



LAW & JUSTICE

The Christian Law Review

No. 191

TRINTY/MICHAELMAS

2023

**The 14th Richard O'Sullivan Memorial Lecture:
a New Great Awakening of Religious Freedom in America**

John Witte, Jr.

Clergy Abuse: a Hard Path for Claimants

Andrew Tettenborn

Clergy Discipline in the Latin Church

John Poland

**The Seminal Case of Butler-Sloss v Charity Commission:
The Purpose of Capital**

Luke Fletcher

Quis custodiet? : News from the Governmental and Political World

Book Reviews

Casebook

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THE CHRISTIAN LAW REVIEW

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Law and Justice was founded in 1963 and is an international peer reviewed journal published twice yearly. It offers a fundamental critique, from a non denominational Christian perspective, of what is happening to the law and through the law, examining ethical foundations and current trends. Thus the journal is concerned with both the substance of the law and its procedures, and with what the law is and what it ought to be. Although the journal is published in the United Kingdom its focus is world wide. In each issue the journal aims to provide comprehensive and authoritative coverage of current developments through the extensive case notes which each issue contains and the Government and Parliamentary Review which appears yearly. Each issue also contains a number of articles and issues often deal with a particular theme. Examples are law and medicine, law and the family, and law and education. In addition the journal has reflected the current debate on the relationship between secular law and religious groups by publishing a series of issues devoted to this.

The journal is published by the Edmund Plowden Trust in honour of the distinguished Elizabethan lawyer who was Master Treasurer of the Middle Temple where his bust is still to be seen in the magnificent Hall which he built. He published the first series of modern law reports but above all he was a lawyer of great integrity who, as a Roman Catholic, refused all offers of professional advancement as to do so would mean denying his faith.

The Trust also sponsors the Richard O'Sullivan Memorial Lecture, when a distinguished lawyer speaks on a topic concerned with Law and Christian values. Richard O'Sullivan was also a Master of the Middle Temple who, like Plowden, was animated not only by the letter of the law but also by its spirit and especially its Christian spirit. Details of these lectures will appear in the journal and on our website.

GUIDANCE FOR CONTRIBUTORS

Detailed guidance may be found on our website (www.lawandjustice.org.uk) but briefly the deadline is 1st February and 1st August and articles should not exceed 6,000 words. Electronic submission to the editor at editor@lawandjustice.org.uk is the preferred method. Book reviews, which should not exceed 2,000 words, should be sent to the book review editor at j.oliva@manchester.ac.uk. Potential contributors who would like to discuss the submission of articles are warmly invited to contact the editor.

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EDITORIAL

Not all readers may be familiar with the decision in *Tracey, R (on the application of) v Cambridge University Hospitals NHS Foundation Trust & Ors*¹ but, in the light of the current debate on whether the UK should remain a signatory to the European Convention on Human Rights (ECHR), it is suggested that they might well look at this case and its implications.

The wife of the appellant was diagnosed with lung cancer and had a nine-month life expectancy but subsequently sustained a serious cervical fracture and was placed on a ventilator in a critical condition on 19 February 2011. Initially, her medical team placed a DNACPR notice² in her notes. She was subsequently successfully weaned from the ventilator and her condition appeared to improve; and following objections raised by her daughter the notice was removed. A few days later her condition deteriorated again and a second DNACPR notice was completed. Mrs Tracey died on 7 March 2011.

The Court of Appeal granted a declaration against the Trust on the basis that it had violated Mrs Tracey's Article 8 right to respect for private life in failing to involve her in the process which led to the first notice. As Longmore LJ observed: 'Mrs. Tracey had expressed sufficiently clearly a wish to be consulted and that in those circumstances Dr Lavinio ought not to have signed a DNACPR notice without consulting her'. Furthermore, Longmore LJ considered that the application of common law principles in relation to a doctor's duty to consult patients in relation to decisions to treat or not to treat would give the same result and referred to *R (Burke) v GMC*³.

This case is not particularly well known and, by the evidence of medical colleagues, is often ignored in practice. However, what it clearly illustrates is the relevance of the ECHR in situations which do not grab headlines in all the debates on the apparent use of the ECHR by asylum seekers and calls for its consequent removal from our law by the repeal of the Human Rights Act 1998. Yet any debate on the future of the ECHR must take account of its actual effect in practice and of its role, often remarked on by practitioners and seen in this case, of buttressing existing common law rights. Moreover there is a strong Christian tradition of locating concern for human rights at the very heart of the gospel message.

¹ [2014] EWCA Civ 822.

² The effect of a DNACPR notice is to prevent the administration of Cardio-Pulmonary Resuscitation which is itself a treatment that for some people may re-start their heart when they suffer a sudden cardiac arrest due to a heart rhythm disturbance. According to evidence given in this case by the chairman of the Resuscitation Council (UK) the likelihood of a cancer patient on a critical care unit having a successful CPR has been reported at only 2.2%.

³ [2006] QB 273.

How this is actually achieved is another matter, whether by leaving the existing human rights legislation in place, suggesting reforms, or replacing the ECHR with what is called a British Bill of Rights. The problem with the latter, of course, is precisely that it is simply a national piece of legislation and weakens international protection of human rights. What is not in doubt is the need for the Christian voice to insist that protection of fundamental human rights in our legislation must continue. I hope that we can have more detailed articles on this area in future issues.

Turning to this issue we have the text of the 14th Richard O’Sullivan Memorial Lecture, which was so generously hosted by Notre Dame, London, with the generous support of the Newman Association. The Edmund Plowden Trust is most grateful to them and to Prof. John Witte who travelled over from the USA to give the lecture. Then we have another article in our series on clergy discipline. In the previous issue we looked at discipline of rabbis and now Fr. John Poland has written incisively on discipline in the RC Church. We hope to have future articles on discipline of the clergy in other denominations. Then there are two articles, for which I am extremely grateful to their respective authors, dealing with recent important case law. Prof. Andrew Tettenborn has written on the Supreme Court decision in *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* on the extent to which religious bodies can be vicariously liable for the acts of what we might loosely call their members and then Luke Fletcher has written on the implications of *Butler-Sloss & Others v Charity Commission* on ethical investments and the wider issue of the very purpose of capital. The fact that these two cases deal with such widely divergent areas shows the extent of the fields which this journal covers. Then of course we have our usual three features: Quis Custodiet, Book Reviews and Case Notes. My thanks to Javier Oliva and Frank Cranmer for the second and third of these are no less for having been expressed on so many occasions.

This editorial is written in the hope that you will receive this issue by the start of 2024 and as ever Anne and I send you our best wishes for the new year and our thanks for your constant support of this unique journal. God bless you all.

John Duddington

A NEW GREAT AWAKENING OF RELIGIOUS FREEDOM IN AMERICA

THE 14TH RICHARD O’SULLIVAN MEMORIAL LECTURE

JOHN WITTE, JR.*

Abstract: *Twenty years ago, American religious freedom was in trouble. The United States Supreme Court had weakened the First Amendment considerably, and religious freedom claims were often subordinated to sexual liberty and other rights claimants. States routinely denied funds and benefits to religious parties and removed traditional religious symbols and ceremonies from public life. Leading academics castigated religious group rights claimants given recent charges of sexual abuse and financial fraud in some churches. In 2000, religious freedom was a second-class right.*

No longer! The past decade has seen a great awakening of American religious freedom, led by the United States Supreme Court. In more than two dozen cases since 2012, the Court has strengthened the First Amendment to strike down public regulations and policies that discriminated against religion. It has granted religious individuals and groups exemptions from general laws that substantially burdened religious conscience and strengthened the autonomy of religious groups to govern their own polity and property. The Court has underscored traditional protections against religious coercion and state hostility toward religion. And it has built strong new protections for the religious worship of prisoners, students, and teachers, and against state efforts to remove religious symbols, ceremonies, and statuary from public life.

This Article maps this new great awakening of religious liberty, but also warns about some of the ample challenges that remain. It argues that religious freedom is precious gift of God to protect, not a prerogative of one political party to brandish, and it encourages people of faith to use this religious freedom wisely to love and serve all their neighbours, not least those of different faith.

Introduction

Religious freedom has reawakened in America over the past decade, and the loudest wake-up call has come from the United States Supreme Court.

* <https://orcid.org/0000-0001-8929-0267>. Portions of this text are drawn from John Witte, Jr. and Eric Wang, “The New Fourth Era of American Religious Freedom,” *Hastings Law Journal* 74 (2023), 1813-1848 and John Witte, Jr., Joel A. Nichols & Richard W. Garnett, *Religion and the American Experiment*, 5th ed. (Oxford: Oxford University Press, 2022).

Only a dozen years ago, American religious freedom was in trouble in several states and federal circuits. Old religious monuments were targeted for removal as badges of bigotry and religious favouritism.¹ Religious parties were excluded from state scholarships and other public programs and benefits.² State civil rights commissions penalised conscientiously opposed vendors for not servicing same-sex weddings,³ religious pharmacists for not filling prescriptions for abortifacients,⁴ religious schools for not teaching inclusive sexual ethics, and religious charities for discriminating in their delivery of services.⁵ Some critics and legislators called for religious communities to be stripped of their tax exemptions, marital solemnization rights, teaching licenses, and social service contracts.⁶ Several states enacted new anti-Sharia measures.⁷ The Supreme Court, throughout the 1990s and 2000s, enforced religious freedom provisions relatively weakly, leaving most religious freedom questions for states and legislatures to work out in accordance with the Court's new devotion to federalism and separation of powers.

There were many likely reasons for this turn against religion and religious freedom: worries about militant Islamism after 9/11; the exposures of massive sexual scandals and cover-ups within some churches; new media exposés on the luxurious lifestyles of some religious leaders occupying large tax-exempt institutions; and transparent political gamesmanship by some religious groups.⁸ A stronger reason still was that some faith communities opposed the emerging constitutional rights of same-sex equality and marriage, and some also opposed constitutional rights to contraception and abortion.⁹ Strong critics in the academy and the media now branded religion

¹ See examples in *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2074–79 (2019).

² See e.g., *Locke v. Davey*, 540 U.S. 712, 715–17 (2004); *Christian Legal Society v. Martinez*, 561 U.S. 661, 672–73, 683 (2010).

³ See, e.g., *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209, 1237 (Wash. 2019) (holding that a wedding florist's refusal to service a same-sex couple violated the Washington Law Against Discrimination), *cert. denied*, 141 S. Ct. 2884 (2021); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58 (N.M. 2013) (holding that a photographer's refusal to serve a gay couple violated the New Mexico Human Rights Act).

⁴ *Stormans, Inc. v. Wiseman*, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

⁵ See examples in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–76 (2021).

⁶ See examples in John Witte, Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge: Cambridge University Press, 2021), 196–226.

⁷ See examples in John Witte Jr. & Joel A. Nichols, “Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions,” *Faulkner Law Review* 4 (2013), 321.

⁸ See John Witte Jr. & Joel A. Nichols, “Come Let Us Reason Together”: Restoring Religious Freedom in America and Abroad,” *Notre Dame Law Review* 92 (2016), 427.

⁹ See Thomas C. Berg, *Religious Liberty in a Polarized Age* (Grand Rapids, MI: Eerdmans, 2022); William N. Eskridge, Jr. & Robin Fretwell Wilson eds., *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge: Cambridge University Press, 2018); Frank Ravitch, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge: Cambridge University Press 2016).

as an enemy of liberty, and decried religious freedom as a dangerous and outdated constitutional luxury.¹⁰

All that has changed dramatically in the past decade. While loud criticisms of religion continue to clatter in the media and the law reviews, the U.S. Supreme Court has led a great awakening of American religious freedom. In more than two dozen cases since 2011, the Court has used both the First Amendment and federal statutes to strengthen the rights of religious organisations to make their own internal decisions about employment and employee benefits.¹¹ The Court has held that some forms of government aid to religion and religious education are not only permissible under the Establishment Clause, but also required under the Free Exercise and Free Speech Clauses.¹² The Court has used the Free Exercise Clause to enjoin several public regulations and policies that discriminated against religion, that penalised parties for taking religious stands, or that coerced parties to act contrary to their conscience.¹³ The Court has strengthened both the First Amendment and statutory claims of religious individuals and groups to gain exemptions from general laws that substantially burdened their conscience.¹⁴ The Court has used religious freedom statutes to give new protections to Muslim prisoners,¹⁵ and insisted that death row inmates have access to their chaplains to the very end.¹⁶ The Court has even allowed

¹⁰ See several examples in Witte and Nichols, “Come Let Us Reason Together.”

¹¹ See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020). See discussion in text at notes 60–61 below.

¹² *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). See discussion of these cases in text at notes 38–42 below.

¹³ See cases in note 12 and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874, 1881–82 (2021).

¹⁴ *Hobby Lobby*, 573 U.S. at 688–91; *Little Sisters of the Poor*, 140 S. Ct. at 2373; *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2307–08, 2312–13 (2023) (holding that the First Amendment prohibits a state from coercing a website designer to create a wedding website for same-sex couples contrary to her religious beliefs in heterosexual monogamous marriage only); *Groff v. DeJoy*, 143 S. Ct. 2279 (2023) (upholding the Title VII religious discrimination claim of a Sunday worker who was not accommodated); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (upholding a Title VII disparate treatment case for a Muslim job applicant who wore a headscarf for religious reasons).

¹⁵ See *Holt v. Hobbs*, 574 U.S. 352 (2015) (holding that a state’s beard-grooming policy substantially burdened a Muslim inmate’s religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5).

¹⁶ *Ramirez v. Collier*, 142 S. Ct. 1264, 1272, 1277–81 (2022) (holding that a death row inmate was likely to succeed on his claims that Texas’s refusal to permit his pastor to “lay hands on him and pray over him” violated his rights under RLUIPA); cf. *Dunn v. Smith*, 141 S. Ct. 725, 725–26 (2021) (Kagan, J., concurring) (finding that Alabama’s “exclusion of all clergy members from the execution chamber” violated RLUIPA because it substantially burdened a claimant’s exercise of religion and failed strict scrutiny).

the collection of money damages from government officials who violated individuals' statutory protections of religious freedom.¹⁷

These two dozen recent cases signal a marked return to America's founding axiom that religious freedom is the first freedom of our constitutional order, not a second class right. The eighteenth-century founders' vision was that religion is more than simply another form of expression and association; it deserves separate and special constitutional treatment. The founders thus placed the guarantee of freedom of religion before the freedoms of speech, press, and assembly in the First Amendment. That gave both religious individuals and groups special protections for their faith claims. All peaceable exercises of religion, whether individual or corporate, private or public, traditional or new, popular or reviled, properly deserve the protection of the First Amendment.¹⁸ The current Supreme Court has seized on this traditional teaching with new alacrity.

The current Court has also increasingly embraced the traditional view that the First Amendment provides an interlocking and integrated shield of religious liberties and rights for all. The First Amendment Free Exercise clause outlaws government *proscriptions* of religion—government policies or actions that unduly burden the conscience, unduly restrict religious exercise, discriminate against religion, or invade the autonomy of churches and other religious bodies. The First Amendment Establishment Clause, in turn, outlaws government *prescriptions* of religion—government actions that unduly coerce the conscience, mandate forms of exercise, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. The First Amendment thereby provides complementary protections to the foundational principles of the American experiment—liberty of conscience, free exercise, religious equality, religious pluralism, separation of church and state, and no governmental establishment of religion.¹⁹ In the 1940s, the Supreme Court had confirmed all these principles when it opened the modern era of religious freedom case law. But in the 1980s and 1990s, the Court gradually reduced the First Amendment to a mere guarantee of state neutrality toward religion.²⁰ That provided some protection, but not much. Today, the Court provides far more multi-principled and robust protection of religious freedom.

¹⁷ *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

¹⁸ See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment*, 35-128.

¹⁹ *Ibid.*, esp. 59-92, 109-28.

²⁰ *Ibid.*, 171-77, 217-27 discussing the development of the neutrality test prescribed for Free Exercise cases in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79, 890 (1990) and for Establishment Clause cases in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Court's recent cases not only revive the founders' vision. They also offer fresh insights and accents that provide a more integrative approach toward religious freedom protection going forward. Five distinct teachings are worth highlighting.

Respecting Historical Democratic Decisions

One teaching of the Court's recent cases is that a regime of religious liberty must respect historical democratic judgments about religion. In *Town of Greece v. Galloway* (2014), the Court used this argument to uphold a local community's decades-long practice of offering prayers by sundry invited local clergy to open its town council meetings. A local taxpayer thought this constituted an establishment of religion. The Court disagreed. The First Amendment "must be interpreted by reference to historical practices and understandings," Justice Kennedy wrote for the Court, particularly those that have "withstood the critical scrutiny of time and political change." "A test that would sweep away what has so long been settled" and accepted by the community "would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."²¹

The 2019 case of *American Legion v. American Humanist Association* (2019) used similar logic. That case featured a large Latin cross that had been privately erected in 1925 as a memorial for local soldiers who had died in World War I. But it now stood at a prominent intersection of two major public roads that had grown up around the monument in the intervening decades. The American Humanist Association thought this major Christian symbol constituted an establishment of religion and should come down. A 7-2 Court, led by Justice Alito, rejected this claim. The Court agreed that a cross is a poignant Christian symbol. But this Latin cross, Alito wrote, in place for nearly a century, had taken on independent value as an "embedded feature of the community's landscape and identity." For some, this cross was "a symbolic resting place for ancestors who never returned home." "For others, it [was] a place for the community to gather and honor all veterans and their sacrifices for our Nation. For still others, it [was] a familiar historical landmark." When the passage of time "imbues a religiously expressive monument, symbol, or practice" with "familiarity and historical significance," the *American Legion* Court concluded, that "gives rise to a strong presumption of constitutionality."²²

The upshot of these and other recent cases is that the First Amendment does not give a disgruntled taxpayer a heckler veto over the longstanding

²¹ 572 U.S. 565, 576-77 (2014). This case is also considered below at p. 125.

²² 139 S. Ct. 2067, 2084-85, 2090 (2019).

democratic decisions the local community took to create and maintain a religious symbol or ceremony. Change might come, but that must be done by legislation not adjudication.

This argument is strong enough to support the continuation of chaplains and chapels in legislatures, military bases, state prisons, public hospitals, or embassies; old Decalogues, menorahs, creches, and ceremonial Indian mounds in state parks; religious figures, verses, and sayings on public monuments and documents; memorial crosses, stars, and other religious symbols in state cemeteries; ceremonial recitations of oaths, proclamations, and pledges that invoke the name of God and other religious language. So long as private parties are not coerced into participating in or endorsing this religious iconography, and so long as government strives to be inclusive in its depictions and representations, there is nothing wrong with a democratic government reflecting and representing the traditional religious values and beliefs of its people.

Yes, some old traditions, no matter how venerated, eventually do have to go when they no longer represent a community's values—as the nation has seen with removal of confederate flags from southern capitol buildings, or the renaming of structures built on the backs of slaves and named for their abusive masters. But many old, innocuous, and avoidable religious symbols and practices can and should stay.

No Religious Coercion

A second key corollary teaching of the Court's recent cases is that government may not coerce parties into supporting or participating in religion—even old and venerable religious traditions and practices that may have won widespread democratic approval.

This is, in part, a time-honored First Amendment teaching. The law is “absolute” in forestalling “compulsion by law of the acceptance of any creed or the practice of any form of worship.” Justice Roberts wrote in *Cantwell v. Connecticut*, the 1940 case that inaugurated the modern era of religious freedom.²³ Later Free Exercise cases thus struck down compulsory flag salutes, mandatory recitations of the Pledge of Allegiance, and state-administered test oaths as forms of religious coercion.²⁴ Later Free Speech

²³ 310 U.S. 296, 303 (1940).

²⁴ See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (finding compulsory flag salutes and pledges to violate the First Amendment); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (finding a religious test for public office violated the “appellant’s freedom of belief and religion”); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545, 546–47 (1958) (finding that government may not require a party who is conscientiously opposed to swear a loyalty oath as a condition for receiving tax exemption).

cases held repeatedly that government cannot induce or coerce private parties to express themselves contrary to their (religious) beliefs.²⁵ That proposition informed the Court's most recent Free Speech case of *303 Creative LLC v. Elenis* which protected a website designer from having to post information about same sex weddings to which she was conscientiously opposed. Even a party who operates in the stream of commerce cannot be forced to say or display something that violates their religious beliefs.²⁶

Later Establishment Clause cases insisted that young, impressionable (state) public-school students who are required to attend school could not be coerced to participate in religious classes, prayers, Bible readings, religious symbols, or daily moments of silence as part of their classroom and curricular experience.²⁷ Even a one-time invocation at a public middle school graduation ceremony was judged to be coercive to a graduating student.²⁸

The Court's recent cases have confirmed this prohibition on religious coercion. But the Court has also raised the threshold on when freedom from religious coercion can be successfully claimed under the Establishment Clause. In *Town of Greece*, the Court made clear that the "brief, solemn, and respectful prayer" offered by an array of local pastors before the town council began its meeting was not religious coercion. It was, the Court said, simply a way "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." No citizens were coerced or compelled "to engage in a religious observance." They could readily skip the brief prayer before entering the meeting, or simply ignore any prayer they may have heard with impunity.²⁹

Yes, some secular citizens might be offended by the very presence of these old religious ceremonies, Justice Kennedy continued for the *Town of Greece* Court, just as some religious citizens might be offended by new secular and sometimes anti-religious messages. Enduring blasphemies of various sorts is the cost we must all bear for robust protections of freedom

²⁵ See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.").

²⁶ 143 S. Ct. 2298 (2023).

²⁷ See cases discussed in Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment*, 232-42.

²⁸ *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁹ 572 U.S. at 588 ("The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.").

of speech. But, the Court continued, offense “does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views.”³⁰

Five years later, Justice Gorsuch made a similar argument in his lengthy concurrence in *American Legion*. Indeed, he argued that, without proof of actually being religiously coerced, “offended bystanders” should not even have standing to press Establishment Clause cases against government actions or expressions that offend them.

In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends somebody. No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an “offended viewer” may “avert his eyes,” cover her ears, or pursue a political option.³¹

In his concurring opinions both in *Town of Greece* and later in *American Legion*, Justice Thomas went still further and called for proof of “actual legal coercion” to press a prima facie case under the Establishment Clause. By that he meant the “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” The “characteristics of an establishment as understood at the founding,” he wrote, were that “attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church.” For Justice Thomas, *that* was the actual legal coercion that the Establishment Clause was created to prevent, and it should be the standard used by courts today. Merely opening legislative sessions with prayers that can be skipped, or having crosses on public land that can be ignored, does not reflect “the historical characteristics of an establishment of religion.”³²

Justice Kavanaugh’s concurring opinion in *American Legion* proposed a new test as a way of combining the Court’s twin concerns of respecting democratic traditions and preventing coercion:

If the challenged government practice is not coercive and if it (i) is

³⁰ *Ibid.*, 589.

³¹ 139 S. Ct. at 2067, 2102–03 (2019) (Gorsuch, J., concurring) (internal citations omitted).

³² *Town of Greece*, 572 U.S. at 608, 610 (Thomas J. concurring); *American Legion*, 139 S. Ct. at 2095–96 (Thomas, J., concurring).

rooted in history and tradition; or (ii) treats religious people, organisations, speech, or activity equally to comparable secular people, organisations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.³³

It is unclear from these recent cases whether religious coercion—hard or soft, alone or with other factors—will become the Court’s preferred test for future Establishment Clause cases, or simply part of the “injury in fact” proof needed to gain standing to press such cases. It is also unclear how claims of religious coercion might be treated if pled under the Free Exercise Clause instead. As we will see in a moment, recent Free Exercise cases now require only minimal proof of unequal treatment or government hostility to religion to trigger strict scrutiny analysis—a much easier threshold to meet than the harder coercion requirement of recent Establishment Clause cases.³⁴ This suggests that victims of government coercion of religion might well fare better today if they sue under the Free Exercise Clause (or a religious freedom statute), rather than under the Establishment Clause.

Equality Not Just Neutrality

A third key teaching of the Court’s recent cases is that religion deserves not just state neutrality, but equal treatment and protection by government. The Court has not formally rejected the 1990 *Smith* free exercise test that neutral, general applicable laws are constitutional no matter what burden they impose on religion. But the Court now judges differential treatment of religion as fatal religious discrimination under the Free Exercise Clause or fatal viewpoint discrimination under the Free Speech Clause. And the Court has repeatedly rejected government’s argument that differential treatment of religion is needed to avoid establishing religion. Disfavorable treatment of religion by government is unconstitutional discrimination – full stop.

State Aid to Religious Education

This focus on equality over neutrality is clearest in recent Supreme Court cases on state aid to religious education. Such aid has long been a vexed topic. Before 1940, thirty-five of the then forty-eight states had passed state constitutional prohibitions on government funding of religious education.³⁵

³³ 139 S. Ct. at 2093 (Kavanaugh, J. concurring).

³⁴ See Eric Wang, “To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion,” *Emory Law Journal* 72, 2023, 723, 729–51 & tbl. 1 (discussing the different types of “substantial burdens” as well as discriminatory treatment against religion that triggers strict scrutiny).

³⁵ See John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 4th ed. (Oxford: Oxford University Press, 2016), Appendix 2 (listing all the relevant state statutes prohibiting state aid to religion).

After 1940, when the Supreme Court began applying the First Amendment to state and local governments, it struck down many forms of direct and indirect state aid to religious schools, parents, and children as violations of the Establishment Clause.³⁶

That has changed dramatically in the most recent cases. The Court now holds that state aid to religious education is not only *permissible* under the Establishment Clause but sometimes *required* by the Free Exercise Clause to ensure equal treatment of religion. *Trinity Lutheran Church v. Comer* (2017) was the first of a trio of cases to open this new regime. There, the State of Missouri excluded a church school from a state program that reimbursed schools for the costs of resurfacing their playgrounds with a new rubber surface supplied by the state's recyclers. The church school applied on time and easily qualified for the funds, but the state denied them funds because its state constitution prohibited funding religious education. That had long been the standard response to religious schools that sought government funding. The church school sued, claiming religious discrimination in violation of the Free Exercise Clause. The *Trinity Lutheran* Court agreed. Writing for a 7–2 majority, Chief Justice Roberts concluded that the church school “was denied a grant simply because of what it is—a church.” State laws that impose “special disabilities on the basis of . . . religious status” alone are permissible only if the state has a “compelling interest” for doing so. A general concern about violating state or federal prohibitions on religious establishment was not compelling enough.³⁷

Similarly, in *Espinoza v. Montana Department of Revenue* (2020), Montana offered its citizens state tax credits for donations to nonprofit organisations that awarded scholarships for private school tuition. But Montana would not allow these scholarships to go to religious-school students, for that would violate the state constitutional prohibition on state aid to religious education. Parents whose children could not get scholarships to attend a Christian school filed suit under the Free Exercise Clause, claiming religious discrimination. The *Espinoza* Court agreed. This program “bars religious schools from public benefits solely because of the religious character of the schools,” and such discrimination cannot be justified by the state’s “interest in separating church and State ‘more fiercely’ than the Federal Constitution.”³⁸

Carson v. Makin (2022) repeated this demand for equality. Maine allowed parents who lived in thinly populated rural school districts without

³⁶ See cases in Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment*, 261–67.

³⁷ 137 S. Ct. at 2012, 2017–18, 2021–24.

³⁸ 140 S. Ct. at 2246, 2251–55, 2262–63.

their own public high school to use public funds to attend a public or private school of their choice, including schools outside Maine. However, the state would provide this assistance only if the chosen school was not “sectarian” based on the state’s review of the school’s curriculum, practices, character, and mission. The Court struck down this policy too. These private schools were disqualified from state public funds “solely because they are religious,” Chief Justice Roberts again wrote, and this was unconstitutional religious discrimination. The state may not “exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.”³⁹

Free Speech and Equality

The recent Court has also used the equality principle in Free Speech cases. In *Reed v. Town of Gilbert* (2015), the Court struck down a town ordinance that placed stricter time, place, and manner regulations on directional signs to a church service than on various “political” or “ideological” signs. A unanimous Court, led by Justice Thomas, held that “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional,” and that violation was easy to find there.⁴⁰ In *Shurtleff v. City of Boston* (2022), municipal authorities had allowed nearly 300 private groups over the prior 15 years to gather in the City Hall Plaza for their own events, and to fly their own flags on one of the city flag poles during these events. When Shurtleff and his Christian group sought to use the Plaza, however, the City refused to allow them to fly their Christian flag for fear of violating the Establishment Clause. Shurtleff claimed religious discrimination under the Free Speech Clause. Another unanimous Court, now led by Justice Breyer, agreed that Boston had committed viewpoint discrimination against religion.⁴¹

Covid Regulations and Equality

The Court’s insistence on equality has also guided its review of free exercise challenges to COVID-19 regulations. Beginning in the spring of 2020, numerous new state and local public health laws placed restrictions on public gatherings, movements, and activities, including those of religious groups. The Court upheld the restrictions when they fell equally on religious and nonreligious parties but enjoined them when religion was treated differently.

In *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020), for example, Catholic and Jewish groups challenged a New York state executive order

³⁹ 142 S. Ct. at 1987, 1993–94, 1997–98, 2000–02.

⁴⁰ 576 U.S. 155, 159, 163–65, 171 (2015).

⁴¹ 142 S. Ct. at 1583, 1588–89, 1593.

that created different tiers of restrictions on public gatherings, depending on local pandemic levels. “Red zones” restricted religious worship gatherings to ten persons; “orange zones” set the capacity limit at twenty-five. The plaintiffs argued that the Governor and other state officials had made disparaging remarks about Orthodox Jewish communities, and that they had gerrymandered the restrictive zones to ensure that they covered those religious communities. Moreover, these regulations placed no capacity limits on purportedly “essential” businesses, which explicitly included acupuncture facilities, campgrounds, garages, transportation facilities, and manufacturing plants, among other businesses. In a *per curiam* 5–4 opinion, the Court concluded that this law “single[d] out houses of worship for especially harsh treatment” that could not be justified and thus issued an injunction.⁴²

Similarly, *Tandon v. Newsom* (2021) involved state and county orders that effectively prevented more than three households from gathering for prayer and Bible study, even though they allowed larger gatherings for business and other secular purposes. House-church worshippers challenged the orders. Writing for a 5-4 majority, Justice Gorsuch applied what he now called “the clear” rule that “government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favourably than religious exercise.” Because California imposed a flat limit on religious gatherings but allowed for “myriad exceptions and accommodations for comparable activities,” the Court enjoined its regulations.⁴³

No Government Hostility Against Religion

With equal treatment as a centerpiece of its free exercise jurisprudence, the Court has been especially sensitive to state hostility against religion. For example, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018), Jack Phillips, a cakeshop owner, refused to bake a wedding cake for a same-sex couple on the grounds that doing so violated his religious beliefs. As a result, the Colorado Civil Rights Commission found that Phillips violated the state’s anti-discrimination law and sanctioned him. In a public hearing, one commissioner characterized the baker’s views as “one of the most despicable pieces of rhetoric that people can use,” and compared it to past uses of religion and religious freedom “to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust.” The baker claimed violations of his free exercise rights.⁴⁴

⁴² 141 S. Ct. 63, 65–66 (2020) (*per curiam*).

⁴³ 141 S. Ct. 1294, 1296-98 (2021) (*per curiam*).

⁴⁴ 138 S. Ct. at 1719, 1723–29.

A 7–2 Court agreed, led by Justice Kennedy, who had authored several of the Court’s opinions supporting same-sex equality and marriage. The Free Exercise Clause outlaws “religious hostility on the part of the State itself,” he wrote, and here the Commission betrayed “clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips’s] objection.” Such hostile remarks in an adjudicatory proceeding “may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion.” Moreover, the Commission “sen[t] a signal of official disapproval of Phillips’s religious beliefs” by favourably treating bakers who refused to bake cakes with messages that the Commission deemed offensive. This animus against Phillips, together with the unequal treatment of discrimination claims brought against other bakers, violated the Free Exercise Clause.⁴⁵

Concern for animus against religion also informed the Court’s opinion in *Kennedy v. Bremerton School District* (2022). In that case, a public high school coach was fired for offering private prayers after the school’s football game, even though every other form of speech was allowed, not least loud whooping and hollering in support of the winning team. The coach claimed religious discrimination in violation of the Free Exercise Clause, and the Court found in his favour. Justice Gorsuch wrote for the Court:

Respect for religious expression is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.⁴⁶

Exemptions for Religion

A fourth teaching of these cases is that sometimes equality is not good enough to guarantee religious freedom. In those cases, both legislative and judicial exemptions from compliance with general laws are needed.

This too was traditional constitutional lore. Already the eighteenth-century founders recognised that exemptions provided parties who had

⁴⁵ *Ibid.*, 1724, 1729–31.

⁴⁶ 142 S. Ct. 2407, 2415–16, 2432–33 (2022).

religious scruples with an oasis of nonconformity—a space to follow the dictates of their conscience or the commandments of their faith community. The founders thus granted religious parties exemptions from religious taxes, religious incorporation requirements, oath swearing, and military service.⁴⁷ These exemptions continued in both state and federal statutes through the nineteenth and twentieth centuries -- statutes which the courts tended to enforce generously for religious claimants.

In the 1963 case of *Sherbert v. Verner*, the Court went further to create judicial exemptions to relieve religious parties from substantial burdens on their faith imposed by otherwise appropriate statutes. In that case, a Seventh Day Adventist was fired from her private job for refusing to work on Saturday, her sabbath. The state denied her unemployment compensation benefits because the applicable statute allowed no benefits for applicants who were fired for cause. Sherbert sued under the Free Exercise Clause, arguing that this ruling forced her to choose between her state benefits and her religious observance. The *Sherbert* Court agreed and granted her a judicial exemption from this specific rule, even while leaving the unemployment statute in place.⁴⁸ The Court thereafter gave judicial exemptions from general laws to Saturday sabbatarians, Amish ascetic parents, Jehovah's Witness pacifists, and similar parties whom the legislatures had not accommodated.⁴⁹

The 1990 *Smith* neutrality test largely closed the door to these judicial exemptions. That triggered an explosion of hundreds of federal and state statutes and amendments providing exemptions for religious parties.⁵⁰ The recent Court has interpreted these statutes broadly to grant relief and exemptions to both religious individuals and groups. Most notably, in the 2014 case of *Burwell v. Hobby Lobby* the Court used the federal Religious Freedom Restoration Act to grant a closely-held private business corporation an exemption from full compliance with the Affordable Health Care Act that mandated employee insurance that covered abortifacients. Because this coverage for abortifacients was contrary to the owners' religious beliefs about the sanctity of life, the corporation was exempted from full compliance with the statute.⁵¹ Similarly,

⁴⁷ See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment*, 60-66, 104-09.

⁴⁸ 374 U.S. 398, 401-06 (1963).

⁴⁹ See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment*, 161-68.

⁵⁰ See, e.g., James E. Ryan, "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment," 78 *Virginia Law Review* 78 (1992), 1407, 1445 (1992) (estimating more than 2,000 religious exemptions in state and federal statutes); Douglas Laycock, *Religious Liberty, Volume 3: Religious Freedom Restoration Acts, Same-Sex Marriage, and the Culture Wars* (Grand Rapids, MI: Eerdmans, 2018); Douglas Laycock, *Religious Liberty, Volume 4: Federal Legislation After the Religious Freedom Restoration Acts, with More on the Culture Wars* (Grand Rapids, MI: Eerdmans, 2018).

⁵¹ 134 S. Ct. at 2751, 2779. See also *Little Sisters*, 140 S. Ct. at 2384 (holding that federal agencies properly promulgated religious and moral exemptions for health plans that include contraceptive coverage under the Affordable Care Act).

the Court has interpreted the federal Religious Land Use and Institutional Persons Act generously to exempt prisoners from grooming requirements that burdened their religion,⁵² and to permit chaplains to lay hands on death row prisoners at the time of their execution contrary to the usual rules.⁵³ The Court has further used Civil Rights Act prohibitions on religious discrimination to protect a Muslim job applicant from a prejudicial hiring practice⁵⁴ and a Sunday sabbatarian from a retaliatory firing for refusing to work on the Sabbath.⁵⁵ And in its most recent cases, the Court has again resumed the practice of granting judicial exemptions to general statutes.

In a world of growing religious pluralism and anti-religious animus, exemptions are important tools for the protection of religious freedom. They have long been controversial, however, because they seem to favour religion over non-religion in defiance of the Court's principled insistence on equality, protecting religious individuals or groups more than their secular counterparts. What has made them more controversial of late is when majority faiths seek judicial exemptions rather than legislative exemptions. Judicial exemptions used to be justified as a suitable refuge for religious minorities from the tyranny of the legislative majority. What has also made them more controversial is that some exemptions can force third parties to forgo services they find important to access, whether website designs or wedding cakes for same-sex weddings or medical procedures for artificial reproduction, contraception, abortion, or sexual transition. Those controversies are mitigated when alternative and equally priced service providers are easily at hand. But they become more acute when there are no easy alternative service providers at hand or no time or funds to access them. They become even more acute when the exempt service provider has government licensing or funding.

Separation of Church and State

A final teaching of the Court's recent cases is that the principle of separation of church and state is no longer the secular be-and-end-all of the First Amendment as it had become in the last half of the twentieth century. Separation of church and state is an ancient principle of religious freedom.⁵⁶ It needs to be retained, particularly for its enduring insight of protecting religious communities and organisations from political intrusion and interference. Today, as much as in the past, governmental officials have

⁵² *Holt*, 574 U.S. at 352.

⁵³ *Ramirez*, 142 S. Ct. at 1264.

⁵⁴ *Abercrombie & Fitch*, 575 U.S. at 768.

⁵⁵ *Groff*, 143 S. Ct. at 2279.

⁵⁶ John Witte, Jr., "Facts and Fictions About the History of Separation of Church and State," *Journal of Church and State* 48 (2006), 15.

no constitutional business interfering in the internal polity and property of religious bodies, determining its membership and leadership, or dictating its doctrines and liturgies.

The Court embraced this view of separation of church and state firmly in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012). In that case, a Lutheran church school had dismissed a “called religious teacher” from her employment because her conduct defied the church’s internal procedures of dispute resolution. The teacher claimed this was a retaliatory firing. The Court rejected her claim. Adducing the historical principle and precedents of separation of church and state, going back to Magna Carta, Chief Justice Roberts wrote for the Court: “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”⁵⁷ Later Free Exercise and RFRA cases have fleshed out this separatist principle in other religious employment cases.⁵⁸

But the recent Court has retreated from its earlier insistence on maintaining “a high and impregnable wall of separation between church and state,” whose “slightest breach” was said to trigger an establishment clause violation.⁵⁹ Not only was this earlier teaching based on selective history and suspect jurisprudence that has now been thoroughly debunked by the majority of the Justices. But absolute separation of church and state is impossible to put in practice today. Ours is not a distant “night watchman” state, content to limit its activities to defense, policing, postal service, and road maintenance. Today’s modern welfare state is an intensely active and ambitious sovereign from whom complete separation is impossible for any religion that forms even the smallest community. Today’s governments not only enact and enforce thousands of laws, but they also make grants, extend loans, confer licenses, enter contracts, and control access to the civic and economic arenas. And so, both confrontation and cooperation with the modern welfare state are almost inevitable for any organised religion. When a state’s regulation imposes too heavy a burden on a particular religion, the Free Exercise Clause should provide a pathway to relief. When a state’s appropriation imparts too generous a benefit to religion alone, the Establishment Clause should provide a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, and when governments cooperate with religious agencies to accomplish secular

⁵⁷ 565 U.S. at 189, 702-03, 707-09.

⁵⁸ See, e.g., *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (“[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.” (internal quotation marks omitted)).

⁵⁹ *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

purposes and promote the common good, Establishment Clause objections are unavailing and Free Exercise rights are vindicated.

Concluding Reflections

“Constitutions work like clock[s],” American founder John Adams reminds us. To operate properly, their “pendulums must swing back and forth.”⁶⁰ We have certainly witnessed wide pendular swings in First Amendment religious freedom jurisprudence over the past century. But the Supreme Court has quietly ended the long constitutional swing of cases away from religious liberty protection from 1985 to 2010 and is now leading a strong pendular swing back. Since 2010, almost every one of the two dozen Supreme Court cases on point have advanced the cause of religious freedom, and those cases have been echoed, elaborated, and sometimes extended in scores of lower federal court cases. The Court has not always produced clean, clear, clockwork logic, nor settled on a grand unified theory that some Justices and academics have advocated. But it has produced a hard swing in favour of religious freedom, even if sometimes wobbly.

This has been a good movement. Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down. And religious freedom litigation is too critical a forum for social stability to be scorned or ignored. In centuries past—and in many regions of the world still today—disputes over religion and religious freedom have often led to violence, and sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process.

As this process continues to unfold, it is essential, in my view, that the full range of founding religious freedom principles remain in operation – liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion by law. Religious freedom norms should not be reduced to neutrality or equality norms alone, and not weakened by too low a standard of review or too high a law of standing.

It is essential that America addresses the glaring blind spots in our religious liberty jurisprudence—particularly the long and shameful

⁶⁰ Letter to William Pym (Jan. 27, 1766), in George W. Carey ed., *The Political Writings of John Adams* (Washington, DC: Regnery, 2000), 644, 647.

treatment of Native American Indian claims.⁶¹ It is essential that we show our traditional hospitality and charity to the “sojourner[s] who [are] within [our] gates”⁶²—migrants, refugees, asylum seekers, and others—and desist from some of the outrageous nativism that have marked too much of our popular and political speech of late. It is essential that religious freedom advocates show compassion for other freedom claimants, including those pressing for various sexual freedoms, and find responsible ways of living together with all our neighbours.

It is essential that we Christians today, who have won most of the recent cases, remain gracious in victory especially to those who do not share their faith. This is not only the heart of the Golden Rule. But sociological studies make clear that Christians who have long enjoyed majority status will soon be in the minority even in the United States.⁶³ Religious freedom may be rising, but Christian allegiance is falling rapidly, much as it has fallen in Europe. We need to remember that the precedents and policies that we craft now for religious and cultural minorities are the rules that will govern the religious liberty of our grandchildren. Doing unto others what is loving and just is not only right, but expedient. It is essential that Christians today treat religious freedom as a precious gift of God to protect, not a prerogative of one political party to brandish. “Put not your faith in princes,”⁶⁴ the Bible tells us, and by extension do not let religious freedom become a political plaything.

Finally, and related, it is essential that we Christians use our religious freedom to discharge our most cardinal callings of preaching the word, administering the sacraments, catechising the young, caring for the poor and needy, and prophesying against injustice. Like all other human institutions, many American Christian churches have been devastated by human sinfulness. Think of the clerical abuse of minors. The embezzlement of tithes and gifts. The degradation and mistreatment of women. Indifference to the poor and needy. A lack of compassion in matters of sexual orientation. Racially and economically segregated congregations. Inhospitability toward immigrants and foreigners. Naked political pandering. Our failure as Christians to live up to our own truths and values not only undercuts our moral authority and spiritual efficacy in the eyes of others. It also weakens the case for religious freedom for all faiths including our own.

⁶¹ See case analysis in <https://pluralism.org/religious-freedom-for-native-americans>; Kathleen Sands, ‘Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases’, 36 *Am. Indian L. Rev.* 253 (2012).

⁶² Exodus 20:10.

⁶³ <https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/>; Robert P. Jones, *The End of White Christian America* (New York: Simon & Shuster, 2016).

⁶⁴ Psalm 146:3.

Martin Luther King Jr. once said that the church “is not the master or the servant of the state, but rather the conscience of the state.”⁶⁵ When their own houses are in good order, churches are still well situated to play this important role, even in our late modern intensely pluralistic societies. To quote Dr. King again:

If the church will free itself from the shackles of a deadening status quo, and, recovering its great historic mission, will speak and act fearlessly and insistently in terms of justice and peace, it will enkindle the imagination of mankind and fire the souls of men, imbuing them with a glowing and ardent love for truth, justice, and peace. Men far and near will know the church as a great fellowship of love that provides light and bread for lonely travellers at midnight.⁶⁶

⁶⁵ Martin Luther King, Jr., “A Knock at Midnight,” in James M. Washington, ed., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* (San Francisco: Harper and Row, 1986), 501.

⁶⁶ *Ibid.*

CLERGY ABUSE – A HARD PATH FOR CLAIMANTS

ANDREW TETTENBORN

Abstract: *The issue of the vicarious liability of churches and other religious organisations for abuse by officers and others is a complex one. It recently reached the UK Supreme Court in Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB, where the scope of vicarious liability for deliberate wrongdoing was considerably limited by their Lordships. This article examines that decision, concentrating not so much on its effect on the law of vicarious liability as a whole, as on its ramifications and implications for religious bodies. It investigates in some detail not only the issue of when wrongdoing by a church officer will be regarded as in the scope of employment (or quasi-employment), but also the difficult question of the structure of religious employment, the issue of who is likely to be regarded as the liable employer, and the practicalities of suits arising out of religious abuse.*

Introduction

With safeguarding now nudging the top of churches’ agendas,¹ especially following the appearance of the Final Report of the Independent Inquiry into Child Sexual Abuse in October 2022,² the issue of tort liability when safeguarding fails takes centre stage. Central to this is the matter of vicarious liability for deliberate abuse. In the last eleven years two cases about church-based sexual misconduct have reached the Supreme Court, of which the latest is *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB*.³

Over time a friendship grew up between one S, an elder⁴ of the Jehovah’s Witnesses sect in the Cardiff suburb of Barry, and B, a married woman and a fellow church member. After a morning spent proselytising with S followed by a lunch out, B and her husband went to S’s house for a social visit. While there, following an argument with his own wife, S raped

¹ In the Church of England it now even has a canon to itself, Canon 30 *Of Safeguarding*.

² See HC 720 (2022). See too the same inquiry’s *Anglican Church Investigation Report*, published in May 2019, its *Roman Catholic Investigation Report*, published in November 2020, and its report on other religions, Child protection in religious organisations and settings, which appeared in September 2021. All are available through the website of the inquiry, which can be found at <https://www.iicsa.org.uk/index.html> (as at August 2023).

³ [2023] UKSC 15; [2023] 2 W.L.R. 953. The other was *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1, holding an informal religious grouping liable for abuse by one of its members.

⁴ Each congregation of Jehovah’s Witnesses is administered by a number of elders and beneath them ministerial servants appointed by delegates of the central governing body of the church.

B in an upstairs room. S was duly convicted and sent to prison.

Both S and B had been affiliated to the Witnesses' Kingdom Hall in Barry. No doubt because S was by then a convict not worth suing, B claimed damages from the local trustees of that hall, and also from the American headquarters of the church, an organisation in Pennsylvania known as the Watch Tower and Bible Tract Society, alleging that they were vicariously liable for S's attack on her.

Chamberlain J⁵ and the Court of Appeal⁶ upheld her claim against the church's headquarters, deciding (1) that S's position as an office-holder within the church was, albeit unpaid, akin to employment for vicarious liability purposes,⁷ and (2) that since S's attack on B had resulted from, and remained broadly in the frame of, his position as an officer of the church and her spiritual superior, it was just to treat it as having been committed in the course of that quasi-employment. The Supreme Court, however, forcefully disagreed. It accepted that S, even if an unpaid office-holder, was equivalent to a servant. But it saw no reason to view his attack on B as in any way closely connected to what he had been employed to do. The whole scabrous episode, it pointed out, had happened off church premises, and had had nothing whatever to do with any of S's functions within the church. True, it would not have occurred at all but for S's occupying the position he had, and in addition S had in a sense had some kind of religious authority over B at the time. But neither of these factors came near to showing the kind of close connection that would justify imposing liability on the church.

The significance of *BXB*

The deep legal analysis of the place of *BXB* and its place in the law of vicarious liability as a whole, we can safely leave to others.⁸ Suffice it to say that, in terms of strict law, neither holding by the Supreme Court was particularly surprising.⁹ Take first the question whether S was equivalent to a

⁵ *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB); [2020] 4 W.L.R. 42.

⁶ *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2021] EWCA Civ 356; [2021] 4 W.L.R. 42.

⁷ It having been definitively established in *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722 and *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 that vicarious liability extended beyond employment properly so-called. The phrase "akin to employment" seems to have originated in the Canadian religious abuse decision in *Doe v Bennett*, 2004 SCC 17; [2004] 1 S.C.R. 436 at [27].

⁸ See e.g. *Clerk & Lindsell on Torts*, 24th edn (2023), para.6-32.

⁹ See the excellent P. Giliker, "Can the Supreme Court halt the ongoing expansion of vicarious liability? Barclays and Morrison in the UK Supreme Court" (2021) 37 *P.N.* 55, 66-67, expressing some scepticism about the reasoning of the Court of Appeal that the Supreme Court later discountenanced.

an employee of the trustees. The Supreme Court had already pointed out in *Various Claimants v Institute of the Brothers of the Christian Schools*¹⁰ in 2012 that employment under vicarious liability was a wide concept, and that you were to be liable for those working for you, logically it should make no difference whether you formally concluded an employment contract with them or even paid them.¹¹ Thus it held there that a schoolmaster member of the Christian Brothers teaching for nothing in a school they helped run made them, as well as the school authorities, vicariously liable when he brutalised boys in his care. Four years later the same court had confirmed this reasoning, deciding that a prison was liable for the acts of prisoners whom it put to work in the prison kitchens.¹² If teaching brothers and prisoners, it is a pretty small step to extend this to clergy and elders.

So too with the question of whether S's act was in the course of his employment. True, the mere fact that the relevant tort consisted of deliberate sexual abuse was of itself no bar: witness the earlier Supreme Court decisions in *Lister v Hesley Hall Ltd*¹³ in 2001, and the Christian Brothers case just mentioned. But in cases like *Various Claimants v Wm Morrison Supermarkets Plc*¹⁴ in 2020 the same court had already made it clear that much more was required than a showing that the tortfeasor's employment had given them the opportunity to commit the wrong, or even made its commission more likely: hence there it had decided that no vicarious liability attached to malicious disclosure of a business's customer details by an employee whose job it was to audit its accounts, there being no close connection between what he did and what he had been employed to do. On the facts of *BXB* the link was even more tenuous, and the case against liability even stronger.

Nevertheless, *BXB* is important for what it says on two issues. One, that of the correct defendant to sue in church abuse claims is of large theoretical import, though (as will appear) may have more limited practical effect.

The other, that of whether in these circumstances the assault on B could be regarded as having taken place in the course of S's "employment" or function within the church, promises by contrast to be immensely important practically for both claimants and church insurers.

¹⁰ [2012] UKSC 56; [2013] 2 A.C. 1.

¹¹ See *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1; also the Court of Appeal in *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.

¹² *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.

¹³ [2001] UKHL 22; [2002] 1 A.C. 215.

¹⁴ [2020] UKSC 12 [2020] A.C. 989.

Issue 1: the correct defendant

In *BXB*, it will be remembered that the church's liability for S's actions depended on a finding that S had been someone in a position "akin to employment." This is a common scenario in the religious context.¹⁵ Although religious denominations sometimes hire clergy under ordinary employment contracts,¹⁶ priests and their equivalents tend overall not to be employees.¹⁷ They are normally seen differently: for instance as office-holders, as in the Church of England,¹⁸ as those pursuing a vocation under the dictates of canon law at the request of a bishop, as with Catholic clergy,¹⁹ as people paid a stipend for service but without any intent to create legal relations, as with many nonconformists,²⁰ or as persons more or less informally asked to act for a group of the faithful, as with the Jehovah's Witnesses elder involved in the *BXB* case.

Unfortunately this raises a further question. With employment contracts the contractual employer's vicarious liability will follow almost as of course,²¹ but if a priest is merely a quasi-employee, who is the quasi-

¹⁵ The possibility of this having been firmly established in *JGE v English Province of Our Lady of Charity* [2013] Q.B. 722 (on which see O'Sullivan, "The sins of the father - vicarious liability extended" [2012] *C.L.J.* 485). In that case a Roman Catholic diocese was sued in respect of priestly abuse, and after a careful discussion the priest held to have been a quasi-employee.

¹⁶ E.g. *New Testament Church of God v Stewart* [2008] I.C.R. 282 (paid priest in charismatic church); *Birmingham Mosque Trust v Alavi* [1992] I.C.R. 435 (paid imam); *Singh v Management Committee of the Bristol Sikh Temple* [2012] UKEAT 0429 11 1402 (Sikh granthi). Indeed, *Percy v Board of National Mission of the Church of Scotland* [2006] 2 A.C. 28 had decided that there was no presumption against such arrangements and each case had to be decided on its own merits. See too Baroness Hale's dissenting judgment in *Preston v President of the Methodist Conference* [2013] UKSC 29; [2013] 2 A.C. 163 at [36].

¹⁷ *Diocese of Southwark v Coker* [1998] I.C.R. 140 (non-incumbent Anglican clergy); *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722 (Catholic priest); *President of the Methodist Conference v Parfitt* [1984] Q.B. 368 (Methodist minister); *Davies v Presbyterian Church of Wales* [1986] 1 W.L.R. 323 (Nonconformist minister). See too *Santokh Singh v Guru Nanak Gurdwara* [1990] I.C.R. 309 (Sikh priest). The authorities are summed up by Lord Nicholls in *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28 at [7]-[11]. To be fair, it should be noted that all these were non-vicarious-liability cases.

¹⁸ See e.g. F.Cranmer, "Unfair dismissal: Church of England rector with freehold - whether employee or office-holder" [2012] *Law & Just* 142; also *Diocese of Southwark v Coker* [1998] I.C.R. 140. But see Lord Nicholls in *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28 at [18].

¹⁹ See *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722, esp at [22]-[30] (Ward LJ).

²⁰ *Preston v President of the Methodist Conference* [2013] UKSC 29; [2013] 2 A.C. 163 (superintendent minister in the Methodist church). In the Baptist Church salaried ministers are appointed by and serve.

²¹ This has never been decided as such, but the assumption lying behind cases such as *Various Claimants v Barclays Bank Plc* [2020] UKSC 13; [2020] A.C. 973 is that an employment contract is a sufficient, but not a necessary, peg on which to hang a vicarious liability claim. See too *Clerk & Lindsell on Torts, 24th edn* (2023), para.6-06.

employer? The answer can be difficult. On the facts of *BXB*, there were actually three plausible candidates: the trustees of the Barry Kingdom Hall, from which S worked, the Witnesses' UK head office, and the organisation's world headquarters, the Watchtower Bible and Tract Society. Which one was liable there? Lord Burrows thought it was probably the third, stressing that on the evidence it seemed to have the final power to hire and fire elders in England.²² But in the event the point was moot and the pronouncement *obiter*, since Watchtower, a well-funded organisation, agreed to pay any damages and took no point about whether it had been correctly sued.

Though deftly sidestepped in *BXB*, this problem remains. It is moreover made more difficult in cases where there is no formal overarching organisation, since in deciding whether someone lower in the hierarchy can be vicariously liable a court also has to bear in mind the rule that a senior servant is not generally liable for the torts of a more junior servant in the same organisation.²³ The answer to it is, it is suggested, highly fact-sensitive, deeply dependent on the denomination involved and how it is organised.²⁴

Take first the Anglican church in England and Wales. Here, interestingly, the theoretical hurdles facing a claimant seeking someone to sue for clergy abuse other than the guilty party are high.²⁵ A claim against a guilty incumbent as a corporation sole, rather than in a personal capacity, is presumably possible, but the claimant might well face difficulties in showing that the abuse had anything to do with the functions of the priest as a priest.²⁶ What, then, about the diocesan bishop?²⁷ Although the *JGE* case²⁸ held a Catholic bishop (or, more accurately, the trustees of his diocese)

²² See *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15; [2023] 2 W.L.R. 953 at [62].

²³ Compare *Bainbridge v Postmaster-General* [1906] 1 K.B. 178 (injury caused by state employee: no action against senior functionary in charge of department).

²⁴ Many of the authorities in the next section admittedly refer to employment status in connection with mainstream employment law, which does not necessarily correspond with employment status leading to vicarious liability. Nevertheless, it is submitted that the particular cases referred to here remain at least a good guide to when vicarious liability will apply.

²⁵ Less so, one suspects, for lower officials such as sidespersons, bell-ringers and churchwardens: such persons act fairly clearly under the general direction of parochial church councils. These latter, moreover, are expressly given full legal personality, thus making suit against them straightforward: *Parochial Church Councils (Powers) Measure 1956*, s.3.

²⁶ There is also strong doubt whether such liability will survive a change in incumbent, which in most such cases is (we hope) likely to have happened well before suit is brought.

²⁷ In practice any such action is likely to be handled by the relevant Diocesan Board of Finance, which oversees the diocese's financial affairs, even if as a matter of strict law liability may attach not to it but to the bishop as corporation sole. But little turns on this.

²⁸ *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.

vicariously liable for the acts of a priest in his diocese, things may well be different in the Church of England. Certainly with incumbents holding the traditional parson's freehold and probably also with those appointed under post-2009 common tenure,²⁹ it remains arguable that the diocesan's limited formal decision-making power as regards appointment and removal³⁰ of priests, coupled with the priest's substantial ability to operate free of episcopal interference, exclude the possibility of episcopal vicarious liability.³¹ The relevant archbishop is even remote and can safely be dismissed; and the Church of England itself, for all its spiritual force, is no legal entity, and so cannot be sued anyway.³²

The Catholic church, in contrast to the Church of England where there is little authority, has spawned a plethora of reported cases concerning liability for abuse.³³ Like the Church of England, it has no legal personality.³⁴ Unlike the Church of England, however, neither its priests nor its bishops or archbishops are regarded as corporations sole,³⁵ which means that any claim has to be brought against the diocesan or archdiocesan trustees.

At times the trustees of its archbishoprics seem to have made it a

²⁹ See the Ecclesiastical Offices (Terms of Service) Measure 2009 for the details. Note that, subject to fairly immaterial differences concerning the disposal of parsonage houses, this also applies to priests in charge: s.1(1)(g). It seems to follow that if an Anglican bishop is not liable for the acts of an incumbent in their see, they are equally not liable for those of a priest in charge.

³⁰ The power of removal, in particular, is today highly circumscribed by the procedures laid down in the Clergy Discipline Measure 2003 and the accompanying Clergy Discipline Rules 2005, SI 2005/2022.

³¹ Indeed, one case decides just this in a slightly different context. In *Calvert v Gardiner* [2002] EWHC 1894 (QB) (*The Times*, 22 July 2002) exasperated Devon villagers tried to sue the Bishop of Exeter alleging vicarious liability for a nuisance caused by an incumbent's over-enthusiastic bell-ringing. They failed.

³² See *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546 at [61] (Lord Hope) and the authorities cited there.

³³ Cases include *A v Archbishop of Birmingham* [2005] EWHC 1361 (QB); *Maga v Birmingham Archdiocese Trustees* [2010] EWCA Civ 256 | [2010] 1 W.L.R. 1441; *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722; *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1; *W v Trustees of the Roman Catholic Archdiocese of St Andrews & Edinburgh* [2013] CSOH 185; *F v TH* [2016] EWHC 1605 (QB); *JL v Bowen* [2017] EWCA Civ 82; [2017] P.I.Q.R. P11; *FXF v Ampleforth Abbey Trustees* [2020] EWHC 791 (QB); and *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB). See too, in other jurisdictions, *Doe v Bennett*, 2004 SCC 17; [2004] 1 S.C.R. 436; *Ellis v Trustees of the Sydney Roman Catholic Archdiocese* [2007] NSWCA 117; (2007) 70 N.S.W.L.R. 565; and *DP (a pseudonym) v Bird* [2021] VSC 850.

³⁴ See *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722 at [18] (Ward LJ); also *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 at [29] (Lord Phillips).

³⁵ See the Australian decision in *Ellis v Trustees of the Sydney Roman Catholic Archdiocese* [2007] NSWCA 117; (2007) 70 N.S.W.L.R. 565 at [157]-[181].

practice to admit that they were the employers of clergy for the purposes of vicarious liability for abuse.³⁶ Nevertheless, in *JGE v English Province of Our Lady of Charity*³⁷ the Court of Appeal, taking some guidance from Canadian authority,³⁸ definitively characterised a Catholic priest as his bishop's quasi-employee because he was accountable to the latter, tasked with furthering the bishop's aims and purposes and with carrying out the programme of the church he represented, and into whose structure he was integrated.³⁹

With other Christian denominations, the identity of the quasi-employer will depend on the facts. In so far as there is a fairly formal executive body, as with the Methodist Conference, there is likely to be little difficulty.⁴⁰ The United Reformed Church, much of whose constitution is laid down by statute,⁴¹ is governed by a General Assembly, which pays clergy stipends,⁴² but appointment of clergy is in the hands of synods, which suggests that in law the latter will be responsible for the acts of ministers. As for Baptists, appointment is by specific churches;⁴³ although the practice is not to create a formal contract of employment, it seems fairly clear that the relation will be one akin to employment and the trustees for the congregation liable accordingly.

The same, moreover, will probably go for the major non-Christian denominations. Imams, granthis and Hindu priests – all of whom are reported on occasion to have been guilty of abuse in or about the course of religious duties⁴⁴ – are generally appointed by the trustees of individual

³⁶ This happened in cases such as *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441, where (no doubt against a background of insurance coverage) quasi-employment was accepted (see Lord Neuberger MR at [36]). Whether this was right in strict law is however made a little doubtful by the Australian decision in *Ellis v Trustees of the Sydney Roman Catholic Archdiocese* [2007] NSWCA 117; (2007) 70 N.S.W.L.R. 565.

³⁷ [2012] EWCA Civ 938; [2013] Q.B. 722. The reasoning in that case was approved by the Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.

³⁸ In particular *Doe v Bennett 2004* SCC 17; [2004] 1 S.C.R. 436. *Jacobi v Griffiths* (1999) 174 D.L.R. (4th) 71 also featured.

³⁹ See particularly [2012] EWCA Civ 938; [2013] Q.B. 722 at [73]-[81] (Ward LJ); and [124]-[131] (Davis LJ).

⁴⁰ Clause 20 of the constitutional 1932 Methodist Deed of Union gives this body power to station ministers to particular places; this would seem a very good indication that, whatever their position under strict employment law, such ministers are in a position akin to being employed by it for the purposes of vicarious liability.

⁴¹ See the United Reformed Church Act 1972, c.xviii.

⁴² See the URC *Plan for Partnership in Ministerial Remuneration 1980*, as updated.

⁴³ See the November 2022 edition of the *Recommended Terms of Appointment to the office of Minister of a Baptist Church*.

⁴⁴ See generally the IICSA's report on other religions, *Child protection in religious organisations and settings*, published in September 2021. There seems no reported case raising the issue of vicarious liability arising out of such abuse.

mosques, gurdwaras or temples. There may well be nothing in the nature of a formal contract of employment, but it is suggested that in so far as such clerics are engaged to forward the aims of their appointing congregations, they will count as akin to employees and will therefore in principle engage the rules of vicarious liability, with actions in practice being brought against the relevant trustees.

Perhaps ironically, however, in most cases none of this discussion really matters. Most parochial church councils and all dioceses in the Anglican church are insured by the Ecclesiastical Insurance Group, which includes accidental injury cover as standard and regards this as covering all claims for abuse other than those brought against the actual perpetrator.⁴⁵ In practice, it seems, the Group settles abuse claims brought against the relevant diocese, if satisfied that the guilty party would be liable and that the act was done in the course of employment, without taking any point on whether its insured was in strict law the right person to be sued.⁴⁶ No doubt this is why there does not seem to be a single reported case on this issue in England and Wales.⁴⁷ Moreover this practical approach is likely to continue: at the time of writing a fairly formal redress scheme is being prepared to regularise the payment of compensation without litigation or the threat of it.⁴⁸ Similarly, in other denominations the universal practice is now to insure, and there is little evidence that other insurers take technical points about whether the correct defendant has been sued.

Nevertheless, the issue of the correct defendant is still not entirely moot. Not all liability insurers will necessarily act scrupulously: and of course there is always the possibility of a religious body remaining uninsured. Here it could matter. In the case of a worldwide religious movement structured similarly to the Jehovah's Witnesses, for example, it may well be scant comfort to someone abused by a now judgment-proof defendant in England to be told that to get compensation they have to sue some foreign body half-way round the globe which technically has control over its ministers and their activities.

⁴⁵ The practice is explained in Exhibit DB14 to the IICSA Report produced by a claims director from the Ecclesiastical Group.

⁴⁶ See *An Abuse Survivor's Tale*, *Church Times*, December 11, 2015, an account by a lawyer describing her abuse claim against an Anglican diocese. A number of complaints are made about the aggressive tactics of the defendant, but there is no mention of any argument by the insurers that she had sued the wrong person.

⁴⁷ This conclusion is borne out by the statement made by the Ecclesiastical Group to the ICSAA that the Ecclesiastical Insurance Group had only seen one case brought against it go to court: see Exhibit DB14 to the IICSA Report, referred to above.

⁴⁸ See the relevant page of the Church of England's website, at <https://www.churchofengland.org/safeguarding/redress-scheme> (as at August 2023).

Issue 2: the course of employment

Far more significant in practice is the holding in *BXB* that S's act had been outside the course of his employment. This point, which we can expect to be taken up with a vengeance by insurers, is going to make it very much more difficult for the victims to use vicarious liability to bring actions against churches, orders or religious hierarchies arising out of deliberate abuse committed by clergy and the like, except in certain fairly limited scenarios.

The reason for this lies in the structure of churches and religious bodies, which typically differ from bodies such as schools, social services providers or care homes. With the latter, job descriptions and chains of line management tend to be fairly clear and precisely defined, thus in turn making it quite easy to apply the course of employment test. Wrongdoing closely associated with the perpetrator's job description (for example, a person employed as carer mistreating an elderly resident, or a counsellor engaging in an inappropriate relationship with a client they are advising) will engender liability: other wrongs where any connection is merely contingent (for example an opportunistic theft by a cleaner) will not.⁴⁹

Religious organisations are not like this. Church functionaries – priests, deacons, bishops, ministers, elders, prayer leaders, or whatever – serve essentially spiritual functions. These obviously vary in detail: but they typically comprise, where laid down at all, something in the nature of conducting worship, religious community leadership, good works, and instruction in and promotion of the faith within the religious community and elsewhere.⁵⁰ And, it is suggested, the same thing is likely to go for other religions too: the job of an officer of a mosque, temple or gurdwara are likely to be expressed in general terms of such things as charitable work, religious observance, singing or recitation of sacred and other scripts, and similar matters.

Herein lies the difficulty. With people whose tasks are diffusely spiritual in this way, in most cases it will be impossible to show that a deliberate act of wrongdoing, for instance abuse or theft, was, in the words of Lord Reed in *Various Claimants v Wm Morrison Supermarkets Ltd*,⁵¹ “so closely connected” with acts the wrongdoer was authorised to do that that wrongdoing might “fairly and properly be regarded as done by him while acting in the ordinary course of his employment.”⁵² This was essentially the

⁴⁹ See generally *Clerk & Lindsell on Torts*, 24th edn (2023), paras.6-31 to 6-34.

⁵⁰ As good an example as any is the Anglican Canon C24, laying down the duties of priests having a cure of souls.

⁵¹ [2020] UKSC 12; [2020] A.C. 989.

⁵² [2020] UKSC 12; [2020] A.C. 989 at [32].

point where the claim in *BXB* failed the stress test. Apart from the fact that the assault by S would not have occurred but for the fact that he had come into contact with B while acting as a church functionary, admittedly something inadequate of itself, there was simply no other plausible connection between S's function and the tort he committed against B. Experienced counsel did his best, but his rather desperate argument that S must have been wearing a "metaphorical uniform" as elder at the time, rightly rejected as far too thin,⁵³ is telling. Unfortunately, a moment's thought shows that this is likely to apply to most situations of what, without wishing to banalise evil, can be described as ordinary clergy abuse cases, outside the slightly implausible scenarios of an assault on an adult taking place during or just after a service, or in a Bible class or prayer meeting.⁵⁴

Of course there do remain exceptional cases, where despite *BXB* liability will remain fairly readily establishable. One, accepted by the Supreme Court,⁵⁵ is child abuse.⁵⁶ This is not because there is or should be anything unique in law about such abuse,⁵⁷ but because of two other contingent factors. One is that in a large majority of cases such abuse is committed by someone to whom the child has been entrusted; the other is that almost all churches and orders encourage their office-holders to engage with children and promote the faith to them. And whereas the abuse of friendship arising out of a person's employment does not put an act in the course of employment, abuse of a trust undertaken as part of one's function emphatically does.⁵⁸ It follows that in the large majority of cases there will be little difficulty in showing that the abuse was sufficiently closely connected with the function of the officer concerned.

The second exceptional case is where religious orders or churches engage in activities also undertaken by secular bodies: for instance,

⁵³ See [2023] UKSC 15; [2023] 2 W.L.R. 953 at [76].

⁵⁴ "... [H]e was not conducting a bible class, he was not evangelising or giving pastoral care, he was not on premises of the Jehovah's Witnesses and the incident had nothing to do with any service or worship of the Jehovah's Witnesses" -- Lord Burrows in *BXB* at [74]. It is of course possible that abuse will take place during such activities; but it seems more likely that it will take place afterwards in a more social setting (as indeed happened in *BXB*).

⁵⁵ Cf *BXB* at [58] and [75] (Lord Burrows).

⁵⁶ Compare *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB); [2020] E.L.R. 579 (religious school janitor: school managers vicariously liable); also *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB).

⁵⁷ A view specifically discountenanced by the law: see Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [29].

⁵⁸ For the position in the Church of England, see Canon B26. See too *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441, especially Lord Neuberger at [47].

education,⁵⁹ or running youth clubs⁶⁰ or residential homes.⁶¹ In such cases the functions of particular officers within the relevant school, club or other institution will nearly always be carefully laid down. From this it follows that the ordinary rules of vicarious liability applicable to such institutions, which since decisions such as *Lister v Hesley Hall Ltd*⁶² have been relatively generous to claimants – will apply. In other words, in such cases it will make no difference whether the body behind the activities happens to be religious or secular.

Nevertheless, outside these cases the general rule remains: since *BXB*, making good an abuse claim against a church on the basis of vicarious liability will not be easy, at least for adults. This might be seen as morally unjust. If abuse is connected with the relation of, say, cleric and parishioner, why should the traumatised adult victim be left with nothing more than a worthless claim against the perpetrator?

Oddly enough, however, there is something to be said for this result. The moral and social justification for imposing vicarious liability, a rule which means choosing where one has the option to impose a loss on an innocent employer as against an innocent victim, was neatly summed up by Lord Reed in *Various Claimants v Institute of the Brothers of the Christian Schools*.⁶³

a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.⁶⁴

Noteworthy here is the reference, perhaps ironically in a case concerning religious bodies, to “business:” *businesses* that profit from their employees

⁵⁹ E.g. the *Christian Brothers case* [2012] UKSC 56; [2013] 2 A.C. 1; see too *D v The Bishop’s Conference of Scotland* [2022] CSOH 46; 2022 S.L.T. 816, and G. Junor, “Child abuse claims - a reversal of view” 2013 S.L.T. 59.

⁶⁰ Compare cases such as *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441 (not cited in *BXB*).

⁶¹ Compare *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.

⁶² [2001] UKHL 22; [2002] 1 A.C. 215.

⁶³ [2012] UKSC 56; [2013] 2 A.C. 1

⁶⁴ See [2012] UKSC 56; [2013] 2 A.C. 1 at [24].

should conversely bear losses suffered by outsiders when things go wrong. But is it necessarily right, as some think,⁶⁵ to put religious bodies on the same footing? There is room for doubt. Religions exist (we hope) for spiritual rather than worldly benefits. If so there is no necessary reason to treat them as if they were businesses run for profit, and hence no clear reason to complain if the rules of vicarious liability make it more difficult to pin liability on them.⁶⁶

It is also noteworthy that where a religious organisation is ordered to pay damages, these damages (or the cost of insuring against them) go not to reduce profits which might otherwise not take adequate account of externalities, but in reduction of the resources available to good works and spiritual improvement. This is not to advocate the resurrection of the nineteenth-century legal idea of charitable immunity in tort, which is dead, and rightly so: but it remains true that the case for bending the law to compensate victims is less strong when it comes to charitable and eleemosynary bodies.

Conclusion

The conclusion, in short, that we can draw from *BXB* is twofold. First, despite its interest to torts scholars, the issue of the identity of the employer as regards abuse victims seeking compensation in respect of clergy misbehaviour is unlikely to cause much difficulty. But secondly, the courts in future are likely to be much more sceptical of attempts to pin liability for clergy abuse on church bodies, and to require a pretty close connection between what happened and the function of the cleric concerned. True, in the specialised areas of abuse of children entrusted to clergy and clergy working in institutions that, while church-run, could equally well be lay-administered, this may not be too difficult. Outside these, however, a claimant is likely to have to prove something very close to abuse in the course of religious (or at least purportedly religious) ceremonies or in the course of religious instruction. At least in practice, not much short of this is likely to do.

Note; Readers who wish to pursue the question of clergy employment status and the linked question of who is the employer of the clergy may find Duddington: The Church and Employment Law (Routledge, 2022) useful. It is reviewed on page 180 of this issue – Ed.

⁶⁵ In *Doe v Bennett* 2004 SCC 17; [2004] 1 SCR 436, McLachlin J at [27] without a hint of irony referred to a Catholic bishopric as an “enterprise.” See too Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [30].

⁶⁶ Compare the scepticism of Tomlinson LJ in his dissent in *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722 at [105].

CLERGY DISCIPLINE IN THE LATIN CHURCH

JOHN POLAND

Abstract: *A contemporary overview is offered of the canonical tools and underlying principles found in the canon law of the Latin Church (the Church in communion with the Roman Pontiff governed by the 1983 Code of Canon Law as amended) pertaining to what can generally be described as the discipline of clergy. The article addresses the two broad areas of non-penal and penal discipline, and it starts with a brief look at the subjects involved, namely, the cleric and the authorities competent for clergy discipline.*

Introduction: Clergy Discipline in the Latin Church

Clergy discipline is an expression which arguably covers two broad areas in the canon law of the Latin Church (the Church in communion with the Roman Pontiff governed by the 1983 Code of Canon Law as amended): namely, the discipline of clergy which is non-penal, and the discipline of clergy which falls under the penal law (both substantive and procedural) of the Church. What is understood by the term ‘clergy discipline’ from the perspective of the law of the Latin Church must be discerned from the different tools the law provides, and the principles underlying their use, for ensuring that discipline is met. An attempt at understanding this term will be developed, beginning with a look at the key subjects involved.

The Subjects Involved in Clergy Discipline

The Cleric

In the 1983 Code of Canon Law, the term ‘cleric’ refers to deacons, priests, and bishops. It is through ordination to the diaconate that a subject enters the clerical state and is incardinated in a particular church, or an equivalent structure, or an institute of consecrated life or society of apostolic life capable of incardinating clerics, a secular institute with the required grant of the Holy See (cf. can. 266), or a personal prelature or personal ordinariate, such as the ordinariate for former members of the Anglican communion.¹ Historically, one of the reasons for the existence of incardination was to ensure the accountability of clerics to ecclesiastical authority.² This lack of accountability – and lack of structure for adequate discipline – is one

¹ Cf. Benedict XVI, apostolic constitution *Anglicanorum coetibus*, 4 November 2009, art. VI §3.

² Cf. F.J. Schneider, ‘The Enrollment, or Incardination, of Clerics’, in J.P. Beal, J.A. Coriden, T.J. Green, *New Commentary on the Code of Canon Law*, (New York, NY, Mahwah, NJ: Paulist Press, 2000) 329-342, at 330.

of the reasons that can. 265 prohibits the clerical *vagus*, that is to say, the unattached or transient cleric. This is nothing new, and the need for an adequate structure to provide for clergy accountability and discipline was recognised in the early councils. For example, the sixth canon of the Council of Chalcedon (451) prohibits the ordination of those who are not appointed to particular churches or a monastery, and that anyone who has been ordained without attachment to a recognised ecclesiastical structure is to be prohibited from exercising orders.

The Competent Authority for Discipline

The competent authority for clergy discipline is the proper Ordinary of the cleric. In the first place, for deacons and priests, this is the diocesan bishop, or the equivalent of the diocesan bishop in law (cf. can. 381 §2). A diocesan bishop, within his diocese, has all ordinary, proper and immediate power required for the exercise of his pastoral office except for those matters which are reserved to another ecclesiastical authority, in particular, the Roman Pontiff (cf. can. 381 §1). The discipline of clergy is included within the competence of the diocesan bishop, save for those matters of discipline which are reserved to the Holy See, for example, in particular penal matters. The disciplinary function of the diocesan bishop is reflected, for example, in can. 384, which sets out some principles governing the relationship between the diocesan bishop and the priests of his diocese. This canon requires the diocesan bishop to ensure that priests (and deacons *ex analogia*) fulfil the obligations proper to their state. Ensuring that clerics meet the obligations of the clerical state suggests itself as one important aspect of clerical discipline which is incumbent on the diocesan bishop. It should also be noted that the same canon requires the diocesan bishop to *protect the rights* of priests (and deacons *ex analogia*), reflecting the dynamic between rights and obligations more generally in the Code.

Responsibility for clerical discipline is not a function reserved to the diocesan bishop alone. Indeed, many of the canons which would be utilised in a disciplinary situation refer to the competent authority with the term 'Ordinary', rather than with the more specific term 'diocesan bishop.' The latter term is used when the law wishes to expressly reserve a matter to the diocesan bishop; in other cases, when the term 'Ordinary' is used, it encompasses more than just the diocesan bishop. Those who possess ordinary executive power and who have the title 'Ordinary', according to can. 134, include the following office holders: the diocesan bishop; those who are placed over a particular church or a community equivalent to it (according to the norm of can. 368), even if only temporarily, which would include diocesan and apostolic administrators who oversee particular

churches when there is no diocesan bishop; those who possess general ordinary executive power, or executive power for particular matters, such as vicars general and episcopal vicars; it includes, for their own members, major superiors or clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right who at least possess ordinary executive power; it also includes, for their own members, the ordinary of a personal prelatore, and the ordinary of a personal ordinariate.

All these subjects can and regularly do have responsibility for aspects of clergy discipline. Generally, in most cases, and unless a diocesan bishop has reserved particular disciplinary matters to himself, those mentioned above can act in disciplinary matters in virtue of the ordinary executive power they hold, that is to say, the executive authority which comes with their office. In most cases, this authority will be vicarious, as with a vicar general or episcopal vicar. Others can act in disciplinary matters only when expressly delegated by one with ordinary executive power, subject to the requisite conditions for delegated power.

Those with competent executive authority are able to act in penal and non-penal matters. In penal matters, when not reserved to the Holy See, competent authority works in the following way. It is for an Ordinary to decree an initial preliminary investigation, according to the norm of can. 1717, when there is suspicion of an offence (or delict). It is also for an Ordinary to decide whether a matter should go to a penal process, and whether the matter should be pursued by way of the judicial penal process or the administrative penal process. In the latter case, it is for the executive authority to assess the evidence, and the rules on delegated executive authority apply. In the former case, the matter becomes a judicial one, and is exercised by a judicial college possessing judicial power, which cannot be delegated.

Understanding the competent authority in disciplinary matters can be significant particularly if the competent authority fails to act in serious matters, that is to say, when the competent authority itself becomes subject to disciplinary action. A diocesan bishop who, through culpable negligence, fails to act in a disciplinary matter, could be open to penal action under can. 1378 §2.³ Given that this canon uses the more general term ‘person’, rather than ‘bishop’, it is also possible that a vicar general, episcopal vicar, or one

³ Can. 1378 §2: ‘A person who, through culpable negligence, unlawfully and with harm to another or scandal, performs or omits an act of ecclesiastical power or office or function, is to be punished according to the provision of can. 1336 §§ 2-4, without prejudice to the obligation of repairing the harm.’ The text of this canon is taken from the English translation of the revised Book VI (which came into force in December 2021) found at: <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/06/01/210601b.html>

delegated to perform a particular disciplinary task (including non-clerics), could find themselves subject to penal action. The facts, circumstances and imputability involved must be carefully discerned in this situation. For example, a belief on the part of a competent authority, which it takes to be genuine and justified at the time, that a report or accusation is manifestly false and so not acting to decree a preliminary investigation, is distinct from wilfully ignoring a matter, failing to initiate an investigation, and therefore, in a reckless way, disregarding the likelihood of harm or scandal.

The obligation to act in particular disciplinary matters is reinforced by Pope Francis' apostolic letter *Vos estis lux mundi*, the most recent edition being from March 2023, concerning acts and omissions of competent authorities pertaining to acts against the sixth commandment of the decalogue committed with minors or with persons who habitually have the imperfect use of reason or with vulnerable adults, and related offences. In particular, the apostolic letter, with regard to bishops (and their equivalents as well as certain other subjects who are or who have been heads of other ecclesiastical structures), details a disciplinary procedure for: 'actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal, against one of the subjects indicated... regarding the delicts referred to in letter (a) of this paragraph.'⁴

It is a disciplinary matter if a diocesan bishop fails to meet the obligation to investigate when he is faced with a report or allegation, which is not manifestly false, regarding the actions of his clerics pertaining to minors or their equivalents. When a bishop fails, or is accused of failing, to meet his obligations in this matter, the disciplinary procedure falls to the competent dicastery of the Holy See, which in most cases is either the Dicastery for the Doctrine of the Faith or the Dicastery for Bishops. Even if, as in *Vos estis lux mundi*, the Metropolitan (or another subject) is tasked with investigating the allegation involving the bishop, at all points the Holy See retains competence.

This reflects an important point about the discipline of bishops in the law: namely, that the discipline of bishops falls within the exclusive competence of the Roman Pontiff (and, by extension, the competent dicastery of the Holy See) at all times. Instances of this principle are seen, for example, in can. 1405 §1, 3°, which specifies that the Roman Pontiff has the sole right to judge bishops in penal cases; can. 1405 §2, that judgement in contentious cases involving bishops is reserved to the Roman Rota; and *Praedicate evangelium*, the March 2022 apostolic constitution of Pope Francis on the

⁴ Francis, apostolic letter *Vos estis lux mundi*, 25 March 2023, art. 1 §1b.

reorganisation of the Roman Curia, which states that: ‘The Dicastery for Bishops is responsible for all matters pertaining to the... exercise of the episcopal office in the Latin Church, without prejudice to the competence of the Dicastery for Evangelization.’⁵ This includes disciplinary matters, including more structured intervention in the form of a fraternal or apostolic visitation, ‘In cases where the correct exercise of the episcopal function of governance calls for a special intervention.’⁶

The competent authorities for the discipline of clergy are therefore several: the Roman Pontiff, in virtue of his supreme, full, immediate and universal ordinary power in the Church which is freely exercised (cf. can. 331) and his pre-eminent ordinary power over all particular churches and their groupings (cf. can. 333 §1), a power which is exercised through the dicasteries of the Holy See; diocesan bishops, in virtue of the ordinary, proper and immediate power required to exercise this pastoral office within the limits established by the law (cf. can. 381 §1); and those holding either ordinary vicarious executive power, delegated executive power, or judicial power within the limits of their competences. The discipline of clerics involves therefore a nexus of various competent authorities which is dependent both on the clerics involved in the disciplinary matter (deacon, priest or bishop), and the nature of the matter in question, particularly as it pertains to penal or non-penal disciplinary matters.

Non-Penal Discipline

Precepts

Can. 49 provides an instrument together with an understanding of what discipline in the law might entail. According to can. 49: ‘A singular precept is a decree which directly and legitimately enjoins a specific person or persons to do or omit something, especially in order to urge the observance of law.’ Discipline is concerned especially (although not exclusively) with ensuring that universal and particular law is observed. The precept is an instrument by which a competent executive authority can ensure that a cleric keeps the obligations attached to his state (namely, those found in cann. 273-289) or those which are specific to the ecclesiastical office held, especially when these obligations are not being met or are in danger of not being met.

For example, the suspicion that a cleric is engaging in sexual activity, contrary to the obligation to continence in the celibate state given in can. 277 §1 for those clerics who have made this promise, or a cleric who is not behaving with due prudence towards a person whose company could

⁵ Francis, apostolic constitution *Praedicate evangelium*, 19 March 2022, art. 103.

⁶ Francis, apostolic constitution *Praedicate evangelium*, 19 March 2022, art. 107 §2.

endanger that obligation or which could give rise to scandal among the faithful – an obligation found in can. 277 §2 – might motivate a competent authority to issue a precept urging observance of this obligation. In the Latin Church, continence in the celibate state is an obligation which is attached to the clerical state, for priests (save for those who have received a dispensation from the Holy See) and some deacons.

An example of an ecclesiastical office is that of *parish priest*. It is established as an obligation in can. 533 §1 that the *parochus* or proper pastor of the parish reside in a house near the (parish) church unless the local Ordinary has permitted him to live elsewhere. If the *parochus* fails to meet this obligation, the competent authority can issue a precept urging that the obligation be met.

The Code contains many obligations which are connected to various states and charisms in the Church: for example, cleric, lay, consecrated life, and marriage. The Code also contains multiple ecclesiastical offices, each with its own obligations. The obligations attached to a particular state or office can give rise to the issuing of a precept by the competent authority.

In fact, the use of the precept can be fairly wide ranging, even if its terms, should they move to restrict rights, are to be understood strictly. Can. 36 §1, for example, sets forward a principle concerning administrative acts, of which the precept is an instance. It states that:

An administrative act must be understood according to the proper meaning of the words and the common manner of speaking. In a case of doubt, those which refer to litigation, pertain to threatening or inflicting penalties, restrict the rights of a person, injure the acquired rights of others, or are contrary to a law which benefits private persons are subject to a strict interpretation; all others are subject to a broad interpretation.

This principle of the interpretation of the words contained in administrative acts parallels a principle of the interpretation of laws found in can. 18, which requires strict interpretation for laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law.

Strict interpretation, then, is important when a precept attempts to limit the rights of a subject. A precept which urges the observance of a law does not of itself restrict the exercise of rights. However, it may be subject to strict interpretation if it goes beyond simply requiring that a subject keeps the law, for example, if a penalty is threatened. A precept which requires a subject to

do or omit something, which is not simply urging the observance of a law, is more likely to be subject to strict interpretation, with such precepts being used by competent authorities in various circumstances. Some of these do not always make easy cases.

For example, the precept is sometimes used to manage risk, in safeguarding or other matters. A priest or deacon who is the subject of a safeguarding complaint – when the complaint is not manifestly false – might find himself subject to various administrative measures. Any measures must be proportionate and justified. To safeguard against potential harm, including harm to the cleric himself, depending on the nature of the complaint, the competent authority might consider it necessary to restrict the ministry of the cleric in some particular way. The competent authority might also consider it necessary to impose conditions on the cleric's living arrangements. In practical terms, this is more likely to affect priests than permanent deacons. In addition to managing risk, even at an early stage of investigation, the precept might be used to manage the risk of scandal to the faithful. In an alternative scenario, a parish priest who is accused of stealing ecclesiastical goods – for example, the theft of parish money – might be subject to restrictions, issued by way of precept, to protect the financial stability of the parish and to prevent, as far as possible, scandal to the faithful. At this point, no penal process has been initiated, one might never be initiated, and the aims of issuing a precept in this moment have a distinct focus in view of the potential for future harm. Nothing is presumed about the guilt of the cleric in any of this.

The precept used as a tool to manage a legitimate risk, for the good of the faithful and to prevent scandal, can be related more specifically to the penal process itself, if and when a preliminary investigation and/or penal process is initiated. Can. 1722, for example, forges the link:

To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.

Once a penal process has been initiated, then the law provides scope for a precept to be imposed for the reasons given in the canon, including the aim of protecting the integrity of the process itself. In cases involving more

grave delicts, and which fall under the competence of the Dicastery for the Doctrine of the Faith, the Ordinary can use can. 1722 from prior to the penal process strictly speaking – that is, from the decree initiating the preliminary investigation – and there is greater scope for the presiding judge to impose can. 1722 measures.

The *Vademecum* (or handbook) of the Dicastery for the Doctrine of the Faith of July 2022, on points related to the penal process when examining the sexual abuse of minors or their equivalents in law, in commenting on can. 1722, specifies that:

To defend the good name of the persons involved and to protect the public good, as well as to avoid other factors (for example, the rise of scandal, the risk of concealment of future evidence, the presence of threats or other conduct meant to dissuade the alleged victim from exercising his or her rights, the protection of other possible victims), in accordance with art. 10 § 2 SST, the Ordinary or Hierarch has the right, from the outset of the preliminary investigation, to impose the precautionary measures listed in canons 1722 CIC.⁷

These are precautionary measures *strictly speaking* and are imposed by precept within the context of the penal process. They can also be imposed by the presiding judge in a judicial process once this process has been authorised by the Dicastery for the Doctrine of the Faith in cases which relate to the competence of this dicastery.⁸ Prior to the penal process, any measures imposed by precept are not considered precautionary measures strictly speaking, although the effect may be similar.

Any measures imposed by precept on a cleric must be proportionate, motivated, and in so far as possible, the subject on whom the precept is to be issued is to be heard (cf. can. 50). The competent authority must be conscious of the good name of the subject on whom the measures are being imposed. The imposing authority must be conscious that a subject's good reputation must not be unlawfully harmed (cf. can. 220), and this is reflected in various aspects of the law relating to the discipline of clergy: for example, can. 1717 §2, with regard to the investigation preliminary to the penal process, that care must be taken not to call into question anyone's good name; and *Vos estis lux mundi*, in art. 5 §2 and art. 13 §7, which require an authority to protect the legitimate good name of a subject and to ensure the application of the presumption of innocence (cf. can. 1321 §1).

⁷ Dicastery for the Doctrine of the Faith, *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, 5 June 2022, art. 58.

⁸ Cf. Congregation for the Doctrine of the Faith, *Normae de gravioribus delictis*, 11 October 2021, art. 15.

The seriousness of this obligation on a competent authority is reflected in, and protected by, the delict in can. 1390 §2, which obliges a penalty for one who has unlawfully injured the good name of another. It must be considered that an overzealous use of the precept could also be a source of scandal to the faithful.

This pertains to deacons and priests. The law does make reference to precautionary measures for bishops, but only the Holy See is competent to take any such action. Specifically, *Vos estis lux mundi* indicates that the Metropolitan should propose to the competent dicastery the measures that should be adopted, and it is for the dicastery to decide, having consulted with the local Pontifical Representative, which measures, if any, are to be imposed.⁹

If a cleric believes that a precept is unjustified, is without merit, has caused injury or is unlawful, then he has the right to make recourse, as long as the precept has been issued outside of a judicial trial (cf. cann. 1732-1739). Indeed, the precept itself would usually detail this right briefly to the subject, as well as the terms and time limits of any potential recourse. The petition to revoke or amend a precept is also assumed to be a petition requesting suspension of the precept, but suspension of the precept is not always automatic. The petition to amend or revoke a precept is given, first, to the diocesan bishop (or the author of the precept). If the diocesan bishop decrees that the petition is to be rejected, then, at the request of the cleric, the diocesan bishop must transmit the case to the competent dicastery of the Holy See, which has the power to amend or revoke the precept.

One interesting issue, which has been examined by the Holy See in recourse, concerns the boundary between a measure which can be legitimately imposed by way of precept and measures which are rightly the preserve of penal law. In particular, a competent authority must be careful that the terms of any precept issued do not become *de facto* penalties. This issue is particularly acute when an administrative act looks to impose a measure permanently – or seemingly permanently – and the Apostolic Signatura, in its own jurisprudence, has been careful to delineate boundaries here. The Apostolic Signatura is important in this matter as it is the final administrative forum of adjudication for recourse against administrative acts, when it is claimed that an act has violated some law, either in the decision-making process or in the procedure employed.¹⁰

A case of interest, the initial details of which date to 2003, involves

⁹ Francis, apostolic letter *Vos estis lux mundi*, 25 March 2023, art. 16.

¹⁰ Cf. Francis, apostolic constitution *Praedicate evangelium*, 19 March 2022, art. 197 §1.

the following facts and decisions.¹¹ A priest had his faculties removed by the diocesan bishop by an administrative act. These faculties included, among others, the faculties to hear confessions and to preach. The priest made recourse to the Congregation for the Clergy, who concluded that the diocesan bishop had imposed an expiatory penalty without having followed due penal process, as the removal of faculties under the terms of the administrative act amounted to a permanent (and *de facto*) penalty. Recourse was made by the diocesan bishop to the Apostolic Signatura. The Apostolic Signatura concluded, among other things, the following: (1) that the faculty to preach can be removed for a just cause; (2) that the faculty to hear confessions can be removed for a grave cause; (3) that faculties can be removed for administrative (non-penal) reasons; and (4) that the diocesan bishop had not made a perpetual decision in this case, but a decision for an indeterminate time lasting as long as the reason for their removal endures. The Signatura reflected that, while a perpetual removal could amount to a *de facto* perpetual penalty, which would require the fulfilment of the penal process, removal for an indeterminate time, for a just and proportionate cause, can indeed be taken by a competent authority by way of a non-penal administrative act. The Signatura cited a 1993 case (*coram Fagiolo*) which is insightful in this regard: ‘A prohibition to exercise power... can affect an offender as an expiatory penalty; however, apart from a delict, it can be imposed as a mere disciplinary precept for a just and proportionate cause, while the cause endures. A perpetual prohibition to exercise power, however... cannot easily be considered a mere disciplinary precept.’¹²

Similar reasoning can be applied to the general principle on the regulation of rights given in can. 223 §2. According to this canon, ecclesiastical authority can direct the exercise of rights which are proper to the Christian faithful in view of the common good. The canon cannot be used, however, to justify the imposition of disciplinary measures by administrative decree in a manner which disregards due process and the rights of those involved (for example, by citing can. 223 §2 in a decree which attempted to limit the ministry of a cleric; or attempted anything which would amount to a *de facto* penalty through a misapplication of the principle given in this canon); indeed, rights are regulated according to the specific procedures given in the Code, for example, by way of a motivated precept issued in accordance with

¹¹ The details of this case are found in B. Daly, ‘Removal of the Faculties of a Priest by a Diocesan Bishop’, *The Canonist*, vol. 8, no. 1, 2017, 94-109, pp. 103-106; and ‘The Revocation of Ministerial Faculties’ in W.L. Daniel, *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, (Montreal: Wilson & Lafleur, 2011).

¹² Quoted in B. Daly, ‘Removal of the Faculties of a Priest by a Diocesan Bishop’, *The Canonist*, vol. 8, no. 1, 2017, p. 106; and ‘The Revocation of Ministerial Faculties’ in W.L. Daniel, *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, (Montreal: Wilson & Lafleur, 2011) 222.

the law, where the motivation is more than simply the principle given in can. 223 §2 alone.

The consequences of failing to follow a legitimate precept depend on the type of precept issued. A precept can urge the observance of a law or can require a cleric to do or refrain from doing something, without imposing any specific penal consequences for failing to comply with the directions of the precept. However, those who are competent to issue a precept are also thereby competent to include specific penal provision in the precept. The precept becomes then a *penal precept*. Can. 1319 §1 makes provision in the following way:

To the extent to which one can impose precepts by virtue of the power of governance in the external forum in accordance with the provisions of cann. 48-58, to that extent can one also by precept threaten determined penalties, with the exception of perpetual expiatory penalties.

The law imposes limits on what is possible here. The penalty threatened cannot be a perpetual expiatory one. This means, for example, that dismissal from the clerical state is prohibited as a penalty in a penal precept. Can. 1317 directs that penalties are to be established only in so far as they are really necessary for the better maintenance of ecclesiastical discipline. Can. 1318 encourages temperance in the imposition of censures (for example, excommunication or interdict) and automatic (*latae sententiae*) penalties.

The subject and penalty in a penal precept is therefore targeted and specific. For example, a priest who takes an active role in governing a trade union, contrary to the direction found in can. 287 §2 that a cleric refrain from such activity (at least, without the permission of the competent authority), might be issued with a penal precept. This penal precept, issued by a competent executive authority, might establish that the priest will be liable for a penalty for non-compliance, such as a prohibition against performing acts of the power of order, which is an expiatory penalty found in can. 1336 §3, 3^o (a prohibition, of course, is not necessarily perpetual).

In any case, even without a threatened determined penalty given in a *penal* precept, failure to comply with a legitimate non-penal precept can result in penal action pursuant to can. 1371 §1:

A person who does not obey the lawful command or prohibition of the Apostolic See or the Ordinary or Superior and, after being warned, persists in disobedience, is to be punished, according to the gravity of the case, with

a censure or deprivation of office or with other penalties mentioned in can. 1336, §§ 2-4. In this case, the subject must be warned and must persist in disobeying the terms of the precept.

Removal from Ecclesiastical Office

While the precept is one canonical instrument involved in clergy discipline, it is not the only instrument. It can happen, for example, that a cleric must be removed from his ecclesiastical office, for reasons which are broadly disciplinary in nature but which are non-penal, that is to say, a non-penal removal from office. Removal from office would be an administrative act enacted by decree (and not a precept) of legitimate authority according to due process. It can also happen by the law itself.

An ecclesiastical office is any position which, by divine or ecclesiastical disposition, is established in a stable manner for a spiritual purpose (cf. can. 145). The office is established by the law itself or by a decree of a competent authority. An office can be conferred for an indeterminate or determinate period of time. Removal from an office conferred for an indeterminate period, or removal before the expiration of the determined period, requires a grave reason for removing a subject from office. An office conferred at the prudent discretion of a competent authority requires a just reason for removal. Due procedure is also required.

Can. 522 specifies the benefit of stability for the office of parish priest, and so the priest is to be appointed for an indeterminate period of time.¹³ Removal requires a grave reason and the following of the procedure given in cann. 1740-1747. A non-taxative list of examples of harmful or ineffective ministry are given which could justify removal of a parish priest, including, a manner of acting which causes grave harm or disturbance to ecclesiastical communion, ineptitude, loss of a parish priest's good name or aversion to him by parishioners, grave neglect or violation of parochial duties, and bad administration of parochial goods. These grounds include therefore behaviours which could be considered disciplinary in nature (although, to be sure, the grounds are more extensive than disciplinary matters), with the process requiring investigation, discussion by the diocesan bishop with two parish priests chosen from a group stably established for this purpose by the council of priests, ending with a decree of removal issued by the diocesan

¹³ Some historical notes on the stability of the office of parish priest – including the historical model of the irremovable parish priest – are offered by E. Caparros, M. Thériault, J. Thorn, *Code of Canon Law Annotated*, (Wilson & Lafleur, Montreal, 1993), 384.

bishop following a period given in law for the priest to resign voluntarily from office. The priest can make recourse to the Holy See against the decree of removal.

Penal Discipline and the penal process

Inevitably, as has been seen, discipline involving non-penal methods can sometimes cross the boundary into discipline which would be more specifically penal in nature. Penal law, and the penal process in particular, has a focus which is more closely aligned to the following aims than measures which are taken outside of the penal forum, although, to be sure, there will be overlap. To this extent, the following aims are of central importance to penal law and the penal process but also have relevance for canonical instruments with a penal dimension, which can include the precept.

The dynamic of penal law pivots on the following aims: (1) the restoration of justice; (2) the reform of the offender; and (3) the repair of scandal (cf. can. 1311 §2). The discipline of clergy from the point of view of the Church's penal law has therefore a specific focus: discipline, by way of application or declaration of a penalty, involves fulfilling sufficiently these aims.

When faced with a disciplinary matter which suggests that a cleric has committed a canonical delict, a competent authority is tasked with conducting a preliminary investigation to examine the facts, circumstances, and imputability of the report received, and to make a decision about subsequent steps (cf. cann. 1717-1718), with special procedures in place for delicts reserved to the Holy See. The second part of the sixth book of the Code details specific delicts or offences and the penalties established.

With the objective of avoiding an unnecessary penal process, can. 1341 directs that the Ordinary is to start a penal process, subsequent to the preliminary investigation, only if he perceives that neither by the methods of pastoral care, especially fraternal correction, nor by a warning or correction, can the above aims be sufficiently met. The penal process tests an allegation by the examination of proofs, obtained through established rules of evidence. *Only with moral certainty that a delict has been committed can a penalty be imposed.*

There is a degree of discretion granted to those involved in the application of penalties, based on the fulfilment of the above aims. For example, if a law or precept grants to the judge discretion as to whether or not to apply a penalty, he is to determinate the matter in accordance with these aims (cf. can. 1343). To this end, a judge can modify a penalty or

impose a penance instead of a penalty, if these aims are better served this way. Conscious of these aims, even when the law imposes an obligatory penalty, the judge may defer the imposition of the penalty, abstain from imposing the penalty or substitute a milder penalty or a penance, or suspend the obligation of observing an expiatory penalty (cf. can. 1344). With certain mitigating circumstances, the judge can refrain from imposing any penalty if it is considered that the reform of the offender may be accomplished in some other way, but if there is no other way to provide for the restoration of justice and the repair of scandal, then a penalty must be imposed (cf. can. 1345). If the competent authority imposes or declares a censure in a judicial process or by an extrajudicial decree, it can also impose the expiatory penalties it considers necessary to restore justice or repair scandal (cf. can. 1335 §1). If a penalty is indeterminate, and if the law does not provide otherwise, the judge in determining the penalties is to choose those which are proportionate to the scandal caused and the gravity of the harm (cf. can. 1349). Indeed, these aims impinge on the promulgation of penal laws themselves. For example, a legislator or other competent authority can promulgate or issue a penal law or penal precept which contains an automatic '*latae sententiae*' penalty if the matter is particularly grave by reason of scandal (cf. can. 1318).

A competent authority is therefore faced with the question of whether a penal process is needed to meet these aims, and if it is, whether the process is to be a judicial or administrative one. In any case, it is established in the Code that the faithful have the right that no canonical penalties can be imposed upon them except in accordance with the law (cf. can. 221 §3). With suspicion that a canonical offence has been committed, and with the belief that the aims of justice restoration, scandal reparation, and reform of the offender can only be sufficiently achieved by way of the penal process, then the competent authority must move to initiate this process. No cleric – and no member of the faithful – can have a penalty imposed without this process.¹⁴

Perhaps the gravest penalty – the gravest disciplinary measure – which can be imposed on a cleric is dismissal from the clerical state. A cleric

¹⁴ The 1917 Code of Canon Law allowed that a competent authority could impose a suspension from office (as a penalty – cf. CIC 1917 can. 2278) on a cleric *ex informata conscientia* or suspension from an informed conscience (cf. CIC 1917 cann. 2186-2194). The procedure raised questions, and concerns, for contemporary commentators, with one canonist observing: 'Now in the decree *ex informata conscientia* all formalities of procedure are omitted; there is no trial; witnesses need not necessarily be heard; the defendant need have no opportunity to defend himself; guided only by his own judgment the Bishop pronounces the decree *ex informata conscientia*.' E.J. Murphy, 'Suspension *ex informata conscientia*', *Canon Law Studies*, 1932, pp. 2-3, quoted in J.T. O'Reilly and M.S.P. Chalmers, *The Clergy Sex Abuse Crisis and the Legal Responses*, (New York: Oxford University Press, 2014) 254.

can lose the clerical state in one of three ways given in the Code (cf. can. 290): (1) By a judicial sentence or administrative decree declaring the ordination invalid; (2) by penalty of dismissal; or (3) by rescript of the Holy See. The first has parallels with the process concerning the declaration of nullity of marriages; the final way is concerned with a voluntary request by a cleric to be dispensed from the obligations of the clerical state. The question of clergy discipline is connected primarily with the second of these possibilities, namely, incurring dismissal from the clerical state as a penalty. This is *primarily* but not exclusively so, in so far as a cleric can always petition for dispensation from the obligations of the clerical state even during a disciplinary or penal procedure.¹⁵

Dismissal is considered the gravest penalty because, at the point of dismissal, the juridical status of the subject changes, the subject loses the rights that are proper to the clerical state and is not bound by the obligations of the clerical state, with the exception of the obligation of celibacy (cf. can. 292). The dispensation from this obligation can only be granted by the Roman Pontiff (cf. can. 291). The subject is prohibited from exercising the power of orders, except in cases of danger of death (for example, can. 976 establishes that, for the sacrament of penance, any priest can validly and lawfully absolve, without a faculty, any penitent who is in danger of death). This reflects the fact that the juridical act of dismissal does not impact the validity of orders. While the competent authority no longer has a juridical obligation to provide for the needs of the dismissed cleric in the way that is required for incardinated clerics, the law places a moral obligation or obligation in charity to ensure his welfare in the best way possible, if the subject is truly in need (cf. can. 1350 §2).

The gravity of dismissal as a penalty is reflected in those directions in the law which set limits on its use or on the use of perpetual penalties, of which dismissal is an instance. First, can. 1317 establishes that dismissal from the clerical state cannot be laid down by a 'lower legislator.' A diocesan bishop has legislative power and is able to promulgate law (including penal law) within the limits of his competence. He can establish particular penal law, he can reinforce with a penalty a law issued by a higher authority, he can add other penalties to those given for certain offences in a universal law, and he can determine or make obligatory a penalty which a universal law establishes as indeterminate or discretionary. The law, however, does not permit the diocesan bishop to include dismissal from the clerical state as a penalty in this legislative activity. Second, perpetual expiatory

¹⁵ Cf. Dicastery for the Doctrine of the Faith, *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, 5 June 2022, art. 157; Congregation for the Doctrine of the Faith, *Normae de gravioribus delictis*, 11 October 2021, art. 27.

penalties cannot be threatened in a precept (can. 1319 §1). Third, perpetual penalties cannot be imposed by decree (can. 1342 §2). Fourth, if a penalty is indeterminate, and left to the discretion of the judge, then a perpetual penalty cannot be imposed (can. 1349).

There are some exceptions to this. For example, the norms governing the more grave delicts which are reserved to the Dicastery for the Doctrine of the Faith allow perpetual penalties to be imposed by extrajudicial decree with the prior mandate of the dicastery.¹⁶ This means that a diocesan bishop or other competent authority who has been authorised to carry out an administrative penal process for one of the delicts within the competence of the dicastery can, with prior mandate of the dicastery, impose dismissal from the clerical state as a penalty by decree. It is also the case that the dicastery:

...in whatever stage and grade of the unfolding of the proceedings, [has the right] to present directly the most grave cases... to the decision of the Supreme Pontiff with regard to dismissal... from the clerical state, together with dispensation from the law of celibacy, when it is manifestly evident that the delict has been committed, after having given the guilty party the possibility of defending himself.¹⁷

The Congregation (now Dicastery) for the Clergy was given special faculties by Benedict XVI in 2009 which impact the law on dismissal. Commenting on these faculties in a circular letter to Ordinaries at that time, the then prefect acknowledged: ‘that situations of grave lack of discipline on the part of some clergy have occurred in which the attempts to resolve the problems by the pastoral and canonical means, foreseen in the Code of Canon Law, are shown to be insufficient or unsuitable to repair scandal, to restore justice or to reform the offender.’¹⁸ These include the special faculty to:

- (1) present to the Roman Pontiff for his approval and decision cases of dismissal from the clerical state including dispensation from the obligation of celibacy for those clerics who have attempted marriage and have not withdrawn after having been admonished and so persist in an irregular and scandalous situation, and for clerics guilty of grave sins against the sixth commandment of the Decalogue (that is to say, sins related to the sexual activity of the cleric);

¹⁶ Cf. Congregation for the Doctrine of the Faith, *Normae de gravioribus delictis*, 11 October 2021, art. 19 §2.

¹⁷ Congregation for the Doctrine of the Faith, *Normae de gravioribus delictis*, 11 October 2021, art. 26.

¹⁸ Congregation for the Clergy, *Circular letter*, 18 April 2009, Prot. N. 2009/0556.

- (2) intervene in accordance with can. 1399. This canon permits that an external violation of a law which is not otherwise a delict can be punished when the special gravity of the violation requires it and necessity demands that scandals be prevented or repaired. With respect to this canon, the faculty allows the dicastery to take direct action in a case or confirm the decision of Ordinaries. Derogation from the laws regarding perpetual penalties was also granted, allowing perpetual penalties to be imposed to deacons for grave reasons and to priests for the gravest reasons, with the requirement that these cases are presented to the Roman Pontiff for his approval and decision; and
- (3) declare the dismissal (with dispensation from the obligation of celibacy) of those clerics who have freely abandoned ministry for a period of more than five consecutive years and who freely persist in this absence.

This last faculty is reflected in the somewhat stricter delict found in the updated sixth book of the Code. The offence in can. 1392 involves a cleric who voluntarily and unlawfully abandons ministry for six months continuously, with the intention of withdrawing from the competent ecclesiastical authority. The punishment, in more serious cases, can include dismissal from the clerical state.

Conclusion

Those responsible for the discipline of clergy in the canon law of the Latin Church are involved in – what can be – a multifaceted discernment of factors which aim at an equitable and just outcome for all involved. Competent authorities must keep in mind, among other things, the common good, the unity of the Church, the protection of the faithful which includes the management of risk, as well as the restoration of justice, the repair of scandal, the reform of the offender, and the good of the individual cleric. The penal or non-penal nature of the matter under consideration will determine the emphasis which is placed on particular aims. Discipline should not be punitive for its own sake and, if an equitable and just outcome is to be achieved, then those applying disciplinary laws should always keep in mind a central principle of canon law, which is specified in can. 19 on laws in general and can. 1311 §2, on penal law specifically, namely, *canonical equity*: that in the application of the law, with justice, there is also mercy.

THE SEMINAL CASE OF BUTLER-SLOSS v CHARITY COMMISSION: THE PURPOSE OF CAPITAL

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LUKE FLETCHER

Abstract: The case of *Butler-Sloss & Ors v The Charity Commission for England And Wales & Anor*¹ is now the leading case in relation to investment by charities. Charities exist to benefit the public and not to benefit themselves. The case therefore illuminates profound questions about the nature and purpose of capital, and in so doing provides us with insights which show how the law might be reformed and developed to guide and shape our economic system as a whole in a way that benefits everyone, rather than the interests of owners of capital.

The Existential Challenge of Climate Change

In 2018, the Intergovernmental Panel on Climate Change produced a ‘special report’ on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways.² The special report graphically showed how the world is rapidly running out of time to adjust quickly enough to avoid the worst impacts of climate change.

According to the summary for policymakers which accompanied the special report on 1.5°C, in order to limit warming to 1.5°C with ‘no or limited overshoot’, net global CO₂ emissions need to fall by about 45% from 2010 levels by 2030 and reach ‘net zero’ by around 2050. In the words of the report, to cut emissions to meet a 1.5°C limit necessitates ‘rapid and far-reaching transitions’ across the global economy, which involves a rapid reallocation of investment. However, unfortunately, instead of decreasing, global annual emissions continue to rise.³

After the release of the report, we gathered a group of foundations at the offices of Bates Wells to ask whether trustees of foundations felt that there was a disconnect between the prevailing and historic view that trustees are obliged when investing to maximise financial returns and the fact that those same investments would mostly be made into a market that

¹ [2022] EWHC 974 (Ch) (29 April 2022).

² <https://www.ipcc.ch/sr15/>

³ <https://www.iea.org/news/global-co2-emissions-rose-less-than-initially-feared-in-2022-as-clean-energy-growth-offset-much-of-the-impact-of-greater-coal-and-oil-use>

is fundamentally misaligned with the goal of the Paris Agreement.⁴ On the basis of current policies, the global economy is currently projected to lead to global temperature rises of 2.7 °C by 2100.⁵ The impacts of global warming at anything like this level would be catastrophic and irreversible, with the projected adverse impacts and loss and damage escalating with every degree of warming.⁶

Until last year, the case law had not addressed the duties of trustees in the light of climate change. What therefore should trustees of charities, which exist for public benefit, do in this context? Is it acceptable for charities to seek to maximise their returns, if it means that the investments they make will increase the harms which they are set up to alleviate? Are trustees able to sacrifice returns or take greater risks if it means avoiding investments which conflict with or undermine their charitable objects? Do the same principles apply more broadly to other harms which arise from investments, such as biodiversity loss, addictive products and obesity?

Moreover does the law of charity provide any insights into the law as it applies or should apply to the duties of directors of other forms of legal entity, including other investors and businesses?

There are today few more pressing questions than how economic actors should reconcile these fundamental tensions, which if left unresolved, threaten the existence of modern civilisation.⁷ At its root, this is a question of justice of the most fundamental kind.⁸

The Bishop of Oxford Case and the ‘Duty to Maximise Returns’

At the time of that gathering of foundations at our offices in November 2018, the leading authority on investments by charities was the case of *Harries v Church Commissioners for England*,⁹ which is commonly known as the ‘*Bishop of Oxford case*’.

It was a challenge brought by the Bishop of Oxford and others against the investment policy of the Church Commissioners. The Bishop of Oxford argued that the Commissioners ought to have regard to the charitable object of the Commissioners to advance the Christian faith and,

⁴ <https://unfccc.int/process-and-meetings/the-paris-agreement>. The goal of the Paris Agreement is to hold ‘the increase in the global average temperature to well below 2°C above pre-industrial levels’ and to pursue efforts ‘to limit the temperature increase to 1.5°C above pre-industrial levels’.

⁵ <https://climateactiontracker.org/global/temperatures/>

⁶ <https://www.ipcc.ch/report/ar6/wg2/chapter/summary-for-policymakers/>

⁷ <https://press.un.org/en/2021/sc14445.doc.htm>

⁸ <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-meant-by-climate-justice/>
⁹ [1992] 1 WLR 1241.

as a result, ought to divest more fully from apartheid era South Africa, as to do otherwise would in essence be to support the apartheid regime which was contrary to biblical principles.

The Court refused to grant the claimants the declaratory relief sought and found in favour of the Church Commissioners. The Court found that the Church Commissioners had an ethical investment policy and had decided upon a policy which involved divesting from companies with a certain level of exposure to South Africa. It was not for the Court to second-guess the discretion and judgments of the Commissioners, who had applied themselves to the question of the ethics of the investment policy and who were best placed to make that assessment.

However, certain *obiter dicta* comments made by Vice-Chancellor Sir Donald Nicholls in delivering judgment were influential and have informed investment practice over the years.

On the one hand, the Vice-Chancellor made clear the priority of the charitable objects:

It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them better to discharge that duty, trustees have powers vested in them. Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust. That is the guiding principle applicable to the issues in these proceedings. Everything which follows is no more than the reasoned application of that principle in particular contexts

With respect to the power of investment specifically, the judge went on to say:

...prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish

In practice, the duty of trustees has usually been understood in the market in shorthand terms to be a 'duty to seek maximum returns', within certain limited parameters. The effect of this interpretation of the Bishop of Oxford

case has been to chill and discourage any deviation from standard market practice, as being legally risky and potentially in conflict with trustee duties. The Vice-Chancellor did countenance the possibility that certain investments might ‘conflict’ with charitable objects but considered that these would only be ‘comparatively rare’ cases, and so did not consider that divesting would in practice significantly affect diversification.

What then should trustees do in a situation where the market as a whole, or at least the vast majority of companies, do not have credible net zero plans and are contributing to irreversible global warming in conflict the Paris Agreement goal of a safe and habitable planet?¹⁰ Is there any need to account for or to seek to minimise or avoid such fundamental ‘conflicts’?

Fighting for a Day in Court

In April 2019, the author wrote open letters to the Chair of the Charity Commission and to the Attorney General, requesting that either body make a reference to the charity tribunal to seek an answer to this question, given its importance and urgency for charities generally. These letters were supported by a wide coalition of charity investors with over £2billion of assets.

The Chair of the Charity Commission responded and arranged a meeting with the executive team at the Charity Commission in summer 2019. The Commission team indicated that it would not make a reference of its own motion but that it would consider an application on the part of charities under s115 of the Charities Act 2011 to bring ‘charity proceedings’ to clarify the issues. However, such proceedings would require the consent of the Charity Commission.

In late 2019, we informed the Commission that we would be applying to it on behalf of the trustees of the Ashden Trust and the Mark Leonard Trust, two of the Sainsbury’s Family Charitable Trusts, for consent to bring charity proceedings. In Spring 2020, the Commission conducted a charity sector-wide ‘listening exercise’ in which it sought the views of trustees and other stakeholders on the barriers to responsible investment, which many took to be a formal consultation. In June 2020, we submitted the application for consent.

The Commission took seven months to respond and in January 2021 wrote to say that it was neither giving or refusing consent to proceedings but that it had revisited the *Bishop of Oxford* case, changed its interpretation

¹⁰ https://www.ey.com/en_uk/news/2023/04/only-five-percentage-of-ftse-100-have-published-net-zero-plans

and would be issuing new guidance on charity investment. It suggested that the trustees might wish to wait for the revised guidance to see if would resolve the difficulties the trustees faced in interpreting their duties in the light of climate change.

The trustees therefore applied in February 2021 to the High Court under s115(5) of the Charities Act 2011 for leave to bring the proceedings. In March 2021, the High Court determined that the initial application to the Commission for consent had been refused, as consent had not been given, and provided leave for the trustees to bring proceedings. In doing so, the High Court noted that only the court could provide an authoritative determination of the law and that a judgment would provide clarity for the benefit of charities generally.

The Commission, which had commenced a formal consultation on draft guidance on charity investment which it issued a few days before the March 2021 hearing, announced that it would wait until the outcome of the case before finalising its investment guidance, known as ‘CC14’.

Seeking The Blessing of the Court

In short, the trustees of the Ashden Trust and the Mark Leonard Trust brought the proceedings in the case of *Butler-Sloss* to seek the Court’s blessing to adopt investment policies which aimed to align the investments of the charities with the goal of the Paris Agreement to limit global warming to 1.5C above. This would mean adopting investment policies which might exclude a potentially very large part of the market, given the paucity of companies implementing credible net zero plans, and the trustees wanted to know if this was lawful.

The trustees were of the view that there was a direct conflict between the charitable purposes of the charities on the one hand and the apparent duty to maximise returns on the other hand. It was a momentous decision to depart from historic market practice and to exclude such directly conflicting investments and the trustees needed to know that this was permitted.

In the words of Michael Green J. the key question in the case was:

Should charities, whose principal purposes are environmental protection and improvement and the relief of poverty, be able to adopt an investment policy that excludes many potential investments because the trustees consider that they conflict with their charitable purposes?

The Charity Commission and the Attorney General were defendants in the proceedings and agreed that there needed to be clarification as to the meaning of the *Bishop of Oxford* case. All of the parties therefore invited the Court to deliver a judgment that would set out the correct approach in law for charity trustees to follow in adopting an investment policy.

The Judgment

Green J. summarised what he considered to be ‘the law in relation to charity trustees taking into account non-financial considerations when exercising their powers of investment’:

‘(1) Trustees’ powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000.

(2) Charity trustees’ primary and overarching duty is to further the purposes of the trust. *The power to invest must therefore be exercised to further the charitable purposes.*

(3) That is normally achieved by maximising the financial returns on the investments that are made; the standard investment criteria set out in s.4 of the Trustee Act 2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is so as to produce the best financial return at an appropriate level of risk for the benefit of the charity *and its purposes.*

(4) Social investments or impact or programme-related investments are made using separate powers than the pure power of investment.

(5) Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.

(6) But where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they *should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict* and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.

(7) In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.

(8) However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.

(9) Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity *and its purposes*. *Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment.*

(10) If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.' [Emphasis added]

The judge therefore articulated a broad balancing exercise to be conducted in which the extent of the potential conflict is weighed up against financial and other relevant considerations.

With respect to the weight to be given to '*direct conflicts*,' where an investment directly undermines the charitable purpose for which a charity exists, the judge said that '*a direct conflict is likely to be the most significant factor and should be avoided if possible*'. Of course, it was the trustees' conviction that investments not aligned with the goal of the Paris Agreement were in conflict with the charitable purposes of the charities, which had formed the basis of the broad based investment exclusions in their proposed investment policies. The trustees had weighed up the potential financial implications of these exclusions and decided that the proposed policies were nevertheless in the best interests of the charities' purposes.

Turning to the specific facts of the case, Green J determined that that the trustees of the Ashden Trust and Mark Leonard Trust had exercised their powers of investment properly and lawfully, taken account of all relevant

factors and not taken into account irrelevant factors. The judge stated that he believed ‘the decision to adopt the Proposed Investment Policy is sufficiently “momentous” to justify the court giving its blessing to that decision.’ On that basis the judge determined that the trustees were permitted to adopt the proposed investment policies and that in so doing would discharge their duties with respect to their powers of investment.

Implications of the Case

On 1 August 2023, the Charity Commission published its long-awaited revised guidance on investment by charities, ‘Investing charity money: a guide for trustees’, known as CC14.¹¹ Alongside the final guidance, it published a document entitled ‘Charities and investment matters: Legal underpinning’,¹² which set out its analysis of the law following *Butler-Sloss*.

In the light of *Butler-Sloss*, the new CC14 is framed in terms of the duties of trustees to advance charitable purposes. It states that ‘Acting in your charity’s best interests means always doing what you decide *will best help your charity to carry out its purposes, both now and for the future. It is not about preserving your charity for its own sake.*’ (Emphasis added)

This is a very new and different tone and emphasis, compared to previous guidance, which placed the stress on the need to justify any departure from seeking maximum returns. In other words, it is the charitable purposes which come first and financial returns are merely a means to an end. The new guidance says that trustees must balance ‘the extent of any potential conflict [arising from an investment with the charity’s purposes] and how likely and serious it is’ alongside financial return considerations, as part of a general balancing exercise. Financial returns are therefore no longer primary in the legal hierarchy of considerations for trustees.

The legal underpinning states that ‘*Butler-Sloss* is now the leading case in this area, and this judgment is central to the basis for the Commission’s guidance on investment by trustees’. The principles set out by Green J. in *Butler-Sloss* are therefore now central to the guidance which informs charity investment of approximately £178bn of investment assets.¹³

As a firm, we are now working with a group of charity umbrella bodies to develop some sector led ‘Charity Investment Governance Principles’, which

¹¹ <https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14/charities-and-investment-matters-a-guide-for-trustees>

¹² <https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14/charities-and-investment-matters-legal-underpinning>

¹³ <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>

will establish best practice principles for charity investment to complement CC14 and be more specific and action-oriented.¹⁴ These principles will detail how boards should delegate to investment committees and engage investment managers, and how in practice conflicts with purposes should be managed.

The author's hope is that post *Butler-Sloss*, charity trustees feel empowered to be able to make and manage their investments in a way which does not conflict with their charitable objects and public benefit, and which does not contribute to irreversible climate change. Hopefully, trustees will no longer feel beholden to market practice or the need to maximise returns and will feel able to do what they believe to be right for their charity's purposes. Given that a generation has passed since the *Bishop of Oxford* case was decided and how rare it is for charity proceedings to lead to judgment, it seems likely that *Butler-Sloss* will be the leading case guiding trustees and decision-makers during the 'decade of action'¹⁵ and beyond.

Purpose is Paramount

The church is marked by its call to participate in the *Missio Dei*. This is its mission and purpose. The church does not exist to serve itself or the interests of any one group. It is bizarre that so many Christians are wedded to a late 20th century economic orthodoxy which believes that the only reliable model for economic activity is one in which corporations serve shareholders.

The central insight of *Butler-Sloss* is that the capital owned by charities is owned not for their own benefit but for the benefit of their purposes and must be used accordingly. The purpose is paramount and takes precedence over institutional interest. This is an outworking of the judgment given by Lady Mary Arden in *Children's Investment Fund (UK) v Attorney General*¹⁶ which concluded that the fiduciary duties owed by trustees (in that case it was actually the company law member of the relevant charity) are essentially owed 'to the charitable purposes or objects of the charity', rather than to the charity itself as an institution.

This legal conclusion has deep and meaningful resonances with biblical principles we see throughout scripture - 'The earth is the Lord's, and everything in it, the world, and all who live in it: for he founded it on the seas and established it on the waters', (Psalm 24:1). What we have is not our

¹⁴ https://cfg.org.uk/knowledge-hub/cc14_updated_and_charities_to_launch_first_charity_investment_governance_principles

¹⁵ <https://www.un.org/sustainabledevelopment/decade-of-action/>

¹⁶ [2022] AC 155.

own; we hold it for a higher purpose. We are essentially trustees of all we possess, and the same principle extends not only to material goods but to all forms of temporal power.

The author is of the view that the same principles of stewardship and trusteeship need to be encoded in all economic and other institutions. One of the fundamental problems of the modern corporation is that the law has unduly elevated the interests of a single stakeholder group – that of the shareholders and their financial interests in individual companies – within the purpose of the company,¹⁷ at the expense of other stakeholders, and even at the expense of the wider interests of shareholders.^{18 19} It should not be a surprise that companies externalise costs and operate at the expense of the environment and future generations, if directors believe that their essential duty is to promote the financial interests of shareholders.

The central insight of *Butler-Sloss* – that purpose is and should be paramount – reveals that it is possible to reform capitalism in a way that serves the public interest and protects the planet. If we can reimagine and rearticulate the legal and constitutional purpose of companies and other institutions in our society in a way which makes it clear that the purpose is to serve and not to harm wider society or the environment, then we will reshape the duties of directors.

In reframing the purpose of a company, we change the ‘meta-question’ we ask its board. This is the insight which is encoded within the B Corp movement, which requires business joining to change the legal purpose of the company so that in the company’s purposes seeking a positive impact on society and the environment is on a par with seeking to benefit shareholders.²⁰ The contention of the Better Business Act campaign is that this principle ought to be the foundation of company law itself and that company law therefore needs reforming.²¹ After all, why should any business be able to profit at the expense of society and the environment?

Without systematic institutional legal reform of this kind, we seem destined to allow our economic system to become trapped in the same destructive path dependent patterns.²² Shareholders will seek returns and companies should seek to profit. But, in our economic system, the uncritical love of shareholders’ financial interests is a root of all kinds of evil.

¹⁷ <https://www.legislation.gov.uk/ukpga/2006/46/section/172>

¹⁸ <https://theshareholdercommons.com/resources-page/#tsc-and-system-stewardship>

¹⁹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004794

²⁰ <https://bcorporation.uk/b-corp-certification/how-to-certify-as-a-b-corp/legal-requirement/>

²¹ <https://betterbusinessact.org/>

²² <https://www.britannica.com/topic/path-dependence>

News from the Governmental and Parliamentary world

This feature is intended to alert readers to contemporary developments which bear on a Christian view of the law and what it ought to be. As such it aims to cover some issues which have a direct bearing on Christian concerns, such as legislation on assisted dying, and those which may be somewhat under the radar for some readers but which, perhaps, ought not to be.

Legislation on Buffer Zones outside Abortion Clinics in Scotland

It will be recalled that s.9 of the Public Order Act 2023 provides that it is an offence for a person who is within a safe access zone(in effect a buffer zone) to do an act with the intent of, or reckless as to whether it has the effect of, *inter alia*, influencing any person's decision to access, provide or facilitate the provision of abortion services at an abortion clinic. However, s.35 (1) provides that this Act extends to England and Wales only. There is now a proposal to introduce similar legislation in Scotland following a consultation launched by Gillian Mackay, a Scottish Green MSP on her proposal to introduce the Abortion Services Safe Access Zones (Scotland) Bill. This is a Members Bill, equivalent to a Private Members Bill in the UK Parliament, although it is understood that the Bill has the support of the First Minister for Scotland.

Following the closure of the consultation it was reported that 56.1% of were fully supportive of the proposal, with a further 38 (0.3%) partially supportive. The most common theme raised in supporting the proposal was women's right to access healthcare services free from intimidation, harassment, or judgement. A minority of the overall number of respondents (5065- 42.6%) were fully opposed to the proposal, with a further 51 (0.4%) partially opposed.

Further details can be found on the website of the Scottish Parliament at www.parliament.scot Similar legislation in Northern Ireland (the Abortion (Safe Access Zones) Act 2023 came into force on 6th February 2023. It is reported that two people have now been arrested at an anti-abortion protest outside the Causeway Hospital, County Londonderry.

Renters Reform Bill 2023

Given the long involvement of churches in both housing provision and campaigning for better housing it is thought that readers will be interested to know that at last the UK Government is promoting the Renters Reform

Bill, promised in the Conservative manifesto for the 2019 election. This will *inter alia* end fixed-term tenancies and move to periodic tenancies, which do not have an end date. As originally introduced it would end ‘no fault’ evictions under s. 21 of the 1988 Housing Act and instead possession of the rented property could only be able to be granted by the court on specified grounds some of which are mandatory and others are discretionary. One mandatory ground would be that ‘The property is held for use by a minister of religion to perform the duties of their office and is required for occupation by a minister of religion’.

However, it appears that at the time of writing (late October 2023) the Government has bowed to pressure from landlords and s.21 will now not be scrapped until improvements have been made to the way that courts handle legitimate possession cases. The Government has noted that court cases by landlords claiming possession can take from over half a year onwards to get to the process of possession even where landlords have a good cause such as tenants in rent arrears or anti-social behaviour. One might ask why the Government had not noticed such a well-known fact before!

Another interesting provision is that tenants will now have the right to request a pet in the property, which the landlord must consider and cannot unreasonably refuse. The interesting question, which your editor once had cause to examine, is exactly what animal can be considered a pet?

Free Speech in Universities

The Catholic Union has reported that Professor Arif Ahmed, Director for Freedom of Speech and Academic Freedom at the Office for Students, has said that he will be launching a consultation exercise later this year about a new complaints mechanism which would deal with obligations on universities and student unions to secure freedom of speech. This may well have started by the time that you read this and is something to look out for.

Mandatory Reporting in Abuse Cases

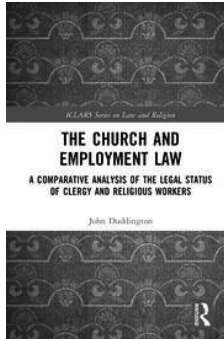
A Government consultation on mandatory reporting for cases of child sexual abuse closed on 14th August 2023. This consultation was in response to a recommendation from the Independent Inquiry into Child Sexual Abuse (IICSA) that people who work with children should be legally obliged to report incidents of sexual abuse. The National Secular Society has told the Home Office it must resist what it calls ‘religious lobbying for sacramental confession to be exempted from new mandatory reporting laws’. Christian bodies have taken a different view of course and readers may care to look

at the articles published on the seal of the confessional in the Hilary/Easter and Trinity/Michaelmas 2022 issues.

Relationships and Sex Education (Transparency) Bill

Miriam Cates MP has introduced a Private Members Bill to make provision to *inter alia* require the sharing with parents and guardians of copies of material used in relationships and sex education lessons in schools in England. Thus s.1(1) provides that school authorities in England must (a) ensure that parents of pupils have access to all teaching and curriculum materials used in relationships education, sex education or relationships and sex education lessons in their schools, and (b) must take all practicable steps to ensure that parents are made aware of how to access relevant materials. This Bill is scheduled for its Second Reading on 24th November 2023. Although it is unlikely to proceed further without government support the debate itself should be interesting.

BOOK REVIEWS



The Church and Employment Law: A comparative analysis of the legal status of clergy and religious workers, John Duddington, (Routledge, 2023) 281 pp. (Hardback £120, ebook £35.09) ISBN: 9780367553173

In the era of globalisation, despite the major social shifts that have taken place since the mid twentieth century, religion continues to occupy a central place in our civilisation. Moreover, migration in the contemporary context has led to an increase in religious diversity, a reality which in turn generates greater potential for questions to arise in relation to religion in the public sphere, and ideological freedom in a variety of settings, including schools as workplaces.

Against this backdrop, legal systems in many jurisdictions are confronted with issues arising from the need to balance the rights of employers against the liberties of workers when it comes to freedom of belief and practice. Consequently, this book is both timely and of ongoing relevance. The author focuses his insightful analysis on an exploration of one particular question in the ambit of labour relations, namely the position of clergy vis a vis their religious communities. The discussion is structured across three parts in the course of which various reforms are proposed in a reasoned way, with the aim of assessing the need to provide appropriate legal protection to the subjects involved in this *sui generis* bond.

In the first part the author considers these three main categories: volunteers, religious workers, and clergy as ministers of religion. Substantial time and analysis is given to the definition of each of these categories, as a necessary foundational step for the subsequent discussion. In the second part, he considers the status of ministers of religion from the perspective of employment law, including valuable insights from a comparative perspective, and concluding with a nuanced analysis of the legal status of clergy, in relation to the employee versus worker debate, outlining the respective implications of both options. Finally in the third part the author explores the implications of overarching Church and State relationships for the treatment of clergy within employment law, considering the implications for the autonomy of churches and other religious bodies within the State. The discussion deals with the present reality, but also pushes forward to consider possible future developments.

Considered holistically, this study engages with a high degree of complexity, both in terms of law and fact and yet manages to do so in a manner which is both clear and accessible. Dr. Duddington paints a detailed picture of the various relationships between clergy and their religious communities in the United Kingdom and in other European states, asking searching questions and presenting possible avenues for reform and development. The work deals with a range of possible perspectives on these debates, for example the argument that religious activity is based on spiritual commitment and not an employment contract, meaning that it should be governed only by the internal laws of the Church, and the contrasting position which regards the work of a minister as compatible with the regulation of secular labour legislation, meaning that it is feasible for clergy to come within the umbrella of statutory and contractual protection, enforceable by the courts.

In the course of the discussion the author highlights the ways in which the “contract” question is particularly problematic, due to the lack of any readily identifiable agreement between the parties, making it a challenge to find an express contract. Furthermore, because the parties’ conduct can be explained by reference to church law, the necessity test for implying a contract would not be met. Taken together, this means that approaching the “contract” question in the traditional way renders it impossible to find that Church of England clergy (or any other ministers employed within a backdrop of church law) are employees or workers.

On this view, the focus should be on a close reading of the church law and factual background to determine whether a contract can be found. Consequently, in these situations, an Employment Judge will usually reject the possibility of concluding that there is a contract between the clergy and religious employer, on the basis that the terms and conditions governing this appointment, on matters such as duties, pay, and disciplinary procedures, are set out in church law, which is binding on both parties, and therefore cannot be the subject of negotiation or contractual agreement.

In addition, the claimants’ arguments are largely defeated by the fact that the most plausible candidate for “employer” in these cases, lack several of the key characteristics of an employer (e.g. they are not directly responsible for payment). A third obstacle is the absence of any right on the part of the Church to control the claimant’s activities, because control is a crucial indicator of an employment relationship, and church law does not allow Church representatives, such as bishops, to initiate disciplinary procedures.

Such an analysis retains the traditional assumption that clergy cannot not

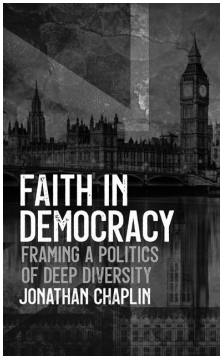
be a party to an employment relationship and rejects potential compromise solutions. One alternative to this position would be to categorise a minister as a worker, defined as: “*an individual who has entered into or works under (or, where the employment has ceased, worked under)—(a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*” (s230 (3) Employment Relations Act, 1996). On a literal reading, this could offer a way of bringing clergy within the extended worker concept, even though they were not parties to a contract.

Since both the law of the Church of England and employment law form part of the law in contexts like England, it is necessary to reconcile the two systems in a coherent way, as Dr Duddington illustrates. The view that ministers of religion should have access to the same rights and remedies as ordinary employees faces serious obstacles, because this road could potentially draw the courts into disputes about the tenets of faith and non-justiciable spiritual questions. In a case involving a minister of religion, secular courts could not be expected to rule on whether the minister had breached a particularly doctrinal requirement, but they could evaluate whether the employer’s procedures for hearing the case were fair and appropriately managed. Furthermore, while the courts seem to assume that most religious dismissals are about matters of faith, this assumption may not be justified in practice. The reported cases reveal that disputes tend to arise from more mundane and temporal matters, such as behaviour in breach of conduct rules.

Consequently, it must be acknowledged that each case turns on its own facts, and the usual tests to determine the presence of a contract of employment or a worker’s contract should be applied. Ministers of religion are human beings and rely on their jobs for all the same reasons as other people in the labour market, they need money, social contact, an opportunity to exercise their skills. They are also often live in accommodation tied to their job. They are therefore in need of the same level of protection as anyone else when it comes to unfair treatment from their paymasters. Sadly, the fact that religions in theory have strong moral codes is no guarantee that there will also be justice in practice, given that processes are administered by fallible human actors. In principle, there is no reason why clergy should not enjoy some employment rights, within parameters acceptable to the faith community. Litigation could potentially raise problems in this regard, but the Church of England could, if need be, take legislative action to remedy any areas of uncertainty.

In summary, Dr. Duddington provides a masterly overview of a legally and ethically difficult subject. His analysis treats the subject with compassion and pragmatism, recognising the fundamental nature of what is at stake for both faith communities and their clergy. He is not afraid to make practical suggestions about possible solutions to longstanding dilemmas and he points out the pros and cons of the various options in terms of ways forward. This is therefore a much needed contribution to the field, and deserves to be widely read, both by those in the discipline of law and religion and anyone interested in employment law.

Carmen Ferradans Caramés



***Faith in Democracy: Framing a Politics of Deep Diversity*, Jonathan Chaplin (SCM Press, 2021) 272 pp. (Paperback £19.99) ISBN: 978-0300044294**

Jonathan Chaplin will be well known to many readers of this review both through his books and articles, one of which, *The Place of Religious Arguments for Law Reform in a Secular State* has appeared in this journal.¹ One of the consistent themes of his work has been the extent to which arguments based on religious belief can be used

in public debate where the prevailing ethos is, as in the UK, now mainly secular. One can of course simply say 'We are Christians. So we are right about this'. That approach does not commend itself to Jonathan nor, one imagines, to most of our readers. One can then take the exact opposite tack and retire *as Christians* from public debate as Christians thus leaving the field to others and making Christianity a merely private matter. This what some secularists would wish. Jonathan quotes the Guardian columnist Jackie Ashley who wrote: 'If any MP really thinks their personal religious views take precedence over everything else then they should leave the House of Commons. Their place is in church, mosque, synagogue or temple. Parliament is the place for compromises, for negotiations in a secular sphere under the general overhead light of the liberal tradition.'² Again, Jonathan would not agree. So the task becomes how to chart a path in public debate from the Christian perspective which avoids dogmatism and yet maintains a Christian stance. It is in effect the same challenge which meets this journal.

¹ (2009) 162 *Law and Justice*, 18

² Jackie Ashley, 'Cardinals, back off from this war with women and state' *The Guardian*, June 4, 2007. There are also echoes of this approach from a Christian perspective in E. Norman 'Christianity and World Order' (OUP, 1979). See especially the concluding chapter: 'The Indwelling Christ'.

At the outset the author asks how one can define the purpose of the political community; and, having considered the Roman Catholic concept of the common good and the parallel Protestant one of seeking justice, rests his discussion on the concept of public justice which he argues is that part of the common good that ‘falls uniquely within the remit of the political community’ (page 23). He then argues that public justice ‘calls for the securing of the requirements of public space itself’ for contending visions which is where he begins to build his case for a Christian vision. He notes that the term ‘*justificatory secularism*’ is used to argue that only fully secular reasons can be used in the public justification of laws and public policies and prefers instead ‘*jurisdictional secularism*’ which he argues means that the state is committed to treating faiths with impartiality and guaranteeing religious freedom. However, he also argues that there is a principle of ‘declaratory restraint’ so that although ‘*jurisdictional secularism*’ applies to actual public debate, when the state reaches the point of announcing its decisions to the public then it speaks on behalf of the whole community and so should speak ‘as inclusively as possible’. At that point it would be wrong to put forward specifically religious reasons for actions.

This applies also to judicial utterances which is why he approves of the now celebrated statement of Laws LJ in *McFarlane v Relate Avon Ltd*,³ made in response to a witness statement of Lord Carey, that explicitly faith based reasoning in court judgments is fundamentally wrong. Nevertheless he disagrees with the apparent assumption of Laws LJ that ‘a bright line can be drawn between the workings of faith and the operations of practical reasoning’ (page 116)⁴ as he argues, correctly I think, that in practice faith reasons are, consciously or not, often influential in the making of public decisions.

One of the strengths of Jonathan Chaplin’s writing is the attention he pays to clear definitions and understandings of contested terms. We have seen examples of this above and another is his illuminating discussion of the term ‘secular’ on pages 57-58 where he correctly points out that this term, far from having its current use as an area where, as it were, religion may not go, was in fact originally used by Christians in the sense of the present age as distinct from that to come, the *eschaton*. Thus as he says; secular ‘was an epoch within the larger plan of divine redemption, not a zone standing over or against a ‘sacred’ or ‘religious’ zone’... The secular was already in process of being graced, primarily through the medium of the church’. All of this will be familiar to many of us who have dealt in this area but, for a wider readership, is excellent to have the term ‘secular’ reclaimed by Christianity.

³ (2010) EWCA (Civ.) 880.

⁴ Joseph Ratzinger would not, I think, have agreed with him either. See below.

One regret which I have had for some time is that, although on the theological level there is of course far more interaction between different Christian churches than in my youth and far more mutual understanding, non-Catholics have yet to fully explore the riches of Catholic social teaching with its fundamental emphasis on the link between faith and reason.⁵ One example is in this book where on page 98 the author refers to the views of Habermas on the place of religious reasoning in public debate and criticises the contention of Habermas that ‘religious’ concepts must be ‘translated’ into a secular language. He, rightly I think, feels that this risks deflating and indeed suppressing the theological meaning of words. However, this quotation from Habermas comes from his celebrated debate with the then Cardinal Ratzinger⁶ where in his contribution Cardinal Ratzinger stressed the ‘mutual relatedness’ between Christian faith and Western secular rationality and the need for reason to listen ‘to the great religious traditions of mankind.’⁷ It would be good if the author could, in some later publication, consider how these insights might help in the charting a path for Christians in public debate.

There are many other good things in this book which it is impossible to cover in a review but one must mention the lucid account of the case law involving religious belief and equality and human rights law set out in Chapter 6 on ‘Faithful Conscience’. This is a model of clear and balanced writing and it is good to see that the author has revived the discussion on whether there should be a statutory right of reasonable accommodation of religious belief. This is a topic which has gone somewhat off the radar recently and it is good to see it brought to the fore again.

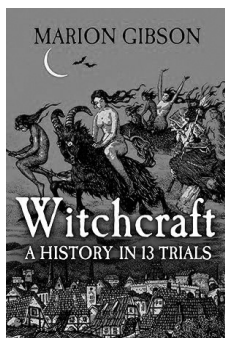
In summary this is an excellent and really challenging contribution to the literature on Christians in public debate. It has stimulated my own thinking and will do so for others too. It is unhesitatingly recommended.

John Duddington

⁵ This is not to say that the relation between faith and reason has been neglected by Protestants. See, for example, the authorities cited by A. Nichols in *From Hermes to Benedict XVI* (Gracewing, 2009) at vii.

⁶ Reprinted in Jürgen Habermas and Joseph Ratzinger ‘*The Dialectics of Secularisation*’ (Ignatius Press, 2004).

⁷ Op. cit. at 77-78. For those wishing to go further the locus classicus is of course the encyclical *Fides at Ratio* of John Paul II.



***Witchcraft in Thirteen Trials*, Marion Gibson (Simon & Schuster UK, 2023) 320 pp.(Paperback £9.99) ISBN: 1398508535**

From the late nineteenth century onwards, a wealth of literature has been generated by historians and anthropologists on the topic of Early Modern witch trials and persecution. Trends within the scholarship have reflected changing societal concerns, as well as the evolution of the disciplines and our collective understanding. As well as changing perspectives on Margaret Murray's highly influential, but now essentially discredited, thesis of a surviving pre-Christian cult, themes about gender relationships, capitalism, employment relations and environmentalism have all transformed with shifting societal sands. It is striking that in recent years, there has been a growth in scholarship examining these events from a perspective of law and history. For example, Emmerson Baker's *A Storm of Witchcraft: The Salem Trials and the American Experience* (OUP 2015) is a notable contribution in this regard, examining as it does the role of legal and Constitutional processes in the tragic and notorious events that gripped a New England community.

Marion Gibson's latest book is another important contribution to this important area of work. She takes a very long view of "witchcraft" in terms of societal perception but does so via an examination of a number of different trials, ranging from the late Middle Ages and cusp of the Early Modern era to the twenty-first century. By its very nature, the work places judicial machinery and legal processes at the front and centre of the discussion. It explores the way in which the processes of law themselves have encapsulated and embodied the anxieties, prejudices, conflicts and needs of the communities in which they are set.

This work is of immense importance to anyone interested in law and religion, legal history or law and anthropology, for a variety of reasons. Firstly, it shines an invaluable light on the changing place of religion in the public sphere and the role of law in regulating faith based practices, both expected and transgressive. Given the unusually long span of time involved, it presents an unusually wide panorama, and therefore invites those who are engaged either in the study of law and religion at a systemic level, Church/State relations and Constitutional arrangements, or specific questions relating to rights and freedoms, to reflect on how these have shifted over time, and where our current direction of travel might lead.

It also dares to explore the ways in which some of the metanarratives

at play within legal frameworks and society have a tangible impact on the delivery of justice, and concrete decisions made about the lives of individuals. How does the issue of “Constitutional Culture” in the sense of the bundle of norms and expectations governing collective life, play out in practical terms in the context of criminal trials? Often reflections on the phenomenon of witch-hunting in the past, allow contemporary audiences to distance themselves from the subject matter, and feel a sense of gratitude for the apparent social progress that have been made. But this study of realities over an extended span of time challenges readers to consider ways in which our present legal machinery may be infected with endemic preconceptions and assumptions.

The study begins in the 15th century with the trial of Helena and moves down the centuries. Some of the stopping points on the journey are expected, for example Salem and Helen Duncan, the so called “Blitz Witch, a Spiritualist medium who was prosecuted in the 1940s under the auspices of 18th century legislation intended to tackle fraudsters purported to be practising magic. A much misrepresented and misreported trial, the Helen Duncan affair raised and still raises profound questions about the boundaries and definitions of religious freedom in law. How do we draw the line between respecting autonomy and protecting the vulnerable, and what does the law define as an unacceptable level of threat or exploitation? Other topics are less prominent in the public consciousness, for example, witchcraft in the French Revolution and the witchcraft in contemporary Africa.

The writing style is fluid and engaging, making the book a pleasurable as well as informative reading experience. At the same time however, it treats the often tragic subject matter with appropriate gravity and is supported by substantial and detailed academic research across a commendable span of primary and secondary sources. The work is highly recommended to anyone interested in law and religion and belief, questions of human rights and freedom, as well as the disciplines of law and history and law and anthropology.

Helen Hall

CASEBOOK

At a glance:

Athwal v State of Queensland [2023] QCA: Queensland: constitutional right of Sikhs to carry the *kirpan*.

Buhuceanu and Others v Romania [2023] ECHR: prohibition on same-sex marriage.

Gulshan v Lord Chancellor [2023] EWCA Civ: carrying the *kirpan* in court.

Higgs v Farmor’s School [2023] EAT: dismissal for Facebook posts expressing disbelief in “gender fluidity” and same-sex marriage.

Jehovah’s Witnesses v Finland [2023] ECHR: requirement for subject’s consent to data collection during door-to-door evangelism.

Koilova and Babulkova v Bulgaria [2023] ECHR: absence of legal recognition of same-sex partnerships.

London Borough of Merton Council v Nuffield Health [2023] UKSC: whether a charity whose beneficiaries are rich is still “charitable”.

Mr A Cave v The Open University [2023] UKET: is “English Nationalism” a protected belief?

Mr J Mitchell v Royal Mail Group Ltd [2023] UKET: religious objection to COVID vaccination.

Ms K Sunderland v The Hut.com Ltd and Ms P Cohen [2023] UKET: are “conservative philosophical beliefs” protected speech?

Ms T Owen v Willow Tower OPCO 1 Ltd [2023] UKET: “ethical veganism” and objections to the COVID vaccine.

Nabokikh and Others v Russia [2023] ECHR: police disruption of religious worship and Article 9 ECHR.

R (Bowen) v Kent County Council [2023] EWHC (Admin): religious education and the right of humanists to representation on SACREs.

Re King's College Chapel Cambridge [2023] ECC: installation of solar panels on the Chapel roof.

Rev M Burns v Secretary of State for Justice [2023] UKET: alleged unfair dismissal and discrimination on grounds, inter alia, of religious belief.

Tousi v Gaydukova [2023] EWHC 404 (Fam): invalidity of marriage.

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC: vicarious liability for rape.

ATHWAL v STATE OF QUEENSLAND

[2023] QCA 156¹

Whether an Australian state law forbidding a Sikh from carrying the kirpan at school unconstitutional.

Initiated Sikhs are obliged ‘at all times to wear or possess the five articles of faith, which collectively symbolise that the person has dedicated themselves to the Sikh way of life’ [66]: the *kachera* (cotton undershorts), the *kanga* (a wooden comb), the *kara* (an iron bangle), *keshas* (uncut hair) and the *kirpan* (a small dagger) – otherwise known as the “Five Ks.”² Queensland’s Weapons Act 1990 prohibits possessing a knife in a public place or a school without reasonable excuse. S.51(4) provides an exception ‘for genuine religious purposes’ and cites Sikhism specifically as an example of that, but 51(5) declares that ‘it is not a reasonable excuse to physically possess a knife in a school for genuine religious purposes’ – and the *kirpan* is regarded as a knife. Ms Athwal challenged that provision.

The Court rejected the State Government’s arguments and made a declaration that s 51(5) (Possession of a knife in a public place or a school) of Queensland’s Weapons Act 1990 was inconsistent with s 10 of the Commonwealth’s Racial Discrimination Act 1975, which prohibits discrimination on grounds of ‘race, colour or national or ethnic origin’ and therefore unconstitutional under s 109 (Inconsistency of laws) of the Australian Constitution Act.

FRANK CRANMER

BUHUCEANU AND OTHERS v ROMANIA

[2023] ECHR 424³

Prohibition on same-sex marriage – Article 8 ECHR.

Article 277(1) of the Romanian Civil Code (Prohibition on equating other forms of cohabitation with marriage) states bluntly that ‘Same-sex marriage is prohibited’. The applicants were 21 same-sex couples who argued that the absence of any form of legal recognition for their relationships was a violation of Article 8 ECHR (respect for private and family life).

¹ <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2023/156.html>>.

² For an explanation of symbolism of the ‘Five Ks’, see <<https://www.bbc.co.uk/religion/religions/sikhism/customs/fiveks.shtml>>.

³ <<https://www.bailii.org/eu/cases/ECHR/2023/424.html>>.

Unsurprisingly in view of the Grand Chamber judgment in *Fedotova*,⁴ the Court held (though only by five votes to two) that there had been a violation of Article 8.

FRANK CRANMER

GULSHAN v LORD CHANCELLOR

[2023] EWCA Civ 306

*Is there a right to carry a kirpan in court?*⁵

The Courts Act 2003 allows court security officers to exclude persons from court buildings and to require the surrender of various articles, including knives, while the Security and Safety Operating Procedures Guidance issued by HM Courts & Tribunals Service forbids Sikhs to carry a *kirpan* in court if it is more than six inches long and its blade is more than four inches long – in which case ‘permission to enter may be refused but the senior person onsite must be consulted before any decision is taken.’ In April 2021, Mr Gulshan, a barrister working for a firm of solicitors, attended Ealing Magistrates Court in a personal capacity to support a relative who was appearing there. He was wearing his *kirpan* – but it was eight inches long and he was denied access [2]. He sought judicial review of the Guidance and of his treatment by the security officers at the Magistrates Court, but permission to apply was refused [3 & 4].

He appealed against that refusal on the following grounds: that because under s.139(5)(b) Criminal Justice Act 1988 it was not an offence for a Sikh to wear a *kirpan* in a public place, he had a legal right to wear it in a court building and it was therefore unlawful for HMCTS to adopt a different rule [10]; that the length restriction in the Guidance contravened the Human Rights Act 1998, was arbitrary [12 & 13] and in breach of Articles 9 and 14 ECHR; that it affected his right to earn his living as a legal representative because he would wish to wear an eight-inch *kirpan* when attending court in a professional capacity, in contravention of Article 8 ECHR; and that even if the Guidance was lawful, the security officers had not followed it because they failed to appreciate that they had a discretion to permit his entry even if his *kirpan* was longer than six inches or to consult with the Senior Person On Site (SPOS).

Permission to appeal was refused [37]. The first ground was based on a fundamental misunderstanding: the 1988 Act was concerned with criminal liability and s.139(5)(b) could not confer a positive right that overrode the

⁴ *Fedotova and Others v Russia* [2023] ECHR 55 Noted in 190 *Law and Justice* at 95.

⁵ <<https://www.bailii.org/ew/cases/EWCA/Civ/2023/306.html>>.

entitlement of those responsible for a public building to impose conditions of access [11]. As to the issue of length, Underhill LJ agreed with the argument of the Lord Chancellor’s Department that while HMCTS did not believe that a devout, practising Sikh would use the *kirpan* as a weapon, there was ‘a risk of it being forcibly removed and used a weapon by a hostile third party’ – and one measuring 6 inches or less would be more discreet and there would be less risk of its being deployed in that way [17]. On the Article 8 and Article 9 points, he agreed with Cavanagh J in the lower court that there was no evidence that Mr Gulshan had ever been prevented from attending a court or tribunal for work because of the length of his *kirpan* [31].

As to the complaint about the behaviour of the security officers, he agreed with Cavanagh J that Mr Gulshan should have sought damages and that it was not a suitable matter for judicial review. It related to ‘an incident in respect of which the facts are substantially in dispute and the procedures for judicial review are not suited to the resolution of disputes of fact. Put another way, *there is a more appropriate alternative remedy, which is a claim for damages in the county court ...*’ [33: emphasis added].

FRANK CRANMER

HIGGS v FARMOR’S SCHOOL

[2023] EAT 89⁶

Facebook posts – dismissal by employer – disbelief in “gender fluidity” and same-sex marriage – Articles 9 & 10 ECHR.

Farmor’s School received complaints about some of Mrs Higgs’s Facebook posts about relationship education in primary schools. One was a repost which she headed, “PLEASE READ THIS! THEY ARE BRAINWASHING OUR CHILDREN!” [5]. She accepted that her posts might have been seen by parents of pupils, though she pointed out that she had not mentioned the school itself [9]. She was suspended, then dismissed after a disciplinary investigation and an appeal [16 & 17]. Before the ET, she argued – unsuccessfully – that she held the following beliefs/disbeliefs: disbelief in “gender fluidity”; disbelief that people can change their biological sex/gender; belief in marriage as a divinely instituted life-long union between one man and one woman; disbelief in same-sex marriage as contrary to Biblical teaching; opposition to sex and/or relationship education for primary school children; belief that she should witness publicly to Biblical

⁶ <<https://www.bailii.org/uk/cases/UKCAT/2023/89.html>>.

truth; belief in the literal truth of the Bible and in particular Genesis 1:27 [17]. The school argued that of her beliefs the first two did not meet the test for protection under s.10 Equality Act 2010 as laid down in *Grainger*.⁷ She appealed, and the Employment Appeal Tribunal also gave the Archbishops' Council of the Church of England permission to make general submissions as an intervenor, though the Council was neutral as to the merits [3].

The Archbishops' Council submitted that under the case-law on the ECHR and the Framework Directive, rights of freedom of religion or belief and freedom of speech were based on the core values of pluralism, tolerance, and dialogue and that any limitation of those rights had to be strictly proportionate to the aim pursued. However, difficulties could arise as to when 'objection could justifiably be taken' to the manifestation of a religion or belief, 'such that the reason why an employer acts is no longer because of the religion or belief but because of the objectionable manner of its manifestation' – and that could create uncertainty which could itself have a chilling effect on the rights in question [77]. A strict proportionality assessment was required in the application of Articles 9(2) and 10(2) ECHR and had to be undertaken 'with the need to encourage pluralism, tolerance and dialogue firmly in mind' [78]. The Church had promulgated a series of 'Pastoral Principles' to help its members to engage in difficult discussions and considered that people should be free to express their views in an environment of mutual respect and tolerance [76].

The EAT concluded that the ET should have determined that there was a close or direct nexus between Mrs Higgs's Facebook posts and the beliefs that she had relied on in her claims and it should then have assessed whether the actions of the school were prescribed by law and necessary for the protection of the rights and freedoms of others. It should have recognised the essential nature of Mrs Higgs's right to freedom of belief and of expression before undertaking the proportionality assessment laid down in *Bank Mellat*,⁸ nor had it carried out the requisite balancing exercise [84]. It had not been perverse for the ET to find that the language used in her posts was 'florid and provocative', but there was merit in her broader objection that the ET had failed to engage with the *nature* of her rights – including the right to hold and to express views on controversial matters of public interest even where those views might offend, shock or disturb [85].

As to the Archbishops' Council's submission that more general guidance should be provided, 'not only to assist the ET in carrying out the proportionality assessment required but to better inform employers and

⁷ *Grainger plc v Nicholson* [2010] ICR 360 EAT.

⁸ *Bank Mellat v HM Treasury (No 2)* [2014] AC 700.

employees as to where they stand on issues arising from the manifestation of religious or other philosophical beliefs' [92], Eady J considered that 'a danger can arise from any attempt to lay down general guidelines in cases such as this' [93]. That said, however, 'the considerations identified by the intervenor [*were*] likely to be relevant' [94(5)]. The appeal was allowed, but the case was remitted for redetermination by a further ET: in particular, whether the measures adopted by the respondent were prescribed by law and, if so, whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others.

FRANK CRANMER

The next issue (Hilary/Easter 2024) will carry an article on this case and its implications by Peter Frost of Herbert Smith Solicitors who acted for the Church of England as intervenors - Ed.

JEHOVAH'S WITNESSES v FINLAND
[2023] ECHR 388⁹

Door-to-door evangelism – data collection – requirement for data subject's consent – Articles 6, 8, 9, 10 & 14 & AIP12 ECHR.

The domestic authorities had told the Jehovah's Witnesses that during door-to-door visits they could only collect personal data with the consent of the individuals in question. Their appeals against the ruling were unsuccessful: before the ECtHR they complained that there had not been an oral hearing in the domestic proceedings and that the ban on them taking notes for their personal use without the explicit consent of those to whom they preached was contrary to Articles 6 (fair hearing), 8 (respect for private life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 14 (prohibition of discrimination) read in conjunction with Articles 8, 9, 10 and Article 1 of Protocol No. 12 (general prohibition of discrimination).

As to Article 6, the Government submitted that the Witnesses had not sought an oral hearing before the Board and that both the Administrative Court and the Supreme Administrative Court had given adequate reasons for proceeding on the papers [45]. As to Article 9, the Witnesses had not been prohibited from taking notes containing personal data linked to their door-to-door preaching activity – but they had to ensure that they processed the data in accordance with the Personal Data Act, for instance, by asking for the consent of the data-subject. That was not an interference within the meaning of Article 9 – but even if it were, it had been prescribed by law and

⁹ <<https://www.bailii.org/eu/cases/ECHR/2023/388.html>>.

had been necessary in a democratic society in the interests of the protection of the rights and freedoms of others [66].

As to Article 6, the Court held that there had been no argument about the credibility of the evidence or the facts on which the order had been based and the matter had not, therefore, warranted an oral hearing [57]. There had therefore been no violation of Article 6 [57]. As to the complaint under Article 9, though the application of the consent requirement constituted an interference [61], it was undisputed that the interference was “prescribed by law” [83] and the Court held that the interference pursued the legitimate aim of protecting “the rights and freedoms of others” [89]. The Witnesses had not put forward any convincing arguments as to ‘how simply asking for, and receiving, the data subject’s consent’ could interfere with their freedom of religion [95]; furthermore, the Personal Data Act applied without distinction to all religious communities and religious activities [96]. There had not, therefore, been any violation of Article 9 [99]. The application under Article 8 was dismissed as incompatible *ratione personae* with the provisions of the Convention and for nonexhaustion of domestic remedies [112]. The application under Article 14 and Article 1 of Protocol No. 12 was also dismissed for nonexhaustion of domestic remedies [120].

FRANK CRANMER

KOILOVA AND BABULKOVA V BULGARIA

[2023] ECHR 634 [in French]¹⁰

Absence of legal recognition of same-sex partnerships – Article 8 ECHR.

Ms Koilova and Ms Babulkova had married in England, but the Bulgarian authorities had refused to record Ms Koilova’s marital status as established by her UK marriage certificate as “married” on her birth record. Bulgarian law did not allow such a change because it did not provide for any form of legally-recognised union for same-sex couples – nor did the Government offer any assurance that it intended to seek to change the current law [5-7]. The applicants argued that they were barred from enjoying the legal protection to which they were entitled as a married couple under Article 8 ECHR (respect for private and family life).

The Court considered that the protection afforded to same-sex couples in a stable and committed relationship in Bulgaria did not satisfy the fundamental needs of those concerned. It had previously held that Article

¹⁰ <<https://www.bailii.org/eu/cases/ECHR/2023/634.html>>.

8 obliged states parties to provide a legal framework giving same-sex couples adequate recognition and protection for their relationships. Further, the Bulgarian Government had given no precise indication as to which public interest the State had wished to defend by refusing to protect the applicants' individual interests. The Court had recently stated that the margin of appreciation on affording same-sex couples the possibility of legal recognition was now significantly reduced [59], and in *Fedotova and Others v Russia*¹¹ it had noted the European trend towards legal recognition for same-sex couples [39]. It concluded that Bulgaria had exceeded its margin of appreciation and had failed to fulfil its positive obligation to ensure the applicants a specific legal framework that would recognise and protect their union as a same-sex couple [65]. Accordingly, there had been a violation of Article 8 [66].

FRANK CRAMER

LONDON BOROUGH OF MERTON COUNCIL v NUFFIELD HEALTH

[2023] UKSC 18¹²

Is a charity most of whose beneficiaries are rich still “charitable”?

Nuffield Health is a registered charity. Its purposes are “to advance, promote and maintain health and healthcare of all descriptions and to prevent, relieve and cure sickness and ill health of any kind, all for the public benefit”. It pursues its purposes primarily through the provision of gyms, including a gym at Merton Abbey. It also operates private hospitals and clinics. The Merton Abbey gym is mainly for fee-paying members, though it also offers certain limited services to non-members. In April 2019, the standard membership fee was £80 per month. To qualify for the 80 per cent mandatory charitable business rate relief under s.43(5) and (6)(a) Local Government Finance Act 1988, the ratepayer must be “a charity or trustees for a charity” and the premises must be “wholly or mainly used for charitable purposes”. Merton Council refused the relief because, in its view, the level of membership fees excluded persons “of modest means” from using the gym, so the gym was not used for charitable purposes because the requirement of public benefit was not satisfied. Nuffield Health challenged that decision and succeeded, both in the High Court and, by a majority, in the Court of Appeal. Merton appealed to the Supreme Court.

The Supreme Court dismissed the appeal unanimously, holding that Nuffield used the gym for its charitable purposes and was therefore entitled

¹¹ [2021] ECHR 636.

¹² <<https://www.supremecourt.uk/cases/docs/uksc-2021-0138-judgment.pdf>>.

to the mandatory relief. Two conditions applied [49]. First, the ratepayer had to be a charity or the trustees of a charity; and as a registered charity, under s.37(1) Charities Act 2011 Nuffield Health’s charitable status was conclusively presumed [49], [52]. Secondly, the premises in question had to be used wholly or mainly for the charitable purposes of the ratepayer or of the ratepayer and other charities, which was a question of fact rather than of charity law [50]-[52].¹³ The Court noted at [28] that, for example, church congregations typically consisted of rich and poor, ‘Yet it has never (as far as we are aware) been suggested that the advancement of the faith of only the poor members is charitable, while the advancement of the faith of the rest is purely incidental to the charitable purpose of the church’.

The Court was satisfied that both conditions were satisfied, while it was common ground between the parties that Nuffield’s trustees were not in breach of their fiduciary duties. In conclusion, therefore, Nuffield used the gym for the direct fulfilment of its charitable purpose of promoting health through exercise. Though the gym was primarily only for those who could afford to pay to use it, that did not negate the fact that it was used for a charitable purpose: *‘the rich are as much a part of the section of the public benefited by Nuffield Health’s charitable activities as are the poor*, and it must be assumed from its registration as a charity and from the fact that it is common ground that the trustees are not in breach of their fiduciary obligations, that the poor are not excluded from benefit, on a view of Nuffield Health’s activities in the round, even if they are at the Merton Abbey gym’ [64: emphasis added].

FRANK CRANMER

MR A CAVE v THE OPEN UNIVERSITY

[2023] UKET 3313198/2020¹⁴

Is “English Nationalism” a protected belief?

In 2020, the University received internal and external complaints about what was claimed to be racist material posted by Mr Cave on Twitter and his YouTube channel, “Renew Britannia” [6]. For example, when Dr Shola Mos-Shogbamimu celebrated Africa Day on Twitter by commenting

¹³ If, however, the ratepayer was not registered (which would be the case for very small charities or those exempted from registration, such as certain church congregations), the rating authority should consider whether it met the test for charitable status – which was a question of charity law [52].

¹⁴ <https://assets.publishing.service.gov.uk/media/6464a859e140700013b6e08c/Mr_A_Cave_v_The_Open_University_3313198.2020_OPH_Reserved_Judgment.pdf>.

‘Proudly African from the roots of my hair to the soles of my feet. Always’ his response was ‘Fuck off and go home!’ [10]. He was suspended and after a disciplinary meeting summarily dismissed [6]. He claimed that the OU had discriminated against him on the grounds of philosophical, religious, and political belief and argued that his belief was a protected characteristic, ‘but did not state directly what that belief was’ [13].

He told the Tribunal that he was ‘right wing, anti-egalitarian, liberal on some things, but generally take the traditionalist stance on most issues’ and that he was an ‘English Nationalist’ [14]. Mass immigration had been ‘destructive and unhealthy’ and there was a ‘pernicious ideology’ which inflicted white guilt on people of ‘white European descent’ [14]. He also argued that someone who was born in the UK and converted to Islam would be ‘less British’ and that Jewish people were in a distinct ethnonreligious group and could not be British. A Black person would have ‘less claim to the land and be less British’ because “Britishness” depended on ancestry [17]. However, there was no evidence that he had discussed those beliefs at work or had advocated or used violence [19]. It was argued for Mr Cave that that the belief relied upon was English Nationalism and that other aspects referred to were encompassed in it – including libertarianism, traditionalism, property rights and anti-immigration – and that his English Nationalism included the belief that ancestry was of more significance than others, such as faith [30].

Applying the tests in *Grainger*, the Tribunal concluded that there was no express challenge to the genuineness of Mr Cave’s stated belief, it was more than merely an opinion, it was about a weighty and substantial aspect of human life and behaviour and, on balance, it achieved a level of cogency, seriousness, cohesion and importance, even though there were likely to be a great many people who disagreed with it [43]. As to the fifth test, however, his belief in English Nationalism as he described was not worthy of respect in a democratic society because it was incompatible with human dignity and it conflicted with the fundamental rights of others: ‘there is a clear denial of the rights of those without the requisite ancestry to be part of the envisaged nation. The claimant’s unequivocal belief that those who are Black or Jewish are not part of the English nation, for example, patently seriously discriminates against people within those groups. It is, at the very least, ethnocentric, as described by the respondent’s representative and could also arguably be described as racist and/or antisemitic’ [44]. Articles 9 and 10 ECHR were both highly qualified rights, ‘referring to legally prescribed limitations which are necessary in a democratic society and to protect the rights of others’ [46], while Article 17 prohibited the abuse of rights [46]. Taking all that into account, Employment Judge Manley was not satisfied that Mr Cave’s belief was protected by section 10: claim dismissed [47].

FRANK CRANMER

MR J MITCHELL v ROYAL MAIL GROUP LTD

[2023] UKET 1805473/2022¹⁵*Religious objection to COVID vaccination.*

Royal Mail Group applied to strike out the claim that Mr Mitchell’s dismissal had amounted to direct discrimination or harassment related to religion or belief. One of reasons for his dismissal was that he was a manager, and Royal Mail had serious concerns about the way in which he expressed his beliefs in the workplace [30.2]. He stated that his belief originated from his Church’s views in 2020 and early 2021 on the COVID-19 vaccination and was based on his Church’s earlier interpretation of *Revelation*13:16: ‘My belief is what it says in the Bible – that the COVID vaccine was the mark of the beast and for us not to get it’. The ET concluded that Mr Mitchell’s complaint of religion or belief discrimination had little chance of success, but it refused to make a strike-out order.

FRANK CRANMER

MS K SUNDERLAND v THE HUT.COM LTD AND MS P COHEN

[2023] UKET 2300911/2022¹⁶*Employment – dismissal for anti-religious “Twitter rant” – whether “conservative philosophical beliefs” protected speech.*

The Hut.com employed Ms Sunderland as a senior business development manager from 6 September 2021 until her dismissal on 10 November 2021 [1]. One of the reasons for her dismissal was a “Twitter rant” [3]: ‘*love your optimism. The thing is religion undermines the hard fought for values and tolerances of progressed countries... Suppresses free speech and is autoimmune from criticism. This is toxic and where the hostility comes from. Religion is totalitarian. Islam has become the new Nazism*’ [48]. She claimed that her dismissal was unfair and discriminatory and that she was harassed on the grounds of conservative philosophical beliefs, namely: conservatism (though she had left the Conservative Party), gender equality, secular atheism and freedom of expression, contrary to s.19 Equality Act

¹⁵ <https://www.bailii.org/uk/cases/UKET/2023/1805473_2022.pdf>.

¹⁶ <https://www.bailii.org/uk/cases/UKET/2023/1805473_2022.pdf>.

2010. She also claimed unfair dismissal, contrary to s.98 Employment Rights Act 1996 [9,10].

Applying the *Grainger* principles, the Tribunal found that there was insufficient evidence to demonstrate a belief in conservatism or a belief that went beyond a political viewpoint [190]. She had not provided evidence to support her belief in gender equality: ‘Rather, her evidence is that she believes some forms of religion oppress women but that is not evidence of a wider belief in gender equality as she has expressed it’ [191]. She had not provided evidence of a belief that was cogent or coherent: ‘The concept of secular atheism is not intelligible and further, there is no evidence at all to support the claimant’s belief in the concept as she has defined it’ [196]. She had not been consistent in her approach on freedom of expression: ‘She regarded her anti-Islamic tweets to be freedom of speech even while comparing Islam to Nazism and yet found comments made by others about Jews to be hate speech’ [197].

While a belief in “secular atheism” met the fifth test in *Grainger*, none of the strands of Ms Sunderland’s beliefs met the other parts of the *Grainger* criteria. She did not, therefore, have a protected characteristic based on the philosophical beliefs on which she sought to rely [202]. Her dismissal was not connected in any way at all to her conservatism, and on that basis the Tribunal did not go on to consider the position of a hypothetical comparator [215]. Her claim for unfair dismissal also failed because she could not meet the threshold of s.108 (4) Employment Rights Act 1996 and the two-year qualifying threshold continued to apply [224]. Claim dismissed.

FRANK CRANMER

MS T OWEN v WILLOW TOWER OPCO 1 LTD

[2023] UKET 2400073/2022¹⁷

“Ethical veganism” and objections to the COVID vaccine.

Willow Tower OPCO 1 Ltd runs residential nursing care facilities, including the Sunrise home at which Ms Owen worked. She also worked for herself as a foot health practitioner, often providing services to Willow Tower [10]. By June 2021, Willow Tower decided that all staff and contractors in the care home where she worked had to have COVID vaccinations, though the legislation obliging care home staff to be vaccinated had not yet come

¹⁷ <https://www.bailii.org/uk/cases/UKET/2022/2305152_2020.html>.

into effect [14]. She refused to be vaccinated and was told that, in the circumstances, the care home ‘would like to continue offering you work however that would have to be on a redeployed basis, likely to the kitchen or laundry department’ [16]. She refused on the basis that she was ‘a vegan person’ and refused to have a vaccination that contained animal products and raised concerns about the efficacy of the vaccine and any potential side effects [17]. In November 2021, vaccination as a condition of deployment in CQC registered homes came into effect under the Health and Social Care Act 2008 (Regulated Activities) (Amendment/Coronavirus) Regulations 2021 and she was dismissed [25&26]. At a preliminary hearing, the issues before the Tribunal were whether she had sufficient continuity of service within the meaning of s.108 Employment Rights Act 1996 to bring a claim for unfair dismissal under s.98(4) and (more interestingly from the point of view of law and religion) whether her belief in veganism amounted to a protected characteristic within the meaning of s.10 Equality Act 2010.

On the first issue, the ET concluded on the facts that she had not acquired the necessary continuity of employment under s.108(1) Employment Rights Act 1996 to bring a claim of unfair dismissal [60 and her application failed on that ground [64]. On the issue of her veganism as a protected characteristic, she had asserted that she was an ethical vegan and that it was a protected philosophical belief, going on to state that ‘As all coronavirus vaccines have been tested on animals, [she] considers them to be inconsistent with her vegan beliefs’ [28]. Employment Judge Mellor went on to distinguish her application from the facts in *Casamitjana Costa*:¹⁸ the question for the Tribunal was whether she had produced sufficient evidence that she held her belief in ethical veganism to the extent required by the Grainger guidelines. It was not enough for her simply to say that she was an ethical vegan – she had to demonstrate the genuineness of her belief and there was little evidence to support her assertion [52]. She followed a vegan diet and avoided using some products that were not vegan, but she was unable to say when she started believing in ethical veganism or about how her life had been modified or structured to follow it, other than diet and some products, and gave no examples of ways in which her daily life was structured to adhere to her belief. She said that she did not wear leather ‘but she did not expand on that and shrugged when she was asked about wool’, and her main criticism of the COVID vaccine appeared that it was experimental and might contravene health and safety legislation [52]. She had not, therefore, established that she had a protected characteristic within the meaning of s.10 Equality Act: claim dismissed [63].

FRANK CRANMER

¹⁸ *Mr J Casamitjana Costa v The League Against Cruel Sports* [2020] UKET 3331129/2018.

NABOKIKH AND OTHERS v RUSSIA

[2023] ECHR 97¹⁹*Police disruption of religious worship – Article 9 ECHR.*

The applicants, Jehovah's Witnesses, complained of the police disrupting their meetings on apparently spurious grounds. Literature was seized during the searches, and some applicants complained of police violence and being detained on the premises overnight [4]. All had complained unsuccessfully to the domestic courts [5]. Before the ECtHR, they complained that the disruption of their worship and their administrative convictions had had no basis in Russian law and had not been necessary in a democratic society, contrary to Articles 9 and 11 ECHR. Some of them also referred to Articles 3, 8 and 10 [6].

On the allegedly unlawful nature of events that had not been notified to the authorities, the Court had previously noted the consistent case law of Russia's Supreme Court that religious meetings, even those conducted on rented premises, did not require any prior authorisation from, or notice to, the authorities. The conviction of some of the appellants for failure to submit such a notification did not, therefore, have a clear and foreseeable legal basis and was not 'prescribed by law'. [10]. Furthermore, it was not disputed that all the assemblies were peaceful and were unlikely to cause any disturbance or danger to public order. Their disruption by the police, even if the authorities genuinely believed that lack of advance notice rendered them illegal, had not pursued a "pressing social need" and was not, therefore "necessary in a democratic society" [11]. The Court also found that the search warrants had been couched in extremely broad terms [12], which gave the police unrestricted discretion in scheduling the searches and allowed them to interrupt the worship [13] and the Government had not explained what considerations of urgency had prevented the police from waiting until worship had been finished [13]. Taken together, those findings were sufficient to conclude that there was no "pressing social need" to disrupt the JWs' religious gatherings and that the interference with their right to manifest their religion was not "necessary in a democratic society" [14]. There had therefore been a violation of Article 9 of the Convention [15]. It was not necessary to examine the applicants' complaints under Articles 8, 10, 11 and 14 [16].

Some applicants also complained that they had been subjected to inhuman treatment during the searches, contrary to Article 3. The Court

¹⁹ <<https://www.bailii.org/eu/cases/ECHR/2023/97.html>>.

declared those complaints inadmissible.

FRANK CRANMER

R (BOWEN) v KENT COUNTY COUNCIL

[2023] EWHC 1261 (Admin)²⁰

Right of humanists to representation on SACREs.

Stephen Bowen, a humanist, sought to join Group A of Kent County Council’s Standing Advisory Council for Religious Education (‘SACRE’) as a full member: his predecessor as chair of Kent Humanists had had observer status. Under s.390(4)(a) Education Act 1996, Group A is required “to represent such Christian denominations and other religions and denominations of such religions as, in the opinion of the authority, will appropriately reflect the principal religious traditions in the area”. The Council refused to appoint him on the grounds that, as a humanist, he did not represent “a religion or a denomination of a religion”. He challenged that refusal on the grounds that it was discriminatory and in breach of Article 9 ECHR and Article 2 of Protocol 1 when read with Article 14. His argument was that pursuant to s.3 Human Rights Act 1998, the words “other religions” should be construed ‘in much the same way that Warby J construed the phrase “religious education” in *Fox*’²¹ [3].

Constable J noted in *Bowen* that ‘it is plain from *Fox* that a religious education curriculum must, in order to be compliant with the HRA 1998, cover more than religious faith teaching. The content of religious education teaching must include, at least to some degree, the teaching of non-religious beliefs (such as humanism)’ [68], and as Warby J had noted in *Fox*, ‘the complete exclusion of any study of non-religious beliefs for the whole of Key Stage 4, for which the Subject Content would allow, would not ... be compatible’ with the ECHR [74]. Article 14 was engaged, and there was a link with the core values of Article 9. The system under which the RE syllabus was decentralised to local authorities was ‘a recognition of the importance of religious education being reflective of the makeup of that local community ... [and] fundamentally about tolerance and pluralism in society, the core value of Article 9. Therefore ... the ability to be a

²⁰ <<https://www.bailii.org/ew/cases/EWHC/Admin/2023/1261.html>>.

²¹ *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), which concerned the new subject content issued for GCSE Religious Studies. Warby J held that the statement that the new subject content was consistent with the requirements for the statutory provision of religious education in current legislation was a false and misleading statement of law; complying with it would not necessarily fulfil the RE obligations because it might not include the study of non-religious views.

representative of a particular relevant belief on a SACRE is (at the very least) more than tenuously connected with that core value, so as to bring the alleged discrimination through the prevention of membership of SACRE within the ambit of Article 9' [53]. S.390(4)(a) of the Education Act 1996 as construed by Kent County Council therefore involved a breach of Article 14.

Constable J also rejected the argument that Group A and Group B (representing the Church of England) were designed to represent faith groups while Group C (representing teachers) and Group D (representing the local authority) were designed to be secular [65]. The distinction was rather between 'the content of the syllabus and the implementation of the teaching of that syllabus. In other words, what is taught and how it is taught': 'It is clear, in my judgment, that the primary concern of Groups A and B is, broadly speaking, the content of religious education and the primary concern of Groups C and D is, broadly speaking, the implementation of religious education within the area' [66]. The teachers sitting in Group C do not provide a 'secular perspective': 'Their personal beliefs (be they religious or non-religious) are not relevant to their representative role in the SACRE' [67].

It followed that s.390(4) was to be read in a way that was compatible with Convention rights and that the Kent County Council's refusal to include Mr Bowen as a Humanist representative within Group A should be quashed on the basis that it was unlawful [108]. Constable J was clear, however, that the judgment extended no further than determining that the basis of the Council's decision was erroneous in law: 'It does not follow that any and every non-religious belief would need to be treated similarly – for example, it may be legitimate to conclude that a particular belief (religious or non-religious) does not attain the requisite level of cogency, seriousness, cohesion and importance to attract protection. Similarly ... there remains considerable discretion for the local authority when determining who to appoint pursuant to section 390(6) to ensure consistency with the efficient discharge of the group's functions' [107].

Comment: *Bowen* is an important milestone in the (regrettably) gradual recognition that freedom of religion or belief protects non-religious beliefs. The High Court judgment is particularly welcome for stating explicitly that the ECHR requires reading domestic legislation to recognise non-religious life-stances. The County Council subsequently announced that it did not propose to appeal.

The Department for Education subsequently issued updated *Guidance for local authorities about membership of Standing Advisory Councils for*

Religious Education (SACREs) in which it stated the Department’s view that ‘representatives from non-religious belief systems may be appointed to Group A of a SACRE and/or to an Agreed Syllabus Conference (ASC)’²² – though it left decisions on individual appointments to local authorities.

RUSSELL SANDBERG AND FRANK CRANMER

RE KING’S COLLEGE CHAPEL CAMBRIDGE

[2023] ECC Ely 1²³ & 2²⁴

Church of England – faculty jurisdiction – installation of solar panels on the chapel roof.

As part of its commitment to reducing its carbon footprint, the College wished to site solar panels on the north and south sides of the Chapel roof. Because the Chapel falls within the jurisdiction of the Consistory Court of the Diocese of Ely, the proposal required a faculty [1/2&3]. In February 2020, the General Synod of the Church of England had voted to adopt a policy for the Church to become carbon neutral by 2030 [1/5]. The C of E’s Church Buildings Council acknowledged that the panels would be visible through and above the perforated parapet from ground level but did not believe that this would detract from views of the Chapel, particularly if the panels were made from non-reflective materials. It did, however, question whether panels on the north side of the roof would generate enough electricity to justify their installation [1/15&17]. The Society for the Preservation of Ancient Buildings expressed reservations but accepted that ‘the level of harm would be less than substantial and may therefore be acceptable if a clear and convincing justification can be provided’ [1/21]. Historic England accepted that the effect on the overall significance of the Chapel would be modest but submitted that the petition should be refused unless the Chancellor concluded that the harm of the installation would be outweighed by the public benefit provided by renewable power generation [1/40]. The College argued that the Chapel roof was the single largest potential opportunity for renewable electricity generation on the main college site and was almost half of the achievable roof space for solar panels [1/42].

Leonard Ch concluded initially that he should grant a faculty either for solar panels on both sides of the roof or for panels on the south side only,

²² <https://humanists.uk/wp-content/uploads/20230808_SACRE-guidance-for-LAs.docx.pdf>.

²³ <<https://lawandreligionuk.com/wp-content/uploads/2023/03/Re-Kings-College-Chapel-Cambridge-2023-ECC-Ely-1.pdf>>.

²⁴ <[https://www.ecclesiasticallawassociation.org.uk/judgments/roofing/cambridgekingscollegechapel\(2\)2023eccely2.pdf](https://www.ecclesiasticallawassociation.org.uk/judgments/roofing/cambridgekingscollegechapel(2)2023eccely2.pdf)>.

but subject to several conditions: that planning consent be granted and a copy of the consent lodged with the Diocesan Registry; that the College provide an updated assessment of the carbon payback for the north roof in light of the CBC's latest calculations; that a test be conducted as to whether an adhesive overlay might mitigate any issues as to "reflection" from the panels; that the panels be removed from the roof at the expiry of their useful life; and that the College architect monitor the impact of the panels on the performance and longevity of the roof covering – the last to be referred back to the Chancellor in the absence of agreement as to the specifications for monitoring. The assessment of the carbon payback was to be produced and provided to the Diocesan Advisory Committee and the other bodies that had been involved in the process within 28 days, then submitted to the consultees for comment within a further 21 days [1/91]. In his second judgment [*unparagraphed*] he accepted that there was 'a clear and convincing justification for installing panels on the north roof as well as the south roof and the faculty can be issued accordingly'.

Comment: Subsequently, General Synod agreed a motion at its July meeting which, *inter alia*, called on HM Government to review 'the weight given to the environmental public benefit in planning regulations to facilitate the installation of renewable technologies, including for buildings that are listed or in conservation areas'.²⁵

FRANK CRANMER

REV M BURNS v SECRETARY OF STATE FOR JUSTICE

[2023] UKET 1805182/2021²⁶

Alleged unfair dismissal and discrimination on grounds, inter alia, of religious belief.

Mr Burns, an Assistant Chaplain at HMP Wakefield, was dismissed in June 2021 following growing concerns about his performance. He brought a claim for unfair dismissal, discrimination on grounds of religious belief, sexual orientation and disability (in his case, dyslexia) and harassment. The Chaplain, the Revd Paul Kirwan, had been critical of Mr Burns's approach to chaplaincy, concluding in his mid-year review in 2019 that he had 'poor interpersonal skills with staff and prisoners' [58] and that he tried to promote the King James Bible and the Book of Common Prayer 'to men who can hardly read or write and who just want to hear what the Gospel is' [67].

²⁵ <<https://www.churchofengland.org/media-and-news/press-releases/general-synod-calls-church-and-government-move-faster-climate>>.

²⁶ <https://assets.publishing.service.gov.uk/media/64008ccd8fa8f527f110a37f/Mr_M_Burns_v_Secretary_of_State_for_Business_-_1805182-2021_-_Final.pdf>.

The Tribunal thought that the chaplaincy was an ‘unhealthy working environment at times’ [193]. Though Mr Burns was a ‘competent’ priest and Mr Kirwan appeared to have an ‘abrasive management style’ [230], a witness, Ms Thompson-Vear, ‘was clear that Mr Kirwan did not discriminate – in her view he treated all chaplains equally poorly’ (!) [231]. The Tribunal concluded that the chaplaincy ‘was an unhappy place to work’ and that there was a degree of dysfunctionality that was probably not helped by Mr Kirwan’s management style. The tension was probably best illustrated by ‘the claimant’s unfortunate inconsistent approach to the very strict security procedures in place’ [232]. It dismissed the claim in its entirety, ruling that either the incidents had not happened as Mr Burns had described them or that they had not been discriminatory: ‘The claimant’s case is that he was set up to fail by Mr Kirwan. We do not agree. We think that Mr Kirwan’s motivation was to get the claimant to an acceptable standard’ [265].

Comment: A cynic (wot, me guv?) might suggest that one possible takeaway from this decision is that an employer who wishes to avoid a claim for harassment should simply be equally nasty to every employee.

FRANK CRANMER

TOUSI v GAYDUKOVA

[2023] EWHC 404 (Fam)²⁷

Invalidity of foreign marriage?

Mr Tousi was an Iranian national and Ms Gaydukova a Ukrainian: both had UK citizenship [3]. They were married at the Iranian Embassy in Kyiv in 1997 but the marriage was not “registered” with the Ukrainian state authorities. According to Ms Gaydukova, they were well aware of the need to register and on three occasions she attempted to do so, but Mr Tousi refused to cooperate [5] because ‘he saw it as a celebratory social event in which he was uninterested’ [6]. They moved to the UK in 2001 and in 2010 a Housing Association gave them the tenancy in their joint names of a property in Notting Hill [8&9]. They separated in 2019 [10]. In September 2021, Ms Gaydukova applied for the transfer of tenancy of the former matrimonial home into her sole name. It was granted though no decree nisi or conditional order of nullity had been made in their case [15-17].

On appeal, Mr Tousi’s case was that the ceremony in the Ukraine was a genuine attempt to enter into a valid marriage and that in Ukraine, a marriage in a diplomatic mission was capable of giving rise to a valid marriage if both

²⁷ <<https://www.bailii.org/ew/cases/EWHC/Fam/2023/404.html>>.

spouses were citizens of the state of the mission. Ms Gaydukova argued that the marriage was a “non-marriage” which could not give rise to a nullity order and, therefore, that the order of tenancy was correctly made. Mostyn J noted that the ceremony at the Iranian embassy had not been a valid marriage because there was a requirement for both parties to be Iranian nationals. The parties had therefore been required to register their marriage with the Ukrainian authorities – which they had not done [80]. He therefore held that the parties were not to be treated as spouses for the purpose of Schedule 7 to the Family Law Act 1996 and that the power to transfer the tenancy had been executed correctly [85]. Appeal dismissed [86].

Comment: The judgment is interesting for Mostyn J’s discussion of the formation of marriage [30-34], the taxonomy of invalidity [35-37], the nature of and grounds for a void marriage [38-47] and nullity and public policy [48-51], but the most important point is in his Postscript, in which he described the law relating to irregular, non-qualifying ceremonies as ‘a disreputable mess’ which ‘urgently needs to be definitively clarified both substantively and procedurally’ [90].

TRUSTEES OF THE BARRY CONGREGATION OF
JEHOVAH’S WITNESSES v BXB

[2023] UKSC 15²⁸

Vicarious liability for rape.

Mr and Mrs B began attending the religious services of the Barry Congregation of Jehovah’s Witnesses in 1984. Mark Sewell was an elder; however, he began drinking heavily and behaving inappropriately towards female members of the congregation. Mr and Mrs B befriended him and tried to help him. In 1990, he raped Mrs B after they had been out evangelising together and in 2014 he was convicted of that rape and of indecently assaulting two others. In 2017, Mrs B sued the JW’s worldwide governing body, the Watchtower and Bible Tract Society of Pennsylvania, and the Trustees of the Barry Congregation, claiming that they were vicariously liable for the rape because of the nature of their relationship with Sewell and because of the connection between that relationship and the commission of the rape. Both the High Court and the Court of Appeal found for Mrs B. The Barry Trustees appealed.

Vicarious liability is subject to a two-stage test: Stage 1 looks at the relationship between the defendant and the tortfeasor and Stage 2 looks at

²⁸ <<https://www.supremecourt.uk/cases/docs/uksc-2021-0089-judgment.pdf>>.

the connection between that relationship and the commission of the tort by the tortfeasor [4]. In this case, the question at Stage 1 was whether the relationship between elders and the defendants was one that could give rise to vicarious liability. At Stage 2, the question was whether the rape was sufficiently closely connected to Sewell's position as an elder to make it just and reasonable that the defendants should be held vicariously liable for it [24].

As to Stage 1, the Court held that the relationship between the Jehovah's Witness organisation and Mark Sewell in his role as an elder was akin to employment. [65]. As to Stage 2, however, Mrs B had failed to establish the correct "close connection test" [73], for the following reasons:

First, the rape was not committed while Mark Sewell was carrying out any activities as an elder on behalf of the Jehovah's Witnesses. He was at his own home and was not at the time engaged in performing any work connected with his role as an elder. So, eg, he was not conducting a bible class, he was not evangelising or giving pastoral care, he was not on premises of the Jehovah's Witnesses and the incident had nothing to do with any service or worship of the Jehovah's Witnesses. The lack of direct connection to the role assigned to him as an elder makes these facts significantly different from the institutional sex abuse cases where, eg, as part of their jobs the warden was on the institutional premises looking after the children in *Lister* or ... living in the same institution as their victims in *Christian Brothers* [74]

Secondly, in contrast to the child sexual abuse cases, at the time of the rape, Mark Sewell was not exercising control over Mrs B because of his position as an elder ... The driving force behind their being together in the room at the time of the rape was their close personal friendship, not Mark Sewell's role as an elder. Put another way, the primary reason that the rape took place was not because Mark Sewell was abusing his position as an elder but because he was abusing his position as a close friend of Mrs B when she was trying to help him [75].

Thirdly, Sewell was not wearing his 'metaphorical uniform as an elder' at the time the tort was committed [76].

Further, though Sewell's role as an elder was a "but for" cause of Mrs B's continued friendship with him and of her being with him in the back room where she was raped, "but for" causation was insufficient to satisfy the close

connection test [77]. What had happened was not equivalent to the gradual grooming of a child for sexual gratification by a person in authority; Mrs B's rape was not an objectively obvious progression from what had gone before but, rather, 'a shocking one-off attack'. In any event, the prior events owed more to their close friendship than to Sewell's role as an elder [78]. Therefore, the "close connection test" was not satisfied [81] and there was no convincing justification for the Witnesses to bear the cost or risk of the rape committed by Sewell: 'Clearly the Jehovah's Witness organisation has deeper pockets than Mark Sewell. *But that is not a justification for extending vicarious liability beyond its principled boundaries*' [82: emphasis added]. Appeal allowed [83].

Comment: In *Catholic Child Welfare Society*²⁹ Lord Phillips PSC famously declared at [19] that 'the law of vicarious liability is on the move' and at [34] explained that the policy objective behind it was 'to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim'. This latest Supreme Court judgment, coupled with its earlier decisions in *Barclays Bank*³⁰ and *Morrison Supermarkets*,³¹ suggests that that move may have ground to a juddering halt.

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See also the article by Andrew Tettenborn in this issue on the implications of this case- *Ed*.

²⁹ *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2012] UKSC 56.

³⁰ *Barclays Bank v Various Claimants* [2020] UKSC 13.

³¹ *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.

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