed to be considered, the Board observed that:

The nature of the employment concerned in this case has to be considered not only with the specific job duties, but also consideration must be given to allow a religious group to achieve its religious objectives. ... How the job or employment relates to the overall functioning of the institution where the job is performed must be considered. This does not mean that one religious faith is right or wrong. However, is it’s goals and objectives of such a paramount consideration that discrimination is necessary to fulfil these goals and objectives? As well, is the discrimination a *bona fide* and reasonable requirement for the employment or Occupation? ¹²

It is clear that the Board of Adjudication in this case was, in Esau’s terms, advocating an ‘organic’ interpretation of the job requirement, rather than an ‘instrumental’ one.¹³ The functions to be performed in the accounting clerk post were not to be separated from the context in which they were carried out, which included the culture of the employing college and its religious objectives. Although the accounting clerk’s job duties were to include ‘technical’ functions, such as payroll, receipting and maintaining office supplies, it was understood that all employees, including support staff, ‘share in a faithful way with students espousing the Christian faith’.¹⁴ In the words of the Board of Adjudication:

I find the mechanical, technical and simplistically described job function duties of the accounting clerk at SBC could not be separated from the religious environment and the atmosphere of the Christian understanding and rationale and feeling that lies at the very heart and root of all the functions, activities and programs at SBC.¹⁵

The Board therefore concluded that the requirement for the accounting clerk to be of the Mennonite faith was a *bona fide* and reasonable requirement or qualification.

¹² ibid [53].

¹³ Esau observes that ‘The adjudicator in this case recognized the organic nature of the workplace as context, but another adjudicator might have come to a different conclusion by separating the job itself into secular cores and religious peripherals.’ Esau, “Islands of Exclusivity” (ch 5, n 3) 775.

¹⁴ Schroen (ch 5, n 8) [54].

¹⁵ ibid [55].

Although Manitoba's Human Rights Code does not contain a specific exception for religious employers, it is apparent from the decision in *Schroen* that the religious ethos of the employer and the religious context in which work is performed is nonetheless significant in the determination of whether religion is a *bona fide* occupational requirement for the purposes of the general exception which is available to all employers.

5.2.3 Religious exception: Prince Edward Island, Newfoundland and Labrador, Saskatchewan, Nova Scotia, Ontario

Five of Canada's provinces include in their human rights legislation tailored exceptions on which certain organisations, including religious organisations, can rely.¹⁶ Although there are important variations among these exceptions in both the type of religious organisation to which they apply and the extent of the discrimination permitted, all of the provinces require that discrimination is justified by reference to the nature of the employment.

The Human Rights Code of Newfoundland and Labrador contains the widest exception, providing that the provisions prohibiting discrimination in employment will not apply to organisations that are, 'exclusively religious' and 'not operated for private profit', where it is, 'a reasonable and genuine qualification because of the nature of the employment'.¹⁷ Thus the exception applies regardless of the particular objectives of the religious organisation (provided these are not-for-profit), and permits discrimination on grounds of any protected characteristic.

Prince Edward Island ("PEI") and Nova Scotia also permit discrimination by exclusively not-for-profit religious organisations where the protected characteristic is, 'a reasonable occupational qualification'.¹⁸ To rely on the exceptions, however, the organisation must be, 'operated primarily to foster the welfare of a religious ... group with respect to persons of the same religion'.¹⁹

¹⁶ In each of these provinces there is also a general exception for *bona fide* occupational requirements, on which any employer may rely.

¹⁷ Human Rights Act, SNL 2010, c H-13.1, s 14(8)(a).

¹⁸ Human Rights Act, RSPEI 1988, c H-12, s 6(4)(c); Human Rights Act, RSNS 1989, c 214, s 6(c)(ii).

¹⁹ *ibid.*

Nova Scotia also provides an exception permitting discrimination on grounds of any protected characteristic in respect of employees engaged by an exclusively religious organisation to perform religious duties.²⁰

A narrower approach is taken in Ontario and Saskatchewan. As in PEI and Nova Scotia, the exceptions in these provinces permit exclusively religious not-for-profit organisations, which are, ‘primarily engaged in serving the interests of persons identified by their religion’, to give preference to persons ‘similarly identified’ when it is a reasonable and *bona fide* qualification because of the nature of the employment.²¹ Whilst this provision will permit discrimination because of religion, it can also be relied on to defend discrimination on other grounds.

In the 2010 case of *Ontario Human Rights Commission v Christian Horizons* (referred to hereafter as *Heintz*),²² the Ontario Superior Court of Justice was asked to consider the exception for religious organisations in Ontario’s Human Rights Code. The case concerned an appeal against a finding of Ontario’s Human Rights Tribunal that Christian Horizons had discriminated against one of its employees, Connie Heintz, on grounds of sexual orientation after it discovered she was in a same sex relationship, contrary to the lifestyle and morality statement which it required its employees to affirm as part of their contracts of employment. Christian Horizons, an Evangelical Christian organisation, ministered to individuals with developmental disabilities, through the operation of residential homes, as well as camping and day programmes in Ontario. Christian Horizons argued before the court that the tribunal had been wrong to find that the special exception in Ontario’s Human Rights Code for religious organisations was not available to it. The tribunal had determined that Christian Horizons could not rely on the exception because it offered its services to all regardless of their religion or religious background, and was not therefore, ‘primarily engaged in serving the interests of persons identified by their

²⁰ Human Rights Act, RSNS 1989, c 214, s 6(c)(iii).

²¹ Human Rights Code, RSO 1990, c H-19, s 24(1)(a); Saskatchewan Human Rights Code, RSS 1979 c S-24.1, s 16(10).

²² *Ontario Human Rights Commission v Christian Horizons* 2010 ONSC 2015 (CanLII), (2010) 102 OR (3d) 267 (*Heintz* cited to ONSC).

religion'.²³ In any event, the tribunal found that Christian Horizons had not demonstrated that conformance with the lifestyle and morality statement by not participating in same sex relationships was a *bona fide* occupational requirement.²⁴

The court allowed the appeal in part, overturning the tribunal's finding that Christian Horizons was not, 'primarily engaged in serving the interests of persons identified by their religion' but agreeing, ultimately, that Christian Horizons had not demonstrated that refraining from same sex relationships was a *bona fide* occupational requirement. In its judgment, the court gave helpful guidance on the interpretation of the exception for religious organisations in the Code, identifying both subjective and objective elements to the test.

In delivering its judgment the court made reference to two Supreme Court decisions on the religious exemptions contained in British Columbia's and Quebec's human rights legislation.²⁵ In both of these decisions, the Supreme Court had ruled that the purpose of these provisions - and similar provisions in the Ontario Human Rights Code - was to protect the right to associate and to promote certain types of association, including religion.²⁶ The court also referred to the values in the Canadian Charter of Rights and Freedoms of 1982 (the 'Charter'), which forms part of Canada's constitution, as an aid to interpretation: freedom of religion was guaranteed by taking into consideration the primary purpose of the organisation, whereas equality rights were guaranteed by the inclusion of the obligation to demonstrate a *bona fide* occupational requirement.²⁷ The court concluded that in finding that Christian Horizons was not, 'primarily engaged in serving the interests of persons identified by their religion' the tribunal did not, 'respect the religious character of Christian Horizons' activities and the purpose of s 24(1)(a) as to protect group

²³ *Heintz v Christian Horizons* 2008 HRTO 22 (WL Intl), 2008 CLLC 230-017 (Ont HRT) (cited to HRTO).

²⁴ ibid [161]-[202].

²⁵ *Brossard (Town) v Quebec (Commission des droits de la personne)* [1988] 2 SCR 279 (CanLII), (1988) 53 DLR (4th) 609 (cited to SCR); *Caldwell v Stuart* [1984] 2 SCR 603 (CanLII), (1985) 15 DLR (4th) 1 (cited to SCR) discussed in *Heintz* (ch 5, n 22) [57]-[63].

²⁶ *Brossard* (ch 5, n 25) [100]; *Caldwell* (ch 5, n 25) 626.

²⁷ *Heintz* (ch 5, n 22) [68]-[71].

rights of association'.²⁸ The Tribunal had erred in applying an objective analysis to the question of whose interests Christian Horizons served. In determining whether an organisation is of a type which can rely on the exception, the purpose of the organisation should be assessed from a subjective perspective.²⁹ Serving all those in need regardless of their faith background was, for Christian Horizons, 'part of its religious mandate'³⁰ and, as such, it was primarily engaged in serving the interests of persons identified by its religion.

Notwithstanding this, the court agreed with the tribunal's determination that Christian Horizons had failed to demonstrate that conformance with the lifestyle and morality statement by not having a same sex relationship was a *bona fide* occupational requirement. The court identified the two-part test in *Etobicoke* as being relevant for determination of this question and referred to commentary by the Supreme Court, 'that bona fide occupational qualification exceptions in human rights legislation should, in principle, be interpreted restrictively since they take away rights which otherwise benefit from a liberal interpretation'.³¹ Although the subjective element of the *Etobicoke* case was satisfied, the objective element was not: Christian Horizons had not shown that the religious conformance requirement was reasonably necessary with reference to the job tasks of the employee who was not required actively to promote an evangelical lifestyle.³²

A common feature in the general and religious exceptions described above, is the stipulation, whether express or implied, that discrimination will only be permitted when the protected characteristic is an occupational requirement by reference to the nature of the particular employment. In this regard the first two approaches may be likened to the OR and ethos exceptions in the EA.³³

²⁸ ibid [73].

²⁹ ibid [73].

³⁰ ibid [72].

³¹ Brossard (ch 5, n 25) [56].

³² Heintz (ch 5, n 22) [105]-[06].

³³ For details of the ethos exception and OR exception see ch 3 at 3.3.2 and 3.3.1.

5.2.4 Religious exemption: British Columbia, Quebec, Northwest Territories, Nunavut, Yukon

The provinces of British Columbia and Quebec and the three territories provide religious groups with the greatest autonomy in employment decisions. Yukon's human rights legislation offers religious organisations the widest exemption, providing that the prohibitions of discrimination do not apply, 'to the employment of a person in any exclusively religious ... organisation'.³⁴ Northwest Territories and Nunavut permit religious, not-for-profit organisations which foster the welfare of a religious group as their main purpose, to give preference in employment if it, 'is solely related to the special objects in respect of which the organisation ... was established'.³⁵ Quebec similarly permits discrimination if it is, 'justified by the ... religious ... nature of a non-profit institution'.³⁶ Meanwhile, British Columbia permits religious, not-for-profit organisations which, 'promote the interests and welfare of an identifiable group or class of persons characterised by ... religion' as their main purpose, to grant preference to members of the group.³⁷ The Supreme Court was asked to decide what was meant by the 'granting of a preference to members of the group' in *Caldwell v Stuart*,³⁸ a case about a Catholic school's decision not to renew the teaching contract of one of its Catholic teachers because, contrary to the teachings of the Catholic church, she married a divorced man in a civil ceremony. The Supreme Court agreed with the Board of Adjudication that the school had not unlawfully discriminated against the teacher on grounds of religion or marital status, finding that religious conformance was a *bona fide* occupational requirement but that, in any event, the school could rely on the special exemption contained in British Columbia's Human Rights Code for religious organisations. The exemption permitted the school to prefer, 'Catholic teachers who accept and practice the teachings of the Church'.³⁹ Thus the exemption in British Columbia

³⁴ Human Rights Act RSY 2002, c 116, s 11(3).

³⁵ Human Rights Act SNWT 2002, c 18, s 7(5); Human Rights Act, SNU 2003, c 12, s 9(6).

³⁶ Charter of Human Rights and Freedoms, RSQ c C-12, s 20.

³⁷ Human Rights Code, RSBC 1996, c 210, s 41.

³⁸ *Caldwell* (ch 5, n 25).

³⁹ *ibid* 628.

can operate to permit discrimination on grounds other than religion, such as marital status, as it did in this case.

In each of these two provinces and three territories, discrimination by religious organisations is justified either explicitly or implicitly by the nature of the organisation itself, rather than the nature of the particular employment at issue. In this regard, the approach resembles more closely the model adopted in the USA. The religious entity exemption in Title VI permits religious discrimination if the purpose or character of the institution is ‘primarily religious’.⁴⁰ The rationale for the ministerial exception, meanwhile, derives from the constitutionally protected nature of the ‘church’ employer.⁴¹

5.2.5 Separate denominational schools

Not unlike the religious exemption approach described above, Canada’s treatment of employment in certain denominational schools is linked to their special nature or status. In the negotiations leading to Canadian confederation in 1867, concerns were expressed over the educational rights of religious minorities.⁴² To allay these concerns, the Constitution Act 1867 afforded denominational schools special protection by providing, *inter alia*, at section 93(1) that the provinces must not make any laws relating to education which infringed any right or privilege applying to denominational schools at the time of confederation.⁴³ Denominational schools which are constitutionally protected by the Constitution Act 1867 are termed ‘separate schools’ and exist today in three provinces, Ontario, Alberta and Saskatchewan.⁴⁴ Their constitutional protection

⁴⁰ See chapter 4 at 4.2.2.

⁴¹ See chapter 4 at 4.2.4.

⁴² Reference Re Bill 30, An Act to Amend the Education Act (Ont) [1987] 1 SCR 1148 (CanLII) [27]-[29]; (1987) 40 DLR (4th) 18.

⁴³ Constitution Act 1867 (UK), 30 & 31 Victoria, c 3 s 93 provides, ‘In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions ... (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.’

⁴⁴ The Constitution Act 1867 does not apply to the three territories which are governed instead by federal statutes (the Northwest Territories Act, the Yukon Act and the Nunavut Act). These statutes protect the right of religious minorities to establish separate schools in the territories.

is further reinforced in the Charter.⁴⁵ Section 29 of the Charter provides that ‘Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.’

The effect of section 29 of the Charter has been described as prioritising the constitutional rights of denominational schools over individual Charter rights.⁴⁶ Several cases, meanwhile, have confirmed that the constitutional right is not restricted to the establishment of separate schools, but extends to the maintenance of their denominational character and the right to dismiss teachers for denominational cause.⁴⁷ It has been held that there is denominational cause to dismiss teachers in Catholic schools who have acted contrary to Catholic doctrine, by, for example, entering into civil marriages⁴⁸ or engaging in pre-marital sexual intercourse.⁴⁹ In *Re Essex County R.C. Sep. Sch. Bd. and Porter*, Zuber J.A. opined that, ‘Serious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties, since within the denominational school, religious instruction, influence and example form an important part of the education process.’⁵⁰

These constitutional rights do not, however, provide unfettered discretion to employers of separate schools to discriminate at will. Rights and privileges will only be protected if they relate to maintaining the denominational character of the school and education. In *O.E.C.T.A v the Dufferin-Peel Roman Catholic Separate School Board*,⁵¹ the Court of Appeal for Ontario considered that the

⁴⁵ Constitution Act 1982 (UK) (enacted as Schedule B to the Canada Act 1982 (UK)) c 11 (*the Charter*).

⁴⁶ *Casagrande v Hinton Roman Catholic Separate School District No 155* (1987) 79 AR 241, (1987) DLR (4th) 382, 1987 CarswellAlta 89, [26] (WL Intl) (AltaQB) (cited to CarswellAlta).

⁴⁷ See review of relevant cases in *ibid* [16]-[24]. Cases considered were *Re Essex County RC Sep Sch Bd and Porter* (1978) 21 OR (2d) 25, (1978) 89 DLR (3d) 445, 1978 CarswellOnt 1271 (WL Intl) (Ont CA) (*Re Essex* cited to CarswellOnt); *Moose Jaw Sch Dist No 1 Bd of Educ v AG Sask* (1975) 57 DLR (3d) 315, [1975] 6 WWR 133 (Sask CA); and *Caldwell* (ch 5, n 22).

⁴⁸ *Re Essex* (ch 5, n 47).

⁴⁹ *Casagrande* (ch 5, n 46).

⁵⁰ *Re Essex* (ch 5, n 47) [7].

⁵¹ *The Branch Affiliates (Ontario English Catholic Teachers Association and L'Association des Enseignants Franco-Ontariens) Incorporating Secondary Teachers v The Dufferein-Peel Roman Catholic Separate School Board, Gail Brent, Roy Filion and Doug Knott* (1999) 172 DLR (4th) 260; 1999 OJ No 1382; 1999 CarswellOnt 1086 (WL Intl) (Ont CA) (OECTA cited to CarswellOnt).

religious exception in Ontario's Human Rights Code, which incorporates a *bona fide* occupational requirement defence was consistent with section 93(1) of the Constitution Act 1867, providing, 'an objective means by which to measure the extent to which the policy ... is necessary to maintain the denominational aspect'.⁵²

The condition that any right or privilege enjoyed by these schools at confederation will only be maintained insofar as it is required to safeguard the denominational character of the schools is significant. Although the exceptions in the Education (Scotland) Act 1980 (E(Sc)A) and the School Standards and Framework Act 1998 (SSFA) were likely introduced to protect the denominational character of certain schools in Britain, there is no stipulation in either piece of legislation (whether express or implied) that the exceptions must be exercised for this purpose. The E(Sc)A provides that teachers must be approved as regards their religious beliefs and character. It is doubtful that it is necessary to approve of the beliefs and character of all teachers in a school for the maintenance of its religious aspect. Even if it was, the exception in the E(Sc)A does not fetter the discretion of the relevant religious body to disapprove of an applicant's beliefs and character for reasons that have no bearing on the school's denominational character. In the SSFA, meanwhile, preference can be given to those teachers who hold religious opinions, attend worship, and give religious education and schools can take religious conformance into account in decisions on dismissal whether or not it is necessary to do so having regard to the school's religious ethos.⁵³

5.2.6 Purpose, ethos and context in Canada's case law: an example to follow?

It is possible to identify at least one common theme among the approaches taken by the Canadian provinces and territories. There is evidence from some of the decided cases that the purpose or objectives of the employer, and/or the context or environment in which the work is carried out, are relevant to the

⁵² *ibid* [29].

⁵³ See chapter 3 at 3.2.1.

judicial determination of whether an exception or exemption should apply in any particular case.⁵⁴

Thus, in *Schroen*, a case decided under the general exception approach, the Board of Adjudication refused to focus solely on what it described as, ‘the mechanical, technical and simplistically described job function duties of the accounting clerk’,⁵⁵ preferring instead to lend significant weight to, ‘the religious environment and the atmosphere of the Christian understanding and rationale and feeling’ which was seen as being at the ‘heart’ of all that the employer did.⁵⁶

The importance of acknowledging the true purpose or mission of an employer with a religious ethos was also recognised in *Heintz*, in the court’s finding that the primary purpose of the organisation was to be determined from the subjective perspective of the employer.⁵⁷ Ultimately, a *bona fide* occupational requirement was not established in *Heintz*: there was no requirement in the employee’s job function to preach to those in her care on their lifestyle from an evangelical Christian perspective and this proved fatal to establishing that refraining from same sex relationships was a *bona fide* occupational requirement.⁵⁸ Whilst it could be argued that the court in *Heintz* focused on, what the Board of Adjudication in *Schroen* described as, ‘the mechanical, technical and simplistically described job function duties’,⁵⁹ it is relevant that

⁵⁴ Although Iain Benson, who argues for a ‘permeated ethos’ approach to religious employer exemptions, argues referring to *Gore v The Ottawa Roman Catholic Separate School Board* (Unreported 7 Dec, 1971) and *Heintz* (ch 5, n 22) that the judiciary in Canada does not always pay sufficient regard to the employer’s ethos. Iain T Benson ‘An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion’ 145-57 (DPhil thesis, University of the Witwatersrand 2013) available at <<http://wiredspace.wits.ac.za/jspui/handle/10539/14004?mode=full>> accessed 28 December 2017.

⁵⁵ *Schroen* (ch 5, n 8) [55].

⁵⁶ ibid [5]. Vickers refers to *Schroen* in support of her claim that the Canadian courts have been willing to recognise an ‘organic’ view of the workplace (Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 205).

⁵⁷ *Heintz* (ch 5, n 22) [72]-[73].

⁵⁸ ibid [105]-[106].

⁵⁹ *Schroen* (ch 5, n 8) [55]. For example, Alvin Esau is critical of the decision of the human rights tribunal in *Heintz* (ch 5, n 23) (affirmed by the Ontario Superior Court of Justice) that religious conformance was not a BFOR. Esau is of the view that the BFOR leads decision makers to take an instrumental view of the workplace. Alvin Esau, ‘Islands of Exclusivity Revisited: Religious Organizations, Employment Discrimination, and *Heintz v Christian Horizons*’ (2009-

the religious conformance requirement had no bearing on the employee's ability to perform her role, nor, importantly, on her ability to contribute to the religious ethos of her workplace. Indeed, the court observed in its decision that although the employee had a same sex relationship, she contributed to the 'Christian environment'⁶⁰ through participation in prayer, hymn singing and Bible reading and was a, 'follower of Christian Horizons' ethos in every other way'.⁶¹

Finally, in *Caldwell*,⁶² a case under the exemption approach, the 'special nature' of the denominational school, and the need for teachers to lead by example if the school's objectives were to be met, were central to the court's decision that the discrimination on religious and marital grounds was lawful. Delivering the judgment, McIntyre J explained:

As has been pointed out, the Catholic school is different from the public school. In addition to the ordinary academic program, a religious element which determines the true nature and character of the institution is present in the Catholic school. To carry out the purposes of the school, full effect must be given to this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education.⁶³

Factors which are not personal to the employee's post, such as the employer's purpose or mission, or the character or ethos of the workplace, are also evident in the model of exemptions adopted in the USA: it is the religious purpose of the employer which engages the religious entity exemption in Title VII, and it is the constitutionally protected 'church' nature of the employer which is the rationale for the ministerial exception.⁶⁴

If the mission or purpose of the employer and the culture, environment or ethos of the workplace are to be relevant considerations in exceptions to non-

2010) 15 CanLab&EmpLJ 389, 406-18. See also criticisms of the appeal court's decision in *Heintz* (ch 5, n 22) by Iain Benson in Benson (ch 5, n 54) 148-50.

⁶⁰ *Heintz* (ch 5, n 22) [101].

⁶¹ *ibid* [104].

⁶² *Caldwell* (ch 5, n 25)

⁶³ *ibid* 618.

⁶⁴ See chapter 4 at 4.2.2 and 4.2.4.

discrimination norms, then determining whether the exceptions are engaged in any case will be a much more complex and involved task than Harriet Harman anticipated when she declared that there would be exceptions in the EA for ‘religious jobs’ but not for ‘non-religious’ jobs.⁶⁵ Yet it is a task which, I would argue, the British judiciary must undertake. Consideration of the judiciary’s approach in the Canadian cases discussed above calls particular attention to the concerns I expressed in chapter 3 that the explanatory notes to the EA and several British policy makers advocate a construction of the exceptions in the EA, which focuses on the job functions of employees to the exclusion of the context in which work is performed.⁶⁶ As I argued in chapter 3, not only is this at odds with the perspective of employment described by certain religious stakeholders,⁶⁷ it is at odds with the statutory wording of the exceptions in the EA and the Equal Treatment Directive. The relevant statutory language in fact invites the British judiciary to take the same holistic interpretation of the exceptions as has been evidenced in this chapter by the Canadian judiciary. The requirements to have regard for the religious ethos of the employer and the context in which work is undertaken cannot be met by focusing solely on technical job functions: the real needs of an employer should, rather, also be assessed in light of its mission and purpose and the ethos of its workplace.

Given the lack of clear guidance from policy makers on the manner in which the exceptions in the EA ought to be interpreted, there is considerable risk of inconsistency in judicial determinations. I argued in chapter 3 that a better understanding of the principle underpinning the exceptions was needed to aid in their interpretation.⁶⁸ In the next part of this chapter, the principles underlying the Canadian approach will be explored to offer a basis for examining, in the next chapter, the foundational principles (if any) of the British model.

⁶⁵ HC Deb 4 February 2010, vol 505, col 468; see chapter 3 at 3.4.

⁶⁶ See chapter 3 at 3.4.

⁶⁷ For example, see chapter 3 at 3.4.

⁶⁸ See chapter 3 at 3.6.

5.3 Principles underpinning the Canadian models

5.3.1 Church-state relations and positive religious freedom

The right to freedom of conscience and religion and the right to be free from discrimination on grounds of religion are contained in the Charter⁶⁹ and are stated to be subject, ‘only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.⁷⁰ Whereas it has been shown that the establishment clause (together with the free exercise clause) of the United States constitution lies at the heart of its church and state relations, the Canadian constitution, by contrast, contains no equivalent clause expressly prohibiting the Canadian Parliament from establishing a religion. That said, the Supreme Court of Canada in *R v Big M Drug Mart Ltd*⁷¹ has interpreted the constitutional guarantee of freedom of religion in a manner which embodies free exercise and establishment ideals, with Chief Justice Dickson opining that, ‘Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.’⁷² Indeed, arguments have been made that Canada’s approach to church and state relations is not dissimilar to that of the USA.⁷³ Case law from both jurisdictions on establishment issues in Sunday closing laws, religious education in public schools, prayers at legislative assemblies and church property disputes has been reviewed, and striking similarities have been identified.⁷⁴ It has also been claimed that central to the Canadian jurisprudence on freedom of religion is the

⁶⁹ The Charter (ch 5, n 45). The right to freedom of conscience and religion is referred to in section 2(a) of the Charter, whereas the right to be free from discrimination on grounds of religion is referred to in section 15(1).

⁷⁰ *ibid*, s 1.

⁷¹ *R v Big M Drug Mart Ltd*. [1985] 1 SCR 295 (CanLII), (1985) 60 AR 161 (*Big M Drug Mart* cited to SCR).

⁷² *Ibid* [95]. See discussion in Lorne Sossin, ‘God at Work: Religion in the Workplace and the Limits of Pluralism in Canada’ (2008-2009) 30 Comparative Labour Law and Policy 485. Sossin remarks at 489, ‘Notwithstanding the absence of an express provision, however, the Canadian Supreme Court has interpreted the freedom of religion in Canada under the Charter to include both the freedom to express religious belief and the freedom from having religious observance imposed through state action.’ See also discussion of *Big M Drug Mart* (ch 5, n 71) in Jeremy Patrick, ‘Church, State and Charter: Canada’s Hidden Establishment Clause’ (2006) 14 Tulsa Journal of Comparative and International Law 25, 38-39.

⁷³ Patrick (ch 5, n 72).

⁷⁴ *ibid* 36-43. See also comparison of jurisprudence in Christopher L Eisgruber and Mariah Zeisberg, ‘Religious Freedom in Canada and the United States’ (2006) 4 IJCL 244, 254-67.

notion of ‘neutrality’ which, it will be recalled from the last chapter, guides modern establishment clause jurisprudence in the USA.⁷⁵

Though some similarities have been identified between constitutional church and state relations in Canada and in the USA, the Canadian experience has been described as embodying concepts of ‘co-operation’⁷⁶ and ‘accommodation’⁷⁷ rather than, separation. That ‘separation’ is not an accurate description of church and state relations in Canada is supported by the inclusion of the phrase, ‘supremacy of God’ in the preamble to the Charter and, more strongly, by the protections afforded by the constitution to denominational schooling. Each of these will be considered in turn.

The Charter, which guarantees the right to freedom of religion and prohibits discrimination on religious grounds, contains the following preamble, ‘Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law’. Though this reference to ‘God’s supremacy’ in a charter which sets out fundamental freedoms might suggest the establishment of a theistic religion,⁷⁸ consideration of its use as an aid to interpretation since, militates against overstating its significance. Since the Charter came in to effect in 1982, the judiciary has made remarkably little use of the reference to ‘supremacy of God’ when interpreting the Charter values, with one academic observing that, ‘the preamble has been all but ignored by the Supreme Court’.⁷⁹

Whilst the importance of the inclusion of a reference to the ‘supremacy of God’ in the preamble should not be exaggerated, it is interesting to reflect that its presence in the United States constitution would be unthinkable. Christopher Eisgruber and Mariah Zeisberg refer to debates on whether the United States Pledge of Allegiance should contain the phrase, ‘under God’ and comment that,

⁷⁵ Patrick (ch 5, n 72) 43-48.

⁷⁶ Kerry O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press 2014) 329.

⁷⁷ Alvin Esau, ‘Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups’ in Richard Moon (ed), *Law and Religious Pluralism in Canada* (UBC Press 2009) 111.

⁷⁸ Sossin observes that it is, ‘widely cited as a statement of fidelity to Judeo-Christian ideals’ in Sossin ‘God at Work’ (ch 5, n 72) 489.

⁷⁹ Lorne Sossin, ‘The “Supremacy of God”, Human Dignity and the Charter of Rights and Freedoms’ (2003) 52 UNBLJ 227, 232. See review of judicial commentary on the preamble in *ibid* 232-35.

unlike in Canada, where the preamble to the constitution has seemingly not been polemic, were the USA to make reference to ‘God’ in their constitution it, ‘would be a continuing source of controversy and agitation’.⁸⁰ It would seem that, ‘separation’, as an ideology for church and state relations, is more entrenched in the USA.

A more striking difference between church and state relations in the USA and Canada than the reference to ‘God’ in the Charter is constituted by the funding arrangements in each country for denominational schooling. The ‘close relationship between government and church leaders, with direct funding arrangements’, has been cited as an example of Canadian church and state relations typifying ideals of ‘cooperation’.⁸¹ The protections secured at confederation and contained in the Constitution Act 1867 for religious groups in education ensure that the rights which denominational schools enjoyed before confederation would continue.⁸² These rights included, for example, government funding in Ontario for Roman Catholic separate and public schools, but not for any private religious schools.⁸³ When the Charter was enacted, it was expressly provided that rights under the Charter could not interfere with the protections for religious schools under the constitution.⁸⁴ Government funding of religious schools in Canada differs by province: state operated religious schools and state funded private religious schools exist, with many provinces giving preferential treatment to certain denominations over others.⁸⁵ Commenting on this, Eisgruber and Zeisberg have remarked that, ‘it would be difficult to overstate how odd Canada’s arrangements appear to someone steeped in the modern U.S. constitutional tradition’.⁸⁶ The USA has a long history of forbidding state support for religious education, although this has been relaxed somewhat in recent years.⁸⁷ The different approaches to funding of religious education are

⁸⁰ Eisgruber and Zeisberg (ch 5, n 74) 267.

⁸¹ O’Halloran (ch 5, n 76) 329.

⁸² Constitution Act 1867 s 93.

⁸³ See *Adler v Ontario* [1996] 3 SCR 609 (CanLII), (1996) 30 OR (3d) 642, discussed in O’Halloran (ch 5, n 76) 329.

⁸⁴ The Charter (ch 5, n 45) s 29.

⁸⁵ Eisgruber and Zeisberg (ch 5, n 74) 255.

⁸⁶ ibid 256.

⁸⁷ Eisgruber and Zeisberg (ch 5, n 74) 255 referring to *Zelman v Simmons-Harris* 536 US 639 (2002).

stronger indicators than the presence or absence of a reference to ‘God’ in their constitutions, of an approach based on separation being adopted in the USA, and an approach based more on ‘co-operation’ being adopted in Canada.⁸⁸

Having argued that ideals of separation do not hold the same influence in Canada as in the USA, it is necessary to ask whether constitutional philosophies based on accommodation or cooperation drive the approach in Canada to religious autonomy in employment. The approach by the Canadian courts to disputes with ministers is, according to Esau, illustrative of freedom of religion in Canada being, ‘tied up with state law *accommodation*, not with state law *recognition* of an independent jurisdictional sphere’.⁸⁹ Whereas in the USA the ministerial exception is applied to strictly limit judicial interference in employment disputes between ministers and their employers, the Canadian courts appear by contrast to be significantly more willing to intervene.⁹⁰ The judicial review of the employment decisions of church bodies has, for example, led to damages being awarded to a minister who has been disciplined and to a dismissed minister being reinstated to his post.⁹¹ Esau, who advocates for a less intrusive approach by the state in the affairs of religious organisations, has commented that this approach by the judiciary ‘threatens the ability of the church to live by its own norms’⁹² and ‘is a significant danger to freedom of religion in Canada’.⁹³

It cannot be said that philosophies of accommodation and cooperation present in Canadian church and state relations have had the same level of influence on the direction of the law pertaining to religious autonomy in employment, as separation ideals have had in the USA. On the one hand, it could be said that

⁸⁸ Although note the remark by Jeremy Patrick in Patrick (ch 5, n 72) 49 that, ‘The continued existence of denominational schools, entrenched as they are in the Constitution, has become a political question rather than a legal one, but their presence cannot logically distract from the theory that the Charter otherwise mandates the separation of church and state.’

⁸⁹ Esau, ‘Living by Different Law’ (ch 5, n 77) 111.

⁹⁰ See *ibid* 121 for examples of judicial review of church employment decisions relating to the recruitment, discipline and termination of clergy.

⁹¹ *Belding v Calton Baptist Church* 1995 OJ No 2843, (1995) 58 ACWS (3d) 5 (Ont CJ); 1995 CarswellOnt 4642 (WL Intl) and *McCaw v United Church* [1991] 4 OR (3d) 481, (1991) 82 DLR 4th 289, 1991 CanLII 7048 (Ont CA). See Esau, ‘Living by Different Law’ (ch 5, n 77) 121.

⁹² Esau, ‘Living by Different Law’ (ch 5, n 77) 121.

⁹³ *ibid* 122.

principles of cooperation and accommodation underpin the general and religious exception approach used by the majority of provinces and by federal law to permit religious employers to discriminate lawfully in employment: employers are accommodated to the extent that their actions are necessitated by occupational requirements which are reasonably necessary. Yet, it could also be said that principles of accommodation and cooperation justify the wider exemptions from the prohibition of discrimination which are available to employers in British Columbia, Quebec and the three territories.⁹⁴ The difficulty with relying on such indeterminate concepts as accommodation and co-operation as guiding principles for the development of the law on religious autonomy in employment, is their susceptibility to different interpretations and thus different outcomes. Cooperation at what level? Accommodation at what cost? A stronger value is required to underpin and guide development of the law on a principled basis. Such a strong value in the USA is found in religious freedom, and its manifestation in the first amendment. There is evidence, however, that the influence of religious freedom on Canada's laws, relating to religious autonomy in employment, is somewhat less pronounced.

In Canada, rights to religious freedom did not start to gain prominence until the post-war period.⁹⁵ Before this time, it has been said that Canadian public law, 'overwhelmingly reinforced assimilation or exclusion', primarily because of its historic approach to aboriginal people as well as to francophone communities outside of Quebec and its discriminatory treatment of other 'racialized and historically disadvantaged groups'.⁹⁶ Human rights legislation started to emerge at federal and provincial level in the 1960s and 1970s, prohibiting discrimination on grounds of religion and, in 1982 constitutional status was given to the right to religious freedom as one of the fundamental freedoms guaranteed by the

⁹⁴ See above at 5.2.4.

⁹⁵ Colleen Shepherd remarks that, 'the emergency of more robust legal protections for human rights did not emerge until the post-World War II era' in Colleen Shepherd, 'Constitutional Recognition of Diversity in Canada' (2006) 30 *VtLRev* 463, 471. Sossin also comments that, 'Postwar civil liberties in Canada in the 1950s were forged not on the crucible of racial equality, but on religious equality, and specifically the protection of the Jehovah Witness community in Quebec.' See Sossin, 'God at Work' (ch 5, n 72) 485 referring to *Saumur v City of Quebec* [1953] 2 SCR 299.

⁹⁶ Shepherd (ch 5, n 95) 466-71.

Charter.⁹⁷ Whilst one academic scholar acknowledges the modern day ‘celebration of religious, ethnic, and cultural pluralism in Canada’ he argues that this narrative of ‘pluralism’ competes with a narrative of ‘exceptionalism’ which sees Canada as still being, ‘a conservative English Protestant society that tolerated, but never considered as equal, all other minority religious communities’. ⁹⁸ Despite its constitutional status, it is contended that the right to religious freedom has not had the same influence on the law relating to religious autonomy in employment as it has had in the USA. The constitutional protection of certain denominational schools to the exclusion of others supports this contention. It is difficult, after all, to make a strong argument that affording constitutional protection for the discriminatory employment practices of some, but not all, denominational schools is justified by freedom of religion principles. It is easier to explain the special employment protection which some denominational schools enjoy as the product of political compromise.⁹⁹

5.3.2 Freedom of association

Of more significance to the development of the law relating to religious autonomy in employment, it is argued, is another civil liberty: the right to freedom of association. In 1984, and 1988 respectively, the exemptions for certain types of employer (including religious employers) from human rights legislation in Quebec and British Columbia were considered by the Supreme Court in *Caldwell*¹⁰⁰ and *Brossard*.¹⁰¹ In *Caldwell*, it will be recalled, the court was asked to determine whether a Catholic school could rely on an exemption in British Columbia’s Human Rights Code to discriminate on marital and religious grounds in refusing to re-hire a teacher who had, contrary to Catholic teachings, married a divorced man in a civil ceremony.¹⁰² In *Brossard*, the employer sought

⁹⁷ Note that freedom of religion was previously included in the Canadian Bill of Rights SC 1960, c 44.

⁹⁸ Sossin, ‘God at Work’ (ch 5, n 72) 485. According to Sossin, both narratives are reflected in Canada’s approach to religion in the workplace.

⁹⁹ See above at 5.2.5.

¹⁰⁰ *Caldwell* (ch 5, n 25).

¹⁰¹ *Brossard* (ch 5, n 25).

¹⁰² Human Rights Code, RSBC 1996, c 210, s 22, ‘Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterised by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as

to argue that it was a not-for-profit institution of a political nature and could therefore rely on an exemption in Quebec's Charter of Human Rights and Freedoms to defend a claim of discrimination on grounds of civil status which arose on the application of its anti-nepotism policy.¹⁰³ In both cases the Supreme Court asserted that the purpose of the exemptions was to protect the right to associate and promote certain types of association. In considering the exemption in British Columbia's Human Rights Code, McIntyre J of the Supreme Court in *Caldwell* quoted these words of Seaton J.A. in the Court of Appeal with whom he agreed:¹⁰⁴

This is the only section in the Act that specifically preserves the right to associate. Without it the denominational schools that have always been accepted as a right of each denomination in a free society, would be eliminated. In a negative sense s22 is a limitation on the rights referred to in other parts of the Code. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of the religion.¹⁰⁵

Beetz J in *Brossard* expressed a similar view on the exemption in Quebec's Charter of Human Rights and Freedoms:

In my view, this branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.¹⁰⁶

In *Brossard*, Beetz J acknowledged that other provinces in Canada included similar excepting provisions for groups in their human rights legislation and that although the precise wording of each differed they all shared the common purpose of protecting the fundamental freedom of individuals to associate in a

contravening this Act because it is granting a preference to members of the identifiable group or class of persons.'

¹⁰³ The exemption in s 20 of Quebec's Charter of Fundamental Rights and Freedoms then read, 'A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.'

¹⁰⁴ *Caldwell* (ch 5, n 25) 626.

¹⁰⁵ *Caldwell v Stuart* (1982) 132 DLR (3d) 79, (1982) CarswellBC 45, [40] (WL Intl) (BCCA).

¹⁰⁶ *Brossard* (ch 5, n 25) [100].

group or organisation for specified purposes.¹⁰⁷ It is likely that Beetz J was referring to the religious exceptions referred to at 5.2.3 above and to the religious exemptions referred to at 5.2.4 above. His dicta has been cited with approval in several subsequent cases¹⁰⁸ and it was critical to the decision of the Ontario Superior Court of Justice to allow in part the appeal by Christian Horizons against the decision of the human rights tribunal in the complaint brought by Connie Heintz, discussed above.¹⁰⁹ In that case, it will be recalled, the Ontario Superior Court of Justice criticised the human rights tribunal for failing to recognise that freedom of association was the underlying policy reason for the exception in Ontario's Human Rights Code.

The argument that freedom of association is the principle underpinning the exceptions and exemptions described in sections 5.2.3 - 5.2.4 above is strengthened by an examination of their scope. This is because none of the provinces or territories restrict reliance on the exceptions or exemptions to religious employers. Whereas the exemption in British Columbia's Human Rights Code extends to, 'charitable, philanthropic, educational, fraternal, religious or social' institutions,¹¹⁰ 'political,'¹¹¹ 'cultural',¹¹² 'athletic',¹¹³ 'racial',¹¹⁴ 'sororal'¹¹⁵ and 'ethnic'¹¹⁶ institutions are among the types of institution included in the exceptions or exemptions of other provinces and territories. Notably, it is not any group which can rely on the exceptions or exemptions. According to Beetz J in *Brossard*, it was the 'group vocation' of non-profit institutions and institutions dedicated to the well-being of ethnic groups which made them,

¹⁰⁷ *Brossard* (ch 5, n 25) [131]-[132].

¹⁰⁸ See, for example, *Parks v Christian Horizons* (1991) 16 CHRR D/40, 1991 Carswell Ont 6678, [39] (WL Intl) (Ont Bd of Inquiry) and *Kostiuk v Toronto Community Housing Corp.* 2012 HRTO 388, [43] (CanLII).

¹⁰⁹ At 5.2.3 above.

¹¹⁰ Human Rights Code, RSBC 1996, c 210, s 41.

¹¹¹ Charter of Human Rights and Freedoms, RSQ c C-12 (Quebec).

¹¹² Human Rights Act RSY 2002, c 116 (Yukon); Human Rights Act, SNu 2003, c 12 (Nunavut); Human Rights Act SNWT 2002, c 18 (Northwest Territories).

¹¹³ Human Rights Act RSY 2002, c 116 (Yukon); Human Rights Act, SNu 2003, c 12 (Nunavut); Human Rights Act SNWT 2002, c 18 (Northwest Territories).

¹¹⁴ Saskatchewan Human Rights Code, RSS 1979 c S-24.1(Saskatchewan).

¹¹⁵ Human Rights Act, SNL 2010, c.H-13.1 (Newfoundland).

¹¹⁶ Human Rights Act, RSPEI 1988, c H-12 (Prince Edward Island); Human Rights Act, RSNS 1989, c 214 (Nova Scotia).

'deserving of protection' by Quebec's exemption.¹¹⁷ When determining which 'views' or 'pursuits' are to be safeguarded, Beetz J was of the view that the express condition in British Columbia's Human Rights Code, that the organisation must have, 'as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterised by a common race, religion, age sex, marital status, political belief, colour, ancestry or place of origin', ought to be implicitly read into the exemption in the Quebec Charter of Rights and Freedoms.¹¹⁸ In other words, discrimination will not be considered acceptable unless it protects the free association of members of an identifiable group. Associational principles further guide Beetz J in carving out the boundaries of Quebec's exemption when he says that the exemption should only be available to, 'groups for which the mere fact of associating results in discrimination'.¹¹⁹ According to Beetz J, therefore, there needs to be a, 'connection between the brand of discrimination practised and the nature of the institution'.¹²⁰ Here it is of significance that Beetz J advocates that principles of freedom of association are utilised to determine both the precise scope and application of the exemption. Freedom of association is both the policy reason behind, and the principled basis for interpretation of, the religious exceptions and exemptions in Canada.

As a final observation, although both *Caldwell*¹²¹ and *Heintz*¹²² were decided after the Charter came into force, and both concerned employers seeking to discriminate to protect the religious ethos of their organisations, it is interesting to note that in neither decision was the Charter right to freedom of religion given much weight by the courts. It was referred to briefly by the court in *Heintz* as an aid to interpretation,¹²³ but was not expressly considered as such in *Caldwell*. Freedom of association, not freedom of religion and not accommodating and cooperationist philosophies of church and state relations, I would argue, is the clear and guiding principle for the Canadian courts and

¹¹⁷ *Brossard* (ch 5, n 25) [125].

¹¹⁸ *ibid* [126].

¹¹⁹ *ibid* [130].

¹²⁰ *ibid* [130].

¹²¹ *Caldwell* (ch 5, n 25)

¹²² *Heintz* (ch 5, n 22)

¹²³ *ibid* [68]-[71].

legislature in the development of the law relating to religious autonomy in employment.¹²⁴

5.4 Conclusion

To gain a greater insight into aspects of the British employment exceptions, I have considered some of Canada's case law on its exceptions and exemptions in this chapter. I have argued that the case law evidences a holistic interpretation by the Canadian judiciary: the technical functions of posts are considered in the context of their wider purpose, the mission of the employer and/or the ethos or character of the workplace. This is at odds with the narrower, functional approach advocated in the explanatory notes to the EA and by some policy makers in the UK Parliament.¹²⁵ The comparative approach in this chapter has thus underlined the case for uncovering principles to guide interpretation of the employment exceptions in the EA. Moreover, by highlighting the lack of any express or implied condition (as there is in Canada) that the statutory privileges afforded to denominational schools by the E(Sc)A and the SSFA are exercised to maintain the school's denominational character, the case for understanding better the principle behind the exceptions in these statutes has been strengthened.

As a step to identifying the principles underlying or informing the British employment exceptions, I have also considered the norms influential on the US and Canadian models. I have argued that in the USA and Canada, strong principles underpin the approach to religious autonomy in employment: church and state relations and positive religious freedom in the USA, and freedom of association in Canada. Can the same be said for the employment exceptions in Britain? After all, given the ambiguities in the scope of the EA exceptions, the uncertainties surrounding the legitimacy of the exceptions in the E(Sc)A and the SSFA and the underdeveloped nature of the jurisprudence in this area, they are

¹²⁴ The Supreme Court of Canada has recently reserved judgment in two important appeals concerning religious associational rights (*Trinity Western University et al v Law Society of Upper Canada (Ont) (Civil)* (By Leave) and *Law Society of British Columbia v Trinity Western University (BC) (Civil)* (By Leave)). For a summary of the appeals, see Supreme Court of Canada, 'Bulletin of December 1 available at <<https://scc-csc.lexum.com/scc-csc/bulletins/en/item/5685/index.do>> accessed 16 December 2017.

¹²⁵ See ch 3 at 3.4.

perhaps most in need of clear guiding principle. As a next step to uncovering such a principle, and building on the analysis carried out in chapters 4 and 5, the next chapter will explore the extent to which, in Britain, church and state relations, positive religious freedom and freedom of association have been influential in the introduction of the employment exceptions.

6 Constitutional, historical and political influences on religious autonomy in employment

6.1 Introduction

I explored the different approaches to religious autonomy in the USA and Canada in the preceding two chapters to highlight and underline aspects pertaining to the nature and scope of the employment exceptions in Great Britain. Further, and as a first step to identifying or uncovering principles to guide interpretation of the British employment exceptions, I considered the norms which have influenced the US and Canadian models.

I argued that the constitutional church and state divide, and the long history of positive religious freedom on which the divide is predicated, have influenced the approach taken in the USA to religious autonomy in employment. I suggested that in Canada, meanwhile, the principle of freedom of association has been more significant. In this chapter, I will examine what effect, if any, constitutional church and state relations, positive religious freedom and freedom of association had on the introduction of the employment exceptions in Britain.

Whereas I argued in the preceding two chapters that the USA and Canada have strong principles to guide the legislative and judicial development of their laws on religious autonomy in employment, I argue here that the employment exceptions in Britain lack a clear foundational principle. I will explore the implications of the absence of clear principle for the rule of law and will argue that one such implication is that the legislature and judiciary are rendered susceptible to criticism for championing a secular agenda and prioritising certain protected characteristics, particularly sexual orientation and sex, over religion.

6.2 Influence of church and state relations

There is no single, clear definition of ‘establishment’¹ but it has been described as applying when, ‘The state singles out a religion (or several denominations or sectors of the same religion) for special recognition and support.’² It has been

¹ Colin R Munro, ‘Does Scotland Have an Established Church?’ (1997) 4 EccLJ 639, 639-40.

² Rex Ahmar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 100.

said of establishment that ‘With endorsement comes a measure of regulation and direction over religious affairs, whether leadership, membership, doctrine and so on.’³ The institution of ‘establishment’ is on this reasoning the source of both privileges and obligations for the established religion.

As was discussed in chapter 2, the Church of England is the established church in England.⁴ State support for and control of the Church of England is articulated in particular ways through the church’s relationship with the monarch, the courts, parliament and the public.⁵ The Church of Scotland, meanwhile, enjoys some elements of establishment in Scotland. Although state involvement in church affairs and church involvement in state affairs is not as pronounced in Scotland as it is in England,⁶ the Church of Scotland has been described as, ‘a church legally recognised as the official Church of the state or nation and having a special position in law’.⁷

In light of the forms of establishment in England and Scotland, the freedom of religion which is guaranteed by the European Convention on Human Rights (the ‘ECHR’) and the Human Rights Act 1998 (the ‘HRA’) cannot, at least in these countries, be read to include quite the same strict principle of neutrality arguably required by the first amendment to the United States constitution. Might, however, the established nature of church and state relations in England and Scotland explain, at least in part, the approach in these countries to the law relating to religious autonomy in employment? One common feature of establishment, and evident in the form of establishment in both England and Scotland, is the privileging of one religion over another. If the law on religious autonomy in employment favoured the established religions, it would be plausible to argue that church and state relations have been influential. Yet the Equality Act 2010 (the ‘EA’) provides the same rights to and places the same

³ *ibid* 100.

⁴ It was also the established church in Wales until 1920 when it was disestablished by the Welsh Church Act 1914. Northern Ireland has no established church.

⁵ See discussion in chapter 2 at 2.2.1; see also Ahdar and Leigh (ch 6, n 2) 101.

⁶ See discussion in chapter 2 at 2.2.1.

⁷ Munro regards this statement which comes from David Walker, *The Oxford Companion to Law* (Clarendon Press 1980), 431 as an appropriate ‘working definition’ of establishment and considers that it describes the Church of Scotland’s relationship with the State, in Munro (ch 6, n 1) 640 and 645.

restrictions on religious employers regardless of their religious affiliation. The faith schools exception in Scotland, meanwhile, could be described as favouring the non-established religions in Scotland. It was, after all, only the denominational schools in Scotland (mainly Roman Catholic) which were afforded statutory privileges to maintain their religious character when they were subsumed within the state sector in 1918. No similar safeguards were provided on the nationalisation of the Church of Scotland schools, although this could have been because of their dominance in the education sector at the time.⁸ Although the Church of England is responsible for the largest number of schools with a religious character in England,⁹ and could therefore be described as the main beneficiary of the statutory privileges in the School Standards and Framework Act 1998 (the ‘SSFA’) on staffing, schools of other denominations have always been entitled to access the same provisions in the SSFA on an equal basis.

Although the UK Parliament passed the Church of Scotland Act 1921 which seeks in the Declaratory Articles to preserve to the Church of Scotland, ‘the right to determine all questions concerning membership and office in the Church’,¹⁰ the House of Lords has determined that a complaint by a minister of sex discrimination against her church employer is not a spiritual matter within the church’s jurisdiction and, as such, must be determined by the civil courts.¹¹ According to Lord Nicholls of Birkenhead, the rights and obligations pertaining to

⁸ Brown, Green and Mair remark, ‘Various denominations continue to enjoy statutory rights over denominational schools which are not afforded to the Church of Scotland in respect of the non-denominational schools, following the abolition of the “educational” jurisdiction of Church of Scotland presbyteries in 1872.’ In Callum Brown, Thomas Green and Jane Mair, *Religion in Scots Law: Report of an Audit at the University of Glasgow* (Humanist Society Scotland 2016) 139.

⁹ For a breakdown of number of schools see Department for Education, ‘Maintained Faith Schools’ (FOI Release, Department for Education 20 July 2010) <www.gov.uk/government/publications/maintained-faith-schools/maintained-faith-schools> accessed 28 December 2017.

¹⁰ The Church of Scotland Act 1921, s 1 brought in to force the Articles Declaratory which comprise the Church of Scotland’s constitution in relation to spiritual matters (*Laws of Scotland: Stair Memorial Encyclopaedia* (June 1994) vol 3, para 1501). Art IV of the Articles Declaratory provides that the Church of Scotland is to have exclusive jurisdiction over spiritual matters, declaring that the Church has the right, ‘subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the church, the constitution and membership of its courts, and the mode of election of its office bearers’.

¹¹ *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, 2006 SC (HL) 1.

a contract of employment including statutory rights are not ‘spiritual matters’.¹² Any claim that the Declaratory Articles exclude the application of employment equality laws to Church of Scotland employees seems doomed to fail.

There is no compelling evidence that religious employers affiliated with the established religions in Britain are treated favourably in relation to religious autonomy in employment. Another effect of establishment, however, is the involvement of the state in church affairs. It has been shown that the UK legislature is more willing than the legislature in the USA to regulate the employment relationships in religious organisations. This begs the question, whether Britain’s establishment tradition is responsible, at least in part, for a more interventionist approach. In 1802 when Thomas Jefferson referred to the ‘wall of separation’ between church and state in the USA, the established churches in England and Wales and in Scotland continued to be treated specially by the state,¹³ albeit by the early decades of the 20th century, both the Church of England and the Church of Scotland had grown somewhat more independent.¹⁴ Whilst it is difficult to draw any strong link between church and state constitutional relations in Britain and the state’s approach to regulating the employment relationships of religious organisations, it is at least possible that the close involvement of the state in church affairs which can still be observed today¹⁵ has been a cultural influence on the development of law which keeps religious autonomy in employment matters within strict confines.

Establishment may have been influential in one further respect. Julian Rivers, who is critical of the limited autonomy religious employers have in the UK,¹⁶ has criticised the law pertaining to organised religions as being too guided by individual rights, with insufficient regard being given to ‘their collective

¹² ibid [40].

¹³ See Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 28-29; and Munro (ch 6, n 1), 642-43.

¹⁴ Sandberg, *Law and Religion* (ch 6, n 13) 28-29; see also Munro (ch 6, n 1) 643-44; and Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 28-30.

¹⁵ Referring to the Church of England specifically, Russell Sandberg remarks on the historical ‘entanglement with the State’ and observes that this ‘can still be seen in the “incidents of establishment” which continue to apply to the Church of England today’. Sandberg, *Law and Religion* (ch 6, n 13) 24.

¹⁶ Rivers, *The Law of Organized Religions* (ch 6, n 14) 122-37.

dimension'.¹⁷ One consideration is whether the individual trends which Rivers has identified could be traced to protestant theology, which has enjoyed more prominence in Britain by virtue of the established nature of the Church of Scotland and the Church of England. One academic has drawn a comparison between, what he refers to as the, 'single, sole self' of the 'American Protestant World' and the Catholic/Jewish emphasis on 'community'.¹⁸ It is at least plausible that the long history of constitutional establishment of the protestant religion in Britain has been responsible for injecting 'individual protestant' values into law and culture.

These conclusions on the possible influence of the established nature of church and state relations on the law relating to religious autonomy in employment are, at best, tentative, failing to provide a strong principled basis for the law in this area. Where constitutional relations may have had a greater impact is in the approach by the state to the doctrinal independence of religious communities. The British judiciary has shown some unwillingness to interpret religious doctrine,¹⁹ a matter for which they consider themselves to be unqualified. This disinclination towards interfering in doctrinal affairs was relevant it would seem, to the inclusion of the organised religion exception in the Employment Equality (Sexual Orientation) Regulations 2003 (the 'SO Regulations'). When the Joint Committee on Statutory Instruments reported on the draft SO Regulations, it commented that the Government decided to insert the organised religion exception into the draft regulations on the basis of evidence collected in consultation exercises and, 'the Government's view that the Regulations should not interfere in matters of religious doctrine'.²⁰ Similarly, when the then Parliamentary Under-Secretary (Trade and Industry) (Employment Relations and Consumer Affairs), Mr Gerry Sutcliffe, spoke to the draft Regulations in committee debate, he claimed the organised religion exception was included 'for one reason alone': the regulations should not interfere with religious

¹⁷ ibid 318-22.

¹⁸ Thomas C Kohler, 'Religion in the Workplace: Faith, Action, and the Religious Foundations of American Employment Law' (2008) 83 ChiKent LRev 975, 978-79.

¹⁹ Russell Sandberg, 'The Right to Discriminate' (2011) 13 EccLJ 157, 177-78.

²⁰ Joint Committee on Statutory Instruments, 'Twenty-First Report of Session 2002-03' (House of Lords and House of Commons 13 June 2003) para 16.

teachings or doctrine and it would be inappropriate for doctrine to be litigated in the courts and tribunals.²¹ According to Sutcliffe:

If there were no regulation 7(3), tribunals would be drawn into considering whether it was right that religious doctrine required someone to be straight. We do not believe that European law intended to interfere with religious doctrine in that way, and nor do we believe that the regulations should do so.²²

Yet judicial reluctance to interfere with religious doctrine and teaching cannot fully explain the organised religion exception. After all, the organised religion exception does not only permit employers to apply requirements relating to sex, sexual orientation etc. for the purposes of doctrinal compliance. It also allows employers to impose such requirements to avoid conflict with a significant number of the religion's followers. There is no stipulation that the 'conflict' should relate to any particular religious doctrine or teaching.²³ Nor do expressed concerns about doctrinal independence explain the ethos and faith schools exceptions.²⁴ The rationale for these exceptions is better explained, I would argue, by the perceived need to preserve the religious character of the employer, or school, than by an interest in safeguarding doctrinal autonomy.²⁵

6.3 Influence of 'positive religious freedom'

Has religious freedom perhaps had a greater influence on the law pertaining to religious autonomy in employment than church and state relations? Sandberg

²¹ HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 029.

²² ibid col 048.

²³ Equality Act 2010 (EA), sch 9, para 2. For comment on the organised religion exception, see chapter 3 at 3.3.3.

²⁴ ibid, sch 9, para 3; Education (Scotland) Act 1980, s 21(2); School Standards and Framework Act 1998, ss 58-60, s 124A. For comment on the ethos exception and the faith schools exception see chapter 3 at 3.2.13.3.2.

²⁵ E.g. in Cabinet Office, 'Towards Equality and Diversity: Implementing the Employment and Race Directives' (Cabinet Office December 2001) para 13.14 the Government comment, 'We ... propose to include in the new legislation a provision based on the wording of Article 4(2) to allow organisations which have an ethos based on religion or belief to pursue employment policies necessary to ensure the preservation of that ethos.' See also comment by Baroness Blackstone on the draft Equal Treatment Directive, 'We shall press for amendments to the directive to ensure that there is no question of religious organisations being forced to employ people who are not members of the relevant faith, because that would dilute the maintenance of a distinctive religious ethos.' HL Deb 30 June 2000, vol 614, c 1238.

asserts that, in England, ‘the advent of religious freedom as a positive right did not really occur until the twenty-first century’.²⁶ He summarises the history of law and religion in England, asserting that for a period before the HRA came into force in 2000, there was ‘religious toleration’, rather than any ‘legal right to religious freedom’.²⁷ Religious toleration was initially evidenced from the 17th century onwards, by the gradual removal of the legal disadvantages suffered by those who did not adhere to the teachings of the established church, and latterly evidenced in the 20th century by the creation of exceptions on religious grounds to certain laws of general applicability as well as by the Race Relations Act 1976, which was interpreted by the courts as protecting Sikhs and Jews against direct and indirect discrimination.²⁸ International human rights laws, particularly the ECHR, were also relevant influences in this phase of ‘religious toleration’ but as the right to freedom of religion in article 9 could not be enforced directly in the UK courts prior to the HRA, the ECHR had ‘little effect’ on laws pertaining to religion.²⁹ The HRA and the right therein to freedom of religion which could be enforced in UK domestic courts against public authorities was, according to Sandberg, the turning point, marking the beginning of a phase of positive religious freedom.³⁰

Given the relatively recent arrival of positive religious freedom in the UK, it is perhaps unsurprising that its influence on the employment exceptions has been weak. Exceptions for religious employers to generally applicable principles of non-discrimination were first introduced in 1975 in the Sex Discrimination Act 1975 (the ‘SDA’), an Act which was made in the shadow of the UK joining the then European Community in 1973 and signing the Treaty of Rome which required that men and women be afforded equal pay at work. The SDA contained an exception in respect of employment for the purposes of organised religion which allowed an employer to impose a requirement related to sex if necessary for compliance with the doctrines of the religion or so as to avoid

²⁶ Sandberg, *Law and Religion* (ch 6, n 13) 36.

²⁷ ibid 30 (and generally 17-38).

²⁸ ibid 26-36.

²⁹ ibid 33.

³⁰ ibid 36-37.

offending the susceptibilities of a significant number of the religion's followers.³¹ It is unlikely that any notion of positive religious freedom influenced the inclusion of this exception in the SDA given that such a notion was at best in embryonic form in 1975. Although the SO Regulations were made following the HRA coming in to force and in a phase, referred to by some, of 'positive religious freedom'³² the decision to include an exception for organised religion which replicates almost in its entirety the form of the exception in the SDA, suggests that the guarantees of religious freedom in the HRA were not a driving force in the legislature's crafting of the exception. Indeed, there is a little detailed consideration of article 9 of the ECHR or the HRA in Parliamentary debates on the exceptions to equalities legislation for religious employers which now appear in the EA and only cursory mention of the right to religious freedom in reported case law on the exceptions. Whereas the religious exceptions in the USA have their origins in strong guarantees of religious freedom, the ethos and organised religion exceptions in the EA have emerged from European equality principles as limited derogations. Their narrow scope is indicative of a view that they should be regarded as tolerated exceptions to equality norms, rather than as positive religious rights. Nor can the introduction of the faith schools exceptions be attributed to any conscious desire to promote positive religious freedom. The exceptions in the Education (Scotland) Act 1980 (the 'E(Sc)A') and the School Standards and Framework Act 1998 (the 'SSFA') originate from the Education (Scotland) Act 1918 and the Education Act 1902 which transferred denominational schools in Scotland and voluntary schools in England and Wales to the state sector. These Acts were, of course, enacted long before the phase, described by Sandberg, of positive religious freedom and long before discrimination on grounds of religion or belief or sexual orientation was prohibited.³³ The faith schools exception, at least at its inception, may have represented a compromise among interested parties in the transfer of voluntary

³¹ Sex Discrimination Act 1975, s 19.

³² Sandberg, *Law and Religion* (ch 6, n 13) 29.

³³ Education (Scotland) Act 1918, s 18(3) provided that all teachers had to be approved by the relevant denominational or church body as to their character and religious beliefs; Education Act 1902, s 7(7) gives the managers of schools which were maintained but not provided by the local education authority the exclusive power (subject to exceptions laid out in the statute) of appointing and dismissing teachers.

schools to the state sector³⁴ and it is the interest in preserving the religious character of their schools which is often cited by religious groups as a defence to discrimination in denominational schools.³⁵

6.4 Influence of freedom of association

The principle of freedom of association, it would seem, has been afforded even less significance in the exceptions model than freedom of religion. Since at least the 1980s, an individualistic frame of reference has dominated the employment policies of successive governments, with individual human rights and equality claims featuring prominently in the jurisprudence on law and religion.³⁶ There is only sparse mention of freedom of association in Parliamentary debates and material on the ethos and organised religion exceptions. In a public bill committee debate on proposals to widen the employment exceptions, John Mason MP remarked that they offered ‘better’ and ‘wider’ protection for freedom of association³⁷ whilst Baroness O’Cathain observed in a House of Lords debate on the exceptions that, ‘A belief in freedom of association demands that, even if we do not share the beliefs of an organisation, we must stand up for its liberty to choose its own leaders and representatives.’³⁸ The Joint Committee on Human Rights also made only the briefest reference to freedom of association in the context of the employment exceptions when it reported on the Equality Bill, opining that the proposed exceptions achieved an appropriate balance between the right to equality and non-discrimination and the rights to freedom of religion or belief and

³⁴ Brown, Green and Mair remark that the safeguards contained in the 1918 Act with regard to the approval of teachers were among provisions included in the legislation ‘to satisfy both the Catholic Church and the trustees of the various Catholic schools in Scotland’. Brown, Green and Mair (ch 6, n 8) 151.

³⁵ E.g. see comment by William Fittal, then Secretary-General of the General Synod of the Church of England in HC PBC (Equality Bill) 9 June 2009, col 78.

³⁶ Brown, Green and Mair (ch 6, n 8) 354. According to Brown, Green and Mair, “New” religion is the religion of individual human rights and of equality, and in these regards the direction of change is towards increased presence. Since the mid-twentieth century, and particularly in the last few decades, new rights for individuals have been introduced, designed to ensure that they have their religious and other beliefs respected and protected. This is an area where there has been considerable legislative reform and where it seems likely we will now see many more cases in years to come.’

³⁷ HC PBC (Equality Bill) 23 June 2009, col 442 and col 444.

³⁸ HL Deb 25 January 2010, col 1212.

association.³⁹ Little attention is similarly given to freedom of association in case law on the exceptions⁴⁰ and it is doubtful that ideals of freedom of association (at least as they are understood nowadays in a human rights context) held much influence in the settlements of 1918 and 1902 regarding the transfer of voluntary schools to the state sector.

It was argued in chapter 5 that freedom of association principles were behind the application in some of the Canadian provinces of the group employment exceptions to different types of organisation, such as political, athletic, ethnic and fraternal. Could the same argument be made about the decision to include, within the scope of the ethos exception, organisations with an ethos based on philosophical belief? The only widely publicised case law on the ethos exception has concerned employers with (or alleged to have) a religious ethos.⁴¹ Further, the only example given in the explanatory notes to the EA of the use of the ethos exception involves an organisation with a religious ethos.⁴² It is more likely that the extension of the ethos exception to philosophical belief organisations derived from a need to reflect the coverage of the Equal Treatment Directive, which is itself in line with the guarantee in article 9 of the ECHR of freedom of conscience, religion or belief. The trend towards protecting philosophical belief in similar fashion to religious belief is a product of the individual rights and equality agenda:⁴³ any general principles of association advanced in doing so are incidental.

³⁹ Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (Twenty-Sixth Report of Session 2008-2009)' (TSO 12 November 2009) 59.

⁴⁰ See chapter 9 at 9.3.

⁴¹ *Hender v Prospects for People with Learning Disabilities* ET 2902090/2006; *Sheridan v Prospects for People with Learning Disabilities* ET 2901366/2006; *Glasgow City Council v McNab* [2007] IRLR 476 (EAT); *Muhammed v The Leprosy Mission International* ET/2303459/2009.

⁴² Explanatory Notes to the EA, para 796, 'A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion's doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief.'

⁴³ See comments in chapter 2 at 2.3.3.

6.5 Principle or political compromise?

Given that the influence of church and state relations, positive religious freedom and freedom of association is at best unclear, consideration will now be given to whether a principled basis for the employment exceptions can be found somewhere else. In this regard, consideration of the legislative history of relevant provisions in Council Directive (EC) 2000/78⁴⁴ (the ‘Equal Treatment Directive’) is illuminating.

The Equal Treatment Directive which required member states to implement measures to outlaw employment discrimination on grounds of religion or belief and sexual orientation, was first introduced by the European Commission on 25 November 1999 in the ‘Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation.’⁴⁵ In its original form, the Equal Treatment Directive contained a tightly drawn exception to the principle of equal treatment in article 4(2), which was directed specifically at religion or belief employers. The exception in article 4(2) could only be relied on by, ‘public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions’ and only for, ‘the particular occupational activities within those organisations which are directly and essentially related to that aim’. Even then, discrimination based on a relevant characteristic related to religion or belief would only be excused where, ‘by reason of the nature of these activities’, the characteristic amounted to a genuine occupational requirement.⁴⁶

In the period of consultation which followed, the UK Government, in its negotiations on the draft Directive, expressed concerns about the impact of its provisions on the ability of religious organisations, and particularly schools, to recruit staff of a particular religion where justified.⁴⁷ The exception to equal

⁴⁴ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OC L303.

⁴⁵ Commission, Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, COM (1999) 565.

⁴⁶ Art 4(2) of the draft directive contained in COM (1999) 565 (ch 6, n 45).

⁴⁷ See comments by the then Minister for Employment Welfare to Work and Equal Opportunities Tessa Jowell in European Standing Committee C, 24 July 2000. For example, Jowell remarks, ‘As things stand, there is clear statutory protection for schools in preserving their religious ethos.

treatment for religion or belief employers which was included in the final version of the Equal Treatment Directive is markedly different to the one first introduced.⁴⁸ The final text of article 4(2) provides that:

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference in treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community Law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

In many ways, the final version of article 4(2) of the Equal Treatment Directive is wider than the version which was first introduced. It can be relied on by any organisation with an ethos based on religion or belief, and whether religion or belief is an occupational requirement is considered by looking not only at the nature of the work, but also at the context in which it is carried out having regard for the employer's ethos. Yet, in two very important respects, it is narrower. Firstly, whereas the original version of article 4(2) permitted discrimination on the basis of any characteristic 'related to' religion or belief, which could, for example, arguably include sex or sexual orientation, the final version of the exception only excuses discrimination which is 'based on a person's religion or belief' and discrimination on the grounds of any other

One of our key negotiating objectives is to retain the present relevant legislative framework under the School Standards and Framework Act 1998. We want Church schools to remain free to recruit teaching staff of the faith in question.'

⁴⁸ For comment on the draft and the amendments made to it, see Ian Leigh, 'Clashing Rights, Exemptions, and Opt-Outs: Religious Liberty and "Homophobia"' in O'Dair R and Lewis A (eds), *Law and Religion: Current Legal Issues*, Vol 4 (OUP 2001) 268-70.

protected characteristic is expressly prohibited. Secondly, the final version of article 4(2) provides that derogations from the principle of equal treatment for employers with an ethos based on religion or belief will be permitted where ‘necessary’ to maintain the status quo in the member state, existing in national legislation or practices at the date the Equal Treatment Directive came into force. The original version of the exception, by comparison, was not conditioned in this way. The stipulation that article 4(2) will only apply to permit member states, ‘to maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive’, is a strong indicator that, rather than being agreed from a point of principle, the final text was born out of a desire to alleviate the concerns of member states that their status quo would be upset by the new provisions on equal treatment.

Thus, rather than being rooted in church and state relations or buttressed by principles of religious freedom or freedom of association, the ethos exception, which is based on article 4(2) of the Equal Treatment Directive, began life as a product of political compromise. There is further evidence that article 4(2) of the Equal Treatment Directive is more a political concession than a rule grounded in principle. In this statement made by the EC Employment and Social Policy Council the negotiations with member states are described as ‘difficult’ and the final text as a ‘compromise’:

After difficult negotiations the Council reached unanimous political agreement on the proposal for a Directive establishing a general framework for equal treatment in employment and occupation. ...

Agreement was finally reached on the basis of a compromise text which accommodated the difficulties encountered by certain Member States concerning, in particular, the possibility for churches and organisations the ethics of which were based on religion or belief of applying different treatment on account of essential, legitimate and justified professional requirements.⁴⁹

It is also instructive to consider the motivations of the UK Government in its negotiations on article 4(2) of the Equal Treatment Directive. Their efforts to

⁴⁹ Employment and Social Policy Council press release, 17 October 2000 available at <http://europa.eu/rapid/press-release_PRES-00-378_en.htm> accessed 28 December 2017.

protect religious organisations appear to have stemmed more from a desire to maintain the status quo, particularly in denominational schooling, than from any attempt to achieve substantive equality for the religious individual or group.

Denominational schooling in the UK has a long history and it will be recalled that statutory privileges permitting discrimination in the employment of staff in denominational schools to preserve the school ethos existed prior to the Equal Treatment Directive on equal treatment and the HRA.⁵⁰ In a recent report on the place of religion in Scots Law, the authors remarked on the ‘increasing’ influence of religion in education and, in particular, a ‘strengthening’ of religion’s status in ‘curricular and governance structures’.⁵¹ This was in contrast to what the authors had found to have been, in the main, a ‘general trend ... towards the secularisation of the law’ in other areas.⁵² When the text of the Equal Treatment Directive was ultimately agreed, the UK Government issued a press release in which it quoted then Employment Minister Tessa Jowell claiming to have been ‘successful’ in ‘negotiations to protect the traditions of religious schools in line with existing UK legislation’.⁵³ The desire to protect the UK’s system of denominational schooling thus appears to have been a driving force in the UK’s negotiations.

Article 4(2) of the Equal Treatment Directive, from which the ethos exception in the EA derives, is not the only example of political compromise in the exceptions model. The origin of the organised religion exception to sexual orientation discrimination can also be traced to political lobbying. The organised religion exception was not contained within the first draft of the SO Regulations but was included, instead, following submissions from certain Church representatives, including the Archbishops’ Council of the Church of England.⁵⁴ As mentioned above at 6.2, the Government defended the later inclusion of the organised religion exception in the draft SO Regulations by arguing that the requirements

⁵⁰ For a discussion of the history of denominational and non-denominational schooling in Scotland, see Brown, Green and Mair (ch 6, n 8) 137-92.

⁵¹ *ibid* 187.

⁵² *ibid* 187.

⁵³ DfEE press release, referred to in Timothy Edmunds and Julia Lourie, ‘Employment Equality Regulations: Religion and Sexual Orientation’ (House of Commons Research Paper 03/54, 9 June 2003) 13-14.

⁵⁴ *R (on the application of Amicus) v The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176 (*Amicus*) [90].

of religious doctrine and teaching in relation to particular posts would otherwise need to be litigated in the tribunals and courts under the OR exception, which would be inappropriate.⁵⁵ The shortcomings of this argument as a justification for the organised religion exception have already been explored.⁵⁶ Moreover, the concerns of the lobbyists which led to the inclusion of the organised religion exception in the SO Regulations were not solely about the risk that courts and tribunals would become embroiled in interpreting religious doctrine. In this excerpt taken from a letter dated 9 June 2003 from the Secretary General of the General Synod and the Archbishops' Council to the Clerk of the Parliamentary Joint Committee on Statutory Instruments, the Archbishops' Council explain that the organised religion exception is needed to permit occupational requirements related, not to sexuality, but rather to sexual behaviour:

The difficulty is that regulation 7(2) applies only where being of a particular sexual orientation is a genuine and determining occupational requirement. As explained above, we have no posts or offices where there is a requirement to be heterosexual (or indeed homosexual). Our requirements are in relation to behaviour, not sexuality itself. That is why the new regulations 7(3) and 16(3) refer to a 'requirement related to sexual orientation'.⁵⁷

Whilst concerns about the propriety of courts or tribunals interpreting religious doctrine may well have impacted on the Government's decision to include the organised religion exception in the SO Regulations, it is likely that the political pressure of the church representatives was an equal, if not greater, influence. Although the Government claimed in committee debate on the SO Regulations that the organised religion exception was, 'not a compromise between two sides of a debate' its explanation that it did, 'justice to the directive, to the traditions in this country, and to the right of people, enshrined in article 9'⁵⁸

⁵⁵ Minister of State, Lord Sainsbury of Turville in HL Deb 17 June 2003, vol 649 cols 778-80. For details of the OR exception, see chapter 3 at 3.3.1.

⁵⁶ See above at 6.2.

⁵⁷ Letter from the Secretary General of the General Synod and the Archbishops' Council to the Clerk to the Parliamentary Joint Committee on Statutory Instruments (9 June 2003) para 13 referred to in *Amicus* (ch 6, n 54) [92].

⁵⁸ HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 032.

simply calls attention to the piecemeal array of influences on the development of the law in this area.

A variety of motivations, then, appear to have influenced the approach to religious autonomy in employment: the history of an established church and the long tradition of denominational schooling; the move from religious toleration to positive religious freedom; the requirement to respond to the European equality programme, the incorporation of the ECHR, and the political compromises made along the way. These historical, constitutional and political influences present as inconsistent at times: the established nature of church state relations and the move to positive religious freedom; the history of denominational schooling and the response to the European equality programme, for example. Driven and shaped by a variety of sometimes competing influences, the model of employment exceptions in Britain, I argue, lacks a clear and strong principled underpinning to guide the judiciary and legislature in future. The implications of this for the rule of law will be explored below.

6.6 Implications of a lack of principle

I argued in chapter 3 that aspects of the law on religious autonomy in employment in Britain are ambiguous and/or of uncertain legitimacy, generating legal uncertainty for employers, applicants and employees. I argued that the conflict between the ‘instrumental’ and ‘organic’ perspectives of some policy makers and church representatives contributed to the ambiguity surrounding the scope of the exceptions, and that the paucity of widely publicised case law was an exacerbating factor.⁵⁹

In each of the jurisdictions studied, the courts are asked to answer difficult questions in their application of the relevant exception or exemption models: is the entity, seeking to rely on the derogation from equalities legislation, a relevant employing entity for the applicable legislative provision; does the discriminatory treatment pursue a legitimate aim; is the requirement justified by the objectives of the employer, or by the nature or context of the work undertaken; how should the rights of the employer be balanced with the

⁵⁹ See chapter 3 at 3.4 and 3.5.

equality rights of individuals? Though the answers to these questions are not usually straightforward, the courts in the USA and Canada have, at least, clear principle, in church and state relations and freedom of association respectively, to guide their analysis. The British courts, by contrast, have no such obvious reference point. This makes it difficult to predict judicial determinations and risks inconsistency in the case law. This is particularly concerning in light of the recent report by the Equality and Human Rights Commission (the ‘EHRC’) into religion or belief in the workplace and in service delivery. The EHRC’s report, published at the end of 2016, examined whether the protection afforded by the law both to individuals with a religion or belief and to the ‘distinctiveness’ of religion or belief organisations, was adequate and appropriate. It recognised that case law on religion or belief discrimination was in its infancy and acknowledged the importance of legal judgments in, ‘clarifying our understanding of the interaction between equality and human rights law, and balancing competing rights’.⁶⁰ Other than recommending that the provisions in the E(Sc)A and the SSFA which permit schools to impose religious requirements on their employees are reviewed for compatibility with the Equal Treatment Directive, the EHRC declined to recommend any amendments to the law pertaining to the definition of religion or belief, the individual manifestation of religion or belief in the workplace, religion or belief requirements in employment, or religion or belief in the provision of services. As far as the EHRC was concerned, the law was, in the main, ‘working’. It did, however, admit that ‘clarification’ was needed in some areas, including in the definition of belief and in the measure of freedom of expression and freedom of thought, conscience and religion afforded to religious organisations.⁶¹ That clarification, however, was not to be given by the legislature, but by the judiciary through case law.

Developing the law in this area, incrementally through case law, is the EHRC’s preferred approach and, given there is no legislative reform of the relevant law on the Government’s policy agenda, it will likely be the approach which is adopted. It is, moreover, surely right that the law on religion or belief in employment develops in this way. This is because the outcomes in

⁶⁰ Equality and Human Rights Commission, ‘Religion or Belief: is the Law Working?’ (Equality and Human Rights Commission, December 2016) 17.

⁶¹ *ibid* 16.

discrimination complaints which involve religion or belief are particularly sensitive to the factual matrices in which they are engaged. Of all the protected characteristics, religion or belief has the most variables. Unlike sex, sexual orientation, age and marital or civil partnership status, for example, the array of beliefs protected under the banner, ‘religion or belief’ is immeasurable.⁶² The modes of manifestation of belief, moreover, are innumerable. Legislation is too blunt an instrument to accommodate, in each factual situation, the delicate balancing exercise between religion or belief and competing interests. The judiciary, rather, must lead the way.

It is, therefore, all the more important that the judiciary has a clear understanding as to the principles guiding interpretation of the exceptions. According to the EHRC:

When assessing whether the legal framework is effective, our starting point has been that the law needs to protect competing rights fairly, for example the right to manifest religious belief and the rights of others not to be discriminated against.⁶³

The determination of whether competing rights have been protected ‘fairly’, however, cannot occur in a vacuum. Fairness can only be assessed when there is a clear understanding as to why particular rights, individuals and groups are afforded protection in the first place. Without this, decisions may turn on the different perceptions of fairness held by the particular judge or judges in each case. There is a risk that the inconsistent decisions which ensue are not regarded as a problem as such, but are instead explained by reference to their ‘fact sensitive’ nature.

Moreover, without clear guiding principle, defending the exceptions model to those who oppose it, whether because too narrow or too wide, is made all the more challenging. For example, two particular criticisms levelled at the treatment of religion in law are that it promotes: (i) an agenda of ‘secularism-

⁶² Comment made by participant at roundtable event on ‘Religion and the Individual: Belief and Employment’ held at the University of Glasgow in conjunction with Humanist Society Scotland on 30 June 2017.

⁶³ ECHR, ‘Religion or Belief’ (ch 6, n 60) 15.

as-indifference';⁶⁴ and (ii) a hierarchy of rights. Lacking a clear principled basis, the exceptions model is left exposed to both these criticisms. Rivers, for example, argues that since 2000, developments in various aspects of the law relating to religious organisations reflect a downgrading in the importance of religious interests.⁶⁵ He sees his thesis as also reflected in the law on exceptions to equality legislation for religious organisations, contending that, 'the law creates rather narrow exceptions expressed in terms which are unreasoned, or at best a matter of temporary political expedient'.⁶⁶ There is a perception, meanwhile, held by some that sexual orientation equality and secular values, in particular, are prioritised over the right to freedom of religion. The EHRC made findings from its call for evidence that some Christian managers and employers considered other religions as well as other groups (such as the lesbian, gay and bisexual group) and the so-called secular 'lobby' enjoyed greater rights.⁶⁷ Rivers also expresses concerns that, 'the gender-equality programme is restricting the scope of religious liberty'⁶⁸ and refers to the employment of clergy and of staff in denominational schools as examples of situations where gender equality and religious interests may clash.⁶⁹

These current and complex debates are fuelled in part by the lack of principle underpinning the approach in Britain to religious autonomy in employment. Having a clear principle to support the exceptions model will not quieten all of its critics. In such a contested area as law and religion, consensus on approach is not a realistic goal. It would, however, at least provide a common starting point for the debate.

⁶⁴ Rivers, *The Law of Organized Religions* (ch 6, n 14) 328-34; see also Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 EccLJ 371 and comments by Lucy Vickers on Rivers' thesis in *The Law of Organized Religions*, in Lucy Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 OJLS 197.

⁶⁵ Rivers, *The Law of Organized Religions* (ch 6, n 14) 333-34.

⁶⁶ ibid 334.

⁶⁷ Martin Mitchell and others, 'Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence' (Equality and Human Rights Commission, 2015) 56 and 62-63.

⁶⁸ Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 EccLJ 24, 38 ('gender equality' is used by Rivers as a collective reference to the principles of non-discrimination on grounds of sex, transsexual status and sexual orientation).

⁶⁹ ibid 39-41.

6.7 Conclusion

Rivers has asserted that, ‘The relationship between law and religion in any country is a reflection of historical contingencies, controversies and compromises.’⁷⁰ This, I have argued, is particularly the case in Britain with regard to religious autonomy in employment. Whereas church and state relations and freedom of association, respectively, positively guide the USA and Canada in carving out the scope of derogations from employment equality law, a patchwork of historical, constitutional and political influences have shaped the model in Britain, rendering it without grounding in a clear foundational principle.

In the absence of a clear foundational principle, what norms could guide the judiciary in its interpretation of the employment exceptions? Determining the limits of religious autonomy in employment requires a careful balancing exercise between freedom and equality, public and private, group and individual. Given the myriad of factual matrices in which religious autonomy issues arise, the role of the judiciary in this exercise is crucial, and a ‘purposive’ approach to the employment exceptions is needed.

What ‘purpose’, however, do the employment exceptions serve? In the next chapter, a better understanding of the interests protected by the employment exceptions will be sought in data from a qualitative empirical study involving 10 employers with a religious or faith ethos. The aims of the study were to learn more about the relationship between an employer’s religious ethos and its employment practices, and to find out how religious groups regard the employment exceptions in the EA. The findings of the study are instructive and support the consideration given in chapter 8 to the utility of freedom of association in the interpretation of the employment exceptions.

⁷⁰ Rivers, *The Law of Organized Religions* (ch 6, n 14) 1. In his monograph, Rivers conducts a comprehensive review of the law of organised religion in the UK as it manifests itself in various areas, identifying inconsistencies and reaching the conclusion that it lacks coherent principle. For a review of Rivers’ monograph see Vickers, ‘Twin Approaches to Secularism’ (ch 6, n 64).

7 A study of ‘ethos’ in a religious or faith inspired organisation

7.1 Study introduction and aims

Navigation of the ambiguities and uncertainties in the application and interpretation of the employment exceptions requires to be guided, I have argued, by clear and consistent principle. In the quest for uncovering such principle, an empirical methodology is used in this chapter to investigate the influence of an employer’s religious or faith ethos on its employment practices and relationships. The study undertaken and reported in this chapter involved qualitative interviews with employers that had a religious or faith ethos to uncover experiences ‘on the ground’ of the importance to the religious employer of its ethos and attain views on the appropriateness of the employment exceptions. The results of the study provide empirical evidence of the importance of an employer’s religious or faith ethos to its employment practices and relationships, and of the views of some religious or faith ethos employers on the employment exceptions.

In many ways, the study investigated and developed particular ideas about the relationship between ethos and employment presented in a publication by Faithworks on religious discrimination and Christian ethos.¹ The said publication arose from a joint project by Faithworks, the Hindu Forum of Britain, the Muslim Council of Britain, the Network of Sikh Organisations and the United Synagogue. Faithworks provide guidance in the publication to Christian employers on relating the use of religion as an occupational requirement to their organisational ethos.² Faithworks further emphasise the importance of employers defining and identifying their Christian ethos and applying it to their organisational behaviour and practices in the areas of recruitment, relations, development, reward and faith.³

¹ Faithworks, ‘Christian Ethos Audit’ (Faithworks 2003). The publication is available at <www.religionlaw.co.uk/FWChristian.pdf> accessed 28 December 2017.

² ibid 2-3, 11.

³ ibid 12-19.

7.2 Methodology

7.2.1 EHRC empirical research

There has been limited empirical research conducted in Great Britain on the needs and interests of employers with a religious or faith ethos. In 2012 the Equality and Human Rights Commission (the ‘EHRC’) commissioned a study on equality and human rights in relation to religion or belief in England and Wales.⁴ As the aims of this study were wide, it did not explore in detail the current model of exceptions from the prohibition of discrimination in employment contained in the Equality Act 2010 (the ‘EA’) and the School Standards and Framework Act 1998 (the ‘SSFA’). It was reported that most of those interviewed in the study who represented religion or belief groups were, ‘broadly happy’ with the current model of exceptions, notwithstanding they were disappointed with the ‘lack of clarity’ around the wording used in the EA.⁵ A small number of religious participants and some academics were reported to be ‘uncomfortable’ with the exceptions in the EA,⁶ and concerns were expressed both that the courts and tribunals ‘interpreted the exceptions too narrowly’ and that the exceptions were ‘applied too widely in practice’.⁷ Interviewees in the study’s religious ‘strand’ mentioned that there was at times disagreement on whether holding a particular religion or belief is an occupational requirement,⁸ and one interviewee, referring to the ethos exception, felt there was a lack of guidance to assist religious or belief groups to express their ethos and apply the exception appropriately.⁹ It was also reported that several interviewees were concerned about the ‘practical impact’ of the provisions in the SSFA relating to the employment of teachers in schools with a religious character.¹⁰ One interviewee commented that the provisions, ‘create real problems for someone

⁴ Alice Donald, ‘Equality and Human Rights Commission Research Report 84: Religion or Belief, Equality and Human Rights in England and Wales’ (Equality and Human Rights Commission, Summer 2012) 94-99.

⁵ *ibid* 97.

⁶ *ibid* (one Christian participant is reported to have favoured a presumption in favour of equality, whilst Russell Sandberg is reported to have said the exceptions, ‘put religion on the back foot’).

⁷ *ibid* 97-98.

⁸ *ibid* 99.

⁹ *ibid* 98.

¹⁰ *ibid* 168.

who is not religious, or has a different religion, or simply chooses not to use their religion and wants to get a job on their own merits'.¹¹

A recommendation was made in the report for further research to be carried out in relation to, 'the application and impact on the ground of some of the exceptions in the EA and the SSFA'.¹² In August 2014, the EHRC issued a call for evidence with the stated aim of exploring, 'the direct and personal experiences of employees and service users concerning religion or belief, as well as the views of employers, service providers, relevant organisations and the legal and advice sectors' in Scotland, England and Wales.¹³ Subsequently, the findings of the call for evidence, which was conducted in an EHRC survey, were published in 2015.¹⁴ Of the 2483 individuals and organisations who responded to the call, only 14 were employers or managers of an organisation that 'practised, advanced or taught' religion or belief.¹⁵

Among the key findings of the EHRC survey was that some Christian employers and managers considered that they were subjected to unfair treatment.¹⁶ For example, some (though not all) Christian employers explained that they wanted greater freedom to recruit Christians to work in their organisations¹⁷ and there was a perception among some Christian employers and managers that Christianity was given less protection in the workplace than other religions, protected groups and 'the secular lobby'.¹⁸

Building on the findings of the EHRC in 2012, I designed the study reported in this chapter to serve the aim of better understanding the needs and interests of organisations with a religious or faith ethos, focusing particularly on how and why the ethos might influence or impact on their employment practices, both at

¹¹ ibid.

¹² ibid 193.

¹³ Martin Mitchell and others, 'Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence' (Equality and Human Rights Commission, 2015) 8.

¹⁴ ibid.

¹⁵ ibid 51.

¹⁶ ibid 56-63.

¹⁷ ibid 56-58.

¹⁸ ibid 56, 62-63.

the recruitment stage and throughout the employment relationship, and on their views on current employment and equality laws. The study also sought to elicit what influence participants considered religion had on their employees' experience of employment and the extent to which faith was a motivation for work.

The aims of the present study sought to augment those of the previous studies conducted by the EHRC by seeking a more in-depth understanding of the issues relevant to employers with a religious or faith ethos, with reference to their employment practices. To this end, two aspects of the methodology of the present study, which is discussed in more detail below, were particularly important. Firstly, the study participants were employers, which enabled evidence to be collected from experiences 'on the ground' (as recommended by the first EHRC study). Secondly, data were collected through face-to-face or telephone interviews with participants rather than surveys, which was the method of data collection used in the EHRC's second study. The use of interviews facilitated an interaction between participants and interviewer conducive to obtaining detailed accounts of the participants' experiences.

7.2.2 Recruitment

Probability sampling was not used in this study to identify the participants as it was not within the scope of this study to obtain views that could be claimed to be representative of all religious organisations. Efforts, however, were made to recruit participants from organisations of different religious affiliations, and to recruit a greater number of participants associated with Christianity and then Islam in light of the popularity of these religions in Scotland.¹⁹ Efforts were also made to recruit participants from organisations of varying sizes and operating in a variety of sectors. This approach was taken with a view to identifying possible trends in the data collected according to the size, type and religious affiliation of the participant's organisation. In the end, however, this exercise was not possible in light of the number and variety of participants who were successfully

¹⁹ Scotland's Census, 'Scotland's Census 2011 - Religion Detailed' (*Scotland's Census, Release 2A*)
http://www.scotlandscensus.gov.uk/documents/censusresults/release2a/rel2A_Religion_detailed_Scotland.pdf accessed 28 December 2017.

recruited. To aid the data collection, it was considered preferable to conduct face-to-face interviews with participants, where possible. For this reason, the pool of potential participants was restricted to those from organisations with operations in Glasgow and the surrounding areas (regardless of the geographical location of the head office). The first phase of recruitment ran from March 2015 to July 2015. The second phase of recruitment ran from November 2016 to July 2017.

In the first phase of recruitment, 49 organisations with a religious or faith ethos were identified using prior knowledge and focused internet searches. Of these, 29 were affiliated with Christianity, 10 with Judaism, 6 with Islam, 3 with Hinduism and 1 with Buddhism. Participants A to I were recruited in this phase.

Following the end of the first phase of recruitment, I was on leave for a period of 12 months. A second phase of recruitment commenced near the end of 2016. Recruitment efforts were somewhat more targeted in the second phase of recruitment, and there was a particular focus on recruiting organisations associated with Islam. Information about the study was provided to particular individuals whom it was considered could assist, identify or recommend suitable organisations to be invited to participate in the study. A further 17 organisations were identified in the second phase of recruitment: some from recommendations made by contacts, but most from focused internet searches. These 17 organisations were subsequently invited to participate in the study. Of these, 13 were associated with Islam,²⁰ 3 with Christianity, and 1 which worked with several different faith groups. Participants J and K were the only participants successfully recruited in this second phase.

Prior consent to contacting denominational schools in the state sector was sought and obtained from one local authority. Letters were written to each organisation identified, inviting participation in the study (Appendix 1). With each letter there was enclosed a copy of the plain language statement (entitled 'participant information sheet') (Appendix 2)²¹ providing more detail on the

²⁰ One invitation to an organisation associated with Islam was returned undelivered with advice that the intended recipient had 'gone away'.

²¹ In the second phase of recruitment, a slightly revised version of the participant information sheet was issued to reflect revised timescales for the study.

study and the involvement requested of the participant. Where it was possible to identify a relevant person in the organisation, either from prior knowledge or publicly available information, the letter was addressed to that person. In the majority of cases, however, the letters were addressed more generally to the organisation, it being left to the recipient to identify the appropriate person to respond. A follow-up letter was issued to all targeted individuals or organisations that did not respond to the initial communication. If there was still no response forthcoming, an attempt was made to contact the individual or organisation by telephone to encourage participation and answer any queries.²²

7.2.3 Participants

Eleven participants were interviewed from organisations with a religious or faith ethos operating in a variety of sectors in Glasgow and/or the surrounding areas. Eight of the participants were from organisations associated with Christianity, which was considered to be appropriate given it is reported that more people in Scotland associate with Christianity than with other religions.²³ Two organisations were associated with Judaism and one with Islam. Invitations extended to organisations affiliated with other religions to participate in the study were not accepted (see below at 7.2.2 Recruitment). The organisations varied in size, from one represented by participant H, which at the time had no employees, engaging a few self-employed contractors instead, to another which employed almost 2000 employees in Scotland. Although the organisation of participant H was ‘staffed’ by self-employed contractors rather than employees, it was considered that the participant could nevertheless provide an insight into the needs and interests of his organisation in the engagement of these individuals. Given participant I’s retired status (see further below), he was unable to confirm the current employment arrangements at his former organisation, but he was able to speak more broadly on some of the issues relevant to the study. The participants represented a range of organisations, including establishments of organised religions, charities and mission

²² Except where no telephone contact number was available, a telephone call was made to try to reach each intended participant who did not respond to the second letter of invitation. If the telephone call was not answered and a voicemail was activated, a message was left inviting the intended participant to return the call to discuss the study.

²³ Scotland's Census (ch 7, n 19).

movements, as well as education and service providers. A description of the religious affiliation of each participant's organisation is provided below at Table A. Specific religious denominations and descriptions of the nature of each organisation are not provided, with a view to preserving the participants' anonymity.

Table A

INTERVIEW CODE	RELIGIOUS AFFILIATION
A (pilot)	Christianity
B	Christianity
C	Christianity
D	Judaism
E	Christianity
F	Christianity
G	Christianity
H	Judaism
I	Christianity
J	Christianity
K	Islam

The participants themselves occupied different roles in the organisations, and included chief executives as well as individuals in management, finance, fundraising, human resource and voluntary roles. Participant D emphasised that

the views expressed in her interview were personal, and not necessarily representative of the views of her organisation. Meanwhile, participant I was, at the time of interview, retired and, therefore, no longer accountable for the organisation he spoke about. It was considered, given the aims of the study, that both participant D and participant I's involvement was nevertheless of value, both being able to provide an insight into employment in organisations with a religious or faith ethos. Although the remaining participants held positions in their organisations which permitted them to speak more closely from the perspective of an employer, some of the questions invited views which relied on the individual participant's interpretation of a particular phenomenon from a position of experience. Participants C1 and C2 represent two participants from the same organisation who attended at interview together. Participant C2 wished his organisation to be described as a faith-based organisation, and not a religious organisation as it did not proselytize Christianity. Participant K preferred her organisation to be described as 'faith-inspired' to reflect that its purpose was not to preach Islam. Rather, participant K's organisation, which worked with and for a faith community, was inspired by faith principles and used aspects of the faith in the delivery of its work. The participants' organisations will be referred to collectively in this study as organisations with a religious or faith ethos.

7.2.4 Interviews

One interview, lasting between approximately 1 and 1½ hours was held with each participant. With one exception, interviews were held face-to-face at the participant's place of business or work. One participant worked remotely from a location in a different part of Scotland and for reasons of convenience, this interview was conducted by telephone. Given the participant was experienced in working remotely, the telephone medium provided no difficulties for data collection. Each participant was issued with a list of interview themes two working days prior to interview (Appendix 3). A list of questions was prepared in advance of the interviews, and each interview was structured around these questions, modified where appropriate to take into account answers given. This approach was taken to ensure discussion of the relevant themes at each interview and to aid comparison of the data collected. Some of the questions posed were designed to investigate and develop ideas from the Faithworks

publication referred to at 7.1 above. One participant (participant A) was a personal contact and acted as a pilot for the study. The outcome of the pilot led to a refinement and reduction in volume of the interview questions, and data from the pilot are not included in the study's findings which are reported below.

With the exception of the pilot interview, all interviews were audio recorded with the consent of the participants and transcribed in full, replacing any reference to the name of the organisation or participant with pre-assigned participant codes to anonymise the data.

7.2.5 Analysis

The interview themes which were issued to the participants formed the basis for the analysis of the data obtained from the interviews. Data relevant to each theme were identified in the transcripts of the interviews and compared. The findings are reported below. Given the number of participants and the adoption of non-probability sampling in recruitment, the views expressed by the participants are not to be considered representative of the wider population. The study is valuable in the provision of an initial evidence base which can be used to develop further research. Findings are reported below at 7.3 to 7.5 and collated under three main themes: recruitment of employees; relationships; and employment / equality law.

7.3 Recruitment of employees

The findings of the study suggest that faith is often a, or even the, motivation for employees to work for an organisation with a religious or faith ethos, and that work itself can be a form of worship. In the recruitment of employees, there is evidence that religion is considered an occupational requirement in certain posts. Such occupational requirements are often imposed to maintain the ethos of the organisation, or in recognition of the context in which particular job functions are to be carried out.

7.3.1 Faith as motivation

Most, but not all, participants expressed the belief that a significant number of those who worked for their organisation chose the organisation as their place of work because of its religious or faith ethos. Indeed, participant B believed that this was the case for all of the staff at his organisation. Faith was described by participant B as, 'a hugely motivating factor for people'.²⁴ Employees would say, 'I'm motivated out of love because I feel God loves me', and some would consider the work they do for the organisation as, 'a calling'. Participant E also considered that faith was 'very much' a motivation for work, commenting that it was important to the organisation's Christian employees that the job was in a Christian organisation where they were 'free and able to express their Christian faith' both with their colleagues and when performing their job responsibilities. That faith is a motivation for work was echoed by participant F. Opining that being able to bring faith and profession together was, 'a privilege and a unique opportunity', participant F commented that a lot of staff he spoke to had chosen to work at his organisation because it gave them, 'an opportunity to apply their professional skills or their skills in a Christian way'. Participant G considered that 'quite a lot' of staff chose to work for his organisation because of its religious ethos and values, though others might simply, 'drift into' a job at the organisation. Participant G was unsure what motivated staff to work, though he acknowledged it could be their religious beliefs or their values which motivated them. Participant J estimated that between 50% and 60% of staff at her organisation chose to work there because it was faith-inspired. Participant K, meanwhile, guessed that about a third of the employees at her organisation chose to work there because it was faith-inspired. This participant also expressed the belief, however, that the faith element of the organisation was not the main attraction for a lot of the volunteers who provided their services.

Although it was considered that the religious character of the organisation was not the attraction for the small number of employees who worked in participant D's regional office, it was estimated that up to 75% of staff at the much larger head office chose to work there because of the organisation's religious

²⁴ Where appropriate quotations throughout have been edited to remove hesitations in speech (for example, word repetitions or phrases such as 'em' or 'you know').

character. Participant D explained that the majority of employees at the head office had been, 'brought up' with the organisation 'all their lives' and working for the organisation was, for them, 'giving back'. When asked whether faith is the motivation for work in her organisation, participant D acknowledged personally, 'being Jewish and working for a Jewish organisation, you do want to prove yourself'. Participant I considered that all of those who chose to work for his former organisation (excluding contractors) did so because of its religious character and that members volunteered their services because of their beliefs. Talking generally from his experience of religious organisations, he agreed that faith was a motivation for work, commenting that, 'if you are working for a church organisation then the fact that you also have faith will make a complete difference for sure'.

Participant C1 believed that the 'values' of her organisation and their manifestation in the organisation's work attracted some people to it. Although these values were Christian values, participant C1 observed they were also held by others. Participant C2 considered there was a 'range' of reasons why people were drawn to work for the organisation: some because of its 'core values' and because they were 'inspired' and 'motivated' by its vision; others because the organisation's work was 'core' to part of their 'faith journey'.

Speaking of some of his contractors, participant H believed that, rather than describe them as having chosen to work for his organisation because of its religious character, it was more accurate to say that their roles were, 'intrinsically tied to the nature of the congregation' noting that the services they provided (with the exception of those performing janitorial functions) could, in Glasgow, likely only be provided to a synagogue of a particular type. Referring separately to members of his synagogue who would volunteer their services, participant H observed that many seek a 'sense of belonging' and therefore involvement in the synagogue in a volunteer capacity was, 'perhaps as important as what happens on the Sabbath day if you're there in the synagogue praying'.

7.3.2 Work as worship

The idea that work in an organisation with a religious or faith ethos is, or can be, a form of worship was shared by some of the participants, with Participant I observing that the word 'liturgy' is Greek for 'the people's work'. This was felt very strongly by participant B for himself and his organisation. Explaining that in Hebrew, 'avoda' can mean 'worship' or 'work', participant B believed that, 'our work can be worship to God'. He considered that there were many opportunities for his staff to worship through their work, commenting:

The way in which we answer the phone, to the way we open the door, to the way we make a cup of tea and sit down and talk with somebody, to our attitude in serving, in our worship, our work, in organising the store, all of these things we would say is an opportunity for an expression of worship, an expression of our faith and would be important to us.

His organisation's work was, according to participant B, 'love in action': an expression of God's love in the care provided to those in need. Referring to the Epistle of James that teaches that, 'faith without works is dead', participant B noted that the organisation gave volunteers a 'place to express', their faith and described how he found it helpful to think, 'Lord, this has been my work today, I hope you find it acceptable worship'.

Participant F observed that some would consider their role in his organisation to be simply, 'a job' whilst others would view it as, 'a calling'. For himself, participant F considered it was, 'the desires of God' that he work in his current position. Participant J, meanwhile, sought to put the values of her faith 'in to action' every day and this led her to show care, respect and compassion in her work. Participant H also considered that at least some of his contractors considered their work was, 'part of their engagement with the congregation' and 'part of their engagement with their own religious practice and belief'. Acknowledging another of his contractors might consider her work as, 'part of her communal engagement', participant H commented that, 'in Judaism that sense of communal engagement might be as high as the worship'. Participant K acknowledged that some of her organisation's staff, board members or volunteers would consider the work they did for the organisation to be a form of worship. Although her employment in the organisation had led to participant K

becoming 'more attached' to her faith, through conversations with colleagues on Islamic issues, for example, she personally believed that if the organisation did not have a faith element, it would still be fundamentally part of who she was.

7.3.3 Occupational requirement

Most, but not all, of the participants identified at least some of the posts in their organisation as requiring the post holder to be of a particular religion. There was a wide variety in the reported numbers of such posts: from all posts, at one end of the spectrum, to just a few posts, at the other end. Participant D believed it, 'probably would make very little difference' whether or not the post holders in her organisation were of the Jewish faith, commenting that, 'if someone's got the organisation in their heart what does it matter where their background is'. Notwithstanding this, it was her belief that all employees in her organisation were nonetheless Jewish. Participant K, meanwhile, explained that her organisation had never, to her knowledge, used religion as an occupational requirement for any post.

Of those participants whose organisations made religion an occupational requirement in at least some posts, a significant proportion indicated that the occupational requirement was necessary for the maintenance of the organisation's ethos or values.

The organisation represented by participants C1 and C2 placed religion as a requirement on only a small minority of posts which were, in the main, senior or leadership roles. Participant C2 explained that the organisation required the post holders in one level of leadership to be Christians because they were responsible for the ethos of the organisation. Participant J similarly recognised that it would only be beneficial to engage a co-religionist for 'strategic influence and direction and guidance'.²⁵

Likewise participant G identified a small minority of posts in the part of his organisation for which he was responsible²⁶ which required the post holder to be

²⁵ Though it is unknown whether religious commitment was an occupational requirement in respect of any such positions at Participant K's organisation.

²⁶ Participant G was unsure the position with regard to posts in a different part of the organisation.

of a particular religion: these, other than posts involved in religious instruction and education, were senior positions. Echoing the sentiment of participant C2, participant G attributed the occupational requirement in the senior positions to the need to maintain the organisation's ethos and values. In the participant's view, these positions, 'set the tone for the [organisation],'²⁷ set the ethos' and as such it would be, 'very very difficult' for a non-Catholic to perform in these roles.

Participant F also identified a connection between the use by his organisation of the occupational requirement in respect of certain positions in his organisation and the ethos and values of the organisation, explaining that religion was an occupational requirement for those staff in his organisation who had a, 'one-to-one relationship' with the service users because they needed to, 'uphold' the organisation's Christian ethos and values. It was also important that senior staff and policy makers at Participant F's organisation had an understanding of the Christian faith to ensure that policies were in line with the organisation's Christian beliefs.

Believing that it was the staff who 'create' the 'culture' or the, 'ethos' of the organisation, participant B identified his organisation's 'culture', which relied heavily on the use of prayer as the reason for requiring its employees to be of the Christian faith. Explaining why it would be beneficial for, say, the receptionist in his organisation to be of the Christian faith, participant B explained, 'when we would gather together, when things are difficult and we're wanting to pray together, we're wanting people to be able to connect, to understand, this is what we're about, and this is why it's important'.

Although participant K's organisation had never used religion as an occupational requirement for any post, the participant considered it could be beneficial for the chief executive of her organisation, which worked predominately with a section of the Muslim community, to be Muslim. According to the participant, a chief executive who ascribes to elements of the Muslim faith will find it more natural to use the faith as inspiration for the organisation's work. Participant K also considered that a Muslim chief executive could be 'more powerful' to effect

²⁷ Description of organisation used by participant removed to anonymise data.

change by bringing lived experience to his or her work and might have a better understanding of the services the organisation offered and the political environment in which it operated.

When participants made reference to specific job tasks which needed to be performed by someone of a particular religion, it was apparent that the nature of the job task was not always considered in isolation from the context in which it was to be carried out. Thus, whilst specific job tasks such as, leading prayers and explaining the Christian faith if requested, needed to be performed by a Christian employee in participant F's organisation, it was also considered 'appropriate' that staff, on a 'one-to-one basis' with service users, were able, in providing care and support, 'to reflect the love and the experience that they have from a faith perspective'.

The wider context in which job tasks are performed was also highlighted as important in the explanation given by participant C1 of why religion was an occupational requirement for the heads of the geographical branches in her organisation. She explained that the occupational requirement was necessary because of the 'relationships' her organisation forged with the churches. The organisation was, in one way, an 'agent of the churches' and participant C1 believed that to have such a partnership and relationship with the churches, understanding them was insufficient: rather, it was necessary to 'share' what she described as 'that degree of commitment'. She also said that being of the Christian faith gave them added authority in the eyes of the churches. Thus it is observed that the nature of the job task might relate to the formation of relationships, but the context in which this is to be undertaken, from a position of commitment and authority, is also relevant.

Participant K also identified that service users in her organisation seeking Islamic advice considered it more credible if the advice was provided by a Muslim. If the role in participant K's organisation dedicated to this service was to become vacant in the future the organisation would likely seek someone of the Islam faith to fill it. Participant K also observed that although her organisation had never insisted on its staff members being Muslim, the lived experience of Muslim employees could (though not always) assist those in client facing roles have a better understanding of the issues facing the users of their services.

Participant E's explanation of the use of religion as an occupational requirement in her organisation gives further weight to the idea that the context in which work is carried out is an important factor. Occupational requirements were applied in her organisation because employees needed to, 'explain the Christian faith' but this was to be, 'from a position of actually believing it and applying it to their day to day life'. This, in turn, involved, 'a regular prayer life' as well as 'a dependence on God for guidance and direction'. She explained that understanding what the Bible says and quoting it is, 'different to actually believing it and living by the principles and the requirements that God's word has upon us'. The participant's own position in Human Resources had religion as an occupational requirement because she needed to have, 'a believing faith as it is described in the Bible' to apply the employment policies, all of which contained 'the principles of Christian relationship'.

This participant agreed 'quite strongly' that the 'context' in which work is carried out is a relevant factor when considering whether it would be beneficial to have religion as an occupational requirement. For her, 'context' related to, 'the reason that the organisation exists' and as her own organisation had a mission purpose, it was important its employees and volunteers had, 'a very clear understanding' and 'personal belief'. The participant explained that the reason her organisation exists is to help people and their 'trust and faith in in God' was essential to this end. For this reason, participant E explained that it was important that employees did not simply 'pay lip service' to that, but rather that they 'actually live it, breathe it' and '*are it*' to the children and adults the organisation assisted, as well as to the other employees and volunteers in the organisation. Believing a viewpoint to be 'right and proper and true', according to participant E, impacted on how one carried out his work and volunteering activities.

Participant H explained that it was a doctrinal requirement that the two contractors who participated in the services of the congregation were Jews (subscribing to a particular type of Judaism) and male. He did not consider that his contractors in administrative or janitorial roles needed to be of the Jewish faith, although those in janitorial roles required to be, 'open minded' and 'willing to learn the Jewish requirements'. Participant I, speaking about another organisation affiliated with his religion, expressed the belief that it might feel

'more comfortable' employing a co-religionist in, for example, a finance role, even where there was no 'technical' reason to do so, because that person would be privy to knowledge of income sources and expenditure. He did not, however, know what this organisation did in practice and did not think it would greatly concern anyone if the person responsible for the finances was not a co-religionist.

7.3.4 'Sympathy' with ethos

In respect of those posts for which it was not an occupational requirement that the post holder be of a particular religion, there was a range of descriptions adopted by the participants' organisations with regard to the commitment they sought from the post holder to the organisation's ethos and values. Participant C1 explained that staff needed to, 'recognise' its organisation's Christian ethos and 'respect' the people and communities they work with and their faith even if they do not agree with it. Seemingly requiring more, participant E's organisation required staff to be, 'broadly in agreement' with its principles and aims. Participant F looked for its staff to be, 'in sympathy' with the organisation's ethos and values, to 'respect' the organisation's beliefs and not 'undermine' its position. In this regard, values were written in a manner which both Christians and non-Christians could easily agree to. Understanding of ethos was important for the organisation's culture and for staff to be able to 'reflect' the organisation's mission in their work. Participant G's organisation asked that all staff members 'support' its ethos, which was not considered to be 'difficult' given the values of the organisation were also 'human values' and 'values in society'. Recognition by staff at participant J's organisation of its guiding values which were borne from gospel values was 'non-negotiable', although it was acknowledged that it was not only Christians who held those particular values. Understanding of and sympathy with the religious ethos was described by participant H as 'essential' for undertaking certain roles in his organisation, as was engaging with the 'openness' of the synagogue, which the participant referred to as the, 'congregational ethos'. Staff at participant K's organisation, meanwhile, needed to understand the organisation's ethos, including the manner in which the organisation used aspects of the faith in particular projects and culturally based sensitivities. Whilst it was technically important, according to participant I, that those working for his former organisation understood (or

even agreed) with its religious values, he acknowledged that the extent of their understanding / beliefs might be unknown. Participant D, by contrast, did not consider it important that staff understand the Jewish character of the organisation, commenting that it was more important that they understood 'charity'. She did not believe it was necessary to be Jewish to learn about the projects and programmes she needed to have knowledge of in her own post. Although participant D advised that it was not as important that the post holders in her organisation understand its Jewish character or belong to the Jewish faith, she acknowledged that sharing the same religion was a 'bond' among staff. She described the character or ethos of her organisation as, 'very family' and noted that, 'family and Jewish probably come together in the same thing'. Participant D was also of the view that staff in an organisation without a religious ethos would find a different bond.

7.3.5 Recruitment strategy

One of the participants advised that its organisation was 'targeting' applicants who had the same religious affiliation as the organisation more in its recruitment strategies, by virtue of where they placed their advertisements for vacancies. The participant explained this was not an attempt to exclude applicants who did not have the same religious affiliation as the organisation, but was because those who did have the same religious affiliation were more likely to want to work for it.

7.4 Relationships

From the findings of the study, it is evident that the religious or faith ethos of the organisations has, in many instances, an influence on their employment relationships, whether in the manner in which they handle employee disputes, or through the opportunities provided to staff for spiritual development or to participate in forms of worship together.

7.4.1 Prayer and other joint acts of worship

For many of the organisations there were opportunities, and in some cases an expectation, in the working day for staff to pray or participate in other forms of communal worship. For some organisations, these acts of worship in the

workplace were considered to be very important to the organisation. Participant B confirmed that prayer was part of its organisation's opening weekly meeting, explaining they gave the 'week over to God in prayer'. The opening weekly meeting in participant B's organisation was supplemented by prayer meetings held at weekly and monthly intervals. Prayer, as well as sung worship and scripture reading, also formed part of quarterly staff meetings and volunteer training sessions. Participant B described prayer as, 'a value that was important' to the organisation and his organisation sought to recruit staff who would 'value' it and participate in it. Believing that, 'prayer makes a difference', the organisation asked its team to pray, and the participant gave examples of staff praying at work for the service users. These acts of worship were, according to participant B, instrumental in creating the culture of the organisation from which the service users benefit: the work carried out by the organisation was 'service' to God and these acts of worship gave, 'God the right place in the building'. Further, it was believed that employee relations benefitted from acts of worship in the workplace, participant B saying:

We do feel that when we worship together, when we pray, when we pray for each other, we can deal with issues such as parking egos, dealing with division, trying to bring unity in the organisation - that it's not about me, it's about the other, reminding each other of that.

Participant E also described the use of prayer in managing employee relations, explaining that employees involved in the mediation of a grievance would be asked by the mediator to pray together. The staff in participant E's organisation were 'encouraged' to come together to pray weekly, it being 'expected' that the staff in one part of its service and for whom religion is an occupational requirement attend short bible study and daily prayers. Visitors to the organisation who carry out Christian activities abroad will give talks which the staff are welcome to attend, and the organisation's annual conference will host some religious activity, though there is no expectation that those who do not share the faith with which the organisation is affiliated take part in that activity.

As in participant B's organisation, staff prayers were also part of regular morning worship in participant F's organisation and for similar purpose. There was an 'expectation' of attendance but it was not 'mandatory'. As his organisation,

'delivers services in Christ's name', Participant F said he considered it was 'appropriate' to 'commit the work that you're doing to God at the start of the day and to worship the subject of your common interest and your common motivation'. Participant F referred to an, 'ongoing worshipful relationship' among staff, giving the example of one employee saying to another that they are praying for them in their bereavement.

Others did not describe the same level of importance of joint acts of worship to the work of their organisation, though some recognised the potential personal benefit of such opportunities to the staff. Participant C2 explained that there were opportunities in his organisation for staff to form prayer groups and attend services on religious festivals but these were 'not obligatory' and there was 'no pressure' on staff to participate. In his view, it was likely that those who did partake of the opportunities did so in part because they viewed their work with the organisation as, 'very much part of connecting with their faith'. Participant G referred to opportunities including liturgies and retreats for staff to 'deepen their faith' though these were not compulsory. Participant D described a monthly forum at which a religious piece was delivered for staff, and an act of religious observance in the office at Hanukah, whilst participant K recalled sharing the opening of the fast with staff which she considered gave a 'sense of team and respect'. Referring to masses and carol services which staff could attend at Christmas and communications from the Archdiocese about opportunities for involvement in activities or prayer groups, participant J considered that faith was used as a motivation in her organisation in indirect ways through the clergy and the 'presence and involvement' of the church. In participant J's organisation prayers were only said at board meetings and meetings of senior management which involved board members. The importance of the faith aspect of the organisation to at least half of its employees and to its service users had led one individual in the organisation of participant J to comment that, 'the faith element was defined by the people'.

Of those participants who referred to joint acts of worship in the workplace, including prayer, various reasons were cited and varying levels of importance were attached. Whilst some participants focused on the personal benefit perceived by staff from such acts, other participants viewed the joint acts of worship as more integral to the workings of the organisation: serving God;

creating culture; and improving employee relations. Of particular note is that the participants who emphasised the importance of joint acts of worship for their organisation also expressed the greater interest in reserving roles in their organisation for co-religionists.

7.4.2 Spiritual development

There were mixed responses to the question enquiring of participants what role, if any, their organisation considered it had in providing its staff with spiritual direction or meeting their spiritual needs. Most, but not all, provided staff with some opportunities for spiritual development though the means by which this was provided ranged from direct involvement, at one end of the spectrum, to the 'unintended consequences' of working to an ethos and values, at the other.

The organisations of participants B and E came closest to taking an active role in their staff's spiritual development. Participant B commented that the primary responsibility for spiritual development lay with the employees' churches but that his staff and volunteers were often on a 'journey of discipleship' at work. Their involvement in the organisation 'changed' them: they began to view their faith, or the service users, differently. More recently, and in response to this phenomenon, participant B's organisation piloted a scheme involving a small number of staff and volunteers who would meet weekly with another member of staff as mentor to, 'biblically reflect over what's happened and ask theological questions'. This, participant B considered, was of benefit to the organisation and its service users, commenting that he wanted people 'of a mature faith' and 'a maturity that can see stuff, and can interpret it, and park it and it doesn't wobble them too much'.

Participant E described the active role its organisation took in its staff's 'spiritual' needs. Commenting on how its staff, 'grow day by day and mature' in Christian faith, participant E explained that as part of line management, there would be 'discussion' about that and its effect on how they do their jobs and what they do in their jobs. This, however, was not to be mistaken for a pastoral role which remained the primary responsibility of the churches to which the employees belonged. That said, participant E acknowledged there could be some 'overlap' since, 'who we are as people ... sometimes has an outflow in our

work'. Accordingly, if an employee is experiencing 'spiritual difficulty', mainly in their 'relationship with God', then the organisation would ask the employee's permission to work together with the employee's church in dealing with it.

There was no 'discipleship programme' at participant F's organisation: the 'level of spirituality' of its employees being a 'personal issue' which was 'between them and God'. Spiritual development came from the employees' personal faith and was the reason many staff would go to church. However, participant F referred to what he would describe as, 'unintended consequences' which arose from participation in worship in the workplace, as well as in, 'the examples that we see in fellow colleagues and the encouragement to try and actually reflect Christ in what we do'. Giving an example, participant F referred to the organisation's 'no blame culture' which was derived from Christian values and noted the importance of managers and directors setting a good example in this regard. The participant quoted the Biblical reference, 'iron sharpening iron',²⁸ explaining that when working to an ethos and values, 'people will sharpen each other'. In participant F's organisation, performance reviews of staff would involve consideration of how the staff member had demonstrated the ethos and values of the organisation in his work.

In participant J's organisation, a chaplaincy service was offered to give staff spiritual direction and meet their spiritual needs but it was also considered that 'elements of spirituality' occurred 'by the default' of the organisation being faith-inspired. The example given of this was a conversation between colleagues about the church's stance on homosexuality, initiated by a staff member who was gay.

Participants C and G referred to opportunities for spiritual development in their organisations. Participant G referred to opportunities for staff to, 'deepen their faith', including liturgies and retreats, whilst participant C2 noted opportunities for spiritual development in prayer groups and services on religious festivals, attendance at which was entirely voluntary. Participant C2 considered that the opportunities given by the organisation to its staff to develop their knowledge of

²⁸ Proverbs 27:17.

the 'bigger issues in this world', for example through attendance at a talk, or on a visit, 'feeds' the 'spiritual journey' of those of faith and those of none.

Participant K, meanwhile, explained that since the majority of staff in her organisation were Muslim the organisation had an interest in supporting their spiritual needs. In this regard, the organisation provided a comfortable environment for staff to pray and considered alternative work patterns for staff fasting during Ramadan.

Aside from the provision of a religious piece at a monthly staff forum, participant D did not consider her organisation had any role in attending to the spiritual needs of its employees, explaining that most employees would visit their Rabbi for that purpose. Participant H, meanwhile, considered his organisation did not have any role in meeting the spiritual needs of its contractors, or giving them spiritual guidance.

7.4.3 Employee discipline and grievance (and other relationship management)

Some of the participants, particularly B, E and F reported that the handling of employee discipline and grievance matters was influenced by the religious ethos and/or values of their organisation. Participant B confirmed there had been a, 'biblical precedent' for historical decisions by management on recruitment, redundancy and discipline and that scripture provided guidance. Participant B considered that, influenced by faith, his organisation had, 'greater tolerance', ensuring in its discipline policies that staff were given the 'opportunity to change'. In a similar way, participant F identified the, 'no blame culture' in his organisation as deriving from the organisation's Christian values. 'Conflict resolution' and 'relationship restoration', through enquiring whether the person is sorry and has learnt from the experience was part of what participant E described as a 'biblical approach' in her organisation. Participant E explained that the workplace policies in her organisation quoted from God's word, referring to where 'God's word is clear' on behaviour towards one another (including the employer-employee relationship). Both participants E and F considered their organisation's ethos and values had some influence on how they handled employee grievances. In participant E's organisation, prayer would be

part of the mediation of a grievance to assist those involved to search for 'God's word' and for what God says about how the dispute should be approached. Participant F, meanwhile, commented that there was an 'expectation' that the Christian principles of 'mercy', 'forgiveness' and 'justice' were relevant to the resolution of employee grievance issues in his organisation.

Participant J identified a number of ways in which the values of her organisation (derived from gospel values) had been important in the management of employment relationships. In particular, the organisation's emphasis on its values in discussions with staff had helped it to improve absence levels, and consult on service closures, as well as change and manage behaviours of staff. The values of the organisation, in participant J's view, also led the organisation to 'less confrontation' with the unions. In employment disputes, participant J also noted the 'guidance' and 'direction' received from clergy involved with the organisation.

Participants C1 and C2 also acknowledged that the values of their organisation guided its approach to relationships within the organisation, which were to be respectful and loving and supportive of human dignity. An example was given as to how this was achieved in performance matters: through examining the manner in which work was carried out, instead of focusing solely on the work outputs. It was felt that 'robust and clear and legal disciplinary frameworks' were necessary to provide 'security and transparency', both important values to the organisation, with 'good administration' being described as 'a form of love'.

Other participants, including participant H did not identify such a strong influence. Participants D and K did not believe that their organisations' religious ethos or values had a bearing on how employee discipline or grievance issues were handled. Participant G, meanwhile, considered that his organisation's ethos might be influential in avoiding the escalation of an employee competency or grievance issue in the first place but that if this were unsuccessful, employment law compliant policies would guide the approach.

7.4.4 Multi-faith employee relations

The organisation of participants C1 and C2 was described as having a 'multi-faith staff' at one of its branches. Participant C2 referred to a Muslim member of his staff who had described his experience of working for the Christian organisation as, 'very positive'. The staff member reported feeling 'very welcomed', finding his own faith and values 'reflected' in those of the organisation and observing that he did not feel, in any way, under pressure to become a Christian. Instead, the 'most difficult tensions' in the organisation were described by participant C1 as coming from the different Christian views on issues like gay marriage or relating to gender. Whilst participant C1 explained that they 'live with these' and tried to negotiate or discuss them, she noted firmly that the organisation was 'very clear' the law applies to them. Explaining that they 'treasure' diversity in the organisation, participant C2 referred to the need to 'create space' for those of different faiths and beliefs. As such, he considered that there was at times, 'a fine line ... to draw' in relation to how Christian the organisation was in its culture.

Participant G and E both reported having experienced no difficulties with employing staff who did not share the organisation's faith, with participant E noting that it was important such individuals were not 'hostile' or 'antagonistic', commenting that it could be, 'to some extent beneficial' with regard to the mission purpose of the organisation which was to expose people to God's word. Participant E acknowledged, however, that it would be 'very difficult' to employ someone who was 'active' in a different faith, saying it would be, 'in contradiction to why we exist and what we exist for'. That participant would find it hard to understand why, other than to be 'divisive', someone who was of opposing views to the faith with which the organisation was affiliated, would wish to work for it.

Participant J acknowledged that there was a risk that newer or younger employees might experience feelings of isolation in those parts of her organisation which were staffed largely by longer serving staff who were in the main Christian or, particularly, Roman Catholic and referred to work in her organisation to address this.

Although participant K had not found managing a multi-faith staff to be an issue, the participant acknowledged that a challenge for the organisation was managing the expectations of service users in particular settings who might expect the employee providing the services to be Muslim, and supporting the non-Muslim employee in this regard. Although feedback from non-Muslim staff in exit interviews had generally been very positive, participant K recognised that non-Muslim employees were in the minority in her organisation. As such she was conscious of their experiences of working in the organisation, and sensitive to any perception from them that Muslim staff were afforded preference and which could lead to a tribunal claim.

7.5 Employment and equality law

7.5.1 Expertise

There was a large range of expertise in employment law amongst the participants, from, at one end of the spectrum, experienced human resource personnel, to, at the other end, those who described having no employment law knowledge whatsoever.

7.5.2 Views on employment and equality law

Some, but not all, of the participants provided comment on the provisions in the EA on occupational requirements for religious ethos employers. One participant (B) described the provisions as, 'grey and uncomfortable'. The burden of proof on the employer to demonstrate the occupational requirement was cited as a particular concern given that someone might dispute his view of his organisation's needs.

Participant E cited similar concerns about the ambiguity surrounding the application of the current provisions on occupational requirements. The participant felt the outcomes of tribunal decisions on the occupational requirement provisions were, 'unpredictable', noting concern that, 'the basis' on which tribunals are to make judgments in this area, 'is not clear'. She considered the judgements were based on the view of the tribunal rather than legal principle and this put her organisation, as a Christian organisation, at risk particularly because the tribunal would not necessarily fully understand the

Christian or faith ethos of each organisation. She observed that, 'tribunals have not been sympathetic' in cases brought against other Christian organisations, considering that the reason for this might be in part due to 'a lack of understanding of the Christian faith'. Participant B felt that one of the greatest challenges for Christian organisations is for them to, 'express themselves maturely enough and well enough for others of no faith to understand what they are trying to do'. The perceived lack of sympathy identified by participant E, was echoed by participant F who observed that he felt there was 'more intolerance' towards and a 'greater readiness to question' his organisation's use of the occupational requirement provisions.

Participant B would like to see a 'clearer' definition of faith organisation and, provided the organisation falls within that definition, a 'freedom' to recruit people from the same faith. Participant E also suggested it would be her preference for 'a wider element of trust' that individuals and organisations would be 'ethical' in the manner in which they handled matters, though she accepted this could not be applied 'randomly'. She expressed a sadness that it was necessary to demonstrate satisfaction of the occupational requirement provisions, saying:

I think as an organisation we'd love for it to be that because we are clear and open and honest about what it is that we believe and why we do what we do that it would be perfectly acceptable both to the law and to the public that we chose to employ people who thought the same as we did.

In its current form, however, the organisation could 'work with it': it gave the organisation an, 'element of choice' and participant E considered it was 'not difficult' to provide evidence of compliance.

Not all participants were concerned about the impact of the occupational requirement provisions on recruitment. Participant G, for example, confirmed it caused his organisation no difficulties, which is understood to be a view shared by Participant C. Participant J was 'comfortable' with the provisions and considered her organisation worked 'very clearly within the parameters of the law'. She acknowledged, however, that increased secularisation and the need to balance the expectations of Christian staff as well as those engaging a faith-

inspired service with the legal challenges of employing a diverse workforce and keeping the faith message and the organisation's values 'alive', was an 'ongoing challenge'. Participant J was strongly of the view that the organisation needed to engage a diverse workforce and serve a diverse user base in order to 'articulate and demonstrate' Catholic teachings through its actions.

Commenting on employment law more generally, one participant observed that difficulties could arise where an employee behaves in a way which brings the organisation into disrepute, for example by having an extra-marital affair: employment law may not permit a fair dismissal in these circumstances.

Participant I did not personally have a strong view on the ethos exception. He believed that the regulation surrounding employment for the purposes of an organised religion would 'terrify' others in his position, and be considered 'all too much'. Understood to be speaking more generally about employment law regulation, participant I expressed the opinion that most others in his position would prefer, if possible, not to have the legal responsibility of being an employer. He expressed the belief that the religious group of which his organisation forms part has avoided employment issues in the past rather than keep abreast of employment law requirements.

More generally, both participants E and F made comments suggestive of a belief that Christianity may not be given its rightful place in law. Participant F wanted to see in the implementation and interpretation of laws, 'as much respect of the Christian faith as there is for all faiths'. Participant E, meanwhile, felt the obligation on organisations to comply with European legislation was causing Britain to lose to a degree, 'what would have been a historic Christian identity'. She felt personally that legal protections had been put in place to protect people against faith groups which were, 'harmful to either people's personal safety or the population as a whole' because of their, 'particular views or values'. She felt this approach, 'disproportionately affects all faith groups'.

Participant E also made reference to the plight of conscientious objectors in the workplace and to a tendency in some cases for gender to be prioritised over faith. She would like to see 'more safeguards' for religious organisations and religious individuals in situations where there were no safety concerns to the

public. She drew a comparison with what she saw as the, 'very clear safeguards' there were for political parties and affiliations. She spoke about the need for freedom of speech for those 'who will exercise it responsibly': a freedom her organisation felt was, to some degree, being 'eroded'.

Other changes to employment law the participants would like included a desire for greater clarity on the distinction between employee and self-employed status (participant H), a strengthening of gender equality (participant C), and a 'recognition' of the difficulties experienced by religious organisations which relied on charitable donations and external funding in meeting changes in employment law which might be 'well based and fair' but which had a financial implication (participant F).

7.5.3 Negative public opinion

Views were sought from some of the participants on how they would respond to the opinion of some sections of the public that all jobs in an organisation with a religious or faith ethos should be open to applicants of all faiths or none. Participant J agreed with this view, commenting that to be 'faith-inspired' an organisation should be 'inclusive'. Participant J also commented positively that having a diverse staff enabled the organisation to be challenged. Participant E considered that 'choice' was relevant: in her view imposition of the occupational requirement in her organisation did not exclude an individual from exercising their skills elsewhere. 'Explanation', 'education' and 'awareness' were cited by participant E as being needed to change attitudes. Participant G, meanwhile, who believed that employing, 'a central cadre' of staff and a leadership who were Catholic was necessary to maintain the organisation as a 'Catholic' one, considered, 'respect' for views and values was needed to change the public attitude. Concern about changing public attitudes towards faith organisations was expressed by participant E who thought, though she did not know for certain, that there may be 'a growing lack of tolerance or understanding of what faith organisations are about and may be a lack of respect perhaps for them which perhaps society had'.

This sentiment that negative public attitude to the use by organisations with a religious or faith ethos of occupational requirements may, in part, be

attributable to a lack of understanding, was echoed by participant F who commented, 'I think that if people don't fully understand the elements of your faith they they're not going to fully understand why you might want to do things.' For participant F, the faith requirement in certain roles was 'important' for his organisation's ethos and values. Whilst he hoped that the public attitudes could be changed by the recognition that there was a 'clear connection' between his organisation's 'good outcomes' and operating to a 'common ethos and common values', he did not believe the public could be persuaded of this, as it was, in his view, 'something that needs to be seen and experienced in order to understand'.

7.6 Conclusion

The study provided participants with an opportunity to convey their views and share their experiences as managers or employers of employment in organisations with a religious or faith ethos. Although the scale of the study would suggest that caution be exercised before reaching firm conclusions, the study nonetheless offers a valuable insight into the needs and interests of employers. As reported above, it reveals some divergence of opinion or in experience among the participants, but so too does it disclose a significant level of common ground and shared understanding. This section will bring together and provide comment on what are considered to be the strongest ideas to have emerged from the study. These are: the relevance of organisational purpose, staff relationships and worship in the workplace, on the use of religion as an occupational requirement; the importance of ethos; and the interdependency of staff and ethos.

7.6.1 Religion as an occupational requirement: purpose; relationships and worship

Whereas there was a significant degree of convergence in opinion on the importance of organisational ethos and values in employment matters, approaches diverged on the use of religion as an occupational requirement. Although the perceived need for the use of the occupational requirement varied from one participant to the next, each participant could quite clearly articulate the reason or reasons for desiring its imposition in each case. It was evident

that the perceived needs of all participants who used the occupational requirement were considered and were felt quite strongly.

Of particular interest was the range of responses in respect of the use of the occupational requirement: from all jobs at one end of the spectrum to just a few, or even none, at the other. In search of an explanation for this divergence, three themes emerge as important and may be worthy of further investigation. These are: purpose; relationships; and worship. There is some evidence from the study’s findings to suggest that there may be a greater perceived need for the use of the occupational requirement in those organisations with a ‘missional’ purpose,²⁹ and/or in those organisations where relationships among staff who are co-religionists, including worshipful relationships, are valued or even integral to the work of the organisation. These aspects of employment form part of the ‘context’ in which work is performed and were important to some of the participants.

7.6.2 Importance of ethos

Although ‘ethos’ has been described as a ‘fluid and indeterminate’ concept,³⁰ most of the participants appeared nonetheless to be very comfortable describing the ethos or character of their organisations in some detail, often with reference to organisational purpose and guiding values. The ease and detail with which organisational ethos and values were referred to by the participants was the first indicator of their importance. It was observed that most of the participants spoke about the ethos and values of their organisations with what could be described as a sense of pride and ownership.

The importance of ethos and values to the participants’ organisations was further underlined by the descriptions given by many of the participants of their influence on internal and external relationships. There was often a clear connection drawn by the participants between the organisational ethos and values and its approach to the external activity it carried out, whether in serving those in need or in educating others, for example. Yet, of even more interest

²⁹ ‘Missional’ is referred to here in the sense of introducing or educating individuals in the religion.

³⁰ Mark Coen, ‘Religious Ethos and Employment Equality: a Comparative Irish Perspective’ (Sep 2008) 28 LS 452, 458.

was the evidence from several of the participants that organisational ethos and values were also important to the relationship between the organisation and its staff, and/or to the relationships among staff members. Indeed, the information provided by several of the participants about the pervasiveness of organisational ethos and values in employment matters was striking. Ethos and values, it would appear, were relevant and influential at many stages of the employment relationship, from recruitment through to decisions on termination. The need for the post holder to uphold the organisational ethos was often cited as a reason by participants for requiring religion as an occupational requirement. Organisational ethos and values were further referred to by certain of the participants as relevant or influential in the organisations' approaches to absence management, performance monitoring, change management, as well as in discipline and grievance matters.

It is instructive to pause and ask whether the tie between organisational ethos and values and managing employment relationships to which several of the participants attested is unique to organisations which are religious or faith-inspired. One might speculate that it is not. After all, many organisations nowadays claim to have a set of values or principles designed to guide their approach to internal and external relationships, albeit the influence of such values or principles will likely vary from organisation to organisation. Still, it remains open to question whether the intensity of the connection between ethos or values and employment relationships of which there is some evidence in this study, is peculiar to religious or faith-inspired organisations. Some of the participants expressed views on what, if anything, made their organisations different to organisations which did not have a religious or faith ethos. One participant agreed that the values of her organisation might have greater significance because the organisation was clear about their gospel roots. Another participant insightfully observed that those staff in an organisation with a religious or faith ethos who performed in roles with religion as an occupational requirement shared, 'a mutual starting point'. This, he thought, made the organisation different (though, he stressed he was not declaring it was necessarily better) to an organisation which recruited staff who were 'converted' or 'inducted' into the organisation's principles or culture after joining. A third participant observed that having in an organisation, a faith

ethos, even if it is not particularly strong, together with a majority of staff who share the faith, 'can help bring people together in terms of an ultimate, kind of goal'. Another participant who considered there was an 'enormous' difference between organisations with a religious character and those without, made reference to 'the voluntary aspect' and the fact people in organisations with a religious character 'go the further mile'. According to this participant, the additional effort by staff who 'believe their job is more than what they are paid for' gave a religious care home which he had visited 'a community atmosphere'. Not all participants agreed that the difference was significant. One participant considered that although a shared religion was a bond among staff in an organisation with a religious ethos, employees working in another organisation would find a different bond.

7.6.3 Interdependency of staff and ethos

Of further interest from the study is the evidence gathered from the participants of what could be described as, the 'inter-dependency' of organisational ethos and staff. Most participants considered that their staff (or at least some of their staff) contributed in an important way to the organisation's ethos, albeit that the desired level of commitment to the ethos varied from participant to participant and from role to role. That an organisation's ethos depends, at least in part, on the actions and behaviours of its staff is perhaps obvious. Of more interest than an organisation's dependency on staff for its ethos, however, is the dependency of some staff in the participants' organisations on the organisational ethos. This is because most of the participants reported that a significant number of their employees chose to work for their organisation because of its religious or faith nature. It was believed that some employees considered employment with the participants' organisations to be, a 'calling' or even a form of religious worship. Work for many of those motivated to seek employment in a religious or faith ethos organisation was not only driven by faith but was an integral part of the exercise of it. Employment in a religious or faith ethos organisation may thus be important, or even essential, to the exercise by certain individuals of their religion or belief.

Whereas individuals who seek employment in organisations which are not religious or faith-inspired may, in part, be attracted by their organisations'

values or principles, it is likely that a number of other factors will also motivate their decision: job availability, location, promotion prospects, salary, for example. If religious or faith-inspired organisations are unique insofar as they attract a significant number of staff whose faith is the dominant motive for employment, the inter-dependency of organisational ethos and staff may be a significant feature differentiating those organisations with a religious or faith ethos, from those without.

7.6.4 Implications for interpretation of the employment exceptions

If the inter-dependency of organisational ethos and staff makes religious or faith-inspired organisations unique, it may also support a different approach to interpretation of the employment exceptions³¹ than to interpretation of the OR exception which, it will be recalled, can be relied on by any employer and can permit discrimination on any grounds.³² In particular, the findings of this study support an approach to the employment exceptions, which considers the context in which work is carried out, including the ethos of the employer, as especially important.

³¹ I.e. the religious ethos exception, the organised religion exception and the faith schools exception (see chapter 3 at 3.3.2, 3.3.3 and 3.2.1).

³² For the detail of the OR exception, see chapter 3 at 3.3.1.

8 Freedom of association as a basis for interpretation of the employment exceptions

8.1 Introduction

I argued in chapter 6 that the employment equality exceptions for religious employers in Britain lack a principled underpinning. An empirical study, seeking the perspective of religious employers, found that ethos and values were nearly always central to the work and employment relationships of employers with a religious or faith-based ethos. The study uncovered evidence of the faith motivations of employees and the relational aspects of some religious workplaces. It also highlighted the importance of organisational purpose, ethos and relationships to the use of the employment exceptions.¹ In light of these findings relating to associative life, the present chapter will consider the utility of freedom of association as a basis for interpretation of the employment exceptions.

In this chapter, the nature of freedom of association will be explored, as well as its value and the extent to which it is protected under the European Convention on Human Rights (the ‘ECHR’) and in the UK. Despite the extensive scope of the right to freedom of association under the ECHR, it will be observed that most judicial consideration of this liberty in the UK concerns mainly its impact on trade union activity. In particular, freedom of association is rarely considered in any detail in British cases concerning exclusionary employment policies: a trend which is also reflected in the case law of the European Court of Human Rights (the ‘ECtHR’). I will make the case for applying freedom of association to the question of interpretation of the employment exceptions. Freedom of association is an important basis of religious autonomy, and the employment decisions of religious employers should engage the protections which the right affords against state interference in an association’s internal affairs. I will argue that freedom of association calls for an interpretation of the employment exceptions that is identity-protecting. On this analysis the employment exceptions offer a vehicle through which employers may discriminate in order to preserve their unique ethos for the benefit of the membership they serve,

¹ For a report and comment on the findings of the empirical study, see chapter 7.

provided always that this does not disproportionately infringe the rights and interests of others. I will contend that this interpretation of freedom of association offers a principled justification for the employment exceptions and a sound basis for defining their limits.

8.2 Freedom of Association: value and scope

8.2.1 Value of freedom of association

Freedom of association protects the right to form or to join an association for a common purpose. Individuals associate in innumerable ways and for various reasons: as members of religious congregations, for example, or of recreational clubs, trade unions, political parties or advocacy groups, to name only a few.² Individuals derive enjoyment from the many ‘experiences’ which associations give rise to, identified as including:

the opportunity for the display of energy and shrewdness presented by business life ... the activism, daring, and creativity summoned by political, moral and cultural movements; the exhilaration that arises from involvement in political life or the life of public advocacy; the camaraderie and self-confirmation that comes from social clubs; the gratification of loyally helping to maintain a tradition or way of life; and so on.³

At the heart of the value of freedom of association is the essential role it plays in the development of one’s identity.⁴ There are many variables which influence the formation of individual identity, but perhaps none more so than expression, thought, religion and/or conscience. Each supports individuals to pursue their chosen paths in life, and to formulate their own morality. It follows that respect

² For comment on the range of associations which people establish, see Amy Gutmann, 'An Introductory Essay' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 3; see also Larry Alexander, 'What is Freedom of Association, and What is its Denial?' (2008) 25 Social Philosophy and Policy 1, 1 where Alexander comments, 'Freedom of association, as I understand it, refers to the liberty a person possesses to enter into relationships with others – for any and all purposes, for a momentary or long-term duration, by contract, consent, or acquiescence.'

³ George Kateb, 'The Value of Association' in Amy Gutmann (ed), *Freedom of Association* (1998) 38-39.

⁴ Kent Greenawalt has asserted, 'associations are valuable because they represent human choices about how to live and because of their influence on people's lives' in Kent Greenawalt, 'Freedom of Association and Religious Association' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 110.

for autonomy and human dignity requires that each be protected.⁵ Though expression, thought, religion and conscience can be practised individually, their exercise can require or be enhanced by association with others. The importance of the collective exercise of religion to the individual has already been explored and attested to.⁶ Collective effort is also often required to realise freedom of expression since the individual voice is restricted in what it can achieve.⁷ One way of understanding the value of association, then, is to regard it as deserving of protection because it is necessary for the full realisation of freedoms that protect individual identity. One academic draws attention to the works of John Rawls as authority for understanding freedom of association as, ‘the collective ancillary to individuals’ moral self-determination’.⁸ He remarks:

In the Rawlsian, liberal analysis, freedom of thought and conscience protects citizens’ exercise and development of different conceptions of the good – public and private – whereas freedom of association safeguards the concrete social structures needed for the practical realisation of these projects and commitments in various social frameworks. Accordingly, it enables the *effective* realisation of moral personality, which would otherwise remain abstract and hollow, devoid of the concrete social structures that are necessary to ensure its flourishing.⁹

On this interpretation, associational life is justified primarily by its contribution to individual identity or, more particularly, ‘moral personality’.¹⁰ It is, however, not only associations which permit individuals to realise their rights to free expression, thought, conscience and religion that are valuable. Relationships of many different kinds can provide the individual with a sense of belonging or purpose, essential to their well-being.¹¹ Freedom of association enables

⁵ See discussion on autonomy and human dignity as justifications for freedom of religion in chapter 2 at 2.4.4.

⁶ See discussion on the role of religious communities in the individual practice of religion in chapter 2 at 2.4.4.

⁷ Gutmann (ch 8, n 2) 3.

⁸ Eoin Daly, ‘Freedom of Association Through the Prism of Gender Quotas in Politics’ (2012) 47 IJ 76, 98.

⁹ *ibid* 97.

¹⁰ *ibid* 97-98. See also Merilin Kiviorg ‘Collective Religious Autonomy *versus* Individual Rights: A Challenge for the ECHR?’ (2014) 39 Review of Central and East European Law 315 where Kiviorg argues that the individual autonomy rationale for both individual and collective religious freedom ought to guide the ECtHR in navigating the conflict between collective religious autonomy and individual rights.

¹¹ In reference to ideas propounded by Robert Cover in Robert M Cover, ‘The Supreme Court 1982 Foreword: Nomos and Narrative’ 97 HarvLRev 4, Martha Minow comments ‘smaller than the

individuals to form close relationships of ‘love and friendship’¹² and other ties which may have importance in their lives. In itself, the autonomy to freely choose and develop relationships contributes considerably to character formation.¹³

The ‘qualities of human life’ brought about by involvement in an association have been said to include: ‘camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others’.¹⁴ Associational activity has been rightly praised for cultivating, ‘respect, equality, deliberation, discussion, compromise, and self-sacrifice’ and teaching individuals how, ‘to deal fairly with their fellows’.¹⁵ Whilst these qualities enhance individual experience, their cultivation in individuals will benefit society as well. There is other societal benefit to be derived from the value which freedom of association affords to the individual. For example, whilst political associations play an essential role in facilitating the individual’s freedom of expression in the political process,¹⁶ they also safeguard, ‘the integrity of the political process against partisan manipulation in the conduct of competition for public power’.¹⁷ In enhancing an individual’s ability freely to pursue his personal vision of what is right and important, associational life advances diversity, essential for a liberal state,¹⁸ and creates a ‘vibrant “public sphere”’, claimed to act, ‘as a counterweight to the power of the State’.¹⁹

state, and exemplified by religious communities, meaningful subcommunities generate norms embedded in texts and histories that organize many people’s lives and lend them both order and a sense of significance.’ Martha Minow, ‘Should Religious Groups Be Exempt from Civil Rights Laws?’ (2007) 48 BCLRev 781, 825.

¹² Gutmann (ch 8, n 2) 3.

¹³ George Kateb comments, ‘Inseparable and indistinguishable from being a self – having a unique identity – is having the relationships that one wants.’ Kateb (ch 8, n 3) 48; see also at 36, where he asserts ‘Picking one’s company is part of living as one likes, living as one likes (provided one does not injure the vital claims of others) is what being free means.’

¹⁴ Gutmann (ch 8, n 2) 4.

¹⁵ Greenawalt (ch 8, n 4) 110.

¹⁶ Gutmann (ch 8, n 2) 3.

¹⁷ Daly (ch 8, n 8) 99-101.

¹⁸ See also Patrick Lenta, ‘Taking Diversity Seriously: Religious Associations and Work-Related Discrimination’ (2009) 126 SALJ 827, 832-33.

¹⁹ Daly (ch 8, n 8) 99, referring to Justice Brennan in *Roberts v United States Jaycees* 468 US 609 (1984) (*Roberts*) at 618-19. See also Greenawalt (ch 8, n 4) 110 where Greenawalt comments,

8.2.2 Scope of legal protection for freedom of association

The recognition of freedom of association in various national, European and international treaties, including the International Covenant on Civil and Political Rights²⁰ and the Charter of Fundamental Rights of the European Union,²¹ is indicative of its value. Article 11 of the ECHR provides, under the heading, ‘Freedom of assembly and association’, that, ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’

Although specific reference is made in the article to trade unions, the ECtHR has held that an association is ‘a form of voluntary grouping for a common goal’²² and therefore has interpreted the article widely.²³ To rely on article 11, the association must be a ‘membership’ organisation,²⁴ ‘voluntary’ in nature and set up in order to pursue a ‘legitimate goal for mutual or public benefit’.²⁵ The association must also demonstrate a, ‘certain institutional character’²⁶ excluding social ties of friendship, for example, from the scope of article 11. The ECtHR has found a wide range of associations capable of satisfying these tests,

‘Associations help prevent a tyranny of the majority and forestall absolutist pretensions of government officials’.

²⁰ Art 22 of the International Covenant on Civil and Political Rights, ‘Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.’

²¹ Art 12 of the Charter of Fundamental Rights of the European Union provides that,

‘1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.’

In the workplace context, see also, Art 5 and art 6 of the European Social Charter and the preamble to the Constitution of the International Labour Organisation (the ‘ILO’), as well as the ILO’s Convention No 87 on ‘Freedom of Association and Protection of the Right to Organise’.

²² *Young, James and Webster v the United Kingdom*, nos 7601/76 and 7896/77, (Commission’s report, 14 December 1979), para 167 available at < [accessed 28 December 2017.](https://hudoc.echr.coe.int/eng#/)

²³ Zvonimir Mataga, ‘The Right to Freedom of Association under the European Convention on the Protection of Human Rights and Fundamental Freedoms’ (Strasbourg, October 2006) 5 <<http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan044376.pdf>> accessed 28 December 2017.

²⁴ Dragan Golubovic, ‘Freedom of Association in the Case Law of the European Court of Human Rights’ (2013) 17 IJHR 758, 761-62.

²⁵ ibid 761-63.

²⁶ Mataga (ch 8, n 23) 5.

including companies.²⁷ Associations which will not engage article 11 include public law associations, such as the Law Society of Scotland which practising solicitors in Scotland must join. Set up by public act, associations like these have public powers and are not primarily engaged in serving their members' private interests.²⁸

The positive rights under article 11 to form and join associations include the right of the association to carry out any action in the pursuit of its goals, acquire legal personality, and, importantly, control its internal structure.²⁹ The ECtHR has also held that article 11 includes the right of an association to freely determine its membership.³⁰ In *ASLEF v the United Kingdom*,³¹ the ECtHR found that the UK had violated the right to freedom of association in preventing a trade union from expelling an unwanted member because of his political views. Delivering the judgment, the then President of the ECtHR, Mr J Casadevall, opined:

Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.³²

The United States Supreme Court has expressed a similar sentiment in respect of its constitutional protection of free association, affirming that compelled membership is the clearest example of interference with a group's internal organisation and concerns.³³ The right to associate freely is often said to require a corresponding right to exclude the unwanted from participating in the

²⁷ For comment on freedom of association cases concerning companies, see Mataga (ch 8, n 23) 6.

²⁸ *ibid* 6-7. See also, Golubovic (ch 8, n 24) 762.

²⁹ Mataga (ch 8, n 23) 8-11.

³⁰ *Cheall v United Kingdom* (1986) 8 EHRR CD74 [6] 'In the exercise of rights under Article 11(1), unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union.'

³¹ *Associated Society of Locomotive Engineers and Firemen (ASLEF) v United Kingdom* (2007) 45 EHRR 34 (ASLEF).

³² *ibid* [39]; see also dicta of Justice Brennan in *Roberts* (ch 8, n 19) 623 'Freedom of association therefore plainly presupposes a freedom not to associate.'

³³ Per Justice Brennan in *Roberts* (ch 8, n 19) 623 'There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.'

relationship.³⁴ Few would disagree with the proposition that the right to exclude is, ‘to some degree, an integral and important part of freedom of association’:³⁵ if a group is compelled to accept any individual requesting membership, the element of choice inferred in the freedom to associate is diminished.³⁶

In addition to these positive rights, article 11 can also engage a negative right not to be a member of an association. In this regard the ECtHR has found that some trade union closed shop arrangements infringe article 11.³⁷ The right to freedom of association is qualified, and restrictions must be ‘prescribed by law’ and ‘necessary in a democratic society’ for one of the reasons stated in the second subsection of the article which include, ‘the protection of the rights and freedoms of others’.³⁸ States have a margin of appreciation in determining the appropriate balance to be struck between freedom of association and competing interests.

Each signatory to the ECHR is under a positive duty to ensure the right to freedom of association is complied with in their jurisdiction, and a negative duty to avoid interference with the right.³⁹ In the UK, the Human Rights Act 1998 (the ‘HRA’) obliges public authorities to comply with the ECHR.⁴⁰ This extends to a duty on the judiciary to interpret legislation where possible in compliance with convention rights, including article 11.⁴¹ Notwithstanding the ‘capacious’ scope

³⁴ For example, Stuart White, ‘Freedom of Association and the Right to Exclude’ (1997) 5 *The Journal of Political Philosophy* 373, 373.

³⁵ *ibid* 373. See also Gutmann (ch 8, n 2) 11 where Gutmann comments, ‘A requirement of open membership would undermine the value of many secondary associations and destroy any meaningful sense of freedom of association as it applies to secondary associations.’

³⁶ The European Court of Human Rights opined that ‘the notion of a freedom implies some measure of freedom of choice as to its exercise’ in *Young, James and Webster v United Kingdom* (App no 7601/76) (1982) 4 EHRR 38, [52].

³⁷ *ibid*; see discussion in Mataga (ch 8, n 23) 11-13.

³⁸ Art 11(2) provides that, ‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

³⁹ Mataga (ch 8, n 23) 23-24.

⁴⁰ Human Rights Act 1998, s 6.

⁴¹ *ibid*, s 3 and s 6.

of freedom of association,⁴² and the obligation on the judiciary to read and give effect to legislation, where possible, in a way which is compatible with convention rights, article 11 has received very little judicial attention in the UK.⁴³ A relatively limited number of cases in the UK have explored freedom of association in any detail,⁴⁴ and most of these relate to trade union activities. Even in the context of trade union activities, exploration of the principle of freedom of association has been constrained by an apparent reluctance on the part of the judiciary, at least until more recently, to consider relevant European and international jurisprudence. One academic, reviewing trade union rights in the UK, makes reference to, ‘the resistance by the domestic judiciary to take account of the legal principles set out in a number of later Strasbourg decisions handed down both before, and since, the Human Rights Act 1998 became enforceable in 2000’.⁴⁵ The Court of Appeal’s decision in *Metrobus v UNITE the Union*,⁴⁶ is indicative. Arguments by Counsel for UNITE that the ECtHR case of *Demir and Baykara v Turkey*⁴⁷ provided authority for the relevance of the jurisprudence of the International Labour Organisation and European Social Charter in determining the extent of article 11 rights, and in interpreting UK statutory law, were given little attention.⁴⁸

Outside of the trade union context, only a few cases in the UK have considered freedom of association. In one of these, *RSPCA v Attorney General*,⁴⁹ the Chancery Division of the High Court of Justice had to determine whether the RSPCA was entitled to adopt a policy to exclude pro-hunting individuals from its membership. Finding that article 11 enshrined the, ‘freedom to exclude from association those whose membership it honestly believes to be damaging to the

⁴² Alexander (ch 8, n 2) 1.

⁴³ Daly has similarly identified a lack of legal analysis in the Republic of Ireland, opining that, ‘Freedom of association remains one of the least theorised, and doctrinally underdeveloped of constitutional rights in this jurisdiction.’ Daly (ch 8, n 8) 116.

⁴⁴ In a Westlaw search, carried out on 10 January 2017, only 58 cases in the UK jurisdiction had in the subject line ‘freedom of association’ or ‘freedom of assembly and association’.

⁴⁵ Charles Barrow, ‘Trade Union Rights in the United Kingdom and Article 11 of the European Convention: Past Failures and Future Possibilities’ (2013) EHRLR 56, 57.

⁴⁶ *Metrobus v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173.

⁴⁷ *Demir and Baykara v Turkey* (2009) 48 EHRR 54.

⁴⁸ See discussion in Ruth Dukes, ‘The Right to Strike Under UK Law: Not More Than Just a Slogan?’ (2010) 39 ILJ 82.

⁴⁹ *RSPCA v Attorney General* (2002) 1 WLR 448 (Ch).

interests of the society',⁵⁰ the court determined that the RSPCA was entitled to adopt the exclusionary membership policy, though it ultimately concluded that the scheme proposed by the RSPCA to implement the policy was inappropriate insofar as it did not give the excluded applicant or member an opportunity to state his case.

Specific accommodation for exclusionary membership policies by associations is made in the Equality Act 2010 (the 'EA').⁵¹ In order to satisfy the definition of 'association' in the EA the body must have at least 25 members and rules regulating membership which involve a selection process.⁵² Though such associations are subject to the general prohibition of discrimination on protected grounds, they are permitted by the EA to restrict membership and access to benefits by associates and guests to people who share a particular characteristic, other than colour.⁵³ Thus, as guidance from the Equality and Human Rights Commission explains, 'An association for Christian women does not have to admit women of beliefs other than Christianity, nor does it have to admit men whether Christian or of any other belief.'⁵⁴ It is only where the association, 'has been set up for people who share a protected characteristic' that it can discriminate,⁵⁵ and the only discrimination permitted is restriction of membership or access to persons holding that characteristic. Thus, as the EHRC guidance explains, 'A men's amateur rugby club can refuse to accept women but it cannot reject men because of their race or their sexual orientation.'⁵⁶

⁵⁰ *ibid* [37(b)].

⁵¹ Equality Act 2010 (EA), pt 7 and sch 16. There are, additionally, special exceptions in the EA permitting religion or belief organisations to restrict membership, participation in its activities or the provision of goods, facilities and services, to persons of a particular religion or belief. The purpose of the religion or belief organisation must be, 'to practice, promote or teach a religion or belief', and its sole purpose must not be commercial. The restriction will be permitted if the purpose of the organisation is to provide services to one religion or belief, or if it is necessary to avoid causing offence to persons with the same religion or belief as the organisation.

⁵² *ibid* s 107.

⁵³ *ibid*, sch 16. Note, this exception does not apply to political parties.

⁵⁴ Equality and Human Rights Commission, 'What Equality Law Means For Your Association, Club or Society' (Equality and Human Rights Commission First Published January 2011 and Updated April 2014) 20.

⁵⁵ *ibid* 21.

⁵⁶ *ibid* 22.

The origins of these provisions pre-date the EA. Prior to the consolidation of equalities legislation, private clubs were prohibited from discriminating against members, associates and applicant members on grounds of race, sexual orientation and disability, but were exempted from liability if the club was formed for people who shared one of these protected characteristics. When the EA extended the prohibition of discrimination by private clubs to cover discrimination on grounds of religion or belief, sex, pregnancy or maternity, age, and gender reassignment, it also extended the exemption to cover clubs set up for people sharing one of these additional protected characteristics.

Some indication of the policy reason behind these provisions in the EA (and those it consolidated) can be gleaned from the Government's response to its consultation on the Equality Bill.⁵⁷ Although the Government does not refer explicitly to freedom of association, there is evidence of its influence. Committing to retain the threshold of 25 members before an association will be subject to non-discrimination norms, the Government explained this would, 'ensure that the law does not impinge on private gatherings'.⁵⁸ By excluding private gatherings from the ambit of the provisions, the Government provides heightened protection for freedom of intimate association. The Government's stated reason for retaining the exemption for single characteristic clubs is further evidence of freedom of association underpinning its approach. Commenting on the response in its consultation to the proposal to retain the exemption, the Government said:

Over 90 per cent of respondents agreed, recognising that it can be a positive benefit to have clubs set up for groups against whom discrimination is prohibited; and that it is important for groups of people to have their own space. We agree that this must not provide an excuse for people to set up clubs just so as to exclude particular vulnerable groups of people and that it should be for a real positive benefit rather than for purposes of segregation.⁵⁹

The Government's references to the, 'positive benefit' of the single characteristic club for its members and the importance of ensuring groups of

⁵⁷ Government Equalities Office, *The Equality Bill - Government Response to the Consultation* (Cm 7454, 21 July 2008).

⁵⁸ ibid 159, para 12.14.

⁵⁹ ibid 159, para 12.12.

people have their, ‘own space’ resonate with the value in freedom of association identified at the outset of this chapter. There is benefit to individuals in forming relationships with others who share the same protected characteristics given the contribution of protected characteristics to personal identity, and the utility of association in developing identity. Discrimination is permitted by these provisions because restricting membership in this way serves the interests of the people for whom the association was created. Though it is likely that freedom of association underlies these provisions, there has yet to be a case on them which would give the judiciary the opportunity to explore the concept further.

8.3 The case for reading freedom of association into the employment exceptions

8.3.1 Freedom of association as a source of religious autonomy

I have argued above at 8.2.2 that despite the importance and extensive scope of the right to freedom of association under the ECHR, and the obligations on the UK to abide by convention rights, it remains an underdeveloped concept in UK jurisprudence. Against this background, it is perhaps unsurprising that there has been little analysis of freedom of association in the reported case law on the employment exceptions. Richards J of the Queens Bench Division gives only the briefest of mentions to ECtHR dicta that article 9 ought to be interpreted in light of article 11 when he delivers his judgment in *R (on the application of Amicus) v The Secretary of State for Trade and Industry*⁶⁰ on the compatibility of the employment exceptions in the Employment Equality (Sexual Orientation) Regulations 2003 with Council Directive 2000/78/EC. This is a trend that is reflected in ECHR jurisprudence on the employment equality exceptions of other member states. In the recent cases of, *Fernandez Martinez v Spain*,⁶¹ *Schuth v Germany*,⁶² and *Obst v Germany*,⁶³ the ECtHR was asked to determine whether religiously motivated employment decisions of employers violated the protections afforded to employees under article 8 of the ECHR. Although in all

⁶⁰ *R (on the application of Amicus) v The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176 (*Amicus*).

⁶¹ *Fernandez Martinez v Spain* (2015) 60 EHRR 3.

⁶² *Schuth v Germany* (2011) 52 EHRR 32.

⁶³ *Obst v Germany* App no 425/03 (ECtHR, 23 September 2010) (French only).

three of these cases, the ECtHR acknowledged the obligation to consider the autonomy claims of the religious employers in the context of the right to freedom of association under article 11, it gave no express consideration as to how this impacted on its decision.⁶⁴

The absence of discussion of article 11 in the context of case law on the employment exceptions is striking. The employment exceptions afford religious employers a greater measure of autonomy than other employers with regard to their employment policies. This autonomy is often defended on grounds of freedom of religion, and article 9. Yet, religious autonomy is not derived solely from freedom of religion. Article 9 of the ECHR grants individuals the right to manifest their religion either alone or *in community with others*. Still, it is freedom of association, under article 11, which limits State interference in the ‘social structures’⁶⁵ which facilitate communal religious exercise. It is freedom of religion and freedom of association which *together* form the basis of the right to religious autonomy. Support for this proposition is found in the following dicta of the ECtHR in the case of *Hasan and Chaush v Bulgaria*, which has been quoted with authority in subsequent cases.⁶⁶

Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention.⁶⁷

Notwithstanding this, freedom of association is, ‘often overlooked’ as a source of religious autonomy.⁶⁸ The UK judiciary has given little consideration to

⁶⁴ *Fernandez Martinez* (ch 8, n 61) [127]; *Schuth* (ch 8, n 62) [57]-[58]; *Obst* (ch 8, n 63) [43]-[44].

⁶⁵ *Daly* (ch 8, n 8) 98.

⁶⁶ *Supreme Holy Council of the Muslim Community v Bulgaria* (App no 39023/97) (2005) 41 EHRR 3; *Metropolitan Church of Bessarabia v Moldova* (App no 45701/99) (2002) 35 EHRR 13.

⁶⁷ *Hasan v Bulgaria* (App no 30985/96) (2002) 34 EHRR 55 (*Hasan*) [62].

⁶⁸ Mark E Chopko and Michael F Moses, remarking in the context of the US jurisdiction in, Mark E Chopko and Michael F Moses, ‘Freedom to be a Church: Confronting Challenges to the Rights of Church Autonomy’ (2005) 3 The Georgetown Journal of Law and Public Policy 387, 390. See also Patrick Lenta criticising the judgment of *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park 2009* (4) SA 510 (T) (Equality Court of South Africa) for only referring to freedom of association briefly once in Lenta, ‘Taking Diversity Seriously’ (ch 8, n 18) 834.

freedom of association in the context of the collective exercise of religion. In only two recorded cases has a religious group argued that the freedoms of both religion and association are together relevant to its claim, and, even then, no detailed judicial analysis of these rights was carried out.⁶⁹

The contribution of freedom of association to religious autonomy claims, including in the employment context, should not be so understated. The right to exercise religion *in community with others* has been shown to be important to the exercise by individuals of their right to religious freedom: a right essential for human dignity.⁷⁰ As the ECtHR has admitted, it is article 11 which protects, ‘associative life’ and gives meaning to the religious believer’s right to exercise religion *in community with others* by ensuring that the *community* can, ‘function peacefully free from arbitrary State intervention’. The Supreme Court of Canada has recognised the importance of freedom of association to religious autonomy claims in the employment context, finding it to be the rationale for the employment exceptions in several of the human rights statutes of the Canadian provinces.⁷¹ The close relationship between freedom of religion and freedom of association is also illustrated in the constitutions of the USA and the Republic of South Africa. There is no explicit reference to freedom of association in the United States constitution but it is implied in the first amendment, which safeguards, among other things, freedom of religion, and in the fourteenth amendment, which makes it unlawful to deprive ‘any person of life, liberty, or property, without due process of law’.⁷² Both freedom of religion and freedom of association are explicitly acknowledged in the

⁶⁹ *Church of Jesus Christ of the Latter-Day Saints v Price* [2004] EWHC 3245 (QB) [56], in which representatives of the Mormon Church argued that actions by the defendant which the court found amounted to nuisance and unlawful harassment had interfered with church members’ right to practice their religion and right to freedom of association. *R (on the application of Watch Tower Bible and Tract Society) v Charity Commission* [2016] EWCA Civ 154, [2016] 1 WLR 2625 in which a charity within the Jehovah’s Witness movement argued that the Charity Commission’s order requiring them to produce certain documents interfered with their right to freedom of religion and association. This excludes cases concerning protests on religious grounds which may refer to both Art 9 and Art 11 rights, such as *R v Uddin (Mohan)* [2015] EWCA Crim 1918, [2016] 4 WLR 24 and *Othman v English National Resistance* [2013] EWHC 1421 (QB). Cases identified from Westlaw search carried out on 11 January 2017, using ‘freedom of association’ and ‘religion’ in the ‘free text’ box, which received 47 results in the UK jurisdiction.

⁷⁰ See chapter 2 at 2.4.4.

⁷¹ See chapter 5 at 5.3.2.

⁷² Gutmann (ch 8, n 2) 9-10.

Constitution of the Republic of South Africa, in s 15(1) and s 18 respectively. Of particular interest, however, the two freedoms are brought together in a further reference to them in s 31(1):

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.⁷³

Aptly described as the, ‘constitutional cousin’ of religious freedom,⁷⁴ freedom of association is an important source of religious autonomy and should therefore assume particular importance in the interpretation of the employment exceptions which afford religious employers greater scope to discriminate in their employment policies.⁷⁵ Before arguing for a particular interpretation of freedom of association for the employment exceptions, the difficulties with applying it in this context will be explored and addressed. Freedom of association, at least as interpreted by the ECtHR, is concerned with membership organisations, and particularly with the relationship between the organisation and its members or prospective members. Can a trade union expel a member whose political views it disagrees with?⁷⁶ Can a religious community be forced to accept a leader appointed by the state?⁷⁷ Can a shareholder be forced to accept

⁷³ Constitution of the Republic of South Africa 1996, s 31(1).

⁷⁴ Mark E Chopko and Michael F Moses referring to the United States constitution in Chopko and Moses (ch 8, n 68) 406.

⁷⁵ The significance of the freedom of association principle to religious autonomy claims in the employment context has been recognised in a series of academic works originating from the jurisdiction of South Africa. See, particularly, Lenta, 'Taking Diversity Seriously' (ch 8, n 18); Stuart Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 SAJHR 280; David Bilchitz, 'Should Religious Associations be Allowed to Discriminate?' (2011) 27 SAJHR 219; David Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 SAJHR 296; Patrick Lenta, 'The Right of Religious Associations to Discriminate' (2012) 28 SAJHR 231; Shaun de Freitas, 'Freedom of Association as a Foundational Right: Religious Associations and Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park' (2012) 28 SAJHR 258; Shaun de Freitas, 'Religious Associational Rights and Sexual Conduct in South Africa: Towards the Furtherance of the Accommodation of a Diversity of Beliefs' (2013) BYU LRev 421; Shaun Alberto de Freitas, 'Doctrinal Sanction and the Protection of the Rights of Religious Associations: Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa (726/13) [2014] ZASCA 151 (June 7, 2016)' (2016) 19 PELJ available at <<https://ssrn.com/abstract=2862609>> accessed 28 December 2017.

⁷⁶ ASLEF (ch 8, n 31).

⁷⁷ Hasan (ch 8, n 67).

a change in company structure?⁷⁸ Those who object to the application of freedom of association to the employment exceptions may protest that an employer's relationships with its employees or prospective employees are fundamentally different to relations between an organisation and its members and that the more private and voluntary nature of 'membership' justifies a more compelling claim to the protections which freedom of association offer. There may also be others who assert that article 11 adds nothing of value to article 9, which already protects the right to manifest religion or belief *in community with others*. Each of these objections is addressed in turn below.

8.3.2 'Membership' and 'employment'

There are similarities between membership of and employment in a particular organisation. Both membership and employment give individuals purpose to their days and provide a forum for them to forge meaningful relationships. They both contribute to an individual's feelings of self-worth, and offer opportunities and experiences which further the development of personal identity.

Membership and employment, however, are not synonymous. An individual chooses to become a member of an association, whether a congregation, a book group, a political party, or a civil rights advocacy group, primarily because of the association's vision, values, purpose, or pursuits. There is usually no compulsion to become a member of any particular association, thus the decision to associate is mostly driven by the individual's character and interests, and exercised free of external pressures.⁷⁹ An individual's choice of employment, by comparison, is more variable. Whilst the vision, values, purpose or pursuits of the employing organisation might be the primary attraction for some employees, the geographical location, job requirements, earning potential and job availability will usually be a weighty influence on the individual's choice.

Employment is, for most people, a necessary undertaking. It provides a wage or salary which enables individuals to provide for themselves and their families.⁸⁰

⁷⁸ See discussion in Mataga (ch 8, n 23) 6 of *Cesnieks v Latvia*, no 56400/00, 12 December 2002.

⁷⁹ It is acknowledged that individuals who consider they are born in to a religion may consider themselves to be compelled to join a particular religious community and the limited rights of exit of some religious communities (e.g. shunning in the Amish community) affect the 'voluntary' nature of these associations.

⁸⁰ For comment on the benefits of employment see Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 56-59.

The decision to engage in a particular employment, therefore, is not as voluntary an undertaking as the resolution to become a member of a particular association. Relations between employer and employee commonly involve an imbalance of power: control by the ‘master’ of the ‘servant’ is still today a primary indicator of employment status. By contrast, relations between an association and its members are usually more equal. Whilst membership of an association denotes an interest in pursuing a common goal, the interests of employer and employee may more often diverge and conflict.

For all these reasons, it could be argued that membership implies a more ‘private’ relationship than employment, and that it is the private nature of the relationships in membership organisations which provides the justification for limiting state interference into their internal affairs. It is not disputed that the employment relationship is of a more ‘public’ nature. There are convincing reasons why the state should have a greater interest in the employment decisions of an organisation than in its membership criteria. The undisputed opportunities - economic and social - which employment affords individuals, and the imbalance of power in employment relationships, give the state a moral justification for greater regulation of employment decisions than membership policies, to ensure individuals are not unfairly excluded, at least not on account of a protected characteristic.⁸¹

Yet, I would argue that there is a conception of freedom of association originating in principles of membership protection, which justifies its application to the employment decisions of religious employers. I argued above that the primary value in freedom of association is its contribution to the identities and personalities of those who decide to associate: the members.⁸² So understood, freedom of association is protected because it serves the interests of an association’s members. This interpretation of freedom of association accords with the EA’s approach to the exclusionary policies of associations: discrimination against prospective members, as well as guests and associates, is

⁸¹ David Bilchitz refers to the history of his jurisdiction (South Africa), the economic and societal import of employment as well as its effect on individuals, and the imbalance of power between employer and employee to explain why in South African law, the employment relationship is not treated as solely a private matter (in Bilchitz, ‘Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere’ (ch 8, n 75) 312).

⁸² See above at 8.2.1.

permitted because it serves the legitimate interests of the association's members.⁸³ The interests of the membership are legitimate because they share a protected characteristic. It is arguable that religious employers can also be regarded as serving the interests of 'members' of a group defined by their religion. I argue here, that where an employer's discriminatory employment policies serve the legitimate interests of these members, they could, like discriminatory membership policies, be justified on associative freedom grounds.

Applying this hypothesis to employers with a religious or faith-based ethos, it is possible in most instances to identify 'members' who share the same religion or faith, and whose legitimate interests the employer serves. The identity of these 'members' will vary, sometimes quite markedly, depending on the type of employer. Sometimes the employer will itself be the association with members. Other times, the employer will serve the interests of members of a separate association. 'Member' is defined simply as, 'a person ... that is part of a group'.⁸⁴ The breadth of this definition lends itself to varying interpretations depending on the context in which it is used. The employment decisions of an organised religion - a church, synagogue, mosque or temple, for example - may serve the interests of its congregation, as members. It is the congregation's interests which are served, for example, by insisting that the individual employed to lead the congregation shares their religion or belief. In Catholic schools, meanwhile, the 'members' whose interests are served by employment decisions may be the Catholic parents in the local catholic parish to which the school is attached, or the church and parent representatives on the school's governing board. Other religious organisations, such as religious or faith-based charities, are often set up by churches, or by individuals who see faith in action as their 'calling'. In these cases, the 'members' who are served by employment decisions of the organisation might be the church community, or the trustees, or top-layer of management. Sometimes the service users in whose interests the employer acts will be the relevant members.

⁸³ EA, sch 16.

⁸⁴ Cambridge English dictionary online <<https://dictionary.cambridge.org/>> accessed 24 January 2017.

In some cases, the employees themselves might be the ‘members’ whose interests the organisation serves. It has been argued, for instance, by South African academic, Shaun de Freitas, that Alvin Esau’s ‘organic’ theory of employment regards employees of religious organisations as being in ‘membership’ with them. De Freitas comments that Esau’s ‘organic’ theory of employment:

emphasises ‘membership’ of a religious institution as an important factor irrespective of the task expected of such a person - the person (employee or independent contractor) is invited into a relationship and into membership with the group, and on obtaining membership, the person becomes inextricably related to the religious ethos of the relevant group which has a core relational understanding encompassing it.⁸⁵

It is important, however, to exercise caution with any interpretation that assumes the employees in a religious organisation can also be the members which the organisation serves. This may be an accurate description of employment in some religious organisations, but it certainly will not be in others, or even in most. Any religious organisation could engage a religiously homogenous staff and then argue that the employees are akin to members whose interests are served by continuing their restrictive recruitment practices. If this were too readily accepted, the scope for discrimination could become unacceptably wide.

Still, there may be some force in the argument that an employer’s employees are the relevant ‘members’ whose interests the employer serves if it can be demonstrated that the primary purpose of the organisation is to provide a forum for religious believers to put their faith into action. The Ontario Superior Court of Justice held in the case of *Ontario Human Rights Commission v Christian Horizons* that a religious organisation can be primarily engaged in serving the interests of, among others, its employees.⁸⁶ The religious organisation in that

⁸⁵ de Freitas, ‘Freedom of Association as a Foundational Right’ (ch 8, n 75) 267-68. The European Commission’s finding in *Young, James and Webster* (ch 8, n 23) at para 167 that the ‘relationship between workers employed by the same employer cannot be understood as an association in the sense of Art. 11 because it depends only on the contractual relationship between employee and employer’ arguably does not take into account this interpretation of employment in a religious organisation.

⁸⁶ *Ontario Human Rights Commission v Christian Horizons* 2010 ONSC 2015 (CanLII), (2010) 102 OR (3d) 267 (*Heintz* cited to ONSC).

case, Christian Horizons, carried out charitable work for people of any and no religion who had developmental disabilities. It sought to rely on the special employment exception in Ontario's Human Rights Code, to require its staff to adhere to a Lifestyle and Morality Statement which was religiously based. To rely on this exception, Christian Horizons had to convince the court that it was primarily engaged in serving the needs of individuals defined by their creed. Accepting that it was primarily engaged in serving, among others, its employees, the Court found that:

The charitable work it undertook for persons with developmental disabilities was undertaken as a religious activity through which those involved could live out their Christian faith and carry out their Christian ministry to serve people with developmental disabilities.⁸⁷

The court acknowledged that Christian Horizons was, 'structured as a community of co-religionists' and that it saw itself as, 'a vehicle through which individuals who identify as Evangelical Christians can live out their faith'. This included the staff, who were found to, 'live out their Christian calling' in their work.⁸⁸

Importantly, providing a forum in which Evangelical Christians could exercise their faith through employment endeavours was a primary reason for Christian Horizons' existence. Whilst the Christian Horizons model is not unique, neither is it the norm. Most organisations with a religious or faith-based ethos do not serve the interests of their employees as a primary purpose, notwithstanding some employees might consider employment in the organisation as a religious 'calling'. These organisations must recognise other persons as members of an identifiable group defined by religion whose interests their work serves if they want to rely on associative freedom grounds to justify employment discrimination. As the 'members' could, as discussed above, comprise the local religious community, a specific congregation of worshippers, a group of trustees or senior management, or even the employer's service users, this should not be too onerous a task.

⁸⁷ ibid [77].

⁸⁸ ibid [75].

The theory that exclusionary employment policies can be justified on a membership-protecting interpretation of freedom of association is supported by an analysis of freedom of association which regards the privileges it affords religious associations as derivative of their members' rights.⁸⁹ This, I would argue, is to be preferred to regarding religious institutions as having rights which are independent of their members. Religious institutionalist claims, gaining prominence in the USA at the moment, are argued on the basis that churches have sovereignty that is, 'basic and irreducible'.⁹⁰ Although various arguments have been led in defence of religious institutionalist claims, including that their sovereignty is derived from God, one argument relies particularly on the associative role of churches as, 'counter-weights to the overweening state'.⁹¹

Concerns, however, have rightly been voiced that religious institutionalist claims entail church autonomy rights which are, 'potentially unlimited'.⁹² Though it is accepted that churches, like many other types of association, provide an important check on state power, I have argued that the primary value of association is, rather, its contribution to the formation of individual identity.⁹³ Rooting the justification for freedom of association in its worth to individuals, buttresses the argument that legal privileges afforded to associations are derivative of their members' rights. The idea that religious groups have a derivative right to associative freedom is not without difficulties. It will not always be easy to assess the sincerity of a group's derivative claim: is the group's claim, for example, based on, 'conscientious religious commitments' or 'bad faith' motives?⁹⁴ Nor is it clear how a large, complex, hierarchical organisation (such as the Roman Catholic Church) can legitimately represent the interests of its members when it makes unchecked decisions independently of

⁸⁹ For an interesting article on the concepts of 'collectivism' and 'individualism' in the context of freedom of association, see Alan Bogg, "Individualism' and 'Collectivism' in Collective Labour Law' (2017) 46 ILJ 72.

⁹⁰ Richard Schragger and Micah Schwartzman, 'Against Religious Institutionalism' (2013) 99 VaLRev 917, 920.

⁹¹ ibid 924.

⁹² ibid 932 and 945-49. Schragger and Schwartzmann consider and reject religious institutionalist claims and consider that religious autonomy rights derive from rights of individual conscience, and not the religion clauses.

⁹³ See 8.2.1 above.

⁹⁴ Ira C Lupu, 'Free Exercise Exemption and Religious Institutions: the Case of Employment Discrimination' (1987) 67 BULRev 391, 427.

them.⁹⁵ Indeed, the idea of ‘membership’ in the first place may not fit well with the way in which certain groups are set up, organised and run.⁹⁶ Further difficulties can also arise when the membership, or sections of it, does not agree on particular tenets of the religion: in whose interests does the group act?

Still, the courts are well-equipped and experienced in determining the sincerity of a person’s motives.⁹⁷ Whilst testing the sincerity of an individual might be a more straightforward task, the sincerity of a group’s concerns could be evidenced by reference to practised doctrine and by a consideration of whether the group’s behaviour is consistent with the asserted belief.⁹⁸ Certainly, the larger and more diverse the religious group in question, the more imperfect is this analysis. Although these are undoubtedly challenges for the derivative rights account of freedom of association, rights pertaining to this freedom must be framed and applied to reflect the individual concerns of group members if such rights are to find justification in the protection of individual interests.

There is a further justification for treating freedom of association as affording groups a derivative right. If the legal privileges afforded to groups are enjoyed independently of their members, it is very difficult to ever defend their prioritisation in any clash with rights held by individuals.⁹⁹ The harm inflicted on an individual subjected to discrimination because of a protected characteristic will, for example, surely always outweigh any harm suffered by a group unless

⁹⁵ Alan Brownstein, 'Protecting the Religious Liberty of Religious Institutions' (2013) 21 JContempLegalIssues 201 211.

⁹⁶ ibid 211.

⁹⁷ Peter Edge comments that, ‘Courts appear to be comparatively comfortable with determining the intensely subjective in the criminal arena, so that a similar investigation in relation to key areas of religion law developing in the 21st century may be less challenging than at first appears.’ Peter Edge, ‘Determining Religion in English courts’ (2012) 1 OJLR 402, 420-21.

⁹⁸ Andrew Hamblen argues that the consistency of an individual’s behaviour with his asserted belief is relevant to determining sincerity, in Andrew Hamblen, ‘A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace’ (2008) 3 Religion and Human Rights 111.

⁹⁹ Referring to the claim that there is a group aspect to religious interests which is independent of the individual aspect, Lucy Vickers remarks, ‘the difficulty with this collective view of religion is that if one recognises collective interests as having a separate independent existence, they could continue to have weight even if no individuals actually hold the beliefs being collectively represented’ in Vickers, *Religious Freedom* (ch 8, n 80) 51.

the group is understood as the instrument of its individual members' interests.¹⁰⁰ Understanding freedom of association as affording groups only those rights which are derived from the need to protect their members' interests provides a context in which principled limits on these rights can be determined and enforced.

8.3.3 Article 9 or article 11?

A second objection to be addressed to the case for applying freedom of association to the employment exceptions is whether article 11 enhances an analysis of the employment exceptions carried out under article 9. After all, article 9 already protects the freedom to manifest religion or belief, 'either alone or in community with others', and the absence of any detailed discussion by the ECtHR of article 11 in several cases involving the collective exercise of religion is perhaps indicative of a view that an article 9 analysis is sufficient.

There is no dispute that article 9 identifies the collective aspect of religion or belief in worship, practice, teaching or observance as a human right. Indeed, the article's explicit reference to the collective aspect of religion or belief is indicative of its significance to the individual freedom, particularly when it is observed that thought, conscience and expression are identified in the ECHR, without any mention of the right to exercise these freedoms collectively. Importantly, however, and as aforementioned, the ECtHR in *Hasan and Chaush* has emphasised that article 9 *must* be interpreted in the light of article 11 of the ECHR, at least in questions involving the organisation of the religious community.¹⁰¹ At issue in *Hasan and Chaush* was the appointment of the Muslim community's leadership in Bulgaria but ultimately article 11 was relevant in *Hasan and Chaush* because it is the article which, 'safeguards associative life against unjustified State interference'.¹⁰² Put another way, 'It protects the

¹⁰⁰ For a discussion on the harm experienced by individuals subjected to unlawful discrimination see Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 The University of Notre Dame Australia Law Review 107.

¹⁰¹ *Hasan* (ch 8, n 67) [62] and [65].

¹⁰² *ibid* [62]

associative structures in society which help to give life and reality' to the personal freedoms of religion and expression.¹⁰³

Just as freedom of religion under article 9 is, alone, insufficient to explain and interpret the employment exceptions, so too is freedom of association under article 11 when it is considered in isolation of its freedom of religion counterpart. After all, the employment exceptions only apply to religion or belief organisations - and rightly so. If discrimination in employment were to be permitted on freedom of association grounds in the multitude of settings in which people may associate, a wholly unacceptable level of discrimination in the workplace would ensue.¹⁰⁴ A line must be drawn between those organisations permitted on freedom of association grounds to discriminate in employment (within limits) and those which may not. The legislature drew the line at religion or belief organisations and for good reason. Providing elevated protection to religion or belief organisations over others simply recognises the unique and important contribution religion or belief organisations make to the individual exercise of religious freedom, which itself is essential for human dignity and autonomy.

If it is accepted, then, that a proper legal analysis of any claim under the employment exceptions must have regard for article 9, interpreted in light of article 11, what is the added value in this? Acknowledging that the right to discriminate pursuant to the exceptions derives from two freedoms protected under the ECHR may serve to elevate its importance in the public eye. The significance of article 11, however, is more than symbolic. If it is article 11 which protects, 'associative life' then it is article 11, and not article 9, which is responsible for setting the contours in which individuals may enjoy the collective dimension of their freedom to exercise religion or belief. The jurisprudence of article 11 should thus assume particular significance in determining the extent of the autonomy which religious organisations enjoy, recognising too that religious associations may have a greater claim to autonomy in certain situations because

¹⁰³ Daly (ch 8, n 8) 97.

¹⁰⁴ Martha Minow comments in relation to the option of extending exemptions from civil rights norms to groups other than religious groups, that 'each additional exemption curtails the application of the overarching norm-and civil rights laws as a result can be too easily and thoroughly undermined'. Minow (ch 8, n 11) 27-28.

they derive rights not only from associational freedom, but also from religious freedom.¹⁰⁵

Perhaps most importantly of all, applying freedom of association to the collective aspect of freedom of religion provides an important context for the protection of religious association under various guises, including the employment exceptions. This context, centred around membership protection, is critical in both justifying, and setting the limits of, the employment exceptions.¹⁰⁶ I have argued that it is possible on a freedom of association analysis to regard employers as serving the interests of a group of members defined by their religion, and to understand the employment exceptions as a vehicle for safeguarding these interests. This, together with an understanding of the value in association, is crucial to the argument at 8.4 below for an identity-protecting interpretation of the employment exceptions, underpinned by freedom of association.

8.4 An identity-protecting interpretation of the employment exceptions

8.4.1 Benefit to members of collective identity

I argued above at 8.2 that the value of freedom of association may be understood to lie with the fact that associations serve members' interests. This interpretation stems from the belief that, 'associations do not possess value that is independent of individuals',¹⁰⁷ and is consistent with the derivative account of group privileges argued for. How does an association best serve its membership? I have argued that the value in association for individuals is its contribution to the formation of individual identity.¹⁰⁸ I argue here that the collective identity of the association is critical to realising this worth. Individuals are nurtured and

¹⁰⁵ Patrick Lenta suggests that the combination of religious freedom and freedom of association may lend religious associations a greater claim to discriminate in Lenta, 'Taking Diversity Seriously' (ch 8, n 18) 834.

¹⁰⁶ *Brossard (Town) v Quebec (Commission des droits de la personne)* [1988] 2 SCR 279, [133] (CanLII), (1988) 53 DLR (4th) 609 (cited to SCR) considered that recognising freedom of association as the underlying policy for the employment exemption in the Quebec Charter of Human Rights and Freedoms indirectly provided a parameter for its application.

¹⁰⁷ Greenawalt (ch 8, n 4) 110.

¹⁰⁸ See above at 8.2.1.

mature through their autonomous choice of relationships and their collaboration to achieve shared goals. On one view, the identity of an association is an extension, or representative, of its members' identities. Acknowledging the importance of religious practice to human dignity, de Freitas observes:

This experience of a specific identity via religious practices is also attained within a collection of individuals who have the same religious beliefs and interest and respective practices, and who are but an extension of the private domain.¹⁰⁹

Whilst there can, and in larger associations may likely be, divergence among the membership in relation to the content of, and/or weight to be given to, the various purposes or objectives of an association, the identity of the association must be protected if members are to enjoy the full benefit to self that freedom of association offers. Safeguarding the religious employer's ethos, I argue, is critical to protecting the collective identity of the members which it serves. It follows that discrimination in employment can be defended on associative freedom grounds when it is necessary to maintain the employer's ethos, provided it does not disproportionately impact on the rights and freedoms of others.¹¹⁰

What is an association's identity? According to the Cambridge English dictionary, 'identity' describes 'who a person is, or the qualities of a person or group that make them different from others'.¹¹¹ Exactly what an association's identity encompasses will differ from one association to another. It might include the association's vision or values, its purpose or objectives, or its approach to internal or external relationships. More likely, it will include a combination of these. The weaker a group identity is, the harder it will be for the employer to

¹⁰⁹ de Freitas, 'Freedom of Association as a Foundational Right' (ch 8, n 75) 262. DeFreitas argues at 267 that it follows from the 'private' nature of the religious association that its membership decisions should attract more 'respectability'.

¹¹⁰ Freedom of association, after all, is not an absolute right. Ira Lupu refers to the relationship between employees and organisational purpose, aims and interests in support of his argument on freedom of association grounds that a religious association should be permitted to exclude 'non-members' from employment positions of 'associational significance'. Lupu, however, considers that religious associations should (acting in good faith and consistently with membership policies) be able to reserve any employment position for members, regardless of the equality interests affected – an approach which is not advocated in this thesis. Lupu (ch 8, n 94) 431-42.

¹¹¹ Cambridge English dictionary online <<https://dictionary.cambridge.org/>> accessed 28 December 2017.

demonstrate that it necessitates discrimination. An example might be a dental surgery set up by three co-religionists but operating as a ‘secular’ dental surgery in every other respect: the dental surgery would not be able to demonstrate it had a religious ethos which required its employees to share the founders’ faith. Even a strong group identity, coupled with a strong argument that it calls for discrimination in a particular position, may be insufficient if in the particular case the discrimination entails serious infringement of the rights and interests of others.

8.4.2 Benefit of an identity-protecting interpretation

Deriving, as it does, from a principled analysis of religious associational freedom, the identity-protecting model is a sound basis for interpreting the employment exceptions. De Freitas also argues on the basis of freedom of association as a foundational right for, ‘an approach to appointments by religious associations, based on “religious ethos”’,¹¹² believing that ‘a religious association represents a unique and important ethos (especially and foremost to its members)’.¹¹³ He is particularly concerned that discrimination is permitted in those roles which do not, to an outside observer, appear to involve religious functions if the discrimination is required by the religious ethos of the organisation. According to de Freitas, the religious ethos might require discrimination in circumstances where the organisation considers that the particular job has a ‘religious foundation’ because, for example, it involves prayer or because the organisation regards the post holder as being in ‘community’ with other believers in the workplace.¹¹⁴ I would argue, however, that it is not only these ‘relational’ aspects of employment which might necessitate employees to hold the religion or faith of the organisation. As the study carried out and reported in chapter 7 found, the maintenance of ethos relies heavily on its employees: whilst it may be enough for employees to simply have an understanding of ethos, there was a

¹¹² de Freitas, ‘Freedom of Association as a Foundational Right’ (ch 8, n 75) 271.

¹¹³ ibid 259.

¹¹⁴ ibid 269-71. Iain Benson also argues for a ‘permeated ethos’ approach to religious employer exemptions, asserting that ‘it is the identity of the religious employees and their group beliefs in co-operation’ which justifies protecting religious group autonomy, in Iain T Benson, ‘An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion’ (DPhil thesis, University of the Witwatersrand 2013) 149 available at <<http://wiredspace.wits.ac.za/jspui/handle/10539/14004?mode=full>> accessed 28 December 2017.

commonly held view shared by a number of participants that those in leadership roles needed to actually share the religion or faith to effectively uphold the organisational ethos. Insisting that religion is an occupational requirement for those employees, who are not in leadership roles but who are instead responsible for spreading the word of their religion, may also be justified by the need to preserve the identity of the organisation, recognising that these individuals represent and personify the organisation's ethos in the outside world.

Other suggested approaches to exclusionary policies grounded in principles of associative freedom have focused on one of either the purpose of the entity, or the relationship between the job and the doctrinal core of the employer's religion. The real benefit of the identity-protecting model, however, is its capability to admit a multifaceted and individualised assessment of whether discrimination pursuant to the employment exceptions should be permitted in any case. In the identity-protecting model, the purpose and nature of the employer, and the proximity of the job to the doctrinal core of the religion are each relevant in the overall assessment of whether a particular policy is defensible, but, importantly, *neither by itself is decisive*.

In the USA, the associative purpose of the group, seeking to rely on the constitutional protection afforded associational freedom, is particularly relevant. Freedom of association is not itself mentioned in the United States constitution but is indirectly protected in the first amendment¹¹⁵ and because of the fourteenth amendment's protection of privacy.¹¹⁶ As the contours of the right to freedom of association have been drawn with reference to freedom of expression and privacy concerns, expressive and intimate purposes have largely been recognised by the United States judiciary as the only ones to benefit from associative freedom.¹¹⁷

Social philosopher, Stuart White, is supportive of a framework that provides heightened protection for expressive and intimate associative purposes. He considers that the advancement of an association's expressive or intimate

¹¹⁵ Roberts (ch 8, n 19) 622; see Gutmann (ch 8, n 2) 9-10.

¹¹⁶ Gutmann (ch 8, n 2) 9-10.

¹¹⁷ Though see White (ch 8, n 34) 390-91 on recent US jurisprudence which has respected a right of 'private association' different to 'intimate association'.

purpose is especially important and will therefore weigh very heavily in the balance with competing interests.¹¹⁸ Categorical exclusion rules for the advancement of other purposes, by contrast, will not normally be morally justified if they cause damage to ‘opportunity interests’. These include an interest in not being excluded from associations which provide access to income and wealth, or civic and community participation, and an interest in not being subjected to rules which those left out, acting reasonably, consider to be stigmatizing.¹¹⁹

The associative purpose of the association is of relevance to the identity-protecting model for the employment exceptions: job roles which are directly connected to expressive concerns, such as leaders of religious congregations, will be particularly important to the association’s identity. Rigidly introducing concepts of expressive and intimate association to the employment law jurisprudence of the UK, however, should be avoided. Not only would this add a significant additional layer of complexity,¹²⁰ it would be unwarranted by the UK’s commitment to article 11 of the ECHR. Unlike the United States Supreme Court’s interpretation of freedom of association under the United States Constitution, the ECtHR has never interpreted the article 11 right to freedom of association as only relevant to the attainment of expressive or intimate purposes. The advantage of the identity-protecting model is that it accommodates a consideration of the association’s purpose, without being constrained by it.

A different approach advocated by proponents who find the justification for exceptions to employment equality norms in freedom of association and freedom

¹¹⁸ White identifies two particular associative purposes, which should be afforded heightened protection because of their contribution to, ‘the development and expression of ethical personality’: these are, ‘the exploration and/or propagation of distinctive religious and/or philosophical beliefs’ and, ‘intimate association’. Exclusion rules which protect these purposes should have, ‘an especially strong presumption of legitimacy’ *ibid* 385.

¹¹⁹ *ibid* 382-86.

¹²⁰ There are undoubtedly complexities associated with linking associative freedom rights to expressive and intimate purposes, many of which White acknowledges and on which he gives his views. When is an association considered to have an expressive purpose, or an intimate purpose? What importance must the expressive purpose have in the context of the association’s overall ends and objectives? Are all beliefs propagated through an association’s expressive purpose to be considered as having equal value? Who determines the content of the expressive purpose? See *ibid* 386-91.

of religion, is to assess the relationship between the nature of the job and the doctrinal core of the religion. Patrick Lenta argues that the religious basis for a claim by a religious employer to discriminate in employment must be closely examined with reference to what he describes as a, ‘spectrum of greater to lesser proximity to the doctrinal core of the religion’.¹²¹ According to Lenta, spiritual and religious leaders sit at one end of the spectrum, and employees or workers such as janitors and secretaries sit at the other. Discrimination on grounds of protected characteristics should be permitted in respect of the former, but not the latter, because their work is not, unlike the work of spiritual and religious leaders, closely connected to the doctrinal core of the religion.¹²² This approach is similar to a theory expounded by Bruce Bagni, which calls for an assessment of the ‘secularity’ of the particular activity or relationship.¹²³

The identity-protecting model is to be preferred to the spectrum model because it provides a more multifaceted and individualised approach to determining when the employment exceptions should permit discrimination. Firstly, there is a difficulty with determining or predicting where on the spectrum any particular job sits¹²⁴ because it oversimplifies the process required to measure the religious basis for any claim to discriminate. The assertion, for example, that the work of

¹²¹ Lenta, 'Taking Diversity Seriously' (ch 8, n 18) 859.

¹²² *ibid* 859.

¹²³ Bruce N Bagni, 'Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organisations' (1979) 79 ColumLRev 1514, 1539-49. Bagni devises a, ‘concentric circle’ model to guide decisions on when discrimination by religious organisations should be permitted. Under this model, three concentric circles orbit an epicentre. At the epicentre, lies church clergy relations, worship and ritual, membership policies, religious education (for example Sunday school) and potentially religious schools where religion pervades non-secular subjects. In the first circle, there are, what Bagni describes as, ‘church sponsored community activities’ such as adoption agencies and hospitals, as well as religious schools where the teaching of secular subjects is not infused by religion, and relations with support employees with certain religious or quasi-religious functions. The second circle includes ‘secular business activities’ and relations with clerical and janitorial employees who have no spiritual functions. The third circle refers to, ‘the totally secular world’. (Bagni, 1539) It is Bagni’s theory that the State should, in most circumstances, refrain from regulating the epicentre in order to safeguard the US constitutional right to free exercise of religion. However, as Bagni explains, State regulation becomes increasingly justified the more the activity or relationship in question, ‘moves closer to the purely secular world’ (Bagni, 1540).

¹²⁴ Lenta recognises this in respect of some roles but not others. He does not consider any circumstance in which discrimination may be permitted in respect of typists of janitors but confesses that it will be difficult to determine where on the spectrum other jobs will sit. He comments, ‘There are, however, positions intermediate between these two poles: a teacher whose duties extend only to non-religious subject occupies one such a position. It may be difficult, admittedly, to judge when such intermediate positions are sufficiently close to matters of faith to mandate a constitutional exemption, but such a determination is necessary in each case.’ Lenta, 'Taking Diversity Seriously' (ch 8, n 18) 859.

typists and janitors is always similar in nature and that it should be at the end of the spectrum which is far away from the doctrinal core of the religion has been criticised by de Freitas for not being, ‘an approach that is sufficiently layered or nuanced’¹²⁵ and for failing to take account of, ‘other possible interpretations of associational rights’¹²⁶ such as Alvin Esau’s organic interpretation of employment in a religious entity.¹²⁷ An organic view of the role of typist in a religious organisation, which takes into account the value of relationships among co-religionists, for example, might justify a placement further along the spectrum and closer to the ‘doctrinal core’.¹²⁸ In the identity-protecting model, the relationship between the job and the doctrinal core of the religion will be an important factor. After all, it would appear that the spectrum approach was derived largely from a desire to protect the identity or ethos of the religious employer.¹²⁹ Naturally, job roles with close proximity to the doctrinal core, such as spiritual leaders, will be particularly important to the associative identity. It will be a rare case where a job position which seemingly has no religious functions must be filled by a co-religionist for the preservation of the associative identity: a commitment to respect the ethos of the employer would normally suffice. In the identity-protecting model the relationship between the job and the doctrinal core of the religion, though important, is not determinative. To this end, the model provides added value in the harder cases: a more flexible approach which assesses the job role in the broader context of the employer’s ethos is required in these cases to access the heart of the associative claim.

¹²⁵ de Freitas, ‘Freedom of Association as a Foundational Right’ (ch 8, n 75) 269.

¹²⁶ *ibid* 269.

¹²⁷ *ibid* 268-69.

¹²⁸ *ibid* 268-69, where De Freitas remarks, ‘Does a typist’s position in a church, whose members view the workplace itself as constituting a community of believers where relationships are as important if not more so, than narrowly defined role-tasks (where matters of faith rather than roles are to a degree the point of the emphasis), not qualify as a ‘religiously-based job’ or a ‘job in proximity to the doctrinal core’ or ‘a job that bears a significant relationship to the settled religious convictions of the organisations?’

¹²⁹ Patrick Lenta argues, ‘The right place to draw the line as far as permissible discrimination is concerned is, I believe, with ‘ordinary’, non-teaching positions such as janitor or secretary, which are further from the core of religious doctrine and practice than positions of religious leadership. Individuals doing these jobs do not typically act as mentors, moral advisors, or role models to students. Since prohibiting discrimination in respect of these positions does not threaten the religious ethos and identity of religious associations nearly as much as does prohibiting discrimination in the case of religious leaders, role models and mentors, such discrimination should be illegal.’ Lenta, ‘The Right of Religious Associations to Discriminate’ (ch 8, n 75) 238.

A further difficulty with the spectrum approach is the implication that the level of harm suffered by an individual who is discriminated against is always more likely to be outweighed, the closer the job is to the doctrinal core of the religion.¹³⁰ Whilst this may often be the case, it may not always be so. The harm an individual suffers when discriminated against is personal and may depend, in part, on the opportunities for work elsewhere.¹³¹ It is entirely conceivable that in a particular case it might even outweigh the benefits to an employer of discriminating in a role which is close to the doctrinal core of the religion. The identity-protecting model offers a more individualised approach than the spectrum permits, weighing the benefit to the associative identity in each case with the harm caused to the individual subjected to discrimination.

A third factor which is relevant to the application of the identity-protecting model is the nature of the employer. It is often asserted that rights to freedom of association are less compelling in the public arena than in the private. The greater the ties held to the public by an organisation, whether through its funding sources, its service users or otherwise, the less latitude it should be afforded in the management of its internal affairs, including its employment decisions. Indeed, it is the quasi-public / private nature of political parties and some trade unions which is sometimes offered to justify increased state regulation of these types of association.¹³² In the ECtHR case of *ASLEF*, the court opined that whilst article 11(1) of the ECHR entitled trade unions to decide their membership for themselves, in line with union rules, this would not necessarily be so if the trade union received public monies or carried out public duties:

This basic premise holds good where the association or trade union is a private and independent body, and is not, for example, through receipt of public funds or through the fulfilment of public duties imposed upon it, acting in a wider context, such as assisting the State

¹³⁰ Patrick Lenta comments that, 'to the limited extent to which refusal to allow discrimination in respect of positions distant from the doctrinal core of the association would disturb the ethos and identity of the group, this is a burden it is legitimate for religious associations to bear' in *ibid* Lenta, 'The Right of Religious Associations to Discriminate' (ch 8, n 75) 238, fn 28.

¹³¹ Lucy Vickers refers to the other employment opportunities of the job applicant as one factor which can be considered in assessing the proportionality of a requirement that the post holder is of a particular faith. Lucy Vickers, 'Religion and Belief Discrimination and the Employment of Teachers in Faith Schools' (2007) 4 Religion and Human Rights 137, 156.

¹³² See discussion in Daly (ch 8, n 8) 89-90.

in securing the enjoyment of rights and freedoms, where other considerations may well come into play.¹³³

There is, of course a difficulty with labelling any organisation as ‘private’ or ‘public’. Since almost all associations, ‘are facilitated and enabled by some form of background State regulation or intervention’, few (if any) can be classified as wholly, ‘private’.¹³⁴ Still, there is a commendable reason for providing a more limited freedom of association to those organisations which operate more in the public arena than others. Though the identity of ‘public’ organisations deserves as much respect as the identity of those operating in a more private sphere, the impact of discrimination in public settings is more likely to infringe the rights and interests of others. To this end, the nature of the organisation is most relevant in determining whether the organisation’s claim for identity protection on freedom of association grounds is outweighed by competing interests. Given the difficulties with precise categorisation, considering the nature of the organisation at this stage of the analysis, is preferable to any attempt to exclude ‘public’ organisations from the scope of the protections which the employment exceptions offer.

The identity-protecting model offers a principled understanding of the employment exceptions and a sound basis for interpreting their limits. Involving a multifaceted and individualised approach, the model requires the judiciary and other decision-makers to take a, ‘cognitively internal’ viewpoint of the needs and interests of religious employers,¹³⁵ and to weigh this against the personal impact of discriminatory behaviour. It asks the judiciary to engage with the employer’s claim on a level that takes full cognisance that its roots lie in religious and associational freedoms, and its purpose is to protect identity. Importantly, it takes the otherwise abstract notion of an employer’s ‘religious

¹³³ ASLEF (ch 8, n 31) [40].

¹³⁴ Daly (ch 8, n 8) 90.

¹³⁵ The concept of a ‘cognitively internal’ perspective is explained in N MacCormack, *Legal Reasoning and Legal Theory* (Oxford, 1978), 292 and is referred to in Christopher McCrudden, ‘Religion, Human Rights, Equality and the Public Sphere’ (2011) 13 EccLJ 26, 31-32 where McCrudden argues that judges should take a ‘cognitively internal’ point of view when determining cases which concern religious issues: a perspective he argues has been lacking in certain recent decisions. See also argument by Iain Benson for an approach to religious employer exemptions which he describes as ‘seeing through the associational lens’ in Benson (ch 8, n 114) 157.

freedom' and gives the claim substance by identifying the membership defined by their religion whose interests the employer serves.

8.5 Conclusion

On the basis that religious autonomy derives from both religious and associational liberties, a case has been made in this chapter for applying freedom of association to the employment exceptions for religious employers. A freedom of association analysis of the employment exceptions provides an important context to the claims by religious employers to discriminate in their employment practices. It recognises that the autonomy which the employment exceptions affords religious employers stems from a need to protect the associational interests of the 'members' served by the employer. I argued that this is best achieved through retention by the employer of its core ethos. An identity-protecting interpretation of the employment exceptions, which adopts a multifaceted approach to assessing the employer's interest in protecting its ethos and weighs it against the discriminatory impact of the employer's actions, has therefore been advanced and developed in this chapter as a principled guideline for their application.

9 Applying freedom of association to the employment exceptions

9.1 Introduction

The ambiguities and uncertainties in the application of the employment exceptions which were highlighted in chapter 3 formed the basis of my case for seeking a principled guideline for their interpretation. This case was strengthened in light of the discovery in chapter 6 that the employment exceptions lack any clear and consistent foundational principle, having been introduced in a piecemeal fashion and partly in response to political and historical pressures. Building, in part, on the findings of an empirical study into employer perceptions, I argued in the last chapter that a helpful way to make sense of the employment exceptions is to regard the autonomy which the employment exceptions afford religious employers as stemming from a need to protect the associational interests of a group membership served by the employer. For that reason, the ‘freedom of association’ principle ought to be applied to interpretation of the employment exceptions. Members, I argued, are best served by retention of their associative identity, and the employment exceptions could therefore be understood as a vehicle through which an employer can, within limits, discriminate to preserve its unique ethos. An identity-protecting interpretation of the employment exceptions with roots in freedom of religion *and* freedom of association could provide a principled guideline for the application of the employment exceptions in Great Britain.

This chapter will revisit the current legislative framework for the employment exceptions with the aim of assessing the extent to which an identity-protecting understanding of freedom of association could explain, and be applied to interpretation of, the exceptions in their present form. The current legislative provisions offer a hierarchy of protection for religious employers, determined by whether employment is for the purposes of an organised religion,¹ education in a faith school,² or otherwise in a religious ethos organisation.³ This hierarchy, I

¹ Equality Act 2010 (EA), sch 9, para 2.

² Education (Scotland) Act 1980 (E(Sc)A), s 21(1); School Standards and Framework Act 1998 (SSFA), ss 58-60, s 124A.

³ EA 2010, sch 9, para 3.

will argue, is consistent with a concern for the protection of associative identity. An interpretation based on an identity-protecting analysis of freedom of association could, I will further argue, be accommodated within the current legislative framework of employment exceptions.

This chapter will thereafter consider reported case law on the employment exceptions to examine the extent to which an identity-protecting interpretation of freedom of association has influenced judicial reasoning in the past. Whilst there is some evidence that the judiciary regards an employer's ethos or identity relevant to its claim, I will argue that their significance is at times underdeveloped in the judgments. There is little reference to 'associative rights' in the judiciary's determinations on the employment exceptions, and little engagement with the equality interests affected by an exercise of these rights. The exceptions are treated by the judiciary, instead, as derogations from the equality principle, which must be interpreted narrowly.

The final part of this chapter will briefly revisit some of the case law on Canada's employment exceptions. The Canadian judiciary recognises the relevance of freedom of association in this area⁴ and therefore it is instructive to explore how it might have approached the British cases. Although the Canadian judiciary would likely have given greater attention than the British judiciary to organisational ethos and identity, I will argue that it would likely have afforded insufficient regard to competing equality interests.

9.2 Revisiting the employment exceptions

It will be recalled that the principal aim of this thesis was to understand how the employment exceptions could best be interpreted.⁵ It was not the purpose of this thesis to consider or recommend any significant reform of the exceptions. It is therefore necessary to consider the extent to which the identity-protecting analysis of freedom of association that I have argued for could explain and be

⁴ See chapter 5 at 5.3.2.

⁵ See chapter 1 at 1.1.

applied to interpretation of the employment exceptions as they are currently drafted.

9.2.1 Hierarchy of different bases

To what extent could an identity-protecting interpretation of freedom of association explain the legislative decision to provide three distinct bases of employment exception for religious employers in Britain: the organised religion exception; the faith schools exception; and the religious ethos exception?⁶

It is possible to describe this framework of employment exceptions as offering a hierarchy of protection, depending on whether employment is for the purposes of an organised religion or in a faith school or otherwise. The organised religion exception is arguably the most protective of associative religious needs and interests insofar as it permits discrimination on several protected grounds, including sex, sexual orientation and marriage, in certain prescribed circumstances, without any express requirement to demonstrate that the discrimination is a proportionate means to a legitimate end.⁷ This contrasts with the religious ethos exception, which sits at the bottom of the hierarchy and only allows employers with an ethos based on religion or belief to impose a requirement to be of a particular religion or belief when it is an occupational requirement and a proportionate means of achieving a legitimate aim. The faith schools exception could be positioned somewhere in the middle of the hierarchy. Employers can exercise preferences in employment decisions because of religious beliefs unhindered, it would seem, by any requirement to demonstrate proportionality. Further, discrimination on grounds other than religion may be permissible in decisions on dismissal insofar as behaviour inconsistent with the precepts or the upholding of the tenets of the religion can be taken into account.

⁶ See the doctrinal analysis on these employment exceptions in chapter 3 at 3.2.1, 3.3.2 and 3.3.3. In addition to these three exceptions which are particularly relevant to employers with an ethos based on religion or belief, there is the OR exception which can also be relied on by employers without a religious or belief ethos (see chapter 3 at 3.3.1).

⁷ See discussion in chapter 3 at 3.3.3 on the measure of ambiguity over whether the organised religion exception entails a proportionality assessment.

Could the identity-protecting understanding of the principle of freedom of association explain this hierarchy? There is certainly a cogent argument that a claim by the membership of a religious association for protection of its associative identity is strongest in the context of employment for the purposes of an organised religion. The personnel who lead the members of an organised religion in religious worship and those who represent and promote the religion have a particularly strong influence on the members' associative identity. The membership concept, moreover, sits most comfortably with organised religion: members of a parish, synagogue, temple or mosque, for example, are relatively easy to identify. The strong claim by members of an organised religion to protect their associative identity through the autonomous selection of their leaders and spokespeople may justify the organised religion exception's position at the top of the hierarchy. The no-conflict and non-compliance principles of the organised religion exception further serve to put membership interests at the forefront. The no-conflict principle expressly refers to the religion's 'followers' and permits discrimination where necessary to avoid conflict with their strongly held convictions. The non-compliance principle, meanwhile, seeks to preserve the integrity of religious doctrine which is, of course, of primary significance to the members who subscribe to it.

The associational claim for identity protection may also explain why faith schools have greater latitude to discriminate in their employment practices than other types of religious organisation. Faith schools arguably have a unique and special purpose. The aim of education in a Roman Catholic denominational school, for example, has been described as, 'not merely the transmission of knowledge and development of skills, but rather the integral formation of the whole person according to a vision of life that is revealed in the Catholic tradition'.⁸ Religious values have been said to infuse every aspect of the pupil's educational experience in a denominational school and, to this end, the teachers' roles have been found to be, 'fundamental to the whole effort of the school, as much in its spiritual nature as in its academic'.⁹ In this regard, the school's membership, whether comprised of the parents in the parish to which

⁸ *Daly v Ontario (Attorney General)* (1999) 4 OR (3d) 349, (1999) 172 DLR (4th) 241, 1999 CarswellOnt 1085, [34] (WL Intl) (ON CA) (cited to CarswellOnt) per Weiler J.A.

⁹ *Caldwell v Stuart* [1984] 2 SCR 603, 624 (CanLII), (1984) 15 DLR (4th) 1 (cited to SCR).

the school is attached, or the representatives of the religion on the governing boards, may give rise to a particularly strong associational claim to justify discrimination in the schools' employment practices for protection of the identity of these associations.

9.2.2 Scope for application of freedom of association

To what extent can the employment exceptions in their current form accommodate an interpretation based on an identity-protecting analysis of freedom of association? The religious ethos exception provides the judiciary with the most scope to assess the interests of the membership served by an employer in protecting its identity. It requires the judiciary to have regard to the employer's ethos, the nature of the work or its context, and to assess whether religion is an occupational requirement and a proportionate means of achieving a legitimate aim.¹⁰ Although it is debatable whether the organised religion exception engages the judiciary in assessing the proportionality of a particular requirement, it nevertheless provides some scope for the judiciary to assess the interests of the members served by the employer. In determining who is, 'employed for the purposes of an organised religion', for example, the judiciary could have regard to those posts most relevant to the members' associative identity. Further, it may not be straightforward in every case to determine whether any particular requirement, such as sex or sexual orientation is necessary in order to comply with a religion's doctrine or to avoid conflict with the convictions of a significant number of the religion's followers. There might be a dispute over the meaning or existence of a particular doctrine, or dubiety over the identity of the religion's followers, or the level of objection that is required to engage the no-conflict principle.¹¹ In these more difficult cases, the judiciary could assess, in the context of doctrinal requirements and membership interests, the extent to which the discrimination is necessary to protect the members' associative identity.

¹⁰ EA 2010, sch 9, para 3.

¹¹ Sandberg acknowledges the difficulties with determining whether there has been offence caused to a 'significant number' of followers, particularly in respect of those religions that do not have a definition of membership. Russell Sandberg, 'The Right to Discriminate' (2011) 13 EccLJ 157, 177 and fn 142.

The opportunity to incorporate the identity-protecting analysis of freedom of association into the faith schools exception is admittedly more limited. The faith schools exception affords schools considerable latitude in their employment practices and does not require them to demonstrate that their actions are proportionate. Still, the associative claim for identity protection could be important to the judiciary's determination of unfair dismissal claims brought by teachers dismissed from employment because of behaviour inconsistent with the precepts or the upholding of the tenets of the school's religion. Although the faith schools exception (at least in England and Wales) permits employers to take such behaviour into account they will still be bound to demonstrate that any dismissals are fair. In determining the question of fairness, the judiciary could benefit from assessing the extent to which the school's actions were required to protect the associative identity of its 'members'.

9.3 Cases on the employment exceptions

Although there is scope for applying an identity-protecting analysis of freedom of association to interpretation of the employment exceptions, there is no real expectation that it will have influenced judicial determinations in the past given the lack of direction provided by Parliament in this respect.¹² Could judicial reasoning on the employment exceptions be improved by application of the principle argued for? This part of the chapter will examine the reported case law on the employment exceptions to uncover the extent to which (if at all) interpretation of the employment exceptions has in the past been influenced by consideration of 'associative rights'.

9.3.1 The Board of Governors of St Matthias Church of England School v Mrs Y Crizzle (EAT)

One of the earliest cases to consider religion as an occupational requirement is *The Board of Governors of St Matthias Church of England School v Mrs Y Crizzle*¹³ ('Crizzle'). The respondents in the case, the Board of Governors of a

¹² See chapter 6.

¹³ *Board of Governors of St Matthias Church of England School v Crizzle* [1993] ICR 401 (EAT) (*Crizzle*).

Church of England voluntary aided school, advertised a job vacancy for head teacher and specified that applicants were to be ‘committed communicant Christians’.¹⁴ Ms Crizzle, a non-practising Roman Catholic of Asian descent who applied unsuccessfully for the position, argued that the job criterion amounted to indirect race discrimination on the basis that fewer applicants of Asian descent could comply with it, and that it was not justified. Although not a case decided pursuant to the employment exceptions,¹⁵ the analysis in the case of whether the criterion was justified offers an insight into the judiciary’s approach to employers’ claims for religious autonomy.

At first instance, the employment tribunal (the ‘ET’) concluded that imposition of the criterion was not justified. The ET dismissed the assertions by the school governors that the legitimate aim pursued by imposition of the criterion and relevant for the justification of indirect discrimination was the safeguarding of the Anglo-Catholic tradition in the school. The ET concluded instead that it was required to assess the needs of the school, and not the governors, and that the school’s primary objective was, ‘efficient education in the light of the needs of the community’.¹⁶ As the criterion prevented the school governors from considering whether a candidate could demonstrate ‘sufficient sympathy for the Christian faith’ to ensure the necessary link between church and school, it could not be justified.¹⁷ The ET reached its conclusion after considering a number of factors. These were: the purpose of the school under the Education Act; the ethnic and religious background of the pupils, parents, and community; recruiting difficulties; the practice of other primary schools; the Diocese standard job specification; and the fact a person other than the head teacher who was licensed by the Bishop could administer the sacrament to pupils at mass.¹⁸ It is notable from these factors that the ET had little, if any, regard for the associative claim of the school governors or the church. In fact, the ET

¹⁴ *ibid* 405.

¹⁵ The case was prior to the introduction of the Employment Equality (Religion or Belief) Regulations 2003, which introduced the prohibition of discrimination on grounds of religion or belief.

¹⁶ Para 45 of ET decision, referred to by EAT in *Crizzle* (ch 9, n 13) 410.

¹⁷ *ibid*.

¹⁸ *ibid*.

attempted to distinguish the needs of the school from those of the church, stating that only the former were relevant:

The need we have to assess is not that of the Governors (whether as a Board or as individuals), nor of the Parish Church, nor of the London Diocesan Board, nor of the Church of England. In our view the need to be considered is that of St Matthias School, as a school, regulated by the Board of Governors within the framework of the Education Act 1944.¹⁹

By readily dismissing the school governors' stated objective for applying the criterion, and by instead assessing the school's needs in its, 'wider context',²⁰ the ET adopted an external perspective of the school's interests and gave little regard to the associative claim of the governors or the church for protection of the school's identity.

On appeal, the employment appeal tribunal (the 'EAT') disapproved of the ET's definition of the school's needs as 'efficient education' and found instead, that imposition of the criterion was justified. Although the EAT purported to recognise that the 'reasonable need' of the governors which was relevant to the justification of indirect discrimination was, 'religious worship and the ethos of the school',²¹ its reasoning suggests that the implications of this were never fully appreciated. The EAT's decision appears to have been heavily influenced by the assertion of the school governors that the post-holder had to be a communicant Christian in order to administer communion to pupils at mass.²² Although this practicality was relevant to the school governors' claim that the criterion was necessary, so too were other factors, which related to the relationship between the post-holder and the maintenance of the school's ethos and identity.²³ Although these factors made up a significant part of the governors' claim, the EAT paid them little attention. The EAT concluded that the objective pursued by the school governors was legitimate, and the means deployed were reasonable and proportionate, but provided no explanation as to how it reached

¹⁹ibid.

²⁰ Para 40 of ET decision, referred to by EAT in *Crizzle* (ch 9, n 13).

²¹ *Crizzle* (ch 9, n 13) 411.

²² The EAT reports that, 'It is in the field of worship that the governors' objective was based and it is in that context that the test of justifiability must be applied.' ibid 412.

²³ibid 407-08.

this conclusion. There was no assessment by the EAT of the discriminatory impact on unsuccessful applicants who could not meet the criterion, and no consideration of whether less discriminatory alternatives were available.

Although the EAT found in favour of the school governors, its parting comment in the judgment suggests that it may have misunderstood the essence of their claim. Stating its thoughts that there was ‘an important distinction to be recognised between education and worship’²⁴ the EAT appears not to have appreciated the school governors’ position which was that worship pervaded the education which they provided.²⁵

9.3.2 Glasgow City Council v McNab (EAT)

In the next case, *Glasgow City Council v McNab*²⁶ (‘McNab’), the employer was the local authority responsible for maintaining, and employing staff in a Roman Catholic school in Scotland. The employer sought to rely on the faith schools exception, the religious ethos exception and the OR exception to defend a decision to restrict applicants for the post of acting principal teacher of pastoral care to those of the Roman Catholic religion. In its decision, the EAT acknowledged that rights guaranteed by the European Convention on Human Rights (‘ECHR’) were relevant, but referred only to Mr McNab’s rights under articles 9 and 14, and not to the associative right of the church or the catholic parent community under articles 9 and 11 of the ECHR.²⁷ The EAT emphasised instead in its judgment that the exceptions on which the local authority sought to rely were, ‘limited exceptions to a strong non-discriminatory principle’.²⁸ The EAT agreed with the ET that the local authority could not rely on the religious ethos exception as it was not an employer with a religious ethos,²⁹ and found no error in law in the ET’s findings that religion was not a genuine occupational requirement for the purposes of the OR exception.³⁰ The reasoning of the ET,

²⁴ ibid 412.

²⁵ The school asserted rather that, ‘the religious and educational life is treated as one’ recorded in para 40 of the ET judgment referred to by the EAT in *Crizzle* (ch 9, n 13) 410.

²⁶ *Glasgow City Council v McNab* [2007] IRLR 476 (EAT) (*McNab*).

²⁷ ibid [23] and [60].

²⁸ ibid [60].

²⁹ ibid [61].

³⁰ ibid [60].

which the EAT reported and considered ‘adequate’,³¹ again suggests a lack of understanding of the interests at stake. The ET boldly asserted that:

the ‘nature’ of the job of Pastoral Care Teacher does clearly not require the holder of the position to be a Roman Catholic as the nature of the position as a teacher of pastoral care can be held by a person who is not a Roman Catholic in a non-denominational school.³²

By equating the nature of the role of pastoral care teacher in a denominational school with the nature of the same role in a non-denominational school, the ET appears to have closed its mind to the potential for the school’s religious ethos to influence the pastoral care it provided its pupils.³³ Though it later accepted that, ‘some elements of personal support and development of a positive school ethos may require input from a teacher familiar with the teaching or doctrine of the Roman Catholic Church’ it did not consider this to be required in relation to ‘support on the school curriculum’ or ‘vocational support’.³⁴ It is difficult to understand how the ET arrived at the distinction between personal support, which might need input from someone knowledgeable of Roman Catholic doctrine, and vocational support, which did not. Indeed, it is noteworthy that the ET appears not to have conceded that the teaching of any part of pastoral care required a teacher who was of the Roman Catholic religion: knowledge of the Roman Catholic doctrine would seem to have sufficed.³⁵ The ET concluded that Roman Catholic doctrine would only be relevant in a small number of pastoral care matters and since it was possible to call on another teacher to assist in these matters, it was not a genuine occupational requirement for the post holder to be of the Roman Catholic religion.³⁶ This reasoning is suggestive

³¹ ibid [60].

³² Para 114 of the ET decision, referred to by the EAT in *McNab* (ch 9, n 26) [20].

³³ The Catholic Education Service, for example, relates the pastoral care function in a Catholic school to its religious character. Explaining the ‘distinctive nature’ of Catholic education, the Catholic Education Service notes that Jesus Christ and his teachings are at the core. The school must advance the ‘uniqueness of the individual’, in recognition that God made each person in his image and loves them. According to the Catholic Education Service, it follows that ‘high quality pastoral care’ is required to cater for each individual’s specific needs. Catholic Education Service, ‘Catholic Education in England and Wales’ (revised and approved by the Catholic Bishops’ Conference of England and Wales, May 2014) 2-3
<<https://www.catholiceducation.org.uk/component/k2/item/1002835-bishops-launch-new-document-in-support-of-catholic-education>> accessed 3 December 2017.

³⁴ Para 116 of the ET decision, referred to by the EAT in *McNab* (ch 9, n 26) [20].

³⁵ ibid.

³⁶ ibid.

of a functional or instrumental approach to the role of pastoral care teacher, rather than a focus on whether the occupational requirement in the pastoral care role was necessary for maintenance of the school's ethos.³⁷

9.3.3 Sheridan and others v Prospects for People with Learning Disabilities (ET)

In *Sheridan and others v Prospects for People with Learning Disabilities*,³⁸ a social care provider for people with physical and learning disabilities, sought to rely on the religious ethos exception to defend its decision to require all of the level 1 and 2 support posts in its organisation to be filled by practising Christians.³⁹ The ET rejected Prospects' claim that Christianity was an occupational requirement for these posts, finding that it had therefore discriminated unlawfully against one of its managers contrary to the Employment Equality (Religion or Belief) Regulations 2003 by requiring him to recruit and promote only Christians. The ET found that Prospects had failed to perform any job evaluation for the posts and that it was not proportionate, having regard to the nature of the work and the context in which work was carried out, to require the post-holders in these roles to be Christians.⁴⁰

It is difficult to argue against the outcome reached in this case. It would appear from the ET's findings of fact that Prospects had been motivated at least in part by the mistaken impression that it needed to make religion an occupational requirement for all posts in its organisation in order to demonstrate that it had a religious ethos and thereby be permitted to discriminate pursuant to the religious ethos exception.⁴¹ Although Prospects argued that the post-holders had to be Christian because of their role in leading prayers, providing service users

³⁷ The EAT quickly dismissed the respondents argument on appeal that the ET ought to have found that pastoral care was designed to protect Roman Catholic education by stating that the ET made no finding that this was the 'purpose and design of pastoral care' (at *McNab* (ch 9, n 26) [58].

³⁸ *Sheridan v Prospects for People with Learning Disabilities* ET 2901366/06.

³⁹ Mr Sheridan's claim was heard together with a claim brought by Ms Louise Hender, a non-Christian level 1 support worker, who was refused promotion to level 2 because she was not Christian. Evidence and submissions in respect of both claims were heard at a conjoined hearing. A separate judgment was issued in respect of the claim by Ms Hender (*Hender v Prospects for People with Learning Disabilities* ET 2902090/2006). Where relevant, aspects of this judgment will be referred to in the footnotes below.

⁴⁰ *Sheridan* (ch 9, n 38) [4.4].

⁴¹ *ibid* [2.33]-[2.34].

with spiritual guidance, and representing Prospects in the Christian community,⁴² the tribunal found sparse evidence of those in support worker roles exercising these functions.⁴³

Given the lack of evidence that Christianity was an occupational requirement for the support worker posts, the ET likely arrived at the right outcome on the facts of this case.⁴⁴ The reasoning in parts of its judgment, however, suggests a lack of appreciation of the needs and interests of organisations like Prospects. It is evident from the factual history set out in the ET judgment that Prospects was struggling with how to maintain its ethos and, at the same time, respond to its growth strategy. Referring to the fact that by 2005, most services provided by Prospects were covered by the Care Standards Act, the ET observed in its findings of fact that, ‘It became increasingly difficult to maintain the Christian distinctive over secular standards for care.’⁴⁵ Although initially staffed exclusively by Christian employees, Prospects had, over the years, recruited a number of employees who were not committed Christians because of the need to staff their growing services and to comply with their obligations under the Transfer of Undertakings (Protection of Employment) Regulations 2006 when taking over services from other providers.⁴⁶ It was clear that Prospects had ongoing concerns about the impact of these recruitments on its policy to employ staff committed to a Christian basis of faith⁴⁷ and on its ability to maintain a Christian ethos.⁴⁸

⁴² *ibid* [2.19]-[2.20].

⁴³ *ibid* [2.22] where the ET notes ‘the overwhelming proportion of the support given at Level 1 was secular in nature’.

⁴⁴ See also the submissions of the claimant’s counsel in *Hender* (ch 9, n 39) at [4.64]-[4.75] as to why the ethos exception should not apply in that case.

⁴⁵ *Sheridan* (ch 9, n 38) [2.8].

⁴⁶ *ibid* [2.9]-[2.13].

⁴⁷ In 1999 the then Director issued a report on Prospects’ Christian employment policy, observing, ‘I am concerned that what amounts to a passive erosion of our Christian Employment Policy is taking place, which has already significantly reduced the proportion of Christian staff in our total workforce. The dilemmas are not simple ones as I hope I have illustrated. There are some historical undertakings to which we are already committed: bidding for contracts will inevitably sometimes bring us into the sphere of TUPE regulations and the pressures to recruit sufficient staff to keep a service running are very real ones. Nevertheless, it would be salutary for us to thinking through carefully the longer-term implications of our current staffing situation.’ *ibid* [2.9].

⁴⁸ *ibid* [4.1.26] (per abstract of witness evidence contained within Prospects’ written submissions).

Although, in Prospects' subjective opinion, it was 'a Christian organisation, established to work out its faith in the service it provides',⁴⁹ the ET was quick to prefer the objective assessment of Prospects' ethos carried out by counsel for Mr Sheridan, where spirituality was only one of six principles guiding its work.⁵⁰ The ET also readily accepted the submissions of Sheridan's counsel that relevant 'context' for the purposes of determining whether Christianity was an occupational requirement included the fact the organisation was largely staffed by non-Christians:⁵¹ an unusual use of 'context' to deny a claim on the exception. The employment by Prospects in the past of staff who were not Christians was further treated by the ET as evidence that Christianity was not required to maintain Prospects' ethos, without due attention being paid to the genuine reasons for these recruitments put forward by Prospects.⁵² The ET also accepted the failure of Prospects to dismiss its non-Christian staff as evidence of a lack of occupational requirement.⁵³ Little weight was given to the explanation given by Prospects that to dismiss the staff in these circumstances would be contrary to their Christian values.⁵⁴ Perhaps of most concern was the concurrence of the ET with the submissions by counsel for Mr Sheridan, which trivialised the role of 'Mission' and 'prayer' in Prospects. Likening them to a preference for staff to be 'happy and relaxed', counsel for Mr Sheridan asserted forcefully that these could never be occupational requirements.⁵⁵

Admittedly, Prospects had changed in character over the years. Its homes in the late 70s and early 80s 'resembled small Christian communities with all Christian staff' who were encouraged to see work as, 'a Christian calling or vocation'.⁵⁶ By the time of the ET hearing, direct service provision prevailed over mainstream

⁴⁹ *ibid* [4.1.16].

⁵⁰ *ibid* [4.2.10]-[4.2.12].

⁵¹ *ibid* [4.2.15]. See also submissions of the claimant's counsel in *Hender* (ch 9, n 39) [4.56], [4.60] and [4.61] (with which the ET agreed [4.76]).

⁵² *Sheridan* (ch 9, n 38) [4.2.19].

⁵³ *ibid* [4.2.20].

⁵⁴ *ibid* [2.20].

⁵⁵ *ibid* [4.2.17]. It was recorded in the ET judgment in *Hender* (ch 9, n 39) that Prospects had argued that prayer and the fact Christian staff were 'called' to work was important to the 'mission' purpose of the organisation. Counsel for the claimant (with whom, it would appear, the ET agreed) argued in response that the 'motivation for performing work cannot form part of an occupational requirement'. See *Hender* (ch 9, n 39) [4.36]-[4.37], [4.47], [4.53], [4.76].

⁵⁶ *Sheridan* (ch 9, n 38) [2.6].

Christian ministry, significant numbers of service users and staff were not Christian, the organisation was highly regulated and in receipt of local authority funding.⁵⁷ These facts and the lack of evidence to support the application of Christianity as an occupational requirement in the particular posts were undoubtedly relevant to the ET's assessment. Still, the wholesale adoption by the ET of the submissions by Mr Sheridan's counsel, referred to above, nonetheless indicates a rather dismissive attitude towards Prospects' continuing endeavour to, 'maintain its corporate and core ethos'⁵⁸ whilst responding to the pressures of growth.

9.3.4 Muhammed v The Leprosy Mission (ET)

In *Muhammed v The Leprosy Mission* ('Muhammed'),⁵⁹ Mr Muhammed, who was a Muslim, complained that the Leprosy Mission had unlawfully discriminated against him on grounds of religion by requiring applicants for the role of Finance Administrator to be Christian. Applying the ethos exception, the ET found that Christianity was a genuine occupational requirement for the role.⁶⁰ Although the ET did not expressly refer to freedom of association, the reasons it gave for its decision nevertheless indicate that it had a good understanding of the interest of the Leprosy Mission in maintaining its ethos. In its findings of fact, the ET observed that all 24 of its employees were Christian and that staff believed they were continuing the work of Jesus Christ.⁶¹ Collective worship and prayer were found to be significant to the work of the organisation and to its relationships. The Leprosy Mission believed that, through prayer, God would assist it to fulfil its vision and that it had a role in supporting the Mission worldwide by acts of collective and individual worship to Jesus Christ for its success.⁶² Each working day started with collective prayer, gospel reading and shared reflections on the work of Jesus Christ and staff were expected to pray individually in response to requests from the Leprosy Mission's partners.⁶³ Prayers were also said at the

⁵⁷ ibid [2.8].

⁵⁸ ibid [2.14].

⁵⁹ *Muhammed v The Leprosy Mission International* ET/2303459/2009.

⁶⁰ ibid [31]

⁶¹ ibid [6] and [9].

⁶² ibid [6] and [9].

⁶³ ibid [10]-[11].

beginning and end of formal meetings, and to assist with dispute resolution within the workplace.⁶⁴ In addition to prayer and fasting days, collective worship was performed in response to particular events.⁶⁵ At the staff ‘away day’ each year, staff would reflect on the Bible and participate in individual and group Christian prayer.⁶⁶ The ET considered that Christianity was not an occupational requirement having regard to the ‘nature’ of employment as Finance Administrator: according to the tribunal, the ‘nature’ of the employment referred to the ‘core requirements’ of the role, which were finance and administration.⁶⁷ The ET was, however, prepared to accept that the responsibilities of the Finance Administrator, which related to the Leprosy Mission’s Christian ethos and to Christian prayer,⁶⁸ were the employment’s context.⁶⁹ Having regard to this context, the ET concluded that Christianity was an occupational requirement for the role. According to the ET:

A Christian belief, and in particular a belief in the biblical account of Jesus healing lepers, and a belief in the power of Christian prayer to achieve the Respondent’s goals are at the core of its work and activities. Among other matters, this is manifested by the daily acts of Christian worship in which all members of staff participate, and acts of prayer in response to requests for Christian prayers from abroad.⁷⁰

Unlike the ET in *Sheridan*,⁷¹ which appeared to attach little importance to the role of prayer and worship, the ET in *Muhammed*, recognised the relational aspects of employment in the Leprosy Mission. Finding that the occupational requirement imposed was both objectively justified and reasonably necessary, the ET remarked that, ‘Employing a non-Christian would have a very significant adverse effect on the maintenance of the Respondent’s ethos, and the sense of religious community cohesion in the working place.’⁷² Although the ET

⁶⁴ ibid [12].

⁶⁵ ibid [11].

⁶⁶ ibid [12]

⁶⁷ ibid [30]

⁶⁸ Responsibilities included, to ‘represent’ the Mission’s Christian ethos and to ‘support its work through Christian prayer and fellowship’ ibid [15].

⁶⁹ ibid [30].

⁷⁰ ibid [31].

⁷¹ *Sheridan* (ch 9, n 38),

⁷² ibid [33].

considered the impact of the discriminatory requirement on Mr Muhammed's job opportunities it did not consider whether preventing Mr Muhammed from applying for the post because of his religion would cause harm to his dignity.

9.3.5 **Reaney v Hereford Diocesan Board of Finance (ET) and Pemberton v Inwood (EAT)**

A review of the two reported cases on the organised religion exception reveal missed opportunities for the judiciary to incorporate an identity-protecting interpretation of freedom of association into its decisions. In *Reaney v Hereford Diocesan Board of Finance*,⁷³ the ET arrived at the finding that the position of youth minister was for the purposes of an organised religion. The ET did not consider whether the role of youth minister was of similar importance as the role of clergy to the associative identity of the church membership. Instead, the ET appears to have been heavily influenced by the statements made by ministers in Parliament, and by Richards J of the High Court in *R (on the application of Amicus) v The Secretary of State for Trade and Industry*, on the types of posts within the ambit of the organised religion exception.⁷⁴ Finding, for example, that the Diocesan Youth Officer had a key role in the 'promotion' of the church, the ET was satisfied that, 'The Claimant would have been promoting religion in the way in which it has been suggested the regulations are meant to encompass.'⁷⁵ A similar rigidity in approach is evident in the EAT judgment of *Pemberton v Inwood*.⁷⁶ In *Pemberton*, the ET and EAT had to determine whether the post of chaplain for an NHS Trust was, 'for the purposes of an organised religion'. The ET and EAT did not assess whether the associative identity of the church membership would be impacted by the employment of a chaplain in an NHS Trust. Instead, the ET was persuaded that the exception applied simply because, 'it is not the nature of the organisation that is in issue but the purpose of the employment' and 'authorisation to be able to minister as a Church of England Priest was an essential requirement of the employment'.⁷⁷ In neither *Reaney* nor *Pemberton* did the ET consider freedom of association to

⁷³ *Reaney v Hereford Diocesan Board of Finance* ET 1602844/2006.

⁷⁴ *ibid* [71]-[79].

⁷⁵ *ibid* [102].

⁷⁶ *Pemberton v Inwood* [2017] IRLR 211 (EAT).

⁷⁷ *ibid* [110].

be a principle guiding interpretation of the exception. The preferred ‘interpretative model’ in both cases was simply to emphasise the requirement to interpret the exception ‘narrowly’, as ‘a derogation from the principle of equal treatment’.⁷⁸

9.4 Judicial reasoning and the Canadian experience

There is thus evidence in the cases discussed above that the importance of ethos or identity to a religious organisation could be better understood and that greater efforts could be made to consider the discriminatory impacts of an exercise of the exceptions. Could an application of the identity-protecting understanding of freedom of association make a difference in these cases? Recalling that freedom of association underpins the group employment exceptions in the human rights legislation of several Canadian provinces,⁷⁹ it may be instructive to consider how the Canadian judiciary might have approached the same cases.

9.4.1 Ethos and identity

There is reason to believe that had the Canadian judiciary been asked to determine cases on the same facts as the tribunals were presented with in *Crizzle*,⁸⁰ *McNab*⁸¹ and *Sheridan*,⁸² it would have engaged more extensively with the importance and relevance of group ethos or identity. Firstly, and as discussed in chapter 5, the Supreme Court of Canada has held that there are both subjective and objective arms to the ‘*bona fide* occupational requirement’ provisions in the human rights legislation of Canada’s provinces and territories.⁸³ The subjective arm requires the judiciary to enquire in the first instance as to exactly what was in the mind of the employer when it imposed the requirement. In this way, the test compels the judiciary to seek to understand matters from the perspective of the employer at the outset. Only then can the judiciary

⁷⁸ *Reaney* (ch 9, n 73) [100]; *Pemberton* (ch 9, n 76) [88].

⁷⁹ See chapter 5 at 5.3.

⁸⁰ *Crizzle* (ch 9, n 13).

⁸¹ *McNab* (ch 9, n 26).

⁸² *Sheridan* (ch 9, n 38).

⁸³ *Ontario (Human Rights Commission) v Etobicoke (Borough)* [1982] 1 SCR 202, 208 (CanLII); (1982) 132 DLR (3d) 14.

assess from an objective perspective whether the criterion is reasonable and proportionate. A clear approach such as this one, which addresses the matter initially from the subjective perspective of the employer, is likely to avoid the errors committed by the ET in *Crizzle*, when it substituted its interpretation of the school's legitimate aim for the one put forward by the school.

Secondly, the judicial reasoning in the Canadian cases of *Caldwell v Stuart*⁸⁴ and *Schroen v Steinbach Bible College*⁸⁵ is illustrative of a deeper engagement by the judiciary with the ethos or identity of the employer seeking to rely on the exceptions. The sparse attention given to the relevance of the religious nature of the schools in *Crizzle*⁸⁶ and *McNab*,⁸⁷ for example, can be contrasted with the detailed attention paid to the Roman Catholic ethos of the school in *Caldwell*. In *Caldwell*, the Supreme Court of Canada recognised that, 'the Catholic school is different from the public school', finding that, as well as 'the ordinary academic program, a religious element which determines the true nature and character of the institution is present in the Catholic school'.⁸⁸ The evidence before the Board of Inquiry developed the content of this 'religious element' further, in Church documents and statements from Church witnesses. The doctrinal basis of the Catholic school was acknowledged: establishment of the school with the purpose of, 'formation of the whole person, including education in the Catholic faith' as a means to continue Christ's work of salvation.⁸⁹ Principles developed by the church to achieve its purpose were set out by the school, one of which described the Catholic school as, 'a genuine community bent on imparting, over and above an academic education, all help it can to its numbers to adopt a Christian way of life'.⁹⁰ The school also attested to the 'different emphasis of the Catholic school' giving examples as to how this manifested itself in the school's administration and its daily activities.⁹¹ All of

⁸⁴ *Caldwell* (ch 9, n 9).

⁸⁵ *Schroen v Steinbach Bible College* 1999 MHRBAD No2, 1999 Carswell Man 634 (WL Intl) (cited to Carswell Man).

⁸⁶ *Crizzle* (ch 9, n 13).

⁸⁷ *McNab* (ch 9, n 26).

⁸⁸ *Caldwell* (ch 9, n 9) 618.

⁸⁹ *ibid* 608.

⁹⁰ *ibid* 624.

⁹¹ *ibid* 624.

this evidence persuaded the Supreme Court that, ‘the religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs’.⁹²

The rather dismissive attitude of the ET in *Sheridan*⁹³ towards the role in the workplace of ‘mission’ and ‘prayer’, meanwhile, can be contrasted with the time taken by the Board of Adjudication in *Schroen*⁹⁴ to engage with the ethos or identity of the employer in that case and to understand the importance of relationships in the workplace.⁹⁵ Although *Schroen* was not a case on an employment exception of the type referred to by Beetz J in *Brossard (Town) v Quebec (Commission des droits de la personne)*⁹⁶ as being underpinned by freedom of association, the attention given by the Board of Adjudication to factors such as identity and relationships suggests its decision was nonetheless influenced by considerations of ‘associative rights’. The Board of Adjudication in *Schroen* considered evidence on the founders of the college, the founding documents and the college policies, and heard from faculty, staff and expert witnesses. It described the college as having a, ‘unique culture’, and acknowledged the significance of ‘community’ at the college.⁹⁷ The college led evidence on the relational aspects of life at the college. One expert witness gave evidence of the importance of community to the Mennonites, and claimed that the college ‘faculty and staff view themselves as a team together fulfilling the mission of the Bible College’.⁹⁸ It was intended by the college that a Christian atmosphere would pervade all aspects of college life, and, as one witness put it, that all ‘teachers, students and staff were expected to interact so that a total sense of community existed to enable students to speak to their teachers, to an accounting clerk or to a janitor’.⁹⁹ Another witness, who was a staff member of the college, described how staff and students would interact

⁹²ibid.

⁹³ *Sheridan* (ch 9, n 38).

⁹⁴ *Schroen* (ch 9, n 85).

⁹⁵ The approach of the ET in *Muhammed* (ch 9, n 59) is more akin to the approach of the Board of Adjudication in *Schroen* (ch 9, n 85).

⁹⁶ *Brossard (Town) v Quebec (Commission des droits de la personne)* [1988] 2 SCR 279 (CanLII), (1988) 53 DLR (4th) 609 (cited to SCR).

⁹⁷ *Schroen* (ch 9, n 85) [60].

⁹⁸ ibid [38].

⁹⁹ ibid [22].

and, ‘how the staff saw the domestic mission of their jobs as being, “my work was my faith - my faith was my work”’.¹⁰⁰ Although the functional aspects of the role of accounting clerk were not religious in any way the engagement by the Board of Adjudication with the distinctive ethos of the college, and particularly its relational aspects, demonstrates a willingness to uncover the real needs of the employer in that case.

9.4.2 Discriminatory impacts

Although the EAT in *Crizzle*¹⁰¹ and *McNab*¹⁰² and the ET in *Sheridan*¹⁰³ and *Muhammed*¹⁰⁴ was required to consider whether the discriminatory standard imposed was ‘proportionate’ to the achievement of a legitimate end, the potential harm - to dignity interests or otherwise - inflicted on the claimants in these cases, was not always considered. Although the tribunal in *Muhammed* purported to take the discriminatory impact of the occupational requirement into consideration, it referred only to its impact on job opportunities for Mr Muhammed.¹⁰⁵ In fact, *Reaney*¹⁰⁶ was the only case among those reviewed above in which the judiciary considered evidence on the emotional harm and harm to dignity interests caused by the employer’s actions. The judiciary in *Reaney* referred to dicta in *Amicus*¹⁰⁷ to the effect that the organised religion exception did not permit enquiry by ETs on a case by case basis as to whether the employer’s actions were ‘proportionate’.¹⁰⁸ This perhaps explains why the ET then only considered the evidence presented on the harm caused to Mr Reaney as relevant only to his allegation of harassment, which arose from the manner in which the Diocese advised of its decision not to recruit him.¹⁰⁹

¹⁰⁰ ibid [28].

¹⁰¹ *Crizzle* (ch 9, n 13).

¹⁰² *McNab* (ch 9, n 26).

¹⁰³ *Sheridan* (ch 9, n 38).

¹⁰⁴ *Muhammed* (ch 9, n 59).

¹⁰⁵ ibid [33].

¹⁰⁶ *Reaney* (ch 9, n 73).

¹⁰⁷ *R (on the application of Amicus) v The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176.

¹⁰⁸ ibid [74], [76] and [77].

¹⁰⁹ ibid [90].

Although the principle of freedom of association underpins the Canadian approach to the group employment exceptions and it might be expected, therefore, that the Canadian judiciary would have regard for its qualified nature and consider in each case, any harm which an exercise would inflict on equality interests, there is evidence of insufficient attention being paid to discriminatory impacts in some of the Canadian decisions. The Board of Adjudication in *Schroen*,¹¹⁰ for example, did not give any consideration to the harm experienced by the Mormon accounting clerk when the Bible College retracted her offer of employment after learning of her religious affiliation. Neither was consideration given by the court in *Ontario Human Rights Commission v Heintz*¹¹¹ to the discriminatory impact on the support worker asked to choose between having a same-sex relationship and her job.¹¹² The lack of any judicial consideration of discriminatory impacts is most evident, however, in the Canadian cases concerning denominational schools. Once satisfied that a school has a religious ethos, the judiciary seems to accept with little question that a religious conformance requirement on the teaching staff is justified.¹¹³ Insufficient consideration is given to any injury inflicted on the party discriminated against, or to whether there are less discriminatory alternatives available.¹¹⁴

9.5 Conclusion

The identity-protecting analysis of freedom of association could, I have argued, explain the hierarchy of protection provided by the three distinct bases of employment exceptions in Britain, and could be used to interpret them in their

¹¹⁰ *Schroen* (ch 9, n 85).

¹¹¹ *Ontario Human Rights Commission v Christian Horizons* 2010 ONSC 2015 (CanLII), (2010) 102 OR (3d) 267.

¹¹² Although, note the Board of Inquiry in *Parks v Christian Horizons* (1991) 16 CHRR D/40, 1991 Carswell Ont 6678 [55]-[60] (WL Intl) recognised the harm inflicted on staff by the employer's inconsistent approach to staff relationships, and concluded that the subjective arm of the *Etobicoke* test was not satisfied where the employer acts inconsistently.

¹¹³ For example, see *Caldwell* (ch 9, n 9); *Kearley v Pentecostal Assemblies Board of Education* (1994) 19 CHRR D/473, 1994 CarswellNfld 519 (WL Intl) (Nfld Bd of Inquiry); *Casagrande v Hinton Roman Catholic Separate School District No 155* 1987 CarswellAlta 89 (WL Intl) (Alberta Court of Queen's Bench); *Central Alberta Association of Municipal and School Employees and Wild Rose School Division No 66* (1998) 55 CLAS 435, 1998 CarswellAlta 2061 (WL Intl) (Alberta Arbitration); *Walsh v Newfoundland (Treasury Bd)* (1988) 53 DLR (4th) 161, (1988) 39 CRR 188, 1988 CarswellNfld 211 (WL Intl) (NLSCTD).

¹¹⁴ See dissenting opinion of Sheila J Greckol in *Central Alberta Association of Municipal and School Employees and Wild Rose School Division No 66* (ch 9, n 113).

current form. To date, as an analysis of reported case law on the exceptions reveals, the judiciary has been more influenced by a perceived need to interpret the exceptions narrowly as derogations from the equal treatment principle, than by considerations of associative rights or interests. It is perhaps as a consequence of this, I have argued, that the importance to religious organisations of their ethos or identity is not as apparent in the British decisions as in the decisions of the Canadian judiciary, which has embraced the principle of freedom of association in the context of group employment exceptions. There was further suggestion in the reported case law of a lack of engagement by the judiciary with discriminatory impacts. A similar lack of consideration for the harm in discriminatory job criteria, meanwhile, was indicated in some of the Canadian decisions.

An approach to interpretation of the employment exceptions which encourages engagement with both the ethos or identity of the employer *and* the discriminatory impacts of any proposed requirement is to be preferred. I will conclude in the final chapter that such an approach *could* be based on freedom of association, and, further, that this could lead to improvements in decision-making on the exceptions.

10 Towards a principled approach to interpretation of the employment exceptions

10.1 The case for a principled approach to the employment exceptions

The reported decline in religiosity of the British public and the greater weight given to individual human rights and equality in policy discourse and legislation has provided the context for considering the potential conflict engaged by the employment exceptions between religious autonomy and the rights of the individual to equality. The aim of this thesis has been to consider how these exceptions can best be understood and interpreted. Notwithstanding the debates in Parliament on their application and the scope which they allow for differing judicial interpretations, the volume of academic literature and reported case law on the exceptions since their implementation has been modest. Not only was the enquiry therefore important, so too was it timely in light of the recent recommendation of the Equality and Human Rights Commission ('EHRC') that the framework of the employment exceptions in the Equality Act (the 'EA') should not be changed and the EHRC's commitment to consider providing assistance or intervening in any case in relation to the application of the exceptions in the Education (Scotland) Act 1980 and the School Standards and Framework Act 1998.¹

As a prelude to considering their nature and scope, the employment exceptions were located in their wider theoretical context, with particular attention paid to the influence of prevailing norms in society. I argued that the continuing influence of the religious group in the political and social spheres, most particularly illustrated by incidents of establishment in Scotland and England and by the role of the religious group in the provision of education and social welfare, ought now be considered in light of the ever increasing dominance of equality and human rights discourses, and the claimed decline in 'religiosity' of the British public.² I argued further that the human dignity and autonomy rationale for the right to religious freedom offered a modern interpretation of

¹ Equality and Human Rights Commission, 'Religion or Belief: is the Law Working?' (Equality and Human Rights Commission, December 2016) 29.

² Chapter 2 at 2.2 and 2.3.

the special status of the religious group, which was consistent with the increased focus on individual interests and the individual in certain aspects of law and culture today.³

Against this background, the nature and scope of the employment exceptions were examined and the argument made that they were riddled with ambiguity and uncertainty.⁴ A comparative examination of the model of exceptions and exemptions in the USA called particular attention to the narrow parameters in which the employment exceptions can be exercised, the potential for differing judicial interpretations of their scope, and the underdeveloped nature of the jurisprudence.⁵ The paucity of precedent on the employment exceptions was recognised as a surprising trend.⁶ Paradoxically, the uncertainty as to the scope and application of the employment exceptions was identified as both a reason for, and a consequence of, the lack of case law on their terms.⁷

Ambiguities in the employment exceptions were also heightened, I argued, by a divergence in understanding among policy makers as to the relative significance of job function, context and organisational ethos in the engagement of the exceptions.⁸ The lack of appreciation by some UK policy makers of the importance to religious employers of the wider context in which work is carried out, including the organisational ethos, was highlighted and then underlined by an analysis of the greater regard had by the Canadian judiciary to the purpose or mission of the employer, its ethos and the context in which work is performed, when interpreting the employment exceptions in Canada's provinces.⁹

Ambiguity in the scope and application of the employment exceptions is problematic for the rule of law, generating legal uncertainty and risking inconsistency in judicial decision making. For that reason, I argued that it was important that clear principle be discerned to guide the judiciary and other

³ Chapter 2 at 2.4.

⁴ Chapter 3 at 3.3.

⁵ Chapter 4 at 4.2.

⁶ Chapter 3 at 3.5.

⁷ *ibid.*

⁸ Chapter 3 at 3.4.

⁹ Chapter 5 at 5.2.6.

actors in their interpretation of the statutory provisions.¹⁰ Whereas the US and Canadian exemptions and exceptions which were tailored for the religious employer were shown to be underpinned by, respectively, principles of church / state relations and freedom of association,¹¹ I argued that a patchwork of factors had shaped and influenced the introduction of the employment exceptions in Great Britain: norms of equality and human rights, the historic importance of denominational schooling and establishment; church and doctrinal autonomy; and a fair measure of political compromise and concession.¹² Consequently, I contended that no single, clear principle has, so far, been recognised as underpinning their existence and interpretation.

In the search for possible principle to guide future development of the employment exceptions, a stakeholder view was sought.¹³ Qualitative interviews with employers who had a religious or faith ethos revealed mixed opinion on the employment exceptions: some participants considered the exceptions were too narrow and/or ambiguous, whilst others reported no difficulties with them.¹⁴ More significantly the interviews provided experiences ‘on the ground’ in answer to the question, how and why might religious ethos impact on employment practices and relationships? Through this, an insight was gained into the associative life of a religious or faith ethos workplace. The importance of employees for the maintenance of an employer’s ethos was revealed in several participants’ accounts, as was the importance of a religious or faith work ethos for the employees’ own personal experiences of religion or faith.¹⁵ Organisational purpose (missionary, for example), the perceived need for worship in the workplace and staff relationships¹⁶ were also found to be important to some participants’ reliance on the employment exceptions.

In light of these findings, I argued that, in the future, it could be both helpful and possible within the existing framework, to apply the principle of freedom of

¹⁰ Chapter 3 at 3.6 and chapter 6 at 6.6.

¹¹ Chapter 4 at 4.3 and chapter 5 at 5.3.

¹² Chapter 6.

¹³ Chapter 7.

¹⁴ Chapter 7 at 7.5.2.

¹⁵ Chapter 7 at 7.2.17.6.2 and 7.6.3.

¹⁶ Chapter 7 at 7.6.1.

association to interpretation of the employment exceptions.¹⁷ Not only is this called for by the European Court of Human Rights (the ‘ECtHR’), it (together with freedom of religion) could offer a principled justification for the employment exceptions and a useful context for their interpretation. I argued for a particular understanding of freedom of association which regards the employment exceptions as offering a vehicle through which employers may discriminate in order to preserve their ethos for the benefit of the members of a group defined by their religion, provided always that this does not disproportionately infringe the rights and interests of others. An examination of the relevant jurisprudence, however, suggested that ‘associative’ rights or interests had not been particularly influential in past decisions on the employment exceptions.¹⁸ The significance of employer ethos and identity was, I argued, underdeveloped in the jurisprudence and little regard was paid to the discriminatory impacts of an exercise of the exceptions.

Drawing on the analysis in previous chapters, I will conclude in this final chapter that the identity-protecting understanding of freedom of association argued for could, as an interpretive tool, assist the judiciary to improve its reasoning and reach fair and balanced decisions on the employment exceptions. A purposive approach to the exceptions which regards them as derogations from the equality principle justified by fundamental human rights could encourage the judiciary to adopt an internal perspective of employers’ needs and assess claims on the exceptions in the context of the interests protected by rights of association. Recognition that the rationale for the derogations derives from a *qualified* right could lead, moreover, to the judiciary engaging more fully than it has done in the past with assessing and balancing discriminatory impacts. I will argue finally that the concept of ‘accommodation’ developed in the Canadian jurisprudence on the *bona fide* occupational requirement (‘BFOQ’) could assist with balancing rights of religious association and equality rights by requiring less discriminatory alternatives to be properly explored.

¹⁷ Chapter 8.

¹⁸ Chapter 9 at 9.3.

10.2 A rights-based rationale for derogations from the equality principle

To date, the judiciary has regarded the employment exceptions as limited derogations from the equality principle.¹⁹ The historical background to their implementation offers an explanation for this interpretation in preference to one which would understand the exceptions as deriving from positive religious or associative rights.²⁰ Although not all of the exceptions were introduced to implement European measures,²¹ they must be interpreted, where possible, in a manner which is consistent with the equality laws of the European Union (the ‘EU’). This interpretive obligation compels the judiciary to regard the exceptions as strictly defined derogations from the equality principle.

For so long as the UK remains a member of the EU, the judiciary must therefore continue to interpret the exceptions as limited derogations from the equality principle. Although the UK may be able to depart from this interpretation after it has left the EU, it is surely preferable that the judiciary continues, even then, to treat the exceptions as strictly defined derogations to ensure that equality is afforded sufficient protection.²² There is, however, a risk that understanding the exceptions *solely* as limited derogations from the equality principle fails to offer much assistance with how they should be interpreted. Advocating for a ‘narrow’ interpretation of the exceptions, moreover, may detract from interpreting them in a manner that is true to their meaning and purpose. Beetz J in *Brossard (Town) v Quebec (Commission des droits de la personne)*,²³ articulates this point neatly in the context of the group employment exception of the Quebec Charter, when he says:

To say that the very nature of the second branch of s.20 lends itself to one of either a restrictive or liberal interpretation oversimplifies the

¹⁹ *Reaney v Hereford Diocesan Board of Finance* ET 1602844/2006 [100]; *Glasgow City Council v McNab* [2007] IRLR 476 (EAT) [60]; *R (on the application of Amicus) v The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176 [115]; *Pemberton v Inwood* [2017] IRLR 211 (EAT) [88]. See chapter 9 at 9.3

²⁰ Chapter 6 at 6.3 and 6.5.

²¹ For example, the faith schools exception was first introduced as part of the political agreement reached in the transfer of voluntary schools to the state sector (see chapter 6 at 6.3).

²² For comment on the harm that discrimination can cause see below at 10.3.1.

²³ *Brossard (Town) v Quebec (Commission des droits de la personne)* [1988] 2 SCR 279 (CanLII), (1988) 53 DLR (4th) 609 (cited to SCR).

provision and is not, in my view particularly helpful in discovering its meaning.²⁴

Unrestrained by any concern to interpret the exception in a ‘restrictive or liberal’ fashion, the court in *Brossard* was able to give the words of the legislative provision their ‘ordinary meaning’²⁵ in the context of the underlying principle of freedom of association.

Thus, whilst the employment exceptions in Britain should continue to be regarded as limited derogations from the equality principle, it is nonetheless important that recognition is also afforded to the rationale for the derogations. I have argued in this thesis in favour of a rationale for the derogations based on fundamental human rights of religious association. The benefits of a purposive approach to interpretation of the exceptions that regards them as limited derogations from the equality principle which are justified by human rights will now be explored.

10.2.1 A purposive interpretation

Canadian case law is illustrative of a purposive approach on the part of the judiciary to interpretation of employment exceptions. It is common for the judiciary to articulate early in its judgments that it understands the rationale of the group employment exceptions to lie with freedom of association. In *Caldwell v Stuart*,²⁶ for example, the Supreme Court, tasked with interpreting the group employment exception in the Human Rights Code of British Columbia, identified its roots in freedom of association at the outset of its deliberations. MacIntyre J of the Supreme Court cited with approval dicta from the Court of Appeal hearing in the same case:

This is the only section in the Act that specifically preserves the right to associate. Without it the denominational schools that have always

²⁴ ibid [97].

²⁵ ibid [100].

²⁶ *Caldwell v Stuart* [1984] 2 SCR 603 (CanLII), (1985) 15 DLR (4th) 1 (cited to SCR).

been accepted as a right of each denomination in a free society, would be eliminated.²⁷

These dicta were also cited with approval by the Supreme Court in *Brossard*,²⁸ a case on the group employment exception in the Quebec Charter of Rights and Freedoms. Beetz J in *Brossard* concluded that the employment exception in Quebec's Charter 'was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits'.²⁹ This was fundamental to the court's decision that the town could not rely on the exception to defend its operation of an anti-nepotism employment policy: the town did not promote the interests of a group identified by a protected characteristic and did not discriminate to promote the free association of members of such a group.³⁰ The Supreme Court in *Brossard* observed that freedom of association was also the principle underlying the group employment exceptions in certain other Canadian provinces.³¹ Its dicta, therefore, have been cited with approval in several subsequent cases on the employment exceptions.³²

Importantly, in basing its group employment exceptions in freedom of association, the Canadian judiciary openly recognises that the exceptions confer rights. The rights-based nature of the exceptions is emphasised in each of the judgments. The parties in *Caldwell* were described by the Supreme Court, for example, as each asserting a, 'clear legal right'.³³ The Board of Inquiry in *Parks v Christian Horizons*, meanwhile, referred to the Ontario Human Rights Code as creating, 'two sets of equal but competing individual and group rights'.³⁴ The Board of Adjudication in *Schroen* expressed a similar sentiment when it observed, in a case on the *bona fide* occupational requirement provision in the

²⁷ *ibid* 626 referring to dicta of Seaton J of the Court of Appeal in *Caldwell v Stuart* (1982) 132 DLR (3d) 79, 1982 CarswellBC 45, [40] (WL Intl) (BCCA).

²⁸ *Brossard* (ch 10, n 23) [99].

²⁹ *ibid* [100].

³⁰ *ibid* [122].

³¹ *ibid* [131].

³² *Parks v Christian Horizons* (1991) 16 CHRR D/40, 1991 Carswell Ont 6678, [38]-[43] (WL Intl) (Ont Bd of Inquiry); *Ontario Human Rights Commission v Christian Horizons* 2010 ONSC 2015, [60]-[64] (CanLII), (2010) 102 OR (3d) 267 (*Heintz* cited to ONSC).

³³ *Caldwell* (ch 10, n 26) 625.

³⁴ *Parks* (ch 10, n 32) [43].

Manitoba Human Rights Code, that the case ‘involves the rights of one religious group and the religious freedom of an individual’.³⁵

There are two relevant consequences of regarding the employment exceptions as ‘rights-conferring’. Firstly, this invites an interpretation of the exceptions in light of the interests they protect, which is a more meaningful guideline than an instruction to interpret them ‘narrowly’. MacIntyre J in *Caldwell* made this observation in respect of the group employment exception in British Columbia’s Human Rights Code:

It is therefore my opinion that the courts should not in construing s.22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights.³⁶

It is a second and related consequence of the recognition that the employment exceptions confer rights, that an ‘internal’ perspective of the needs and interests of the religious employer is invited. Iain Benson has considered the religious employer exemptions in Canada and South Africa and has argued for an approach which he refers to as ‘seeing through the associational lens’ or ‘the use of the oculus’.³⁷ According to Benson, it is necessary ‘to imagine life through other people’s eyes and come to offer respect for their vision, their difference and their way of seeing’.³⁸ If the exceptions are interpreted as rights-conferring (rather than, *solely* as derogations from the equality principle), there may be a greater incentive to properly understand the real interests that they protect and, particularly, the relationships in a religious group between its ethos, its members and its employees.

³⁵ *Schroen v Steinbach Bible College* 1999 MHRBAD No2, 1999 Carswell Man 634, [53] (WL Intl) (cited to CarswellMan).

³⁶ *Caldwell* (ch 10, n 26) 626.

³⁷ Iain T Benson, ‘An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion’ (DPhil thesis, University of the Witwatersrand 2013) 157 available at <<http://wiredspace.wits.ac.za/jspui/handle/10539/14004?mode=full>> accessed 28 December 2017.

³⁸ *ibid* 158.

10.2.2 Context: ethos, members and employees

Whereas the judicial understanding of the relationships among ethos, members and employees in a religious group is underdeveloped in the context of the employment exceptions in Britain, there is evidence that the application of freedom of association to group employment exceptions in certain Canadian provinces assists the judiciary to better recognise the intricacies of these bonds. This recognition offers an important context in which to balance the right to associate with the right to be free from discrimination.

There is evidence, firstly, of the Canadian judiciary having particular regard to the task of identifying the membership interests served by the employing entity. Indeed, the judiciary in several of the Canadian provinces is compelled to undertake this enquiry by the statutory language of the group employment exception applicable in its jurisdiction. The employment exception in Ontario's Human Rights Code, for example, will only apply where, 'a religious ... institution or organisation ... is primarily engaged in serving the interests of persons identified by their ... creed'.³⁹ In *Caldwell v Stuart*, the Supreme Court accepted the finding of the Board of Enquiry that 'the persons interested are not just the pupils in the School, but are the members of the Catholic faith who have created the School and who support it'.⁴⁰ In *Parks v Christian Horizons*, the Board of Inquiry found that the interests which were served by Christian Horizons included, 'the Evangelical Christian interests of its founding and present executive personnel and membership',⁴¹ a finding which was largely followed by the court in *Ontario Human Rights Commission v Heintz*.⁴² Even in *Schroen v Steinbach Bible College*, which concerned a claim under the general BFOQ provision in the Manitoba Human Rights Code rather than a group employment exception of the type which the Supreme Court of Canada has held protects freedom of association, the Board of Adjudication heard evidence of the ties the college had with Mennonite church groups, which owned the college, and

³⁹ Human Rights Code, RSO 1990, c H-19, s 24(1).

⁴⁰ *Caldwell* (ch 10, n 26) 627-28.

⁴¹ *Parks* (ch 10, n 32) [53].

⁴² *Heintz* (ch 10, n 32) [76]-[77].

supported it financially, and on the impact of the college's employment practices on the 'support and confidence' of this constituency.⁴³

Identifying the membership interests served by the employing entity at the outset is useful in providing the relevant context in which to interpret the employment exceptions. Importantly, understanding in whose interests the employers act, adds vital substance to their claims to maintain a particular ethos. One consequence of this is that job roles could be more confidently related to the ethos of the organisation. So, in *Caldwell*, for example, the Supreme Court arrived at the conclusion that a requirement of religious conformance on teaching staff was justified because the right to denominational schooling, enjoyed by the members of the Catholic community served by the school entailed the right to, 'preserve the religious basis', of the school.⁴⁴ In *Schroen*, the Adjudicator was clear that consideration of the specific job duties of the accounting clerk was insufficient. Instead, as he put it, 'consideration must be given to allow a religious group to achieve its religious objectives' and this required reflection as to the manner in which the role, 'relates to the overall functioning in the institution'.⁴⁵

A focus on the membership interests served by the employing entity can also assist with setting the parameters within which the employment exceptions are to operate: discrimination must be necessary for protection of these interests. The decision of the court in *Heintz* is illustrative. The court found that the interests served by Christian Horizons were those of the founders, members and employees, in living out their Christian faith and performing their Christian ministry. It was in that context that the tribunal assessed the argument by Christian Horizons that religious conformance was necessary in the role of support worker. Finding that the, 'Christian environment' in the homes comprised prayer, hymn singing and Bible reading,⁴⁶ and that there was no attempt to instil in the residents Evangelical beliefs or lifestyle, the court held that the imposition of a religious conformance requirement was not justified.

⁴³ *Schroen* (ch 10, n 35) [21] and [25].

⁴⁴ *Caldwell* 10(ch 10, n 26) 628.

⁴⁵ *Schroen* (ch 10, n 35) [53].

⁴⁶ *Heintz* (ch 10, n 32) [101].

Put another way, the imposition of the religious conformance requirement was unnecessary for protection of the interests of the members in performing their Christian ministry. The Christian culture in the homes, maintained by staff through participation in prayer, hymn signing and Bible reading adequately served these interests.

10.3 A *qualified* right

10.3.1 Discriminatory impacts

The failure of the British judiciary to assess the impacts of discrimination is not limited to cases on the employment exceptions.⁴⁷ Indeed, it has been said that, ‘It is nearly impossible to find a UK employment discrimination decision where the impact of the discrimination is measured or weighted at all.’⁴⁸ The historical influence of the equalities jurisprudence from the EU might explain this, at least in part. Whereas jurisprudence from the ECtHR has been found to regard discriminatory impacts, including the ‘experiences of the claimant’ and ‘societal costs’⁴⁹ as important in determining whether discriminatory conduct is proportionate,⁵⁰ EU equalities jurisprudence, by comparison, requires that the discriminatory conduct is ‘necessary’ pursuant to a ‘real need’.⁵¹ Although the British judiciary has more recently been obliged under the Human Rights Act 1998 to have regard for ECtHR jurisprudence, the judiciary has been criticised for its reluctance to consider the impacts of discrimination and to weigh these in the balance with competing rights and interests.⁵²

An approach to the employment exceptions which regards their rationale as based in fundamental human rights of religious association could encourage the judiciary to focus on the discriminatory impacts of a proposed measure and pay

⁴⁷ For comment on the little regard paid to discriminatory impacts in cases on the employment exceptions see chapter 9 at 9.4.2.

⁴⁸ Aaron Baker, ‘Proportionality and Employment Discrimination in the UK’ (2008) 37 ILJ 305, 311.

⁴⁹ *ibid* 320.

⁵⁰ *ibid* 317-21.

⁵¹ Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607, [36]; see Baker (ch 10, n 48) 306-10 in which Baker argues that the UK courts often do not follow EU jurisprudence in discrimination cases. But now see *Homer v Chief Constable of West Yorkshire* 2012 UKSC 15, 2012 ICR 74 and comment in chapter 3 at n 64).

⁵² Baker (ch 10, n 48) 321-23.

greater regard to Strasbourg's approach to balancing competing interests. Freedom of association (like freedom of religion), after all, is not absolute. Article 11 of the ECHR provides that freedom of association can be limited, if prescribed by law and necessary for the protection of the rights and freedoms of others. When an employer exercises their derivative right to religious association, those most often infringed are freedom of religion and equality rights.

There have been many justifications offered for the limits imposed by anti-discrimination laws on freedom of association, including social engineering, perfectionist-paternalism, and legal moralism.⁵³ Discrimination can inflict on individuals, 'major physical, emotional, psychological and social harm',⁵⁴ and in cases of sexual orientation discrimination, the harm can be particularly severe. Counsel for the claimant in *Reaney v Diocese of Hereford* submitted before the employment tribunal (the 'ET') that the purpose of the Employment Equality (Sexual Orientation) Regulations 2003 was, in part, to, 'remove and approach the concealment of sexual orientation which is corrosive of integrity'.⁵⁵ He referred the ET to a South African case in which the court approved comments made by the ECtHR on the 'often serious psychological harm' suffered by homosexual victims of discrimination.⁵⁶ The Supreme Court of Canada similarly asserted in *Vriend v Alberta*⁵⁷ that, 'The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.'⁵⁸ There is evidence of this harm in the South African case of *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*,⁵⁹ which concerned a claim of sexual orientation discrimination brought by a music

⁵³ See discussion in Larry Alexander, 'What is Freedom of Association, and What is its Denial?' (2008) 25 Social Philosophy and Policy 1, 15-20.

⁵⁴ Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 The University of Notre Dame Australia Law Review 107, 127.

⁵⁵ *Reaney* (ch 10, n 19) [84].

⁵⁶ ibid [84] referring to *The National Coalition for Gay and Lesbian Equality, South African Human Rights Commission v The Minister of Justice, The Minister of Safety and Security, and The Attorney General of the Eitwatersrand* [1998] ZACC 15, [23] (Constitutional Court of South Africa).

⁵⁷ *Vriend v Alberta* [1998] 1 SCR 493 (CanLII), 156 DLR (4th) 385 (cited to SCR).

⁵⁸ ibid [102]. Also referred to by Counsel for the Claimant in *Reaney* (ch 10, n 19) [84].

⁵⁹ *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 (4) SA 510 (T) (Equality Court of South Africa).

teacher for an academy run by the Dutch Reformed Church. When the academy discovered the teacher was involved in a homosexual relationship, it terminated his contract. The impact on the teacher's emotional, psychological and financial well-being was reportedly particularly grave: he became depressed and had to sell his house and his piano.⁶⁰ There must also be appreciation of the financial harm suffered by individuals who are subject to discrimination because excluding individuals from employment opportunities because of protected characteristics results in inequality of opportunity for economic advancement.⁶¹

Perhaps most importantly, though, equality laws protect individuals against the harm caused to their dignity interests when subjected to discrimination on grounds of a protected characteristic.⁶² A person's interest in his own sense of self-worth can undoubtedly be affected by unlawful discrimination, but so too can the wider public view of that person's worth.⁶³ For this reason, one United States Supreme Court judge has referred to discrimination as causing a, 'stigmatizing injury'.⁶⁴ Obtaining and retaining employment is a significant contributor to feelings of self-worth, and therefore discrimination in employment can have a substantial adverse effect on dignity interests. The impact of discrimination on dignity interests, however, can be even more profound, as one South African critic has said:

Employment is of course connected to a person's sense of dignity and thus losing one's job on discriminatory grounds may indeed cause a crisis of self-worth. Yet, the dignity claim goes beyond this: it is about the exclusion of individuals from the community in question on the basis of a central element of their identity, and the stigma that this causes. It involves fundamentally a failure to treat individuals as ends in themselves. It involves reducing individuals to a particular

⁶⁰ Ibid [25], [33]. See also, Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 126 SALJ 827, 838 and 852.

⁶¹ White considers that, 'Individuals have an *economic opportunity interest* in not being excluded specifically from ... goods-conferring associations.' Stuart White, 'Freedom of Association and the Right to Exclude' (1997) 5 The Journal of Political Philosophy 373, 383.

⁶² See discussion in ibid 384-85 on the dignity interest infringed by exclusion on categorical grounds.

⁶³ ibid 384.

⁶⁴ Justice Brennan J in *Roberts v United States Jaycees* 468 US 609 (1984) at 625, discussed in White (ch 10, n 61) 384.

characteristic and taking decisions that have a detrimental impact upon them simply because of this characteristic.⁶⁵

The dignity interests affected, moreover, are not restricted to those of the individual who is the subject of the discriminatory act. Rather, all those in the community to which the individual belongs can suffer from the knowledge that the state has permitted rejection of an individual because of a protected characteristic, which they all share.⁶⁶

It is noteworthy that dignity could be the basis both for freedom of religious association and for the right to non-discrimination because of protected characteristics. Some have even argued that dignity itself could be useful in determining the outcome in cases where these rights compete.⁶⁷ Though the concept of human dignity is certainly beneficial to a deeper understanding of equality law and human rights, it is doubtful that 'dignity' is a robust enough concept to provide much assistance to the judiciary in balancing competing interests.⁶⁸ Though some have argued that general principles ought to guide mediation of the conflict between freedom of association, on the one hand, and the right to equality of opportunity, on the other⁶⁹ there is no basis in the European Convention on Human Rights for any hierarchical ordering of freedom of association and rights to equality. A case-by-case approach is required to assess the relative strength of each claim in the conflict, and the facts of each case must inform a comparison of the claim to equality with the claim to associate freely.⁷⁰

⁶⁵ David Bilchitz, 'Should Religious Associations Be Allowed to Discriminate?' (2011) 27 SAJHR 219, 233.

⁶⁶ Walsh (ch 10, n 54) 129.

⁶⁷ Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law: A Better Route to equality?' [2006] EHRLR 610

⁶⁸ See discussion in Walsh (ch 10, n 54) 131-32 and Walsh's reference to dicta of the Canadian Supreme Court in *R v Kapp* [2008] 2 SCR 483, [21]-[22] (CanLII), 294 DLR (4th) 1 that, 'human dignity is an abstract and subjective notion that ... cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be'.

⁶⁹ For example, Rawls has argued that basic liberties (like freedom of association) should always be prioritised over equality of opportunity. See discussion in Peter De Marneffe, 'Rights, Reasons and Freedom of Association' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 149.

⁷⁰ Peter De Marneffe argues against general principles to guide the approach in *ibid* 149-56. He concludes that, 'whether it is permissible or impermissible for the government to interfere with a liberty for reasons of equality depends not upon the category of liberty it falls within, but upon

10.3.2 Proportionality as a means of balancing

Of course, at present, only the religious ethos exception and the OR exception incorporate an express proportionality test that the judiciary can use to assess the relative strength of the claim to associate freely with the claim to equality on a case-by-case basis. Proportionality is entirely absent from the faith schools exception and there is dubiety over whether proportionality is implicitly incorporated into the organised religion exception.⁷¹ Proportionality provides a mechanism for decision-makers and the judiciary to consider the discriminatory impact of a proposed measure and to ask whether an alternative with less of a discriminatory impact would suffice to achieve the employer's purpose.⁷² The requirement to act proportionately in the circumstances of each case ensures that due respect is afforded to all competing interests in the particular contexts in which they arise. Proportionality is an essential component for affording the dignity interests of all affected parties sufficient weight.

It was observed in chapter 3 that arguments have been made that the lack of any express stipulation that discriminatory requirements must be proportionate renders the organised religion exception and the faith schools exception incompatible with Council Directive 78/2000.⁷³ In light of these persuasive arguments and the benefits of a facility allowing the judiciary to balance the right to associate with the right to be free from discrimination on a case-by-case basis, the UK Government should amend the faith schools exception and the organised religion exception. Amending the organised religion exception and the faith schools exception to include an explicit requirement on the employer to act proportionately would provide greater scope for freedom of association to guide interpretation of the exceptions by offering a more flexible and nuanced mechanism to balance competing rights.

the relative weight of this reason of equality and the reasons against interference. We should resolve conflicts between freedom of association and equality or opportunity not by considering general principles, then, but by considering the details of each case.' ibid 156.

⁷¹ See chapter 3 at 3.3.3.

⁷² For comment on the doctrine of proportionality, competing interests, and the range of factors which may be relevant in balancing religious freedom with other rights and freedoms, see Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 65-96.

⁷³ See chapter 3 at 3.3.5.

10.3.3 Accommodation and the search for less discriminatory alternatives

It has been argued above that a full understanding of the freedom of association basis of the employment exceptions ought to recognise the qualified nature of this right and seek an appropriate balance with the rights and interests adversely impacted by its exercise.⁷⁴ There is a concept of ‘accommodation’, developed by the Supreme Court of Canada in the case of *British Columbia (Public Service Employee relations Commission) v B.C.G.E.U*⁷⁵ (hereafter, referred to as *Meiorin*) which could usefully be incorporated into decision-making to assist relevant parties achieve this important balance.⁷⁶

Meiorin was not a case on an employment exception, but rather a case on the BFOQ provision in British Columbia’s human rights legislation.⁷⁷ The Supreme Court of Canada held in *Meiorin* that there was a three-step test to decide whether a *prima facie* discriminatory standard was a BFOQ. Firstly, the employer has to demonstrate a rational connection between the purpose of the standard and performance of the job. Secondly, the employer must show that it adopted the standard in the honest and good faith belief that it was necessary to fulfil a legitimate work-related purpose. Thirdly, it must show that the standard was reasonably necessary for that purpose. To establish that the standard was ‘reasonably necessary’ it must be demonstrated that it was impossible to accommodate individual employees sharing the characteristics of the claimant

⁷⁴ See above at 10.3.1 and 10.3.2.

⁷⁵ *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3 (CanLII), (1999) 176 DLR (4th) 1 (*Meiorin* cited to SCR).

⁷⁶ For an argument in favour of incorporating proportionality and the *Meiorin* principle of accommodation into the BFOQ analysis in cases (including those pertaining to discrimination in employment by religious schools) see Hilary MG Paterson, ‘The Justifiability of Biblically Based Discrimination: Can Private Christian Schools Legally Refuse to Employ Gay Teachers’ (2001) 59 U Toronto Fac LRev 59.

⁷⁷ For a helpful summary of the development of Canadian jurisprudence on the BFOQ in Canada, see Alvin Esau, “Islands of Exclusivity”: Religious Organisations and Employment Discrimination’ (1999-2000) 33 UBC LRev 719, 781-93.

without imposing undue hardship on the employer.⁷⁸ The third step of the *Meiorin* test, therefore, incorporates a norm of ‘accommodation’.⁷⁹

The Supreme Court in *Meiorin* proposed a list of questions to assist the judiciary to determine whether an employer has satisfied their duty to accommodate to the point of undue hardship. These questions included whether the employer investigated alternative approaches and whether there was a way to perform the job, which was not as discriminatory, but which still achieved the employer’s legitimate purpose.⁸⁰ The ‘financial cost of the possible method of accommodation’, the ‘relative interchangeability of the workforce and facilities’, and ‘the prospect of substantial interference with the rights of other employees’ were also among the factors which the Supreme Court considered might be relevant to an assessment of efforts to accommodate.⁸¹ In addition to the procedure followed by the employer to consider accommodation, the ‘substantive content’ of ‘either a more accommodating standard which was offered or alternatively the employer’s reasons for not offering any such standard’, was to be scrutinised.⁸² The following words of McLachlin J of the Supreme Court capture effectively the duty of the judiciary to engage with the issue of accommodation when interpreting the BFOQ:

Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer’s legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and

⁷⁸ *ibid* [54]. The *Meiorin* decision was also significant for removing the distinction between direct and indirect discrimination and creating a unified approach to defending discrimination based on the BFOR.

⁷⁹ Esau describes the decision as creating what he termed ‘an accommodationist BFOR test’ in Esau (ch 10, n 77) 786. Prior to the Supreme Court’s decision in *Meiorin*, the obligation to ‘accommodate’ to the point of undue hardship had, to a degree, been incorporated in to some of the provinces’ legislative provisions on the *bona fide* occupational requirement (see Yukon, Ontario, Manitoba), as well as in the federal human rights code. The Canadian Human Rights Act, for example, provided at section 15(2) that an otherwise discriminatory practice will not amount to a *bona fide* occupational requirement unless it is established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the employer. See *Meiorin* (ch 10, n 75) [52].

⁸⁰ *Meiorin* (ch 10, n 75) [65].

⁸¹ *ibid* [63].

⁸² *ibid* [66].

potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.⁸³

The Supreme Court's decision in *Meiorin* requires the employer to do more than simply ask whether it is possible to accommodate an individual in any particular scenario: it requires, rather, that accommodation is built into the standard itself.⁸⁴ At the heart of the *Meiorin* ratio, therefore, is, 'the core value of inclusiveness'.⁸⁵ 'Inclusiveness' as a value is not inconsistent with a freedom of association underpinning of the employment exceptions.⁸⁶ This is because a full understanding of the freedom of association basis of the group rights protected by the employment exceptions ought to recognise the qualified nature of these rights and seek an appropriate balance with the rights and freedoms adversely impacted by their exercise. By incorporating considerations of 'accommodation' into the BFOQ provision, factors relevant to achieving this balance are placed at the forefront of the minds of employers and the judiciary.

The Canadian case of *Smith v Knights of Columbus*⁸⁷ illustrates how the requirement to consider 'accommodation' could help to foster an environment in which there is more regard for the dignity interests of those affected by discrimination.⁸⁸ In *Smith* the complainants alleged that they had been discriminated against because of their sexual orientation when the Knights of Columbus (a Catholic men's organisation) retracted its offer to rent a hall to them when it discovered they intended to use it for a reception following their same-sex marriage. The tribunal held that the Knights had failed to establish a *bona fide* and reasonable justification defence to the discrimination because they had not accommodated the complainants to the point of undue hardship.

⁸³ibid [64].

⁸⁴ibid [55]. See also, Canadian Human Rights Commission, 'Bona Fide Occupational Requirements and Bona Fide Justifications under the Canadian Human Rights Act: The Implications of *Meiorin* and *Grismer*' (Minister of Public Works and Government Services, March 2007) 1 <<https://www.chrc-ccdp.gc.ca/eng/content/bona-fide-occupational-requirements-and-bona-fide-justifications-under-canadian-human-rights>> accessed 28 December 2017.

⁸⁵Esau (ch 10, n 77) 793.

⁸⁶Esau argues the contrary. Observing that *Meiorin* is not based 'on the acceptance of exclusionary practices as an associational group right' Esau argues that the 'message' of inclusiveness 'is in stark conflict with the culture of the islands of exclusivity'. ibid.

⁸⁷*Smith v Knights of Columbus* 2005 BCHRT 544 (WL Intl), 55 CHRR 10 (cited to BCHRT).

⁸⁸See also *Eadie v Riverbend Bed and Breakfast* 2012 BCHRT 247 (WL Intl), 74 CHRR 410.

According to the tribunal, although the Knights could have declined to rent the hall ‘because of their core religious beliefs’, they were compelled, ‘to consider the effect their actions would have on the complainants’⁸⁹ and they, ‘could have taken additional steps that would have recognized the inherent dignity of the complainants and their right to be free from discrimination’.⁹⁰ These steps included, ‘meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any expenses they had incurred and, perhaps offering assistance in finding another solution’.⁹¹

If the British judiciary was to build this concept of ‘accommodation’ into its interpretation of proportionality in the employment exceptions, it would need to consider the adverse impacts of an employer’s actions on the affected employee or applicant and whether the employer took steps to avoid or mitigate these. This would render it more likely that due respect would be afforded to the dignity interests of the individual affected by the discrimination. It is important to recognise that considering ‘accommodation’ as part of the proportionality enquiry would not necessarily create a more stringent test for defending discrimination. It is recalled that ‘accommodation’ in the Canadian jurisprudence is only required to the point of ‘undue hardship’. It would be for the British judiciary to set the bar for ‘undue hardship’. Given the freedom of religious association underpinning of the employment exceptions argued for, the British judiciary ought to look particularly to ECtHR jurisprudence for guidance in this task.⁹² The real benefit of incorporating the ‘accommodation’ ideal, therefore, lies not in the creation of a stricter test for defending discrimination, but rather in encouraging the judiciary (and employers) to focus on discriminatory impacts and alternatives.

⁸⁹ *Smith* (ch 10, n 87) [120].

⁹⁰ *ibid* [123].

⁹¹ *ibid* [124].

⁹² For comment on the ECtHR approach to balancing religious autonomy with individual rights, see Ian Leigh, ‘Balancing Religious Autonomy and Other Human Rights under the Convention’ (2012) 1 OJLR 109, 120-24.

10.4 Conclusion

In the past, the legislature in the UK has recognised freedom of religious association as only one of a number of influences on the employment exceptions. The principal conclusion of this thesis was that there is significant merit in treating freedom of religious association as the *primary* basis for the employment exceptions. The principle of freedom of association, in particular, could assist the judiciary to navigate, on a principled footing, the ambiguities in scope and application of the exceptions. It could invite, moreover, greater attention to be paid to the real interests affected by an exercise of the exceptions.

Understanding freedom of religious association as the primary basis for the exceptions could focus the minds of decision-makers on the individuals (or members) whose associative interests an exercise of the exceptions is intended to protect and encourage a purposive interpretation which regards the exceptions as protecting the associative identity of those individuals. Canadian jurisprudence has been used to illustrate that a purposive interpretation of the exceptions, which treats them as derogations from the equality principle that are justified by fundamental human rights, could encourage the judiciary to have greater regard than it has had previously, for the ethos of the employer, and how this interacts with the relationships the employer has with its employees and the members it serves. The importance of ethos in a religious workplace should not be understated, as the findings of the empirical study show.

Regarding freedom of religious association as the primary basis for the exceptions is also an important reminder that they derive from qualified rights. Regarding the rationale for the employment exceptions as rooted in qualified rights could encourage the judiciary to engage more fully than it has in the past with the discriminatory impacts of an exercise of the employment exceptions and any less discriminatory alternatives which might be available. Extending proportionality to the organised religion and faith schools exceptions and considering ‘accommodation’, I have argued, could facilitate this engagement, and assist the judiciary to balance the dignity interests on both sides. In summary, I have argued that regarding freedom of religious association as the

primary basis for the employment exceptions could help the judiciary to take into account the intricacies of the interests protected and affected by their exercise.

Understanding freedom of religious association to be the *primary* basis of the employment exceptions could thus have a significant impact on the manner in which the judiciary interprets its cases. It invites the judiciary to take a new perspective in its deliberations. It is a perspective which regards the derogations from the EU equality principle as justified by fundamental human rights. It puts ECtHR jurisprudence at the forefront and compels the judiciary to embrace Strasbourg's approach to balancing competing rights with its attendant regard for discriminatory impacts. It asks the judiciary in its deliberations to be respectful and tolerant of differing needs but also to be inquisitive of the context in which they arise and the personal and societal interests which may be impacted if these needs are catered for. Ultimately, it offers the judiciary the flexibility and principled guidance to produce fair and well-reasoned decisions.

Appendix 1



College of Social
Sciences

[Recipient name]

Rm. 514, Stair Building

[Recipient address]

5 – 9 The Square

University of Glasgow

Glasgow

G12 8QQ

[Date]

Dear [Sir / Madam] OR [Name]

Invitation to participate in a research study

What are the needs and interests of religious organisations as employers?

I am writing to invite you to take part in a research study on behalf of your organisation. The aim of the study is to elicit the needs and interests of establishments with a religious identity with regard to their role as employers. The information gathered will contribute to my assessment of current employment law as it affects religious organisations in the UK.

I am undertaking the study for the degree of PhD in Law at the University of Glasgow (School of Law, College of Social Sciences). The study has been reviewed by the College of Social Sciences Research Ethics Committee at the University.

I enclose an information sheet which explains why the research is being carried out and what it will involve. I would be grateful if you would read the enclosed information and consider whether you are willing to take part in the study. If you decide to participate, I will meet with you (or another representative from your organisation) to conduct an interview lasting approximately one hour. I anticipate being able to collect all of the information I require from this interview.

If you have any questions about this request please contact me by email at c.cannon.1@research.gla.ac.uk. Alternatively, Professor Jane Mair of the University of Glasgow, who is supervising the study, can be contacted at jane.mair@glasgow.ac.uk.

I would be grateful if you would advise me by [Date] by email to c.cannon.1@research.gla.ac.uk whether you are willing to participate in the study. Thank you for your time in considering my invitation.

Yours [faithfully] OR [sincerely]

Catriona Cannon

Appendix 2



College of Social Sciences

Postgraduate research study

Study title: What are the needs and interests of religious organisations as employers?

Researcher details: Mrs Catriona Cannon of the University of Glasgow (School of Law, College of Social Sciences) is undertaking the study for the degree of PhD in Law. The study is being supervised by Professor Jane Mair.

You are being invited to take part in a research study. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part. Thank you for reading this.

PARTICIPANT INFORMATION SHEET

1. What is the purpose of the study?

The study forms part of my research for the degree of PhD in law. My research is on religion in employment law. I am comparing the UK law to the law in the United States and Canada.

The study in which I am asking you to participate will help me to understand the needs and interests of religious organisations in the employment context. The information gathered will contribute to my assessment of employment law as it affects religious organisations in the UK.

It is not the objective of my study to assess your organisation's compliance with employment law. I want to understand instead why and how religion might influence or impact on your employment practices, both at the recruitment stage and throughout the employment relationship. It is also of interest to me to hear about any challenges which you consider religious workplaces face, including any challenges arising from current UK employment law.

2. Why have I been chosen?

You have been chosen to participate in the study because you are a religious organisation operating in the Glasgow and/or surrounding area. I intend to conduct interviews with approximately 14 other religious organisations operating in the Glasgow and/or surrounding area. It is anticipated that the participants will include religious organisations functioning in different sectors as well as organisations affiliated to different religions.

3. Do I have to take part?

It is up to you to decide whether or not to take part. If you decide to take part you can decline to answer any question I ask and are free to withdraw at any time and without giving a reason.

4. What will happen to me if I take part?

If you decide to take part, I will meet with you at your place of business (or at another agreed place) to conduct an interview. Prior to the interview commencing, I will ask you to sign a form to confirm that you consent to participating in the study. I would also like to audio-tape our conversation (with your consent) to ensure accurate recording of your views. The interview will last approximately one hour. I anticipate being able to collect all of the information I require from this interview. As such, I do not intend to request any further involvement from you in the study after this interview. I anticipate that participants in the study will be interviewed over the first half of 2015.

5. Will my taking part in this study be kept confidential?

Paper and audio copies of the data collected from you will be stored securely at the University of Glasgow and any electronic copies of the data will be password protected with limited access. Your name and your organisation's name will be removed from copies of the data before storage and replaced with an ID. Details of the participants and their IDs will be stored separately from the data. The data will be destroyed securely after a period of ten years.

It is likely the data collected will be reported in publications. When referring to the data collected from you in any publication, you will be referred to by a pseudonym and a job title and your organisation will be described in general terms, for example relating to its size, form, religious affiliation and/or the sector in which it operates. I must advise, however, that it may be possible, given the geographical scope of my study, that the description given to your organisation with or without the text that accompanies it may be sufficient to identify it to readers of any publication in which the data are reported. All arrangements regarding confidentiality will be subject to any applicable legal limitations.

6. What will happen to the results of the research study?

It is intended that the results of the study will be included in the thesis I am preparing for the purposes of obtaining the degree of PhD in Law. It is anticipated that the degree will be awarded in the course of 2017, after which time the thesis will be available to the public to read. It is possible that the results of the study might also be included in other publications or in conference papers.

7. Who is organising and funding the research?

I am organising and funding the research as part of my PhD in Law which is being supervised by the School of Law at the University of Glasgow.

8. Who has reviewed the study?

The study has been reviewed by the College of Social Sciences Research Ethics Committee.

9. Contact for Further Information

Mrs Catriona Cannon: c.cannon.1@research.gla.ac.uk 0141 330 7475

Professor Jane Mair: jane.mair@glasgow.ac.uk 0141 330 6841

If you have any concerns regarding the conduct of the research project then you can contact the College Ethics Officer, Dr Muir Houston: Muir.Houston@glasgow.ac.uk

Appendix 3



College of Social
Sciences

Title of project: A study of the needs and interests of religious organisations as employers

Researcher: Mrs Catriona Cannon

Interview themes

1. **Background information on the participant** (current position / role; work history)
2. **Background information on the organisation** (mission/purpose; religious affiliation; structure / financing; size)
3. **Organisation's ethos and values** (description; statement; dissemination to staff; influence on organisation's work)
4. **Characteristics of the workplace of an organisation with a 'religious' or 'faith-based' ethos**
5. **Recruitment of staff** (understanding of / sympathy with ethos; occupational requirements; status)
6. **Relationships with staff** (standards of behaviour; mediating employee disputes; staff development; multi-faith staff)
7. **Faith as the motivation for work**
8. **Challenges for religious organisations in current times and views on UK employment law**
9. **Concluding thoughts**

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