Towards a Jurisdictional Autonomy Approach: Rethinking State Regulation of Religious Organizations in Taiwan

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Abstract

This thesis calls for a reorientation of Taiwan's approach to regulating religion towards a new paradigm that recognizes the jurisdictional autonomy of religious organizations. I argue that an essential element of Taiwan's tradition of regulating religious affairs is a discourse that characterizes religion as a problem that must be contained and controlled for the benefit of society as a whole. Such a "religion as a problem" discourse gave rise to a number of paternalistic policies and regulations aimed at religious organizations. In contrast to a state paternalistic approach to regulating religion, the jurisdictional conception of church autonomy holds that religious organizations enjoy an exclusive jurisdiction over some of their internal affairs immune from state interference. In this thesis I defend the legitimacy of this conception of religious autonomy and explore the proper scope of the exclusive jurisdiction of religious organizations. The thesis concludes by presenting some of the positive changes to Taiwan's current regulatory scheme for religious organizations that could be brought about as a result of the recognition of the jurisdictional conception of church autonomy.

Résumé

Cette thèse vise à une réorientation de l'approche taïwanaise en matière de réglementation de la religion vers un nouveau paradigme reconnaissant l'autonomie juridictionnelle des organisations religieuses. Je soutiens qu'un élément essentiel de la tradition taïwanaise de la réglementation des affaires religieuses constitue un débat public qui caractérise la religion comme un problème qui doit être restreint et contrôlé au profit de la société dans son ensemble. Un tel débat sur la "religion en tant que problème" a donné lieu à un certain nombre de politiques et de réglementations paternalistes visant des organisations religieuses. Contrairement à une approche paternaliste étatique de la réglementation religieuse, la conception juridictionnelle de l'autonomie de l'église présuppose que les organisations religieuses exercent une compétence exclusive sur certaines affaires intérieures, sans l'intervention de l'État. Dans cette thèse, je défends la légitimité de cette conception de l'autonomie religieuse et j'examine le champ d'application propre de la compétence exclusive des organisations religieuses. La thèse se termine en énumérant quelques changements positifs sur le système actuel de réglementation des organisations religieuses à Taiwan. Ces changements pourraient découler de la reconnaissance de la conception juridictionnelle de l'autonomie de l'église.

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Introduction

A consensus among scholars who study the relationship between the state and religion in Taiwan is that Taiwan's public policy with regard to religion has gone through a major and positive transformation in the post-war era. This is reflected in the titles of two recent articles adopting a historical perspective to evaluate the state-religion relationship in Taiwan: "The Regulation of Religious Affairs in Taiwan: From State Control to *Laisser-faire*?"[1] by André Laliberté and "State-Religion Relations in Taiwan: From Statism and Separatism to Checks and Balances"[2] by Cheng-Tian Kuo. Both articles end with a very positive note on the current state of religious freedom in Taiwan. Laliberté argues that the Taiwanese government's embrace of a liberal approach to religion since the 1990s provides important lessons for the government of the People's Republic of China in its future reform of the state policies toward religious institutions.[3] Kuo suggests that the Taiwanese model of state-religion relationship—a checks-and-balances model—arguably offers religious groups more freedom and more political rights than the strict separationism model seen in some Western democracies.[4] Another article addressing the same topic but focused on community temple cults is Paul Katz's "Religion and the State in Post-war Taiwan."[5] Katz concludes by

[1] André Laliberté, "The Regulation of Religious Affairs in Taiwan: From State Control to *Laisser-faire*?" (2009) 38:2 Journal of Current Chinese Affairs 53.

[2] Cheng-Tian Kuo, "State-Religion Relations in Taiwan: From Statism and Separatism to Checks and Balances" (2013) 49:1 Issues & Studies 1.

[3] Laliberté, *supra* note 1 at 75-76.

[4] Kuo, *supra* note 2 at 31.

[5] Paul R. Katz, "Religion and the State in Post-war Taiwan" (2003) 174 The China Quarterly 395.

observing that in today's Taiwan, "local religious traditions are not merely autonomous but actively involved in attempting to mould state policy to meet community needs."[6]

I fully agree that religious communities in Taiwan currently enjoy an unprecedented level of religious freedom and autonomy. Long gone is the martial law era (1949-87), in which the authoritarian Kuomintang regime exercised "extensive and intensive control over religion."[7] However, the previous studies have not paid enough attention to an essential element of Taiwan's tradition of regulating religion, which has influenced, and can continue to influence, Taiwan's regulatory scheme for religious organizations: a public discourse that characterizes religion as a problem that must be contained and controlled for the benefit of society as a whole. My claim that the "religion as a problem" discourse is an essential element of Taiwan's tradition of regulating religion is based on an examination of the three most important legislative regulations governing religious organizations in the history of the Republic of China (ROC), as Taiwan is formally known. As I will demonstrate in chapter 1, each of the three legislative regulations is linked to a movement or a unique social context in which religion was regarded as a problem or a threat to the public welfare. I will also explain how such a "religion as a problem" discourse seems to have re-emerged during the recent public debate over the legalization of same-sex marriage in Taiwan.[8] Even though Taiwan has transitioned into a consolidated democracy, it seems to me that this view of religion as a problem has not completely faded away from Taiwan's collective consciousness.

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[6] *Ibid* at 411-412.

[7] Kuo, *supra* note 2 at 20.

[8] See chapter 1 at note 124.

A necessary consequence of such a public discourse problematizing religion is that it gave rise to a number of policies and regulations characterized by state paternalism. The state's paternalistic attitude toward religion is manifested most obviously in several key provisions of a draft bill entitled *Religious Groups Act*, which will be a focus of discussion throughout this thesis. A recent governmental campaign called "Good People and Good Gods Movement", which is intended to discourage certain religious practices the government finds unsavory, can also be understood as an example of state paternalism.[9] The paternalistic attitude toward religious organizations can even be found in a landmark decision by the Constitutional Court of Taiwan (formally known as the Council of Grand Justices), Judicial Yuan Interpretation No. 573.[10] The Interpretation was rendered in 2004 and was generally considered as a more progressive decision compared to the Court's earlier decisions on freedom of religion. However, the majority opinion in J.Y. Interpretation No. 573 suggested that a law targeting religious organizations would be legitimate if it is enacted for the purpose of "preserv[ing] the freedom of religion."[11] I will explain in chapter 2 how this suggestion created an opening for the state to intervene in the internal affairs of religious organizations based on paternalistic concerns.

The central argument of this thesis is that Taiwan should move away from the current approach to regulating religion, which has state paternalism as one of its notable features, and move towards a new paradigm grounded in the "jurisdictional conception of church

[9] See the discussion in chapter 5, III. A.

[10] J. Y. Interpretation No. 573 (27 February 2004). Judicial Yuan Interpretations are the judgments rendered by the Constitutional Court of Taiwan. The judgments are numbered according to the order in which they are given. By the end of November 2018, the latest judgment by the Court is Judicial Yuan Interpretation No. 769, which was rendered on November 9, 2018.

[11] *Ibid* at "Reasoning."

autonomy" (JCCA). The core idea of the JCCA is that religious organizations have exclusive jurisdiction over some—but not all—of their internal affairs, such as the appointment of ministers and the determination of whether an individual is qualified to be a member. The decisions made by religious organizations with respect to those affairs should be immune from any form of state interference. The JCCA is diametrically opposed to the state paternalistic approach to regulating religion. It demarcates a zone of freedom for religious organizations that is entirely off-limits to the state even if the state has some seemingly benign intent in intervening in the internal governance and operation of religious organizations. Much of this thesis is devoted to defending the legitimacy of the JCCA as well as its applicability in the Taiwanese context. I intend to convince the readers that the JCCA offers an alternative vision of state-religion relationship that could bring about positive changes to Taiwan's current regulatory scheme for religious organizations if it is recognized by the government and the courts in Taiwan.

The jurisdictional conception of church autonomy is a core claim of the recent theory of "freedom of the church" advanced by Steven Smith and Richard Garnett. The freedom of the church—*libertas ecclesiae*—is a historical concept that emerged during the "Investiture Controversy" of the eleventh and twelfth centuries in Continental Europe.[12] At the heart of the power struggle between Pope Gregory VII and Henry IV the Holy Roman Emperor was whether or not the church could maintain its status as "a jurisdiction independent of the state."[13] In their recent writings, Smith and Garnett have been actively calling attention to

[12] Steven D. Smith, "Freedom of Religion or Freedom of the Church?" in Austin Sarat ed, *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* (Cambridge: Cambridge University Press, 2012) 249 at 266.

[13] *Ibid* at 250.

this historical concept and explaining why it "remains a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government."[14] A landmark decision by the United States Supreme Court that seems to vindicate the theory of freedom of the church is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[15] In that case, the Court ruled unanimously to affirm the constitutional legitimacy of the ministerial exception, which bars the employment discrimination suit brought on behalf of a minister against his or her church. However, criticisms of the doctrine of the ministerial exception continue[16] and the idea of freedom of the church remains a contentious subject of scholarly debate in the U.S.

The idea that religious groups enjoy a degree of jurisdictional autonomy or sovereign autonomy has also been a focus of discussion in contemporary liberal political theories. Such an idea has been developed especially in the writings of a group of theorists whom Daniel Weinstock called "toleration liberals."[17] The toleration liberals whose works heavily informed the theoretical discussion on the JCCA in this thesis include William Galston, Chandran Kukathas, Jeff Spinner-Halev, and Lucas Swaine. I examine and compare different models of jurisdictional autonomy proposed by these theorists in chapter 3.

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[14] Richard W. Garnett, "The Freedom of the Church" (2006) Notre Dame Law School Legal Studies Research Paper No. 06-12 1 at 1.

[15] 132 S. Ct. 694 (2012).

[16] See e.g. Robin West, "Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract" in Micah Schwartzman et al., ed., *The Rise of Corporate Religious Liberty* (Oxford [UK] ; New York: Oxford University Press, 2016) 399.

[17] Daniel M. Weinstock, "Value Pluralism, Autonomy, and Toleration" in Henry S Richardson & Melissa S Williams, ed., *Moral Universalism and Pluralism* (New York: New York University Press, 2009) 125 at 142.

The theoretical discussion in chapter 3 is followed by an examination of the Canadian jurisprudence on religious autonomy from the perspective of the JCCA. A word of explanation is needed here as some may question the relevance of Canadian jurisprudence to a research project that analyzes state regulation of religious organizations in Taiwan. According to Alvin Esau, a leading voice in Canada advocating for jurisdictional autonomy of religious organizations, the dominant approach to religious autonomy taken by the Canadian courts can be defined as "the outside law sovereignty model."[18] This is a model which asserts the superiority and dominance of state law over the internal norms and processes of religious communities. In a recent article, he reiterated this point by suggesting that "in Canada we do not have a real separation of church and state, but rather a subordination of the church to the state."[19] This is because "[g]iven our historical connection to the English notion of the sovereignty of parliament, there is no structural sphere sovereignty that the church has over its own ecclesiastical affairs, other than what the state will grant."[20] The Canadian approach to religious autonomy as described by Esau thus represents a position that is opposite to the jurisdictional autonomy approach defended in this thesis. Indeed, as we will see in chapter 4, there are a number of decisions by the lower courts in Canada involving the internal governance of religious organizations that seem to contradict the JCCA. I treat these decisions as presenting important counter-arguments

[18] Alvin A.J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver, B.C.: UBC Press, 2004) at 304. See also *ibid* at 306 ("We may question Ogilvie as to the desirability of this model of outside law sovereignty, but she is surely correct that this is the dominant approach taken by our courts.")

[19] Alvin A.J. Esau, "Collective Freedom of Religion" in Dwight Newman ed, *Religious Freedom and Communities* (Toronto, Ontario: LexisNexis, 2016) 77 at 108. (Footnote omitted.)

[20] *Ibid*.

against the claims of the JCCA. Responding to these counter-arguments allows me to further defend the legitimacy of the JCCA.

On the other hand, it is important to note that some of the recent decisions by the Supreme Court of Canada may signal a change in the traditional Canadian approach to religious autonomy. For example, in both *Loyola High School v. Quebec (Attorney General)*[21] and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*,[22] the Court ruled unanimously in favor of religious organizations.[23] The *Wall* decision is especially noteworthy because it is a clear recognition of the principle that a church has independent and exclusive jurisdiction over the issue of membership qualifications. Engaging with the Canadian jurisprudence on religious autonomy and paying careful attention to its continual development may, I believe, help shed light on the direction Taiwan should take in the future.

This thesis is divided into five chapters. Chapter 1 examines the three most important legislative regulations governing religious organizations in Taiwan— the *Act of Supervision of Temples and Shrines*, Article 7 of the *Private School Act*, and the draft *Religious Groups Act*. They are—or will become—the basic legal frameworks for the interaction between the

[21] 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[22] 2018 SCC 26 [*Wall*].

[23] In *Loyola*, the Court was unanimous in setting aside the Quebec government's decision denying the school's request to be exempt from the requirement of using the governmental program to teach the "Ethic and Religious Culture" course. However, the majority judgment and the concurring opinion diverge on the issue of whether it is legitimate to require the school to teach about the ethical positions of other religions from a neutral and objective perspective. I will examine this issue in more detail in chapter 4.

state and religious organizations in Taiwan. As we will see in that chapter, the ways in which the ROC government interact with religious organizations have not been always consistent with the principles and requirements laid out in those basic frameworks. However, the three legislative regulations are still worthy of our consideration because they give us a glimpse into how religious organizations were perceived by the government and by the general public at the time when they were promulgated or, in the case of the draft *Religious Groups Act*, when the process of drafting the bill initiated. My conclusion after examining the history of the three legislative regulations is that they are all premised primarily on the view that religion is a problem that poses threat to the stability and welfare of society, and therefore must be placed under strict supervision of the state.

However, there is a new perspective on the regulation of religious organizations that has recently emerged in Taiwan's constitutional jurisprudence and scholarly discussion. In contrast to the view of religion as a problem, it claims that religious organizations are entitled to robust protection against state interference with their internal affairs. Several prominent jurists in Taiwan hold such a view, including two former justices of the Constitutional Court of Taiwan and a renowned law professor. Chapter 2 presents the main ideas of their arguments and explains how their arguments differ from a more traditional view on religious freedom in Taiwan's constitutional jurisprudence. In addition, I identify a couple of historical/political factors in the Taiwanese context that are conducive to, or create space for, the development of such a new perspective. In the last part of the chapter I explore the ways in which this newly emerging approach to religious autonomy is similar to the JCCA.

I begin my defense of the JCCA in the first part of chapter 3, arguing that the idea that religious organizations enjoy a degree of "sovereignty" over their internal affairs, especially

those that are distinctively religious in nature, is not as radical as it appears to be. The support of such an idea can be found in several U.S. Supreme Court decisions including *Hosanna-Tabor* and the older case of *Watson v. Jones*.[24] In the second part of the chapter I examine three models of jurisdictional autonomy of religious groups proposed by liberal political theorists: Chandran Kukathas's liberal archipelago model, Lucas Swaine's semi-sovereignty model, and William Galston's liberal pluralist model. I argue that Galston's model is more justifiable but disagree with his approach to employment disputes between religious organizations and non-ministerial employees. I conclude by proposing two general principles which I believe should inform judicial decisions dealing with conflicts that involve the internal governance of religious organizations.

Chapter 4 examines Canadian jurisprudence on religious autonomy based on the theoretical discussion in the preceding chapter. The chapter starts by drawing attention to a principle strongly affirmed by the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*,[25] namely, the civil courts should abstain from adjudicating religious disputes. I argue that the interventionist approach adopted by the lower courts in dealing with cases involving ministerial employment disputes and cases involving membership qualifications, as seen in *Kong v. Vancouver Chinese Baptist Church*[26] and *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*,[27] violated the *Amselem* principle. The courts should have deferred to the decisions made by religious authorities in those two types of cases. On the other hand, it will not be reasonable to afford religious organizations such deference when it comes to the

[24] 80 U.S. 679 (1871).

[25] 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

[26] 2014 BCSC 1424, 2015 BCSC 1328.

[27] 2015 ABCA 101, 382 DLR (4th) 150.

employment of non-ministerial staff. The state also has a legitimate interest in regulating the education dispensed by religious communities to ensure that the virtue of toleration is properly taught and that children have a realistic option of leaving the community to which they belong when they grow up.

I return to the Taiwanese context in chapter 5 and explore the ways in which the JCCA can change the contour of Taiwan's current regulatory scheme for religious organizations. I first address a potential concern about the plausibility of the project of applying the JCCA to Taiwan, which claims that as a theory deeply rooted in Western history and Christian theology, the JCCA may not be compatible with the Taiwanese context. After addressing this concern, I proceed to examine three concrete policy issues related to the regulation of religious organizations: (1) the draft *Religious Groups Act* and whether or not it should be passed into law; (2) the right of a religious university to require compliance by faculty members and students with its religiously based rules of conduct; (3) the regulation of religious schools. I conclude by emphasizing the need for Taiwan to move away from the current approach to regulating religion and move towards a new paradigm which recognizes the jurisdictional autonomy of religious organizations.

Chapter 1. Religion as a Problem: Three Legislative Regulations that Form the Basis of the Relationship between the State and Religious Organizations in Taiwan

I. Introduction

This chapter analyzes three legislative regulations that form the basis of the relationship between the state and religious organizations in Taiwan. The three legislative regulations are the *Act of Supervision of Temples and Shrines*, Article 7 of the *Private School Act*, and a draft bill entitled *Religious Groups Act*. I argue that all three of these regulations are primarily informed by a view which suggests that religion is a problem that must be contained and controlled for the benefit of society as a whole. Because it is expressed in three important legislative regulations governing religious organizations, I suggest that this view is an essential part of Taiwan's tradition of the state-religion relationship. It is true that Taiwan's tradition of the state-religion relationship consists of elements other than the view of religion as a problem.[1] My intention in this chapter is *not* to suggest that Taiwan's tradition of regulating religious organizations can be reduced to a social and political discourse in which religion is characterized as a problem. Instead, I argue that gaining a full

[1] One of those elements, and which stands in opposition to the view of religion as a problem, is an emerging discourse in Taiwan's constitutional jurisprudence which suggests that religious groups deserve a high level of constitutional protection for their autonomy in managing internal affairs. This chapter and the next chapter will be devoted respectively to exploring the two important elements—the view of religion as a problem and the contrasting view that religious groups deserve robust protection— within Taiwan's tradition of regulating religious groups.

understanding of the state-religion relationship in Taiwan is not possible without a recognition of the existence of such a discourse in Taiwan's (or Republic of China's) history.

The structure of this chapter is as follows. I discuss the *Act of Supervision of Temples and Shrines* in section II and focus on the act's connection with the "build schools with temple property" movement, which began in the final years of the 19th century. I then discuss Article 7 of the *Private School Act* in section III and explain how its precursor—Article 5 of the *Private School Regulation*—was a product of the anti-Christian movement that originated in 1922 and continued to develop until the Kuomintang (KMT) came to power in 1928. Both the *Act of Supervision of Temples and Shrines* and the *Private School Regulation* took effect in Taiwan after World War II. Since 1949, the year when the KMT government retreated to Taiwan after militarily defeated by the Chinese Communist Party, the enforcement of the two pieces of legislation was restricted to Taiwan and not mainland China. Both section II and section III include subsections that discuss how the two pieces of legislation have evolved and been applied (or not applied) in Taiwan since 1949. Section IV analyzes the draft *Religious Groups Act*, which is intended to replace the *Act of Supervision of Temple and Shrines*. In the final section, I briefly address the tension between the main argument of this chapter—that the view of religion as a problem has been and continues to be an essential part of Taiwan's tradition of regulating religion—and a more positive view on the state-religion relationship in Taiwan held by some scholars.

II. The Act of Supervision of Temples and Shrines

The *Act of Supervision of Temples and Shrines* (*ASTS*)[2] has several unique characteristics. It was enacted in 1929 in mainland China and is still part of Taiwan's official law. To many observers and scholars, it is almost unbelievable that such an archaic law remains in effect to this day. For example, Zheng Zhi-Ming has called it "the greatest miracle in the modern legal history of Taiwan" that the *ASTS* has survived the many decades since its enactment while the Republic experienced tremendous political unrest and turmoil.[3] Additionally, the *ASTS* was the focus of one of the most important decisions by the Constitutional Court of Taiwan on freedom of religion, Judicial Yuan Interpretation No. 573.[4] The *Act of Supervision of Temples and Shrines* was also enacted against the background of the "build schools with temple property" (*miaochan xingxue*) movement, which spanned across the years of the late Qing dynasty and the early Republican era (the Republic of China was founded in 1911). In the following section, I briefly introduce the history of this movement, as I believe the essence of the *ASTS* cannot be fully captured without an understanding of this historical movement.

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[2] Jiandu Simiao Tiaoli (監督寺廟條例) [*Act of Supervision of Temples and Shrines*] (promulgated and effective Dec. 7, 1929) (R.O.C.).

[3] Zheng Zhi-Ming, *台灣宗教組織與行政* [*RELIGIOUS ORGANIZATIONS AND THE ADMINISTRATION OF RELIGIOUS AFFAIRS IN TAIWAN*] (Taipei: Wen-jin Publishing House, 2010) at 50.

[4] Judicial Yuan Interpretation No. 573 was the first case in which the Constitutional Court of Taiwan directly addressed the issue of the autonomy of religious organizations. In this Interpretation, the Court struck down two articles of the *Act of Supervision of Temples and Shrines*. See J.Y. Interpretation No. 573 (27 February 2004). An English translation is available at <www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=573.> I will discuss J.Y. Interpretation No. 573 in more detail in chapter 2.

A. Build schools with temple property movement

1. The first stage—from the late 19th century to the first decade of the 20th century

The idea of using temple property to finance a modern educational system emerged during the final years of the Qing dynasty, the last imperial dynasty of China. One of the earliest advocates of this idea was a prominent political reformer named Kang Youwei, who was an advisor to the Guangxu Emperor. In 1898, Kang Youwei made a formal proposal to the Guangxu Emperor that "all academies and temples in China, with the exception of those included in registers of state sacrifices [], be turned into schools."[5] The radical nature of this proposal should not be overlooked; Kang Youwei called for not a crackdown on a few temples dedicated to uncanonical deities but the confiscation of *all* temples, including those that belonged to the dominant Buddhist and Taoist religions.[6] Only a small number of temples that were designated as holding state sacrifices were exempt from being turned into schools under his proposal.[7] The emperor initially accepted this proposal and promulgated an edict to enforce it on the same day; however, the edict was quickly rescinded three months later.[8]

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[5] Vincent Goossaert, "1898: The Beginning of the End for Chinese Religion?" (2006) 65:2 The Journal of Asian Studies 307 at 307.

[6] *Ibid* at 315. ("He [Kang Youwei] made his point clearly enough, for all available sources show that both reformers and the general public understood the July 10 edict as calling for the destruction not of a few select temples but of all temples, bar the handful of those where state sacrifices were performed.")(Footnote omitted).

[7] *Ibid*.

[8] *Ibid* at 307.

Although the edict of temple confiscation was short-lived, the idea itself did not fade from the public consciousness; on the contrary, its popularity clearly increased in the following years, especially among the elite. One of the most important factors that helped increase the popularity of the idea of converting temples into schools was the "Boxer Uprising of 1900."

The Boxers United in Righteousness (*Yihetuan*) was a local militia formed in 1898 in China's coastal province of Shandong, and expanded dramatically in 1900.[9] The Boxers consisted mainly of poor peasants who "believed they were invulnerable to swords and bullets in combat, and they drew on an eclectic pantheon of spirits and protectors from folk religion, popular novels, and street plays."[10] Backed by Empress Dowager Cixi, who issued a "declaration of war" against foreign powers in June 1900, the Boxers began to attack foreigners and missionaries in China. More than 200 Westerners were killed at the hands of Boxer fighters in 1900.[11] After months of atrocities, the Boxers were finally crushed by a foreign expeditionary force dispatched by the Eight-Nation Alliance formed in response to the crisis of the Boxers uprising.[12] After the defeat of the Boxers, the Eight-Nation Alliance demanded that the Qing government pay an indemnity of 450 million tales and execute government officials who had supported the Boxers.[13] The indemnity was "a staggering sum"

[9] See Jonathan D. Spence, *The Search for Modern China* (New York: W.W. Norton & Company, 2013) at 222-223.

[10] *Ibid.* at 222.

[11] *Ibid.* at 224.

[12] *Ibid.*

[13] *Ibid.*

of money, as it was more than 1.5 times greater than the revenue of the entire Qing government at the time.[14]

One impact of the Boxer Uprising was that it led to the emergence of a deep resentment toward Chinese religion among China's social and political elite. As Vincent Goossaert and David Palmer have explained, "[i]n the end, the humiliating defeat, with its heavy human, political, and financial costs, convinced China's political elites that Chinese religion, from which the Boxers had emerged, was a major hindrance and threat to China's survival in the modern world."[15]

From 1901 to 1902, the famous Shanghai daily newspaper *Shenbao* published several editorials advocating the idea of building schools with temple property.[16] One editorial, entitled "A Proposal to Destroy Buddhist and Taoist Monasteries so as to Finance Schools" (*Hui siguan yi chong xuetang jingfei yi*), suggested that transforming temples into schools would have "the most desirable effect of expelling all the 'rascal Buddhists and Taoists.'"[17] Another editorial titled "A Discussion on Allocating the Property of Monasteries to the Building of Schools" (*Bo siguan chanye yi kai xuetang shuo*) took an even stronger tone, demanding that "[a]ll temples, without exception, should be razed to the ground and all statues destroyed, as this is the only way to root out the poison of Buddhism and Taoism."[18] It is worth highlighting that an important element of the "build schools with temple property"

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[14] *Ibid* at 225.

[15] Vincent Goossaert & David A Palmer, *The Religious Question in Modern China* (Chicago; London: University of Chicago Press, 2011) at 40-41.

[16] See Goossaert, *supra* note 5 at 328.

[17] *Ibid*.

[18] *Ibid*.

movement was hostility toward the corrupt Buddhist and Taoist clergy, which is demonstrated in the first editorial mentioned above (the "rascal Buddhists and Taoists"). According to renowned sociologist Chiu Hai-Yuan, during the late 19th and early 20th centuries, almost all those who advocated confiscating temple property to build schools criticized the debauched lifestyle of Buddhist and Taoist clergy and the ways in which these clergy had corrupted the customs of society.[19]

In 1904, under the social pressure to restore its 1898 temple confiscation edict, the Qing government issued a new set of school regulations granting formal permission to confiscate temple property for the purpose of building new schools.[20] The works of Prasenjit Duara carefully study the effects of the large-scale confiscation and destruction of temples that followed this government approval. According to Duara, in one county of China's Hebei province alone, "the number of temples declined by 316 between the years 1900-1901 and 1915, from 432 to 116."[21] Most of these temples "had either been destroyed or been converted into public buildings."[22] In Liangxiang County, another county of the province, the finance officer reported that "in 1911 all temple property in the county became the property of the public association."[23] While many temples were destroyed or converted to

[19] See Chiu Hai-Yuan, *宗教, 術數與社會變遷 (二)* [*Religion, Occultism, and Social Change: Volume II*] 2d ed (Taipei: Gui-guan Publishing House, 2006) at 228.

[20] See Goossaert, *supra* note 5 at 329.

[21] Prasenjit Duara, *Culture, Power, and the State: Rural North China, 1900-1942* (Stanford, California: Stanford University Press, 1988) at 149.

[22] *Ibid*.

[23] *Ibid.* at 150.

public use, in some cases temple lands were sold or pawned to finance the construction of new schools.[24]

2. The second stage—1928-1929

Another wave of the "build schools with temple property" movement took place from 1928 to 1929. Not long after the Qing dynasty was overthrown and the new republic established in 1911, China entered into the "Period of Warlordism" (1916-1927) in which the nation was divided into several independent political entities controlled by different warlord groups.[25] In 1926, the KMT launched a military campaign known as the Northern Expedition aimed at defeating the warlords and reunifying the nation.[26] In 1928, the Northern Expedition ended with a resounding success and China was unified under the control of the KMT government.[27]

The nation's reunification in 1928 brought about an enthusiasm and revolutionary fervor that permeated the entire society.[28] Encouraged by the new political situation, intellectuals and educational leaders were determined to rebuild China and revitalize the nation's strength through education.[29] However, as the new Nationalist government had just finished a military campaign and did not have the financial capacity to provide educational

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[24] *Ibid*.

[25] See Immanuel C. Y. Hsu, *The Rise of Modern China*, 6th ed (New York: Oxford University Press, 2000) at 482-486.

[26] See *ibid* at 523-525.

[27] See *ibid* at 531.

[28] See Chiu, *supra* note 19 at 227.

[29] *Ibid.*

funding, many educational leaders began to contemplate the idea of nationalizing temple property to build a public education system and its infrastructure.[30] For example, at the National Educational Council held in May 1928, the Education Bureau of Nanjin City submitted "A Proposal that the Property of Temples Nationwide be Declared under the State Law and Reused as National Educational Fund" (*quanguo miaochan ying you guojia zhi fa qing li chong zuo quanguo jiaoyu jijin an*).[31] The proposal emphasized that temples throughout the country had significant assets that could and should be used to build schools. Additionally, the proposal argued that the possession of immense wealth by Buddhist and Taoist clergy was against the policy of "equalization of land ownership," a key part of the KMT's political creed.[32]

In response to the renewed call for the expropriation of temple property, the Nationalist government issued the *Temples and Shrines Management Regulations* (*TSMR*) in January 1929.[33] Section 9 of the *TSMR* stipulated that each temple and shrine shall be managed by a "Committee for the Preservation of Temple Property," which consists of not only clergy members of the temple or shrine but also representatives of the city or county government and local public bodies.[34] Section 10 stipulated that the committee would decide on the disposal of or changes in the ownership of temple property.[35] Under these two sections, the rights of Buddhist and Taoist clergy to autonomously manage temple property were greatly

[30] *Ibid* at 227-228.

[31] *Ibid* at 228.

[32] *Ibid* at 228.

[33] *Ibid* at 220.

[34] *Ibid* at 229.

[35] *Ibid*.

circumscribed. These two sections were clearly meant to pave the way for the government to transfer temple assets and property to public use.[36]

However, the *TSMR* was met with fierce opposition from Buddhist and Taoist leaders. In an attempt to defuse the anger and resistance of Buddhists and Taoists, the government referred the *TSMR* to the legislative branch of government, the Legislative Yuan, and asked the legislators to draw up another piece of legislation on the management of temples and shrines.[37] The Legislative Yuan proposed the *Act of Supervision of Temples and Shrines* in November 1929; the government promulgated the act a month later.[38]

The previous regulations in the *TSMR* regarding the committee for the preservation of temple property, which had the power to transfer temple property, no longer existed in the new law. The approach of direct expropriation of temple property was abandoned, and Buddhist and Taoist clergy regained a degree of autonomy in managing the assets that belonged to temples and shrines.[39] However, under the *ASTS*, the government still retained significant power to monitor the ways in which temple property was used. For example, Article 7 of the *ASTS* stipulates that monks and nuns shall not use the income derived from temple property except for specifically religious purposes such as giving religious instruction or engaging in practices in accordance with religious commandants.[40] Article 8 stipulates that the plan of disposal of temples' real estate shall be approved by both the parent

[36] See *ibid* at 221, 229.

[37] *Ibid* at 221.

[38] See *ibid* at 221-222.

[39] See *ibid* at 229.

[40] *ASTS*, art. 7. (See appendix).

religious association to which a temple belongs and the government.[41] Article 10 requires Buddhist and Taoist clergy to use a certain amount of temple property for charity and public welfare. Clergy face harsh punishment if they fail to comply with these requirements.[42] Article 11 stipulates that clergy who violate Articles 7 and 8 will be banished from the temple or be prosecuted in the courts; clergy who violate Article 10 will be removed from the role of administrator of the temple.[43]

In sum, the *ASTS* was directly linked with the "build schools with temple property" movement that had existed since the late 19th century and reached a new peak between 1928 and 1929. The *ASTS* can be understood as a compromise between the two opposing sides of this movement, the educational elite and Buddhist and Taoist leaders. This historical background explains why 8 of the 13 provisions of the *ASTS* address issues related to the property of temples and shrines.[44] It also explains why the *ASTS* targeted only Buddhism and Taoism while leaving other religions aside. (Christian schools were the target of another piece of regulation, the *Private School Regulation*, which was promulgated in the same year as the *ASTS.*)

B. The ASTS in Taiwan

[41] The article has been struck down by the Constitutional Court of Taiwan in J.Y. Interpretation No. 573.

[42] *ASTS*, art. 10. (See appendix).

[43] *ASTS*, art. 11. (See appendix).

[44] Of the other provisions, one prohibits foreigners from being the administrator of a temple or a shrine (art. 6 sec. 2); the rest deal with secondary issues such as definition and jurisdiction.

As part of the legal regime of the Republic of China, the *ASTS* took effect in Taiwan after the island's retrocession to China after World War II. However, for most part of its history as an official law—and as the most important legislation with regard to religion—in Taiwan, the *ASTS* has largely been a "law in the books." According to Chiu Hai-Yuan, many provisions of the *ASTS* have never been enforced.[45] For example, many clergy members of temples and shrines did not use a certain amount of temple property to engage in charitable activities, as required by Article 10 of the law. However, the government has never "banished" these clergy members from their temples in accordance with Article 11.[46]

The KMT government instead relied on the numerous administrative regulations it issued as the basis for dealing with religious organizations.[47] These administrative regulations were originally meant to complement the *ASTS* or serve as further interpretations of the *ASTS*'s provisions. But it turned out that many of the administrative regulations went well beyond the *ASTS* and its main focus on temple property, and limited the freedom and rights of religious communities in other areas, such as the internal structure of religious organizations. Perhaps the most notorious of these regulations was one that required every temple and shrine to organize a "members' congress" (*xintu dahui*) as its highest authority.[48] According to this regulation, the clergy's management of a temple's affairs would be subject to the supervision of a members' congress—which was composed of lay followers—of the temple. Such a requirement goes against Buddhist doctrine on monastic authority whereby monks and nuns are supposed to be instructors who provide guidance to lay followers and

[45] See Chiu, *supra* note 19 at 255.

[46] See *ibid* at 251.

[47] See *ibid* at 259. See also Zheng, *supra* note 3 at 61.

[48] See Zheng, *supra* note 3 at 56-57.

not the other way around.[49] In some cases, local elites took advantage of this administrative order and acquired power to control temple property by manipulating the elections of the heads of members' congresses.[50]

Ironically, the fact that few provisions of the *ASTS* have been enforced perhaps partially explains why this piece of legislation continues to maintain its status as an official law to this day. In fact, evidence shows that KMT government officials knew for a long time that the *ASTS* was outdated and had to be replaced with a new law.[51] Internal government discussions on the issue of replacing the *ASTS* began as early as 1955;[52] the current draft bill of *Religious Groups Act* represents the Taiwanese government's latest attempt in this regard. However, when such attempts failed, it seems that the government was fine with simply leaving the *ASTS* in place without revising or repealing it. In my observation, since most actors involved in the formulation and enforcement of state religious policy—government officials, religious institutions, lawyers, and scholars—seem to have recognized the fact that the *ASTS* is only an official law in name, no one actively advocates to have the law repealed. The law's "irrelevance" in the interaction between the state and religious institutions in

[49] See Lin Ben-Xuan, "監督寺廟條例與宗教管理" ["The Act of Supervision of Temples and Shrines and the Management of Religious Affairs"], *聯合報 United Daily* (14 April 1994).

[50] See *ibid*.

[51] In 1983, the then Minister of the Interior Lin Yang-Gang made the following remarks when he responded to a question posed by a legislator: "There were only 13 provisions in the *ASTS* promulgated by the government in 1929, and it only applied to Taoism and Buddhism but not to other religions. The Ministry of the Interior believes that this law is no longer fit to deal with the current situation, and therefore is considering [to propose] a draft law on religion." Quoted from Chiu, *supra* note 19 at 246.

[52] In August 1955, the Ministry of Interior convened a meeting to discuss the issue of enacting a new law regulating religion, seeking advice from the members of the KMT Central Committee as well as the representatives of other government branches. See Zheng, *supra* note 3 at 75-76.

contemporary Taiwan possibly explains why, ironically, it has not been formally removed from the statute book.

III. Article 7 of the Private School Act

Another legislative regulation that forms the basis of the relationship between the state and religious institutions in Taiwan is the *Private School Act* (*PSA*).[53] Unlike the *ASTS*, the *PSA* does not target religious institutions; it is a neutral law of general applicability. However, the *PSA* contains an important provision aimed specifically at religious educational institutions—Article 7. Like the *ASTS*, Article 7 of the *PSA* traces its roots back to a unique historical context in the early Republican era: the anti-Christian movement of the 1920s. In what follows, I first briefly introduce the content of Article 7 of the *PSA* and then explain its connection with the anti-Christian movement.

A. Introduction

The current Article 7 of Taiwan's *Private School Act* (*PSA*) reads as follows:

> Private schools shall not force students to participate in any religious rituals or take any religious courses. However, religious training institutes are not bound by this Article.[54]

[53] Sili Xuexiao Fa (私立學校法) [*Private School Act*] (promulgated and effective Nov. 16, 1974, as amended June 18, 2014) (R.O.C.).

[54] *PSA*, art. 7.

Under Article 7 of the *PSA*, private schools in Taiwan are prohibited from making religious courses[55] a part of the mandatory curriculum and from requiring compulsory attendance at religious rituals held by the schools. If religious schools establish religious courses and hold religious activities, as they will necessarily do, they are obligated to accommodate anyone who enrolls at the schools but refuses to participate in these courses and activities.

The precursor of Article 7 of the PSA was Article 5 of the *Private School Regulation* (*PSR*).[56] The *PSR* was promulgated by the KMT government in August 1929, four months before the *ASTS* was issued.[57] Article 5 of the *PSR* stipulated:

> Private schools established by religious organizations shall not include religious courses as part of their mandatory curriculum, nor shall they promote religion in class. Students shall not be forced nor induced to participate in religious rituals. Religious rituals in elementary schools are prohibited.[58]

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[55] "Religious courses" here refer to those courses that involve an element of religious indoctrination, or take a confessional approach to the teaching of religion. Courses that teach religion in an objective way and for the purpose of transmitting the knowledge about religion do not fall within the category of "religious courses" referred to in this Article.

[56] Sili Xuexiao Guicheng (私立學校規程) [*Private School Regulation*] (promulgated and effective Aug. 29, 1929, abrogated Nov. 16, 1974) (R.O.C.).

[57] See Yang Si-xin & Guo Shu-lan, *教育与国权: 1920 年代中国收回教育权运动研究* [*Education and Sovereignty: The Study of the China Regaining Educational Right Movement in the 1920s*] (Beijing: Guang-ming Newspaper Publishing House, 2010) at 246.

[58] *PSR*, art. 5. Quoted from Chou Chih-Hung, "高等教育階段中的宗教教育問題—教育基本法第六條與私立學校法第九條之檢討" ["The Problems concerning Religious Education at the Higher Educational Level: An Analysis of Article 6 of the Educational Fundamental Act and Article 9 of the Private School Act"] (2000) 51 The Law Monthly 687 at 711.

This provision imposed serious constraints on the freedom of private religious schools to conduct religious education and hold religious rituals. It effectively prohibited a confessional approach to religious education in private schools, since such an approach would necessarily involve "promoting religion." In addition, religious rituals were totally banned at the elementary level under this provision. Private schools at the secondary level were allowed to hold religious rituals, but the schools must fully respect students' decision whether or not to participate in those rituals. According to historians Yang Si-Xin and Guo Shu-Lan, representatives of Christian churches in China made a petition to the Ministry of Education following the promulgation of the *PSR*, asking that parochial schools be given more freedom in conducting religious education.[59] Their petition, however, was firmly rejected by the government.[60] In its reply to the representatives of the Christian churches, the Ministry of Education insisted that religious indoctrination of children in schools was inappropriate because it would "deprive students of freedom to choose their religious beliefs in the future" and would "restrict individuals' freedom of thought."[61]

B. The anti-Christian movement

This heavy-handed approach to religious education in private schools was a product of the anti-Christian movement (*Feijidujiao Yundong*) and the ensuing "restore educational rights" movement (*Shouhui Jiaoyuquan Yundong*) that broke out in the 1920s in mainland China.

[59] Yang & Guo, *supra* note 57 at 246.

[60] *Ibid*.

[61] *Ibid*.

In 1922, several student-led anti-Christian organizations were formed in response to the news that the World Student Christian Federation (WSCF) was planning to hold a conference at Tsinghua University, a famous university located in Beijing, in April that year. The conference was the 11th General Assembly of the WSCF. This was the first time that the WSCF's General Assembly was to be held in China since its establishment in 1895.[62] In February 1922, a group of university students in Shanghai who were determined to thwart the WSCF's plan of convening a conference in China formed the Anti-Christian Student Federation (*Fei-jidujiao xuesheng tongmeng*, ACSF). In their manifesto, they claimed that Christianity and the Christian church were the "vanguard of the economic invasion of China by capitalism."[63] The manifesto continues in an extremely hostile tone: "foreign capitalists established the church in China with no other aim but to dupe Chinese people into welcoming capitalism; youth organizations were established [by them] in China for no other purpose but to produce the good running dogs of capitalists."[64] The manifesto characterized the upcoming WSCF conference as "a bunch of running dogs of capitalists discussing how to dominate [Chinese people]."[65]

A few weeks later, a group of students in Beijing, following the lead of their peers in Shanghai, formed an organization called the Great Anti-Religion Federation (*Fei-zongjiao da tongmeng*, GARF).[66] These two student organizations quickly attracted widespread support among intellectuals and the educational elite, and similar organizations were created

[62] *Ibid* at 71.

[63] *Ibid* at 75.

[64] *Ibid.*

[65] *Ibid* at 76.

[66] See *ibid*.

in numerous cities.[67] Although these student organizations did not succeed in preventing WSCF's conference from taking place, they continued to spread their anti-Christian message through publications and demonstrations.

A number of factors contributed to the eruption of the anti-Christian movement in the early 1920s. Perhaps the most important factor was the anti-imperialist sentiment that intensified in the late 1910s and throughout the 1920s. The May Fourth Movement of 1919, for example, was triggered by the Shandong Settlement reached at the Versailles conference at the end of World War I that transferred Germany's concessions in the Chinese province of Shandong to Japan rather than recognizing China's sovereign authority over the province.[68] The Nanking Road Massacre of 1925 further raised the anti-imperialist fervor to an unprecedented level. On May 30th, 1925, the British police in Shanghai's International Settlement opened fire on student demonstrators protesting the killing of a Chinese worker by a Japanese supervisor in a Japanese-owned cotton mill in Shanghai. The shooting left twelve Chinese dead and seventeen injured.[69] Shocked by the brutality of the British police, Chinese people across the country responded to the call to rally around the nationalist movement and stand up to foreign imperialism as they had never done before.[70] Given this anti-imperialist and anti-foreign atmosphere, it is not surprising that the Chinese became more hostile to Christianity during this time period.

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[67] See *ibid* at 77-78.

[68] See Spence, *supra* note 9 at 286-287.

[69] See Ka-che Yip, *Religion, Nationalism, and Chinese Students: the Anti-Christian Movement of 1922-1927* (Bellingham: Center for East Asian Studies, Western Washington University, 1980) at 45.

[70] See *ibid*.

The leading intellectuals of the 1910s and their views of religion also played an important role in the advent of the anti-Christian movement. Cai Yuan-pei, the Principal of Peking University from 1916 to 1927, serves as one example. In 1917 and 1922, he published two essays on religion that had significant influence on students and the public. He expressed a secular humanist and atheistic worldview in his 1917 essay entitled "Replacing Religion with Aesthetic Education." He characterized religion as nothing more than a manipulation of people's emotions and asserted that religion was harmful to society because of its inclination to persecute those who held different religious views.[71] Cai Yuan-pei suggested that religion be replaced by aesthetic education, which he saw as capable of cultivating a noble spirit in a far more superior manner than religion could.[72] In his 1922 essay "On Independence of Education," Cai Yuan-pei called for the establishment of an educational system controlled solely by professional educators, and demanded the prohibition of religious instruction and religious services in all schools.[73] Cai Yuan-pei's view of religion expressed in these two essays certainly left a mark on the minds of students in that era. In fact, he was invited in April 1922 to give a speech at an anti-Christian rally organized by the GARF and attended by approximately 3,000 students.[74]

Beginning in the second half of 1922, the legitimacy of mission education in China gradually emerged as the focal point of the anti-Christian movement. For example, Hu-Shih,

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[71] *蔡元培全集 第三卷* [*The Collected Works of Cai Yuanpei: Volume III*] (Hangzhou: Zhejiang Education Publishing House, 1997-1998) at 59-60.

[72] *Ibid.* at 62.

[73] *蔡元培全集 第四卷* [*The Collected Works of Cai Yuanpei: Volume IV*] (Hangzhou: Zhejiang Education Publishing House, 1997-1998) at 585, 587.

[74] See Yip, *supra* note 69 at 27.

a prominent intellectual leader in the May Fourth movement of 1919, proposed at the first annual meeting of the National Association for the Advancement of Education that religious education be totally banned from elementary schools as well as kindergartens.[75] This proposal was passed in the meeting.[76] Nationalist educator Yu Jia-Ju was another important figure in the 1920s who advocated for imposing stringent regulations on mission schools. The slogan "restore educational rights" came from an essay he wrote in March 1923 and became widely popular among anti-Christian activists.[77] Yu Jia-Ju published another essay in September 1923 entitled "The Problem of Mission Education" in which he proposed that a private school should not be allowed to register as a formal educational institution if it "promotes religion in any form" or "engages in any activity related to religious propaganda."[78] Despite being a radical idea, Yu Jia-Ju's proposal gained traction among intellectuals and the educational elite. Approximately one year later in October 1924, in a meeting of the National Federation of Educational Associations (NFEA), an influential professional organization, two sets of motions related to parochial schools in China were passed. The first set of motions "forbid[] schools to propagate religion, conduct any religious activities, or differentiate in the treatment of converts and non-believers."[79] The second set of motions condemned the "control of education in China that has been maintained by foreigners."[80]

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[75] Yang & Guo, *supra* note 57 at 106.

[76] *Ibid*.

[77] See *ibid* at 81.

[78] *Ibid* at 82.

[79] Jessie Gregory Lutz, *Chinese Politics and Christian Missions: The Anti-Christian Movements of 1920-28* (Notre Dame, Ind., U.S.A.: Cross Cultural Publications, Cross Roads Books, 1988) at 148.

[80] *Ibid.*

Hu-Shih and Yu Jia-Ju's proposals can be understood as counter-reactions to the rapid advances of Christianity and its educational institutions in China in the first two decades of the 20th century. By 1922, Protestant educational institutions had a total enrollment of over 200,000 students in China.[81] At the level of higher education, the Protestant church had "a monopoly of most of the better institutions" including the famous Canton Christian College and St. John's University in Shanghai.[82] Within all mission schools, religious instruction was strongly emphasized and even given priority over the teaching of secular subjects. According to historian Ka-che Yip's study, in 1922 mission schools devoted "an average of twenty semester hours to religion, as compared to only ten in sociology, seven in economics and six in politics."[83] The fact that mission schools operated virtually without any government supervision at that time probably explains why they were able to prioritize religious instruction in their curriculum.[84]

I noted earlier that since the May Fourth movement of 1919, anti-imperialist sentiment has been widespread in Chinese society. Inevitably, mission schools were cast in a negative light in this social atmosphere, and they were increasingly seen as a major obstacle impeding efforts to overthrow imperialism. For example, as discussed, the second set of motions related to parochial schools passed in the meeting of NFEA in 1924 condemned foreign control of education in China. One rationale given by those who proposed this motion was that mission schools "created submissive pupils who loved another country better than their

[81] See Yip, *supra* note 69 at 17.

[82] *Ibid*.

[83] *Ibid* at 33.

[84] See *ibid*.

own."[85] Similarly, an article published in 1925 by an anti-Christian journal suggested that Christianity "had produced apathetic youths who should have been the main source of energy"[86] of the nationalist movement of China. This resentment towards mission education was one of the main reasons why the anti-Christian movement that began in 1922 soon developed into the "restore educational rights" movement. It was also why increasing numbers of calls were made to secularize the educational content of mission schools and restore full Chinese control over education.

It is worth noting that the KMT played an active role throughout the anti-Christian movement. The anti-Christian movement began only a few years before the KMT formally launched the Northern Expedition in 1926, and KMT leaders saw this movement as an important opportunity they could use to further the cause of the Nationalist revolution. Many organizations involved in the anti-Christian movement were either influenced or dominated by members of the KMT or the newly formed Chinese Communist Party.[87] The National Student Association, whose national congress in 1924 called for "the eradication of mission education in China," also received financial assistance from the KMT.[88]

The *Private School Regulation* (*PSR*) was promulgated in 1929, approximately one year after the KMT came to power. As discussed at the beginning of this section, Article 5 of the *PSR* prohibited elementary schools from holding religious rituals; this prohibition is similar to the proposal made by Hu-Shih in July 1922. Meanwhile, Article 5 of the *PSR* also prohibited religious schools from "promot[ing] religion in class," a prohibition that echoed

[85] Lutz, *supra* note 79 at 149.

[86] Yip, *supra* note 69 at 46.

[87] See *ibid* at 37, 39-41.

[88] See *ibid.* at 37-38.

Yu Jia-Ju's idea that a private school should not be allowed to register if it "promotes religion in any form." With the KMT government's promulgation of the *PSR*, these proposals and recommendations made during the years of the anti-Christian movement were formally adopted and became the official policy of the government.

C. The Private School Regulation (and the Private School Act) in Taiwan

Like the *ASTS*, the *Private School Regulation* took effect in Taiwan after World War II. However, the regulation did not remain untouched as the *ASTS* did. In 1974, the *Private School Act* replaced the *Private School Regulation*, and Article 5 was revised as follows:

> Private schools shall not have religious courses as part of their mandatory curriculum. If religious rituals are held in the schools established by religious organizations, students shall not be forced to participate.[89]

The original ban on "promoting religion in class" in religious schools was removed. Religious schools at the primary level were also allowed to hold religious rituals, though they were still prohibited from requiring compulsory attendance at those events.

This provision underwent another three revisions in the subsequent four decades before its current version came into being.[90] Despite being constantly under the spotlight when legislators reconsidered the contours of the educational regulatory scheme, the basic framework of this provision (now Article 7 of the *Private School Act*), which prohibits

[89] *Private School Act of 1974*, art. 8. Quoted from Chou, *supra* note 58.

[90] The three revisions were made in 1984, 1997, and 2008, respectively.

private schools at all levels from making religious courses and religious rituals compulsory, remains largely intact.

Interestingly, a similar regulation exists in another law: the *Educational Fundamental Act* (*EFA*).[91] Article 6 Section 4 of the *EFA* stipulates the following:

> Private schools may organize specific religious activities aligned with the purpose for which the school was established or with the specific nature of the school; they shall respect the wishes of school administrative personnel, teachers and students to participate in such activities, and may not treat any person in a discriminatory way because they do not participate.[92]

Article 6 Section 4 of the *EFA* was passed in 2013 and therefore can be seen as representing the Taiwanese government's latest position on the activities of religious schools. On the one hand, Article 6 Section 4 of the *EFA* does not negate the prohibition of the compulsory religious courses and rituals in private schools regulated in the *Private School Act*. On the other hand, it clearly recognizes the right of private religious schools to hold religious activities including religious rituals. Article 6 Section 4 of the *EFA* is the first time in Taiwan's (or Republic of China's) legal history that the right of religious schools to engage in religious activities was formally recognized by law. Although much room for improvement arguably still exists, it is fair to say that the regulation of religious schools in Taiwan has come a long way since the 1920s.

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[91] Jiaoyu Jibenfa (教育基本法) [*Educational Fundamental Act*] (promulgated and effective June 23, 1999, as amended Dec. 11, 2013) (R.O.C.).

[92] *Ibid*, art.6 sec.4.

IV. Religious Groups Act

Finally, I would like to discuss the draft bill entitled *Religious Groups Act* (*RGA*), which is intended to replace the *ASTS*. The current version of the draft bill has sixty articles contained in nine chapters.[93]

One of the main purposes of this bill, in addition to replacing the *ASTS*, is to grant religious groups that register under this bill the status of "religious corporations." Such entities are religious groups that possess a legal personality specifically designed for them. It should be noted that the draft bill does not impose an obligation on religious groups to register and acquire religious corporations status; religious groups can decide by themselves whether or not they would like to register with the government under this law. Once registered, a religious group can enjoy certain benefits extended to religious corporations. However, because the law contains a number of regulations that restrict the activities of religious corporations, religious groups subject themselves to these restrictive regulations by registering under this law.

A thorough analysis of the content of this draft bill is beyond the scope of this chapter. What I would like to argue in this section is that this draft bill embodies a particular view of religious groups which regards them as a potential threat to the welfare and stability of society. I develop this argument from three angles as follows: (1) the legislative background of the draft law; (2) the attitude of some government officials in the process of drafting the law; and (3) an analysis of the key provisions of the draft law that restrict the autonomy of religious groups.

[93] Zongjiao Tuantifa Caoan (宗教團體法草案) [*Religious Groups Act* (draft)] (May 8, 2015) (R.O.C.).

A. Legislative background

The officials of the KMT government in Taiwan have long recognized the need to replace the *ASTS* with a new law, as I have mentioned. The Ministry of the Interior proposed three draft laws on religion in 1979 (Law for Temples and Churches, *Simiao Jiaotang Tiaoli*), 1983 (Law for the Protection of Religion, *Zongjiao Baohufa*), and 1993 (Law on Religious Corporations, *Zongjiao Farenfa*), but all three attempts failed due to the opposition of religious organizations.[94] During the fall of 1996, however, several high-profile religious controversies and scandals were reported by the media and sent shock waves throughout the country. In the Chung Tai Chan Monastery controversy, approximately 40 college students who served as volunteers at a summer camp held by the famous Buddhist monastery decided collectively to give up their studies and become monks and nuns after the camp. The parents of these students protested fiercely and sought to take them back from the monastery because the parents did not expect their sons and daughters would make such a decision without consulting them.[95]

Several other scandals that attracted significant public attention in 1996 involved non-traditional religions and their leaders. For example, Song Qi-Li, a controversial religious leader with a large number of followers, was accused in October 1996 of faking photos in order to give the illusion that he possessed supernatural powers and asking his followers to

[94] See André Laliberté, "The Regulation of Religious Affairs in Taiwan: From State Control to *Laisser-faire*?" (2009) 38:2 Journal of Current Chinese Affairs at 69-70.

[95] See Huang Yin & Chen Dong-Xu, "小星辰夏令營結束已兩星期 學佛人未歸" ["Two weeks after the Little Stars summer camp, volunteers are still not coming home"], *聯合報 United Daily* (4 September 1996) A5.

purchase these photos at high prices.[96] In the Tai Ji Men Qigong Academy incident, the head of the academy, Hong Shih-Ho, was accused of soliciting large donation without paying any taxes. Only a few days after the accusation appeared in the news, the Ministry of Justice Investigation Bureau deployed "hundreds of officers" to raid the academy's schools, and Hong Shih-Ho and his wife were arrested.[97]

These incidents triggered a public outcry to impose tougher regulations on religious organizations. A term widely used in media reports and public discussions during that period of time was "religious chaos" (*zongjiao luanxiang* 宗教亂象), which was used to refer generally to all the incidents and controversies related to religion that happened in 1996. To many religious believers, the fact that this term became widely popular in public discussion was unfortunate because it placed religion, "*zongjiao*," side by side with the derogatory word "*luan,*" which means chaotic or unruly. In the meantime, various proposals for government intervention in religious affairs appeared in the media. For example, an opinion article in *The China Times* suggested that the state should establish a certification system for clergy.[98]

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[96] See Luo Xiao-He & Chen Jin-Zhang "「宋七力」被指造神斂財 見他需供一千萬" ["'Song Qi-Li' accused of cheating his followers of their money: it takes 10 million to personally meet with Song"] *聯合報 United Daily* (10 October 1996) A3.

[97] See "太極門涉斂財漏稅 檢調全台大搜索" ["Tai Ji Men suspected of illegally soliciting donations and tax evasion; prosecutors and law enforcement officers carried out raids across Taiwan"] *聯合報 United Daily* (20 December 1996) A1.

Eleven years later, however, Hong Shih-Ho and his wife were acquitted of all charges against them. See "纏訟十多年太極門案 洪石和無罪定讞" ["After more than ten years of trial proceedings, Hong Shih-Ho is now acquitted of all charges"] *大紀元時報 Epoch Times* (14 July 2007).

[98] Quoted from Yu-Dian Hsu & Jing-Fan Chou, "以宗教自由檢視國家在宗教領域中資訊提供行為" ["An Examination of the Provision of Religion-Related Information by the Government from the Perspective of Religious Freedom"] (2016) 298 Taiwan Law Journal 1 at 15.

Another opinion article called for stricter regulation of religious organizations' activities aimed at youth.[99]

One of the most remarkable comments made during that period of time was a joint statement issued by 11 religious organizations.[100] The organizations claimed that "religion in Taiwan enjoyed too much freedom" and that the "religious chaos" was inevitable due to the lack of government regulation of religion.[101] In the statement, the organizations urged the government to enact a law to regulate religious organizations as soon as possible.[102] That these organizations made such a statement is a testimony to the highly unfavorable climate for religious organizations in 1996. In making such a statement, these organizations may have intended to differentiate themselves from those involved in the controversies and protect their own public image. Revered Buddhist leader the Venerable Master Hsing-Yun echoed the organizations' call for the government to enact a law regulating religion. He suggested that such a law was an integral part of the solution to the social problems generated by the "religious chaos."[103]

Strong calls from the public and these religious organizations to impose tougher regulations on religion apparently revitalized the government's previous failed attempts to pass comprehensive legislation to regulate religion. According to sociologist Lin Ben-Xuan,

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[99] Quoted from *ibid*.

[100] Some of the eleven religious organizations were: Buddhist Association of the Republic of China, Chinese Muslim Association, World Inter-Faith Association, and the General Association of Tienti Chiao. The media report did not identify the other seven religious organizations. See Liang Yu-Fang, "宗教界促訂宗教團體法" ["Religious communities call for legislation on religion"] *聯合報 United Daily* (27 October 1996) A3.

[101] *Ibid*.

[102] *Ibid*.

[103] *Ibid*.

the government's renewed effort to propose a law regulating religion in the late 1990s was a direct result of the 1996 "religious chaos."[104] Although many different drafts of the *Religious Groups Act* have been proposed since the late 1990s, I argue that all of them, including the current version of the draft law, stem from the same source, the so-called "religious chaos" of 1996.

B. Officials' view of religion as a threat to the social order

While the draft *RGA* has roots in the unfavorable social climate for religion in 1996, scholars in Taiwan still disagree on how the general orientation of the current version of the draft law should be understood. Some scholars suggest that a number of provisions of the draft law reveal the government's intention to control religious groups' internal affairs to prevent a recurrence of frauds and scandals related to religion.[105] Others suggest that the empowering aspect of this draft law should not be ignored since the draft law confers many benefits, or even privileges, to religious organizations, to the extent that some critics of this draft law have dubbed it the "Religious Welfare Law."[106]

I suggest that both views hold some truth. To some extent, this draft law can be understood as being based upon a "carrot-and-stick" approach. Religious groups that register

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[104] See Lin Ben-Xuan, "我國當前宗教立法的分析" ["An Analysis of Current State of Legislation on Religion in Taiwan"] in Liu Wen-Shi ed, *宗教論述專輯第三輯: 宗教法制與行政管理篇* [*Volume Three of Religious Discourses: Laws on Religion and Administrative Management*] (Taipei: Ministry of the Interior (R.O.C.), 2003) 213 at 215.

[105] See Zheng, *supra* note 3 at 85-87.

[106] See *「宗教自由與宗教立法」論壇實錄* [*Conference Proceedings of Religious Freedom and Legislating on Religion*] (Taipei: Ministry of the Interior (R.O.C.), 2010) at 108-113.

under this law become eligible for certain benefits (such as tax exemptions) while also subjecting themselves to a number of strict regulations. However, it is important to emphasize that this draft law is at least partly informed by the view that religion poses a threat to the social order and must be contained. My argument is based on an episode that occurred when one of the first drafts of the *RGA* was being prepared. I suggest that government officials' reaction to a draft proposed by scholars and representatives of religious groups reflects the view of religion as a threat to the social order. Below is a summary of this episode recounted by Lin Ben-Xuan in his essay "An Analysis of Current State of Legislation on Religion in Taiwan."[107] This essay is of great value because Lin Ben-Xuan has been heavily involved in the task of drawing up the draft law since the late 1990s, and the essay contains important factual accounts of his participation in the process of formulating the draft law.

In 2000, the Democratic Progressive Party won the presidential election and formed a new government for the first time, ending the KMT's 55-year rule in Taiwan. The new government created the Consultation Commission on Religious Affairs to advise on issues related to religious policy.[108] Six members of the Commission consisting of representatives of four major religious groups, a prominent lawyer, and the sociologist Lin Ben-Xuan, were appointed to form a research group on legislating on religion and charged with the task of proposing a new draft law on religion.[109]

[107] Lin, *supra* note 104.

[108] *Ibid* at 223.

[109] *Ibid* at 224.

In the first draft bill the research group proposed, only one provision dealt with the punishment of religious organizations.[110] According to this provision, the status of a religious organization as a registered religious corporation should be revoked if its activities involve criminal conduct including gambling, violence, and sexual offenses.[111] When the draft bill was referred to the Laws and Statutes Committee of the Ministry of the Interior, officials at the Ministry criticized it for having too few provisions related to punishment and sanctions and being too lenient toward religious organizations.[112] When the bill was referred to the Executive Yuan for further review, it drew even more criticism from representatives of other government branches. These government officials called into question the approach taken by the research group when drafting the bill. They saw the proposed bill as only being concerned with solving problems for religious organizations and having little intention to monitor and regulate religious organizations' activities.[113]

After the meeting at the Executive Yuan, several revisions were made to the draft bill. The revised draft included more situations in which religious organizations would be subject to legal punishment.[114] One such situation was the failure to make a formal report to the government on how many landed properties a religious organization owned.[115] The original punishment for religious organizations that engaged in certain criminal conduct (gambling, violence, and sexual offenses) was also made more severe. In addition to revoking the status

[110] *Ibid* at 234-235.

[111] *Ibid*.

[112] *Ibid* at 235.

[113] *Ibid* at 236.

[114] *Ibid*.

[115] *Ibid* at 238.

of religious organizations as registered religious corporations, the government now has the right to remove the chairmen of those religious organizations.[116]

From this account it is apparent that government officials had a very different view on how religious organizations should be regulated than the representatives of religious groups and scholars of the research group. The government officials tended to see religion as a potential threat to the welfare of society and wanted religious organizations to be placed under strict control and subject to punitive measures. It appears that the government officials' view had a greater influence on the contours and orientation of the draft law. Based on this account, I suggest that the *RGA* is at least partly informed by the view that characterizes religion as a problem and a threat to the social order that must be contained.

C. Key provisions that restrict the autonomy of religious groups

Several provisions of the current version of the draft law, which was proposed by the Ministry of the Interior in May 2015, continue to convey a message of distrust of religion and also embody a form of state paternalism.

For example, Article 15 of the draft law bars a person from being appointed to the position of chairperson of a religious corporation, if he or she has committed certain criminal offenses or unlawful acts in the past. Section 1 of Article 15 stipulates that anyone who has "committed criminal offences under 'Organized Criminal Prevention Act,' sexual offences, or crimes related to sexual moralities, and has been convicted by the courts" is not qualified

[116] *Ibid* at 237.

to hold the position of chairperson of a religious corporation.[117] Another condition that would disqualify a person from taking the chairperson position is if he or she had been "dishonored for unlawful use of credit instruments, and the term of such sanction has not expired yet" (Section 3).[118]

The government's intention here is to ensure that the leaders of religious organizations are morally qualified for their positions so as not to do damage to the interests of the organizations and larger society. In my view, however, Article 15 is an expression of state paternalism and interferes with religious groups' freedom to choose their own leaders. After all, why should the state be concerned that members of a religious organization may not be capable of selecting a person to be their leader in the best interest of the group? And, what if a religious group does not want a seemingly "moral" person to lead them but a person who best embodies their spiritual message (one who may be a "sinner" in the eyes of the state)?

Another example of state paternalism is Article 20 of the draft law, which regulates the property of religious corporations. Article 20 prohibits religious corporations from disposing of or encumbering the property with which they incorporate unless in one of three circumstances.[119] In two of these three circumstances in which religious corporations may dispose of or create encumbrance on their property, approval from the competent authority

[117] *RGA* (draft), art. 15 sec. 1 (Author's translation from Chinese).

[118] *Ibid*, art. 15 sec. 3 (Author's translation from Chinese).

[119] *Ibid*, art. 20 sec. 2. The three circumstances are: (1) the need to demolish and relocate the buildings of religious corporations due to public construction projects. (2) A religious corporation plans to reconstruct or remodel their real estates on the original site, or to relocate and reconstruct their real estates, and such a plan has been approved by the competent authority. (3) Unexpected conditions arises which generate the need to dispose of the property, and the religious corporation's plan for so doing has been approved by the competent authority.

is required. For example, if a religious corporation would like to transfer ownership of its church building, it first needs to check whether its situation falls into one of the three circumstances described in Article 20 of the draft law. The corporation is then required to submit its plan for transferring ownership of its building to the government for approval, except in situations in which it is necessary to demolish and relocate the building due to public construction projects.

In the "explanation" section attached to the text of Article 20, the Ministry of the Interior indicates that the regulation, which in principle forbids religious corporations from disposing of or creating encumbrance on their properties, is intended to "ensure the continued operation of religious corporations."[120] Such legislative intent raises a number of crucial questions. First, should a secular state that has an obligation of neutrality toward religious and non-religious groups concern itself with the survival and continued operation of religious organizations? Second, is it legitimate for the state to assume the role of the guardian of religious groups, which are perceived as needing the guidance of the state to avoid putting themselves in dangerous situations by disposing of their property in an unreasonable way? Not surprisingly, Article 20 and its regulation of the ways in which religious groups manage their properties has drawn criticism from religious leaders as well as from scholars who are sympathetic to religious communities. For example, in discussing the property regulation in the draft *RGA*, Chang Chia-Lin and Tsai Shiou-Jing argue that "the state adopts a paternalistic position and monitors religious organizations on behalf of the general public. From the state's perspective, the properties of religious organizations are *public properties*, which are entrusted to religious organizations for them to own and manage

[120] *Ibid*, art. 20 (explanation).

temporarily. Therefore, the state believes that it is entitled to intervene according to the law if religious organizations want to dispose of those properties."[121]

Lastly, this draft law contains many provisions that authorize the government to make further regulations. Ten provisions end with the language: "…shall be prescribed by the central competent authority."[122] This phrasing has the effect of changing the draft law from a basic-law type of statute with only general principles to a law with various detailed regulations and directions. It also conveys a message of distrust of religious organizations' ability to govern themselves, as more regulations typically mean less latitude for religious organizations to autonomously manage their internal affairs.

Article 15 and Article 20, along with many other provisions of the draft law that authorize the government to make further regulations, place a limit on religious organizations' right to autonomy. It seems that these provisions all fit in with the public narrative of 1996 that describes religion using the adjective "*luan*," meaning chaotic or unruly. If religion is regarded as an unruly social actor that is the source of many problems, a logical conclusion that flows from such a view is that a degree of state paternalism in regulating religion is justified and religious organizations need to be placed under strict supervision of the state.

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[121] Chang Chia-Lin & Tsai Shiou-Jing, "國家對〈宗教團體法草案〉的思維與詮釋" ["The State's View and Interpretation of the Draft Religious Groups Act"], in Chen Zhi-Jie & Wang Yun eds, *法治的侷限與希望: 中國大陸改革進程中的台灣、宗教與人權因素* [*The Limit and Hope of Legalism: The issues of Taiwan, Religion, and Human Rights in China's Reform*] (Taipei: Angle Publishing House, 2015) 175 at 207 (emphasis added).

[122] *RGA* (draft), art. 3 sec.2; art. 8 sec. 4; art. 20 sec.4; art. 22 sec.2, sec.5; art. 23 sec.3; art. 30 sec.5; art. 39 sec.3; art. 44 sec.2; art. 50.

V. Concluding Remarks: Religion as a Problem

In this article, I discussed three legislative regulations—the *ASTS*, Article 7 of the *PSA*, and the draft *RGA*—that form the basis of the relationship between the state and religious groups in Taiwan. Each of the three regulations has roots in a hostile social atmosphere toward religion. Of course, these laws also differ in many ways. The *ASTS* and Article 7 of the *PSA* (or, to be more precise, Article 5 of the *PSR*) were the products of a turbulent era in which China struggled to free itself from the domination of Western imperialism and re-emerge as a strong and unified nation. Such an anti-imperialist sentiment was not part of Taiwan's sociocultural landscape in 1996. The three legislative regulations can also be distinguished by their respective targets. Buddhist and Taoist institutions are the main targets of the *ASTS*. Article 5 of the *PSR* was aimed at Christianity and its mission schools. While the draft *RGA* is intended to apply equally to all religious groups, the main "culprits" of the so-called "religious chaos" of 1996 appear to be smaller and non-traditional religious groups, although institutionalized religions received their share of criticism as well.

Despite these differences, I suggest that all three legislative regulations were primarily informed by a particular view of religion as a problem and an anomaly that must be contained and controlled to prevent it from causing havoc in society. Many mainland Chinese intellectuals and educational elites held such views in the 1920s. I believe such a view also underlay the Taiwanese government officials' proposal in the early 2000s to introduce more punitive measures into the draft *RGA*. Accordingly, I argue that the view of religion as a problem is a fundamental element of Taiwan's (or the Republic of China's) tradition of regulating religious groups.

It should be noted that some tension exists between my argument and a more positive view of the state-religion relationship held by some scholars in Taiwan. For example, after a comprehensive examination of the interaction between the state and religious groups in the second half of the 20th century, Professor Cheng-Tian Kuo concluded the following:

> State-religion relations in Taiwan have developed from the control over religion exercised by the Leninist state in the period of 1945-87, through separation of state and religion during 1987-2000, to a relationship of checks and balances since 2000. The Taiwanese people probably enjoy more religious freedom now than their counterparts in some Western democracies, free of serious religious conflicts or significant complaints about religious discrimination. At the same time, religious leaders and groups probably enjoy more political rights than their counterparts in some Western democracies without major political controversies or significant complaints about political discrimination.[123]

I agree that the Taiwanese people currently enjoy a high level of religious freedom that is the envy of many parts of the world. However, I would suggest that we remain cautious in considering what lies ahead for the state-religion relationship in Taiwan. One reason for caution is the ever-present discourse of "religion as a problem" in Taiwanese society. Sometimes the effects of this discourse may have been offset by other voices within society that are committed to promoting the rights and interests of religious communities. However, it is too early to say that this discourse has completely disappeared from Taiwan's sociocultural landscape and no longer plays a role in Taiwan's policy of regulating religious

[123] Cheng-Tian Kuo, "State-Religion Relations in Taiwan: From Statism and Separatism to Checks and Balances" (2013) 49 Issues & Studies 1 at 31.

organizations.[124] Perhaps cautious optimism is needed in the examination of the future of the state-religion relationship in Taiwan.

[124] Recent public debate on same-sex marriage in Taiwan seems to have provided an occasion for the "religion as a problem" discourse to re-enter into public conversation. In the past several years, some members of Taiwan's legislature who are committed to the promotion of gay rights have been attempting to push the legislature to pass an amendment to the *Civil Code* that would legalize same-sex marriage. Their initiatives to legalize same-sex marriage have not been successful, in large part due to the so-called "Pro-Family Movement" launched by Taiwanese conservative Christianity. Despite having been "politically inactive for decades," conservative Christianity in Taiwan "has publicly mobilized itself since the early 2010s, particularly in reaction to the gay-rights movement." (Ke-hsien Huang, "'Culture Wars' in a Globalized East: How Taiwanese Conservative Christianity Turned Public during the Same-Sex Marriage Controversy and a Secularist Backlash" (2017) 4 Review of Religion and Chinese Society 108 at 108.) However, as Ke-hsien Huang observes, the conservative Christians' recent public engagement against gay marriage has spurred "a secularist backlash." (*Ibid*.) For example, "anti-religion webpages such as 'Get out of Taiwan, Evil (Christian) Cults' (邪教，滾出台灣) and 'Bastard Jesus' (靠北耶穌) were created" to openly attack Christian churches and biblical teachings. (*Ibid* at 125). A progressive pundit referred to participants of a mass demonstration staged by Christian organizations to protest against gay marriage as being "brain-damaged" many times in one of his articles. (*Ibid* at 127). That pundit further claimed: "If this kind of church people keeps oppressing those who hold views different from one's own and raises antiquated religious banners to intervene in educational, political, and social policies, it means that we have returned to European medieval times completely." (Quoted from *ibid* at 129). These language and remarks provide some evidence that religion in Taiwan continues to be cast in a negative light and portrayed as a major obstacle to achieving social progress.

Chapter 2. Robust Protection for Religious Organizations: Recent Developments in Taiwan's Constitutional Jurisprudence and Scholarship

I. Introduction

There are three legislative regulations—the *Act of Supervision of Temples and Shrines*, Article 7 of the *Private School Act*, and the draft *Religious Groups Act*—that form the basis of the relationship between the state and religious groups in Taiwan, as discussed in chapter 1. I have argued that all three of them are premised primarily on the understanding of religion as a problem. There is nevertheless a contrasting view of religion that has been gradually developed in Taiwan's recent constitutional jurisprudence as well as in scholarly discussion. Rather than seeing religion as a problem to be regulated by the state, this newly developed view suggests instead that religious organizations are entitled to robust constitutional protection against state intervention. This chapter is devoted to explaining the emergence and characteristics of this new approach to the autonomy of religious organizations.

Section II describes how this new approach to religious autonomy emerged in both Taiwan's constitutional jurisprudence and legal scholarship. Section II. A first examines Taiwan's constitutional jurisprudence on the autonomy of religious organizations. It presents in chronological order the important decisions of the Constitutional Court of Taiwan (formally known as the Council of Grand Justices) on religious freedom and religious autonomy. As I indicate there, the view that religious organizations deserve robust constitutional protection had not emerged until 2004 with Justice Wang He-Xiong's

concurring opinion in Judicial Yuan Interpretation No. 573. In that opinion, Justice Wang advocated for a strict separation between religious groups and the state and proposed several doctrines and principles which he saw as essential for this strict separation. Another judge, Justice Chen Shin-Min, also endorses strongly a high level of constitutional protection for the autonomy of religious organizations to manage their internal affairs. His position on religious autonomy was articulated in his concurring opinions in J.Y. Interpretations No. 728 and No. 733. Section II. B turns to a review of the scholarly discussion on religious autonomy. This section focuses on the work of Professor Hsu Yu-Dian, who argues in his most recent book that there are certain aspects of religious belief and practice that deserve "absolute respect and protection."

Section III explores whether there are particular historical and political factors in the Taiwanese context that are conducive to the development of the view that religious organizations are entitled to robust protection. I identity two such factors in this section: the protection of religious freedom as a way for Taiwan to win international support, and the contributions of the Presbyterian Church of Taiwan to the nation's democratization.

Finally, in section IV, I suggest that there is an interesting similarity between the newly emerging approach to religious autonomy in Taiwan and the "jurisdictional conception of church autonomy," which in recent years has received increasing attention in the law and religion literature in the U.S. I conclude this section by providing a brief roadmap of the direction of the chapters that follow.

II. The emergence of the view that religious organizations are entitled to robust protection

A. Constitutional jurisprudence

1. J.Y. Interpretation No. 490—the no-exemption rule

In October 1999, the Constitutional Court of Taiwan rendered Judicial Yuan Interpretation No. 490,[1] in which the Court rejected the claim by the members of Jehovah's Witnesses that the obligation of military service violated their freedom of religion and that they have the right to be exempt from the obligation.

One of the appellants, Mr. Wu, was sentenced to eight years in prison for refusing to perform military service in 1987. He served his sentence for three years and nine months thanks to a commutation act in 1988. Article 5 of Taiwan's *Act of Military Service System*[2] stipulated that a person is prohibited from enlisting in military service if he has been sentenced to more than seven years in prison. However, according to Article 59 Section 2 of the *Enforcement Act of Act of Military Service System*,[3] the prohibition on enlisting is annulled if the person has not served his sentence for more than four years. Because Mr. Wu served his sentence for "only" three years and nine months, he was called to military service

[1] J.Y. Interpretation No. 490 (1 October 1999). An English translation of the Interpretation is available at <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=490> (accessed 25 October 2018).

[2] Bing Yi Fa (兵役法) [*Act of Military Service System*] (promulgated and effective June 17, 1933, as amended June 14, 2017) (R.O.C.).

[3] Bing Yi Fa Shixing Fa (兵役法施行法) [*Enforcement Act of Act of Military Service System*] (promulgated and effective February 19, 1947, as amended June 4, 2014) (R.O.C.).

twice more after his release from prison. His refusal to comply with the two military service calls led to two further prison sentences, in 1992 and 1995 respectively.[4] Other appellants experienced the similar plight of being put in jail several times. Therefore, the other claim they made, in addition to the religious freedom claim, was that their right against double jeopardy had been violated.[5] This claim, however, was also rejected by the Court. The discussion below focuses on the reasons given by the Court as to why the constitutional guarantee of freedom of religion does not confer a right to be exempt from the obligation of military service.

First, the Court defined freedom of religion as follows:

> Freedom of religious belief, one of the fundamental rights of the people, shall be protected by the constitution of a modern state governed by the rule of law (Rechtsstaat). Such a freedom ensures that the people shall have the freedom to believe in any religion and to participate in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious beliefs.[6]

The Court then divided freedom of religious belief into three sub-categories: "freedom of inner belief", "freedom of religious practices", and "freedom of religious association."[7]

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[4] See Brief of Appellant (Mr. Wu, 16 August 1997), J.Y. Interpretation No. 490.

[5] See *ibid*. See also Brief of Appellant (Mr. Hsu, 19 November 1998), Brief of Appellant (Mr. Chen 11 January 1999), and Brief of Appellant (Mr. Lee, 26 July 1999), J.Y. Interpretation No. 490.

[6] J.Y. Interpretation No. 490, *supra* note 1 in "Reasoning".

[7] *Ibid*. There is a difference in the translation of "*neizai xinyang ziyou*" (內在信仰自由) in the English version of Interpretation 490 and in the English version of Interpretation 573. While the same Chinese term, "內在信仰自由", was used in both Interpretations, the English version of Interpretation 490 translated it into "freedom of personal religious belief," and the English version of Interpretation 573 translated it into

Importantly, the Court suggested that these three sub-categories of religious freedom should be accorded different degrees of constitutional protection. Freedom of inner belief, which includes "an individual's ideas, speech, beliefs, and spirit," is an "absolute right," whereas freedom of religious practices and freedom of religious association are "relative rights."[8]

The question that follows is: what are the limitations on freedom of religious practices and freedom of religious association, since they are relative rights? The Court's answer to this question is the core of the decision. The Court pointed out: "Except for the freedom of inner belief that shall be absolutely protected and never be infringed upon or suspended, it is permissible for relevant state laws to constrain, if necessary and to the least restrictive effect, freedoms of religious practices and association."[9] The term "necessary and to the least restrictive effect" gives the impression that a law that limits the freedom of religious practices or freedom of religious association must be subject to a stringent standard of judicial review. However, immediately following this assertion, the Court made a statement that seems to contradict what it has just suggested: "[N]o one shall renounce the state and laws simply because of his/her religious belief. Thus, because believers of all religions are still people of the state, their basic responsibilities and duties to the state will not be relieved because of their respective religious beliefs."[10]

This is a categorical refusal of the possibility of religious exemption from state law. What the Court suggested is that as long as a person is a citizen of the state, he or she is

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"freedom of inner belief." In my view, "freedom of inner belief" is a more accurate translation and therefore I use it in place of "freedom of personal religious belief" throughout this chapter.

[8] *Ibid*.

[9] *Ibid*.

[10] *Ibid*.

obliged to comply with the law and has no right to be accommodated on the basis of religious beliefs. This means that state law always trumps freedom of religious practices and freedom of religious association. I believe this is the view that truly represents the Court's stance in this decision, because in the rest of the decision the Court did not conduct an interest-balancing analysis to determine whether compulsory military service with no exemption offered for conscientious objectors could be justified as being a "necessary" means of achieving a legitimate objective and infringes religious freedom "to the least restrictive effect." In particular, the Court did not explore whether there are other means, such as establishing the "alternative service program," that could be adopted to strike a better balance between the legislative goal and the protection of religious conscience.

In contrast, both of the two justices who wrote separate opinions considered and affirmed the legitimacy of the alternative service program. Take Justice Wang He-Xiong's partly dissenting opinion, for example. Justice Wang proposed in his opinion that, in dealing with the cases where the exercise of religious freedom is limited by citizenship obligations imposed by a law, "the standard of strict scrutiny" should be applied to examine the legitimacy of the law.[11] In applying the standard of strict scrutiny, Justice Wang continued, the Court should consider especially whether there exist alternative ways that infringe freedom of religion to a lesser extent. He then pointed out that the "alternative service program" has been established in many other countries—including Germany, the United States, and Austria—to accommodate religious believers' conscientious objection to combatant military service.[12] He called for a similar program to be provided under the *Act*

[11] J.Y. Interpretation No. 490 (J. Wang He-Xiong, partly dissenting).

[12] See *Ibid*.

of Military Service System, which he saw as a better way to balance the public interest in upholding the compulsory military service system and the constitutional guarantee of the protection of religious freedom.[13]

The lack of discussion on alternative service program in the majority opinion was curious because since March 1998—one year and a half before J.Y. Interpretation No. 490 was rendered—high-ranking government officials including the Minister of Defence and the Minister of the Interior had repeatedly announced that the government would introduce such a program, and the announcements were widely reported in the news.[14] It was not clear why the majority did not take the opportunity to express their view on the alternative service program, in contrast to the two justices who wrote separate opinions. On January 15, 2000, the Legislative Yuan passed a number of amendments to the *Act of Military Service System* and the *Enforcement Act of Act of Military Service System* to provide legislative grounds for the alternative service program.[15] The revised *Act of Military Service System* allows a person who refuses to perform military service on grounds of religious conscience to enroll in the alternative service program, but the duration of the alternative service will be eleven months longer than that of the ordinary military service.[16] According to the official figures released by the Ministry of the Interior, the first year of the implementation of the alternative service

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[13] See *Ibid*.

[14] See Chen Shin-Min, *法治國原則之檢驗* [*An Examination of the Principle of "A State Governed by the Rule of Law"*] (Taipei: Angle Publishing House, 2007) at 202.

[15] See Ling Pei-Jun et al, "常備兵役期縮短 新增替代役" ["The Duration of Ordinary Military Service is Shortened; the Alternative Service Program is Added"] *聯合報 United Daily* (16 January 2000) A2.

[16] See *ibid*.

program saw 28 members of Jehovah's Witnesses applied and granted permission to perform alternative service.[17]

Returning to J.Y. Interpretation No. 490, it is worth emphasizing that the "no exemption" rule established in the majority opinion applies not only to individual religious conscience, which is the main focus of this Interpretation, but also to the right to autonomy of religious organizations. As we have seen, the Court suggested that freedom of inner belief is an absolute right while freedom of religious practices and freedom of religious association are relative rights. Under such a dichotomy, freedom of religious practices—which denotes the aspect of religious freedom that involves individual conduct—and freedom of religious association are put into the same category and enjoy the same level of constitutional protection. If no exemptions can be granted in cases where individual religious conscience conflicts with state law, there is no reason, based on the majority opinion in this Interpretation, why an exemption should be granted to a religious institution whose decisions violate the requirements of the state law. Both individual religious conscience and the associational rights of religious organizations have no ground to challenge the authority of state law.

J.Y. Interpretation No. 490 drew widespread criticism from constitutional scholars. Professor Huang Chao-Yuan of National Taiwan University was perhaps the one who offered the most powerful criticism of the Interpretation. He laments the fact that the term

[17] See the Ministry of the Interior, "The Statistics of Enrollment at the Alternative Service Program on the basis of Religion: 2000-2015", retrieved from <http://data.moi.gov.tw/moiod/Data/DataDetail.aspx?oid=9BB2C6EB-5E3D-4B51-A077-68675C86D67F>.

"necessary and to the least restrictive effect" was used in a light way.[18] That is, although the majority of the Court employed such a term and indicated that this is the standard against which the legitimacy of a limit on freedom of religious practices and freedom of religious association must be examined, in reality the majority did not apply such a standard to analyze the case before the Court. Such an important term, Professor Huang suggests, deserves to be used and applied in a more careful way in the Court's decisions.[19] He also criticizes the total lack of sympathy in the majority opinion for the miserable situation of the members of Jehovah's Witnesses who were put in jail again and again for their conscientious objection to military service. The opinion was filled with "abstract, cold, yet highly problematic statements," while "showing no compassion [for the members of Jehovah's Witnesses] at all."[20] This is disgraceful, he points out, especially in view of the fact that Taiwan (at the end of the 1990s) has moved away from an old era and is now entering into a new democratic era.[21]

[18] See Huang Chao-Yuan, "信上帝者下監獄?—從司法院釋字第四九〇號解釋論宗教自由與兵役義務的衝突" ["'Those Who Believe in God Go to Jail?' An Analysis of J.Y. Interpretation No. 490 and the Conflict between Religious Freedom and Military Service Obligation"] (2000) 8 Taiwan Law Journal 30 at 39.

[19] See *ibid*.

[20] *Ibid* at 44.

[21] See *ibid*.

2. J.Y. Interpretation No. 573—paternalistic concerns

(a) The majority opinion

Judicial Yuan Interpretation No. 573[22] was the first case in which the Constitutional Court of Taiwan directly addressed the issue of the autonomy of religious organizations. In this Interpretation, the Court struck down two articles of the *Act of Supervision of Temples and Shrines* (*ASTS*), a law which we have discussed in some detail in the previous chapter. The first of the two articles struck down by the Court was Article 2 Section 1, which subjected Buddhist temples and Daoist shrines, but not institutions of other religions, to the regulation of the *ASTS*.[23] The Court struck it down because it violated "the principles of religious neutrality and religious equality as required by Articles 13 and 7 of the Constitution."[24] The second article invalidated by the Court was Article 8, which stipulated that a temple's real estates and ritual objects shall not be disposed of, or altered, unless the plan for so doing has been approved by both its parent association and by the government.[25] The Court declared this article unconstitutional on the grounds that it "failed to give considerations to the autonomy of a religious organization"[26] and that it infringed the

[22] J. Y. Interpretation No. 573 (27 February 2004). An English translation of the Interpretation is available at <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=573> (accessed 25 October 2018).

[23] Article 2 section 1 of the *ASTS* stipulated: "The temple, its property and ritual objects shall be under the supervision of this Act, besides other specifications in the law."

[24] J. Y. Interpretation No. 573, *supra* note 22 in "Reasoning."

[25] Article 8 of the *ASTS* stipulated: "The real properties or ritual objects of a temple shall not be disposed of or modified unless and until the decision has been ratified by its related religious association and thereafter approved by the government authorities."

[26] J. Y. Interpretation No. 573, *supra* note 22 in "Holding."

property right of a temple. The following quote is the core of the Court's discussion on the autonomy of religious organizations in this Interpretation:

> Article 13 of the Constitution provides for the people's freedom of religious belief… The scope of such protection extends to the freedom of inner belief, freedom of religious practices, and freedom of religious association. (See J.Y. Interpretation No. 490.) It is impossible to completely separate the religious practices engaged in and religious association attended by the people from the heartfelt, devout religious convictions held by the same. In respect of a religious association established and attended by the people for the purpose of observing their religious beliefs, autonomy should be given to it as far as its internal organization and structure, personnel and financial administration are concerned. Any religious regulations, if not made to preserve the freedom of religion or any significant public interests, and if not being necessary and [infringing rights] to the least restrictive effect, should be deemed to be in conflict with the constitutional intent to protect the people's freedom of belief.[27]

This quote contains several important points. First, The Court recognized that freedom of religious belief guaranteed in Article 13 of the ROC Constitution includes the protection of the autonomy of religious associations. While the Court in J.Y. Interpretation No. 490 had pointed out that "freedom of religious association" is one of the three sub-categories of freedom of religious belief guaranteed by the Constitution, this was the first time that the Court invoked the term "the autonomy of religious associations" and explicitly recognized its place in the Constitution. Second, the Court revised its previous position in J.Y. Interpretation No. 490 with regard to the dichotomy between freedom of inner belief, which is an "absolute right," and freedom of religious practices and freedom of religious

[27] *Ibid* in "Reasoning."

association, which are "relative rights." The Court now suggested that "[i]t is impossible to completely separate the religious practices…and religious association...from the heartfelt, devout religious convictions." This is a more accurate understanding of the nature of religious activities, either engaged in individually or collectively. Few, if any, "outward" religious activities are not motivated or required by "inner" religious beliefs. Therefore, the limit on outward religious activities is also a limit on the inner religious beliefs that compel believers to engage in those activities. It is thus unreasonable to try to distinguish between outward activities on the one hand, and inner beliefs on the other, and accord them different levels of constitutional protection.[28]

Perhaps the most important part of this quote is the statement regarding the standard of judicial review that must be applied when the autonomy of religious organizations is infringed by the state law. The Court stated: "Any religious regulations, if not made to preserve the freedom of religion or any significant public interests, and if not being necessary and [infringing rights] to the least restrictive effect, should be deemed to be in conflict with the constitutional intent to protect the people's freedom of belief." On the face of it, this is a very stringent standard of review. A closer look, however, reveals some negative implications such a standard may have for the autonomy of religious organizations. To begin, the term "religious regulations" (or "laws targeting religion") at the beginning of this quote

[28] For a criticism of the dichotomy created by the majority in Interpretation 490 between freedom of inner belief, on the one hand, and freedom of religious practices and freedom of religious association, on the other, see Chen Shin-Min, *supra* note 14 at 190. See also Chen Shin-Min, "憲法宗教自由的立法界限—評「宗教團體法」的立法方式" ["Constitutional Protection of Religious Freedom and the Limitations on Legislative Power: A Comment on the Draft Bill of 'Religious Groups Act'"] (2006) 52:5 The Military Law Journal 1 at 6.

indicates that the standard of review suggested by the Court here is meant to be applied only in cases involving a law designed specifically to regulate religious affairs, such as the *ASTS*. The Court did not mention how a neutral law of general applicability should be reviewed if it violates the right to autonomy of religious organizations. Therefore, it can be argued that the "no exemption" rule established by the majority in J.Y. Interpretation No. 490 remains the guiding principle in the situation where the decision of a religious organization comes into conflict with a neutral, generally applicable law.

Furthermore, the Court noted that a religious regulation (a law targeting religion) can survive judicial review if it is enacted "to preserve the freedom of religion" or other "significant public interests." The meaning of "to preserve the freedom of religion" is somewhat ambiguous. It can be understood as implying that the autonomy of a religious organization may be limited if it operates in a way that violates the *individual religious conscience* of its members. Alternatively, it can be understood as suggesting that sometimes state supervision and intervention are necessary in order to ensure the healthy development of religious organizations. The latter reading of "to preserve the freedom of religion" is probably more consistent with what the author of the majority opinion really meant because it has a better fit with other arguments made in the opinion. For example, despite the fact that the Court invalidated Article 8 of the *ASTS*, it pointed out that the article was based on a *legitimate* goal (the article was invalidated on the grounds that it did not adopt the least restrictive means of achieving the goal). The Court asserted: "The said provision is designed to protect the properties of any kind of temple not listed in Article 3 of said Act, preventing the real properties and ritual objects from improper disposition or modification that may be detrimental to the spread and the continued existence of the beliefs of the temple community.

No doubt, the foregoing are legitimate grounds for such provision."[29] Apparently, such a goal—*preventing the improper disposition of temple property so as to ensure the spread and the continued existence of religious beliefs of the temple community*—does not concern any "significant public interest"; rather, it concerns only the interests of religious communities. So why is this goal still regarded by the Court as legitimate, despite that it has nothing to do with public interests? The answer is that it falls into the category of "to preserve the freedom of religion," understood as meaning "to ensure the healthy development of religious organizations."

However, there is a sense of paternalism in suggesting that the state is justified in intervening in religious affairs for the purpose of ensuring the healthy development of religious organizations. Indeed, the goal identified by the Court as providing a legitimate ground for Article 8 seems to imply that religious institutions may not be able to sustain themselves and fulfill their mission of spreading religious messages without the supervision and guidance of the state. It implies that the state knows better than religious institutions themselves of how to advance towards their spiritual goals. By asserting that "to preserve the freedom of religion" is a legitimate ground for state regulation of religion, the Court opened the way for the state to intervene in the internal affairs of religious organizations based on paternalistic concerns.

[29] J. Y. Interpretation No. 573, *supra* note 22 in "Reasoning."

(b) Justice Wang's concurring opinion

Similar to what he did in J.Y. Interpretation No. 490, Justice Wang He-Xiong wrote a separate opinion in J.Y. Interpretation No. 573 that would have offered a stronger protection for religious freedom. In his concurring opinion, Justice Wang advocated for a strict separation between the state and religious groups. Quoting a famous line from John Locke's *A Letter Concerning Toleration*, "the care of souls cannot belong to the civil magistrate," he suggested that religious affairs belong to a sphere over which the state has no jurisdiction.[30] There must be "a bright line" (*jingwei fenming*), he claimed, that separates religious groups and the secular state.[31]

He went on to propose several doctrines and principles that would honor this bright-line separation between religious groups and the state. First, he proposed that civil courts should abstain from hearing cases which involve the interpretation of religious doctrine or which involve the internal organizational matters of a religious entity.[32] The constitutional prohibition on judicial involvement in controversies over religious dogma has long been recognized in the American jurisprudence, particularly since the decision of the U.S. Supreme Court in *Watson v. Jones*.[33] But this was the first time that such a concept appeared and was recognized in an opinion by the Justices of Taiwan's Constitutional Court.

Second, he strongly opposed legislative initiatives designed specifically to regulate the internal affairs of religious groups. He pointed out: "The state should not intervene in the

[30] See J. Y. Interpretation No. 573 (J. Wang He-Xiong, concurring).

[31] *Ibid*.

[32] See *ibid*.

[33] 80 U.S. 679 (1871). I will discuss this decision in more detail in chapter 3.

internal affairs of religious organizations, which should be regulated by religious organizations themselves. If the state were allowed to comprehensively regulate the way a religious group organizes, the content of their religious activities, or the group's internal administration, this would no doubt result in state predominance over religion. Religious beliefs would thereby be fixed in the particular value mode or goal determined by the state."[34] It is worth noting that, by comparison, the majority opinion took a relatively conservative stance on this issue—although it struck down two articles of the *ASTS*, it did not take a step further to question the legitimacy of the law as a whole.

Justice Wang also held a different view on the specific issue of state regulation of temple property from that of the majority. He wrote: "The ways in which a religious organization manages or disposes of its property to achieve the goal of following religious duties or spreading its faith belong to the realm of religious autonomy. The state has no obligation nor right to maintain what it views to be a proper condition of the continued existence, independence, or integrity of a religious organization. State intervention for this purpose would be a violation of the principle of state neutrality."[35] According to Justice Wang, the state cannot justify its intervention in the ways in which a religious organization manages its property by claiming that the intervention is necessary for the continued existence and development of the religious organization. This position is in contrast to that of the majority opinion, which held that the state may limit the autonomy of religious organizations for the purpose of "preserv[ing] the freedom of religion." Justice Wang's

[34] J. Wang He-Xiong, *supra* note 30.

[35] *Ibid*.

position leaves no room for state paternalism in regulating the internal affairs of religious organizations.

I see Justice Wang's concurring opinion in J.Y. Interpretation No. 573 as representing the advent of an approach to religious autonomy that provides religious organizations with robust protection. Such an approach, however, had not been further developed in Taiwan's constitutional jurisprudence until eleven years later by Justice Chen Shin-Min, who was appointed to the Court in 2008. In the following section, I examine Justice Chen's position on the constitutional protection of the autonomy of religious organizations, which was articulated in two concurring opinions he wrote in 2015.

3. Justice Chen Shin-Min's position on the constitutional protection of religious autonomy[36]

Justice Chen Shin-Min began to develop his understanding of the constitutional protection of the autonomy of religious organizations in J. Y. Interpretation No. 728,[37] which was rendered in March 2015. This Interpretation considered the issue of whether the constitutional protection of gender equality was applicable in a private association formed for the purpose of ancestor worship. While strictly speaking the association in question was not a religious organization, Justice Chen, in explaining why the internal governance of the

[36] This section reproduces what I have written in Rung-Guang Lin, "Towards Religious Institutionalism? The Future of the Regulation of Religious Institutions in Taiwan" (2017) 12:1 National Taiwan University Law Review 87 at 91-93.

[37] J.Y. Interpretation No. 728 (20 March 2015). An English translation of the Interpretation is available at: < http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=728> (accessed 25 October 2018).

association should be given a high degree of protection, nonetheless made a reference to religious organizations and the constitutional protection they enjoy in his concurring opinion.

First, Justice Chen asserted that the autonomy of religious organizations was a sub-category of the constitutional protection of freedom of association. He insisted, however, that the freedom of association of religious groups is unique among other types of freedom of association. He wrote:

> With regard to freedom of association, the right to freedom of association of ordinary nature can be limited by general legislation; courts may adopt a lower level of scrutiny in the adjudication of cases involving this type of freedom of association. The constitutional protection for political parties, however, is stronger than the protection for the freedom of association of ordinary nature, since political associations are closely related to the practice of democracy and serve to sustain a nation's rule of law…Religious groups enjoy an even greater protection for their autonomy than political parties in the constitutional system of freedom of association.[38]

This is a clear recognition that religious organizations occupy a distinctive place in the ROC Constitution. What is suggested here is that, as a matter of law, religious organizations can be distinguished from other kinds of associations and that they deserve a higher degree of constitutional protection. Since religious associations enjoy a higher degree of constitutional protection, they might be able to claim an immunity from certain regulations with which the other voluntary associations are required to comply.

[38] J.Y. Interpretation No. 728 (J. Chen Shin-Min, concurring).

Second, Justice Chen asserted that it was illegitimate to intervene in the operation of religious organizations even for the purpose of enforcing gender equality. He wrote,

> Under state law religious organizations should be guaranteed to enjoy the greatest extent of autonomy with regard to matters including the ways in which they organize, their membership requirements and duties, the interpretation of doctrine and the conducting of rituals. The autonomy of religious organizations is so crucial that it should be accorded the strongest constitutional protection…Accordingly, constitutional clauses on human rights protection are not necessarily applicable within the confines of a religious organization. For example, the principle of gender equality cannot be invoked as a basis upon which to limit the operation of religious groups.[39]

In the previous quote we see that religious organizations are not necessarily subject to a general governmental regulation. Here Justice Chen went on to suggest that, even if a regulation is based on highly recognized public values such as the principle of gender equality, it still should give way to the concern for the protection of the autonomy of religious organizations.

Justice Chen further developed his view of the autonomy of religious organizations in J.Y. Interpretation No. 733,[40] which was decided in October 2015. Again, the issue considered by the Court in that Interpretation did not involve a religious organization; rather, it concerned whether a teachers' association may select its leader in the way that the majority of its members choose without state intervention. However, in his concurring opinion,

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[39] *Ibid*. He then referred to the traditional practice in Catholicism and Islam of allowing only male members to serve as clergy and endorsed the constitutional legitimacy of this practice.

[40] J.Y. Interpretation No. 733 (30 October 2015). An English translation of the Interpretation is available at <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=733> (accessed 25 October 2018).

Justice Chen took the opportunity to emphasize that the state had no right to require a religious organization's selection process for its clergy or leader be carried out democratically.[41] According to him, neither the principle of gender equality nor the principle of democracy could constrain the internal governance of religious organizations.

4. Summary

As illustrated by the discussion above, Taiwanese constitutional jurisprudence has in the past two decades moved gradually in the direction of strengthening the protection for the autonomy of religious organizations. J.Y. Interpretation No. 490 categorically rejected the possibility of religious exemption from the obligations imposed by state law. This no-exemption rule applies both to individual religious practices or conscience and to the activities of a religious association. J.Y. Interpretation No. 573 is certainly more progressive vis-à-vis Interpretation 490, in that it explicitly recognized the place of the autonomy of religious organizations in the ROC Constitution. However, the majority opinion in Interpretation 573 opened the door for the state to regulate religious affairs based on paternalistic concerns. Justice Wang He-Xiong, by contrast, firmly rejected the legitimacy of state intervention on the basis of paternalistic concerns, arguing that there must be a bright line separating church and state. Justice Chen Shin-Min argued strongly against state interference with the activities of a religious organization as well, suggesting that the autonomy of religious organizations outweighs other constitutional values, especially in

[41] See J. Chen Shin-Min, *supra* note 38.

cases that involve the appointment of clergy. Both Justice Wang and Justice Chen view religious organizations as deserving to enjoy significant protection against state intervention.

B. Scholarly discussion on the autonomy of religious organizations

The view that religious organizations should be accorded robust protection against state intervention is echoed in recent scholarly discussion on religious freedom. I focus here on the works of Professor Hsu Yu-Dian of National Cheng Kung University, who is one of the most influential and prolific writers on the issues related to religious freedom in Taiwan. In his most recent book, *Religious Organizations, Law on Religion, and Religious Education*,[42] Professor Hsu proposes a unique view on the autonomy of religious organizations that would basically free them from most, if not all, of the regulations of state law. In what follows, I introduce his view by discussing how he treats the issue of where the limitations on the right to autonomy of religious organizations lie.

As a German-trained scholar, Professor Hsu approaches the issue of the limitations on religious autonomy by borrowing two German legal concepts originally used in the context of theoretical discussion on university self-government: "Autonomie" (autonomy) and "Selbstverwaltung" (self-administration). These two concepts, as they were originally used in German legal scholarship, represent two major categories under which the internal affairs of a university are to be classified.[43] The two categories of university affairs are then accorded different levels of constitutional protection respectively: those affairs that are

[42] Hsu Yu-Dian, *宗教團體，宗教法制與宗教教育* [*Religious Organizations, Law on Religion, and Religious Education*] (Taipei: Angle Publishing House, 2014).

[43] See *ibid* at 29.

classified into the "Autonomie" category enjoy a higher level of protection while the affairs that belong to the "Selbstverwaltung" category enjoy only limited protection.[44]

Professor Hsu suggests that this conceptual distinction can be invoked in the context of religious autonomy as well. An internal affair of a religious institution should be classified into the "Autonomie" category, he claims, if it is connected to "the individuals' perception and understanding of religious doctrine" and "contributes to the religious self-fulfillment of the individuals."[45] Importantly, he suggests that the "Autonomie"-type religious affairs deserve "*absolute respect and protection*."[46] Similarly, he claims that: "The state is prohibited from intervening in a religious affair that involves religious self-fulfillment."[47] This last quote has no provisos being attached to it.

On the other hand, a religious affair falls into the category of "Selbstverwaltung" if it does not contribute to the religious self-fulfillment of the individuals.[48] Although this type of religious affairs are not entitled to the same level of protection as that accorded to the "Autonomie"-type religious affairs, it does not mean that they are necessarily and automatically subject to state regulation. Professor Hsu suggests that state regulation of this type of religious affairs still has to pass the examination of "the principle of legal preservation" (the limit shall be prescribed by law) and "the principle of proportionality" (appropriate balance between rights and objectives).[49]

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[44] See *ibid* at 30.

[45] *Ibid* at 31.

[46] *Ibid*.

[47] *Ibid* at 32.

[48] See *ibid* at 31.

[49] See *ibid* at 32.

Applying the dual requirement of "legal preservation" and "proportionality" to examine the limit on the "Selbstverwaltung"-type religious affairs—those activities engaged in by religious organizations yet having nothing to do with religious self-fulfillment—could result in the state's ability to regulate the activities of religious organizations being significantly restricted. Take the obligation of religious organizations to submit an annual financial report, which is required by Article 23 of the draft *Religious Groups Act*, for example. Professor Hsu suggests that the decision of a religious organization regarding whether or not to disclose its financial condition is a "Selbstverwaltung"-type activity.[50] In other words, the state regulation that requires religious organizations to disclose their financial information would not affect their understanding of religious doctrine nor would it pose a threat to the groups' religious self-fulfillment.[51] However, he argues that such a regulation would nonetheless fail the proportionality test. In particular, he does not think there exists any legitimate public interest that provides ground for the state to require religious organizations to submit financial reports.[52] In laying down such a requirement, he notes, the state may want to promote trust between individual members and the religious groups to which they belong.[53] The state may also want to help outsiders to make an informed decision as to whether or not to join a particular religious group.[54] However, he points out that the relationship between individual believers and a religious group, or the relationship between the potential members and a religious group, is by nature a *private relationship*, which

[50] See *ibid* at 60.

[51] See *ibid*.

[52] See *ibid* at 63-64.

[53] See *ibid* at 61.

[54] See *ibid* 64.

should be governed by the principle of freedom of association.[55] Such a private relationship does not generate any public concern on the basis of which the state may justify its regulation of the financial dealings of religious groups.[56]

Let us not forget that, under Professor Hsu's framework, the dual requirement of legal preservation and proportionality is meant to be a standard against which the regulation of the "Selbstverwaltung"-type activities is to be examined. With regard to the "Autonomie"-type religious affairs, Professor Hsu claims that they deserve "*absolute respect and protection*," as we have seen. This implies that the state has no jurisdiction at all over those matters that can be defined as contributing directly to the religious self-fulfillment of the members of a religious community. The education of children in accordance with religious beliefs, for example, can certainly be seen as an activity that is intimately connected with the religious self-fulfillment of religious parents and communities. Although Professor Hsu has not elaborated on his position on religious education in a private institutional setting, it seems that his approach, if strictly applied, would recognize the authority of religious communities over such activity to the extent that any form of state intervention is prohibited. Religious groups would thus enjoy a significant level of freedom and autonomy under such an approach.

The absolute protection for the "Autonomie"-type religious affairs, combined with the dual requirement that a limit on the "Selbstverwaltung"-type activities has to meet, form an extremely high standard for the state regulation of religious organizations. As I have

[55] See *Ibid*.

[56] See i*bid*.

suggested, such an approach could free religious organizations from most, if not all, of the regulations of state law.

III. Historical and political factors that are conducive to the development of the new approach to religious autonomy

In the previous chapter I explored the historical backgrounds that helped shape the discourse of "religion as a problem" in Taiwan's tradition of state-religion relationship. While I do not see there are parallel historical backgrounds that directly gave rise to the contrasting view that religious organizations deserve robust constitutional protection, I do think there are certain historical/political factors in the Taiwanese society that are conducive to, or create space for, the development of such a view. This section identifies and discusses two such factors: (1) the protection of religious freedom as a way for Taiwan to earn international support; (2) the contributions to Taiwan's democratization made by the Presbyterian Church of Taiwan.

A. The protection of religious freedom as a way to win international support

The protection of religious freedom has come to be seen by many in Taiwan as a defining characteristic that distinguishes the island nation from China, and an important ground for Taiwan to win international recognition and support. Take the first Asia-Pacific Religious Freedom Forum, which was held in Taiwan on February 18-21, 2016, for example. This forum was jointly hosted by US-based Christian human rights organization China Aid,

US-based watchdog Freedom House, and Taiwan's Democratic Pacific Union.[57] The participants of this forum include religious freedom advocates, parliamentarians, government representatives, and religious leaders from 27 countries.[58] This event attracted considerable attention from the politicians in Taiwan, especially those from the governing Democratic Progressive Party (DPP). The chair of the forum was Annette Lu, an influential DPP member who served as Taiwan's Vice President from 2000 to 2008. The press conference for the signing of a declaration at the forum —"Taiwan Declaration for Religious Freedom"— was hosted by the Speaker of Taiwan's Legislative Yuan, Su Jia-Chyuan, who is also a well-respected member in the DPP.[59]

Why was this forum highly valued among DPP politicians? One of the reasons, I believe, is that this event was an important opportunity to showcase Taiwan as a champion of religious freedom. The declaration signed at the forum includes a statement that acknowledges Taiwan's record for protecting human rights, including freedom of religion: "Whereas religious freedom advocates from both government and non-governmental sectors and religious leaders representing 27 countries gathered in Taiwan, *a model for the Asia Pacific region in promoting human rights and freedom of religion or belief*, to create mechanisms and partnerships and collectively commit to advancing freedom of religion or belief and related human rights in the Asia Pacific."[60] To some DPP politicians, presenting

[57] See Stacy Hsu, "Lu Touts Religious Rights as Forum Nears", *Taipei Times* (17 February 2016) online: <http://www.taipeitimes.com/News/front/archives/2016/02/17/2003639544> (accessed 25 October 2018).

[58] See *ibid*.

[59] See He Hao-Yi, "26 國宗教代表 在台簽署宗教自由台灣宣言" ["Representatives from 26 countries signed 'Taiwan Declaration for Religious Freedom'"] *民報 Taiwan People News* (19 February 2016). Online: <http://www.peoplenews.tw/news/da5c052f-4ffc-4476-a458-2e64bb8b7213> (accessed 25 October 2018).

[60] "Taiwan Declaration for Religious Freedom", available online at: http://aprff.org/taiwan-declaration.html.

Taiwan as a champion of religious freedom on the international stage has an instrumental value: it serves to distinguish Taiwan from the repressive regime of People's Republic of China (PRC), thereby generating support and winning friendship for Taiwan, an internationally isolated country. For example, speaking of the significance of this forum to Taiwan, a prominent DPP legislator, You Mei-Nu, told the reporter: "Taiwan's international space is very limited due to the diplomatic suppression of China. However, freedom of religion guaranteed in the constitution has been fully realized in Taiwan. The government can therefore consider 'religion diplomacy' as a strategy [to gain more international support]."[61]

The idea that the protection of religious freedom domestically has implications for Taiwan's international relations is not new; even the KMT regime in the authoritarian era recognized that a degree of religious freedom had to be maintained to preserve the "image" and the legitimacy of the ROC. I have mentioned in the previous chapter that there had been discussions within the KMT government on the issue of replacing the *ASTS* with a new legislation since the 1950s.[62] According to Professor Zheng Zhi-Ming, during those internal discussions, the Ministry of Foreign Affairs had repeatedly expressed its opposition to the attempt of enacting a new law regulating religion.[63] The Ministry of Foreign Affairs was

(Emphasis added, accessed 25 October 2018).

[61] Kuo Bao-Sheng, "首次亚太宗教自由论坛的意义何在？" ["What is the significance of the first Asia-Pacific Religious Freedom Forum?"] *ChinaAid News* (24 February 2016). Online <http://www.chinaaid.net/2016/02/blog-post_97.html#.Vs5VMQ8T2mg.facebook> (accessed 25 October 2018).

[62] See chapter 1, II. B.

[63] See Zheng Zhi-Ming, *台灣宗教組織與行政* [*Religious Organizations and the Administration of Religious Affairs in Taiwan*] (Taipei: Wen-jin Publishing House, 2010) at 76.

concerned that such a legislative initiative may ruin the ROC's relationship with other Western countries.[64] The concern of the Ministry of Foreign Affairs might have been, I suspect, that once the ROC government gives the impression that it is persecuting religious organizations (by making a comprehensive and restrictive law on religion), an important contrast between the ROC and the PRC would be lost. The ROC would lose a moral ground for its claim that it represents the true China.[65]

In sum, religious freedom has been, and continues to be, regarded by political leaders in Taiwan as an important moral ground, and strategy, for the nation to win international support while it is under the diplomatic suppression of China. Religious freedom has to be protected, in a sense, because it is critical for Taiwan's international reputation. The significance of religious freedom to Taiwan's international reputation is certainly a positive factor that is helpful for the development of a robust framework for the protection of religious autonomy.

B. The Presbyterian Church of Taiwan and Taiwan's democratization

Another factor in Taiwan's historical or political context that is conducive to the development of a robust protection framework for religious autonomy has to do with the

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[64] See *ibid*.

[65] My argument here is based on Professor Zheng's account of the opposition of the Ministry of Foreign Affairs to such a legislative initiative, as well as André Laliberté's more general observation that the KMT regime had "sought…to use religion to emphasize the contrast with its adversary across the Taiwan strait." André Laliberté, "The Regulation of Religious Affairs in Taiwan: From State Control to *Laisser-faire*?" (2009) 38:2 Journal of Current Chinese Affairs 53 at 64.

Presbyterian Church of Taiwan (PCT) and its contributions to Taiwan's democratization. Beginning in the 1970s, the PCT has become one of the key actors in the struggle for Taiwan's democracy. What the church has done to push the nation towards political liberalization and democratization shows how religion can be an agent of social change. I suggest this "religion as an agent of social change" narrative, as exemplified by the PCT's story, can be relied upon to provide a justificatory ground for the idea that religious organizations should be allowed to enjoy a high level of protection for their autonomy, because such a protection would enable them to continue to bring valuable contributions to the public sphere.

In what follows, I briefly introduce the conflicts between the PCT and the authoritarian KMT regime, which culminated in the late 1970s, as well as the strong support provided by the church for the *Tangwai* opposition movement.

1. The conflicts between the PCT and the KMT government

Established by the Scottish and Canadian missionaries who came to Taiwan in the 1860s and the 1870s, the Presbyterian Church of Taiwan is one of the oldest Protestant churches in Taiwan.[66] It is currently the largest Christian Church on the island. According to the church's 2014 statistics, it claims a membership of 254,604 and has a total of 1,234

[66] See Cheng-Tian Kuo, *Religion and Democracy in Taiwan* (Albany, NY: State University of New York Press, 2008) at 38.

churches nationwide.[67] The second largest church in Taiwan is the Catholic Church, which in 2012 claimed a membership of 243,233.[68]

The seed of the conflicts between the PCT and the KMT regime was the KMT's language policy. The PCT has a long tradition of using Taiwanese Hokkien (commonly known as Taiwanese) as the language of sermons and prayers within the church. It also has a practice of using the romanized Taiwanese Bible as well as the romanized Taiwanese Hymnal (the Taiwanese Romanization System was developed by Presbyterian missionaries in the 19th century to help foster literacy).[69] In fact, this was the very reason of the Presbyterian missionaries' success in Taiwan—they were willing "to speak, teach, write, and pray in the language of Taiwan, the Minnan-Taiwanese dialect."[70] But such a practice clashed with the KMT's policy on the official language of the island. As Murray Rubinstein points out, the KMT-led government who retreated to Taiwan in 1949 "saw itself as the government of China in exile and mandated that Taiwan, as a province of China, was a *guoyu*-speaking nation."[71] The government ordered that guoyu, or Mandarin Chinese, must be the only official language and banned the use of Taiwanese in public discussions and in

[67] The Presbyterian Church of Taiwan, "Church Statistics: 2014." Retrieved from http://churchstat.pct.org.tw/datalist.htm (accessed 25 October 2018).

[68] Chinese Regional Bishops' Conference, "Taiwan Catholic Church Statistics in 2012." Retrieved from http://www.catholic.org.tw/catholic/2014/2014%20Statistic%20of%20Catholic%20Directory.html.

[69] See Marc J. Cohen, *Taiwan at the Crossroads: Human Rights, Political Development and Social Change on the Beautiful Island* (U.S.A: Asia Resource Center, 1988) at 190.

[70] Murray A. Rubinstein, "The Presbyterian Church in the Formation of Taiwan's Democratic Society, 1945-2004" in Tun-jen Cheng & Deborah A Brown, ed., *Religious Organizations and Democratization: Case Studies from Contemporary Asia* (Armonk, N.Y.: M.E. Sharpe, 2006) 109 at 111.

[71] *Ibid* at 116.

schools.[72] The PCT's insistence on using Taiwanese as the primary language of church service angered the state authorities. For example, in 1955, the Taiwan Provincial Government issued a decree ordering the local governments to crack down on the use of romanized Taiwanese by missionaries in spreading their religious message, especially those aimed at children.[73]

Major confrontations between the PCT and the KMT-led government arose in the early 1970s. In 1971, the government suffered a major diplomatic setback when the United Nations General Assembly Resolution 2758 was passed. The resolution recognized that "the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations" and expelled "the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations."[74] The PCT issued a public statement, entitled "Statement on Our National Fate by the Presbyterian Church in Taiwan,"[75] in that December in response to this diplomatic disaster. In that statement, the church called on the government to carry out political reforms and "hold elections of all representatives to the highest government bodies."[76] It claimed that only by

[72] See *ibid* at 116-117.

[73] Decree of Taiwan Provincial Government, Fu Min Yi Zi (府民一字) No.99409 (17 October 1955).

[74] "Restoration of the lawful rights of the People's Republic of China in the United Nations", United Nations General Assembly Resolution 2758 (25 October 1971).
Online: <http://www.un.org/documents/ga/res/26/ares26.htm> (accessed 25 October 2018).

[75] The Presbyterian Church of Taiwan, "台灣基督長老教會對國是的聲明與建議" ["Statement on Our National Fate by the Presbyterian Church in Taiwan"] (29 December 1971). The English version of the statement is available at: <http://english.pct.org.tw/Article/enArticle_public_19711229.html> (accessed 25 October 2018).

[76] *Ibid*.

doing so will the ROC be able to gain genuine respect in the international community.[77] Unfortunately, this statement did not nudge the government leaders into changing their mind but instead invited retaliation from the government. In January 1975, the government confiscated more than two thousand romanized Taiwanese Bibles recently printed by the PCT.[78] The church responded by issuing another public statement—"Our Appeal."[79] In this statement, which was issued on November 18, 1975, the PCT made several proposals to the government, with the first among them being a request that it "preserve the freedom of religious faith which is guaranteed to the people in the constitution."[80] The church stated firmly that "every person should be able to enjoy the freedom to use his own language to worship God and to express his own religious faith."[81] It also urged that "the freedom to continue to publish and distribute the Bible in any language be guaranteed."[82]

In 1977, the PCT issued the third, and perhaps the most provocative, public statement, entitled "A Declaration of Human Rights."[83] The last paragraph of the statement reads: "In order to achieve our goal of independence and freedom for the people of Taiwan in this critical international situation, we urge our government to face reality and to take effective

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[77] See *ibid*.

[78] See Rubinstein, *supra* note 70 at 121-122.

[79] The Presbyterian Church of Taiwan, "我們的呼籲" ["Our Appeal"] (18 November 1975). The English version of the statement is available at: <http://english.pct.org.tw/Article/enArticle_public_19751118.html> (accessed 25 October 2018).

[80] *Ibid.*

[81] *Ibid*.

[82] *Ibid*.

[83] The Presbyterian Church in Taiwan, "台灣基督長老教會人權宣言" ["A Declaration of Human Rights"] (16 August 1977). The English version of the statement is available at: <http://english.pct.org.tw/Article/enArticle_public_19770816.html> (accessed 25 October 2018).

measures *whereby Taiwan may become a new and independent country*."[84] This was seen by many as a clear call for Taiwan independence, which was still a political taboo in the 1970s. The KMT government acted swiftly to suppress the spread of this political message: just days after the declaration was issued, the government "confiscated copies of the *Taiwan Presbyterian Church News* that contained both the declaration and the newspaper's editorial support for it."[85] In 1979, the government introduced a draft bill called "Law for Temples and Churches" (*Simiao Jiaotang Tiaoli*). Article 7 of this draft bill stipulated: "The spreading of religious faith should be conducted openly and in the Chinese language. Those who do not speak Chinese can spread religious faith through translation."[86] Article 7 of the draft bill was clearly intended to suppress the missionary work of the PCT, as the church understood that the "Chinese language" here does not include Taiwanese.[87]

2. The PCT's support for the opposition movement

Throughout the 1970s and the 1980s, the PCT was also one of the most reliable friends of the *Tangwai* (meaning "outside the KMT") opposition movement, which was the precursor to the Democratic Progressive Party. During the late 1979 and early 1980, when Shih Ming-Teh, a prominent leader of the movement, became the most wanted person of state authorities, it was Pastor Kao Chung-Ming, the then General Secretary of the PCT, who

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[84] *Ibid*. (Emphasis added).

[85] Rubinstein, *supra* note 70 at 123.

[86] See The Presbyterian Church in Taiwan, "反對制定「寺廟教堂條例」台灣基督長老教會請願書" ["A letter of appeal objecting the draft 'Law for Temples and Churches' by the Presbyterian Church in Taiwan"] (4 July 1979). Online: <http://www.pct.org.tw/ab_doc.aspx?DocID=008> (accessed 25 October 2018).

[87] See *ibid*.

coordinated with several other church members to provide refuge for him.[88] In April 1980, after Shih Ming-Teh was finally captured by the police, Pastor Kao and all those who had helped hide Shih were also arrested. Pastor Kao was sentenced to seven years of imprisonment and served his sentence from 1980 to 1984 (He was released in 1984 as a result of the pressure exerted on the government by the worldwide Taiwanese network to free him).[89] Another PCT official arrested for helping hide Shih was Lin Wen-Cheng, who served as the dean of a women's Bible college before the arrest. Following Lin's conviction, the authorities seized her property and the land belonging to her relatives.[90] Lin was even denied medical treatment in the prison; only after Pastor Kao staged a hunger strike on her behalf did the government concede and grant her medical bail.[91]

The PCT showed its support for the leaders of the opposition movement once again in the aftermath of the "Lin Family Murders." In February 1980, the two daughters and mother-in law of Lin Yi-Hsiung, an influential dissident leader, were brutally killed at home while Lin was in police custody.[92] To show solidarity with the dissident leader and to provide financial assistance for the remaining members of the family, the PCT bought the apartment where the murder happened and transformed it into a church. Since the establishment of the church, known as Gikong Church, it became "the site of a weekly prayer meeting for the

[88] See Rubinstein, *supra* note 70 at 124.

[89] See *ibid* at 127.

[90] See Cohen, *supra* note 69 at 199.

[91] See *ibid* at 199-200.

[92] See Rubinstein, *supra* note 70 at 125. The murderers remain unknown to this day.

families of political prisoners"[93] as well as "a center for political and social activism over the course of the 1980s."[94]

The attacks on the *Tangwai* movement and on the PCT itself did not silence the Church. The Church continued to speak out loud on the human rights issues in the 1980s. In 1987, the PCT held a series of Thanksgiving Conventions to mark the 10th anniversary of its 1977 Human Rights Declaration. The Thanksgiving Convention held in the city of Tainan was attended by over 2,000 people, who were led by the church ministers to parade through the city after the service.[95] In May 1988, when around 130 peasants were arrested for confronting the police in a demonstration protesting the government's trade policy, the PCT did not hesitate to issue a statement calling for the immediate release of the peasant protestors: "Our church has a responsibility for the mission of reconciliation entrusted to us by Jesus Christ, so now we solemnly appeal to the courts to be just in dealing with this 5-20 incident. Let those who are innocent victims be released immediately, and let those who really used violence, whether common people, police, or military police, be punished by the law…We are convinced that democracy and freedom are human rights bestowed by God for us to

[93] Cohen, *supra* note 69 at 198.

[94] Rubinstein, *supra* note 70 at 125.

[95] See Yoshihisa Amae, "行過死蔭的幽谷: 高雄事件前後期台灣基督長老教會與黨外的合作關係之研究, 1977-1987" ["Walking through the Valley of the Shadow of Death: The Cooperative Relationship between the Presbyterian Church in Taiwan and Tangwai Activists before and after the Kaohsiung Incidence, 1977-1987"] in *黃彰輝牧師的精神資產研討會論文集* [*The Collected Papers on the Spiritual Assets of Rev. C.H. Hwang*] (Tainan: Taiwan Church Press, 2015) 380 at 418.

enjoy: 'He (the Lord) knows when we are denied the rights He gave us. (Lamentations 3:35).'"[96]

The late 1980s and the early 1990s saw dramatic change in Taiwan's political atmosphere. The Martial Law that was imposed in 1949 was finally lifted in July 1987 by the President Chiang Ching-Kuo. In 1988, following the death of Chiang Ching-Kuo, the then Vice President Lee Teng-Hui, a native Taiwanese and a Presbyterian, succeeded Chiang as President. In 1990 the Constitutional Court of Taiwan rendered a landmark decision, J.Y. Interpretation No. 261, in which the Court set a deadline for the retirement of the old representatives in the National Assembly who were elected on mainland China and had held the seats for more than four decades without standing for re-election in Taiwan.[97] A direct election of all representatives in the National Assembly was held in the following year.

The PCT's contributions to Taiwan's political liberalization and democratization have made the church a well-respected religious organization in Taiwan. Of course, not everyone in Taiwan agrees with the political stances of the church, especially its strong commitment to Taiwan independence. But it seems that the majority of people in Taiwan recognize the moral courage of the church and the prophetic role it played during the 1970s and the 1980s. Their story, only briefly introduced here, serves as an example of the discourse that religion can be an agent of social change. Such a discourse stands in direct opposition to the "religion

[96] The Presbyterian Church in Taiwan, "Statement of the Presbyterian Church in Taiwan on the 5-20 Incident", (31 May 1988). Quoted from Cohen, *supra* note 69 at 202.

[97] J.Y. Interpretation No. 261 (21 June 1990). An English translation of the Interpretation is available at <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=261> (accessed 25 October 2018).

as a problem" discourse, which is embodied in the three most important legislative regulations governing religious institutions in Taiwan, as we have seen. If the "religion as a problem" discourse provides justification for the claim that religious organizations should be placed under strict regulation of the state, then the "religion as an agent of social change" discourse, by contrast, offers reasons why religious organizations are entitled to a high degree of autonomy. Religious organizations should be given robust protection to ensure their autonomy in developing religious doctrine (including their political theology), in educating their children, and in training future leaders of the church, so that they can continue to make meaningful contributions to the public sphere. This is why I suggest that the PCT's story has, or can have, implications for the development of a robust protection framework for religious autonomy in Taiwan's jurisprudence and legal theory.

IV. Concluding remarks—the jurisdictional conception of church autonomy

In the foregoing sections of this chapter I have explained the emergence of an approach in Taiwan's recent constitutional jurisprudence and scholarly discussion that would provide religious organizations with robust protection against state intervention. I have also discussed a couple of historical/political factors in the Taiwanese context that are conducive to the development of such an approach. In this final section, I would like to note that such a newly emerging approach to religious autonomy bears some resemblance to an idea that has recently received renewed attention in the law and religion literature in the United

States—what Steven Smith called "the jurisdictional conception of church autonomy."[98] The jurisdictional conception of church autonomy (JCCA) views the church "as a 'jurisdiction' that is in some sense independent of the state's jurisdiction."[99] It claims that "there is a space within a church that government should presumptively treat as *the church's* business*, not the government's*."[100] Secular authorities that recognize the JCCA would refuse to take any jurisdiction over certain matters of the church—such as the interpretation of religious doctrine or the appointment of ministers—that should be decided exclusively by the church.

The jurisdictional approach to religious autonomy is a core claim of the theory of "freedom of the church" recently advanced by Steven Smith and Richard Garnett.[101] In fact, "freedom of the church"—*libertas ecclesiae*—is not a newly invented notion; on the contrary, it was an ancient idea that first emerged during the "Investiture Controversy" of the eleventh and twelfth centuries in Continental Europe.[102] According to Garnett, *libertas ecclesiae* served as a "powerful slogan" that Pope Gregory VII relied on in his struggle with Henry IV the Holy Roman Emperor for papal control over the church.[103] The church's campaign for *libertas ecclesiae* in the eleventh century was one that was "devoted to

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[98] See Steven D. Smith, "The Jurisdictional Conception of Church Autonomy" in Micah Schwartzman et al, eds, *The Rise of Corporate Religious Liberty* (New York, NY: Oxford University Press, 2016) 19.

[99] *Ibid* at 19.

[100] *Ibid* at 26 (Emphasis original).

[101] See Steven D. Smith, "Freedom of Religion or Freedom of the Church?" in Austin Sarat ed, *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* (Cambridge : Cambridge University Press, 2012) 249; Richard W. Garnett, "The Freedom of the Church" (2006) Notre Dame Law School Legal Studies Research Paper No. 06-12 1.

[102] Smith, *supra* note 101 at 266.

[103] Richard W. Garnett, "The Freedom of the Church: (Toward) an Exposition, Translation, and Defense" in Micah Schwartzman et al, eds, *The Rise of Corporate Religious Liberty* (New York, NY: Oxford University Press, 2016) 39 at 40.

maintaining the church as a jurisdiction independent of the state."[104] In other words, the claim of Pope Gregory VII in this power struggle against the king was that the church should be treated like an independent sovereign beyond the regulatory reach of the state: "Government has no more jurisdiction over the internal workings of the church than it would have over the internal governance of a foreign sovereign nation."[105] It is clear from this account that the claim for jurisdictional autonomy was part and parcel of the struggle for freedom of the church against the interference of secular powers in medieval Europe.

In their writings in the past decade or so, Smith and Garnett have been endeavoring to arouse an interest in this medieval concept of freedom of the church and explain why it deserves to be given a prominent place in modern constitutional discourse and jurisprudence with regard to religious freedom. As freedom of the church has gradually "taken center stage" in recent scholarly discussion and debate in the U.S.,[106] the question of whether religious organizations should be treated to a certain extent like an independent jurisdiction enjoying certain immunities from state regulations has also become one of the most contentious issues in this debate.

Many of the claims made by Justice Wang, Justice Chen, and Professor Hsu are consistent with the JCCA. As we have seen, Justice Wang argued in his concurring opinion in J.Y. Interpretation No. 573 that civil courts should decline to hear cases which involve the interpretation of religious doctrine or which involve the internal organizational matters of a religious entity. Justice Chen suggested in his two recent concurring opinions that the state

[104] Smith, *supra* note 101 at 250.

[105] *Ibid* at 269.

[106] Garnett, *supra* note 103 at 40 (quoting Michael McConnell).

is prohibited from interfering with the clergy selection process of a religious institution on the basis of the norm of gender equality and the principle of democracy. Finally, Professor Hsu argued that the "Autonomie"-type religious affairs deserve "absolute respect and protection." This type of religious affairs is deemed by Professor Hsu as completely beyond the jurisdiction of the state. The state does not even have a chance to try to justify the intervention in those affairs by arguing that it has met "the principle of legal preservation" and "the principle of proportionality." All the three jurists seem to recognize that religious organizations are entitled to a zone of freedom over which state has no jurisdiction at all.

In light of the similarity between the new approach to religious autonomy in Taiwan and the JCCA, in the following chapters I will conduct a theoretical/doctrinal examination of this particular conception of religious autonomy. I believe an engagement with the ongoing discussion and debate around the legitimacy of the JCCA will help facilitate a fuller development of Taiwan's newly emerging approach to religious autonomy. Based on this understanding, in the next three chapters I first examine the plausibility of the JCCA and the proper scope of religious organizations' exclusive jurisdiction (chapters 3 - 4), and then proceed to consider the changes to Taiwan's current regulatory scheme for religious organizations that could be brought about by the recognition of the JCCA in Taiwan (chapter 5).

Chapter 3. The Jurisdictional Conception of Church Autonomy: Theoretical Justification and Models

I. Introduction

As we have seen in the previous chapter, a newly emerging approach to the autonomy of religious organizations has been gradually developed in Taiwan's constitutional jurisprudence and scholarly discussion. Under this new approach, religious organizations would be provided with robust protection of their right to conduct internal affairs without interference. I suggested that this new approach bears some resemblance to "the jurisdictional conception of church autonomy." As Steven Smith points out, the jurisdictional conception of church autonomy views the church "as a 'jurisdiction' that is in some sense independent of the state's jurisdiction."[1] This conception of church autonomy asserts that "there is a space within a church that government should presumptively treat as *the church's* business*, not the government's*."[2] In this chapter, I explore the legitimacy of this notion of religious autonomy and examine three theoretical models that recognize a degree of jurisdictional autonomy for religious organizations. Before commencing this discussion, I would like to note that there are several key terms used in the chapter that I treat as interchangeable: the jurisdictional conception of church autonomy, jurisdictional autonomy of religious organizations, and sovereign autonomy of religious organizations.

[1] Steven D. Smith, "The Jurisdictional Conception of Church Autonomy" in Micah Schwartzman et al., ed., *The Rise of Corporate Religious Liberty* (Oxford [UK]; New York: Oxford University Press, 2016) 19 at 19.

[2] *Ibid* at 26 (Emphasis original).

These terms all convey the idea that religious organizations should be regarded as independent jurisdictions separate from the state and are presumptively exempt from the regulatory authority of the state.

I discuss the plausibility of sovereign autonomy of religious groups in section II and argue that it is not unreasonable to claim that religious organizations are entitled to have and exercise sovereignty—understood as "ultimate arbitral authority"—over internal affairs of a distinctively religious nature. After justifying the idea of sovereign autonomy of religious organizations, I discuss three models of sovereign autonomy proposed by political theorists in section III. The three models are Chandran Kukathas's liberal archipelago model, Lucas Swaine's semisovereignty model, and William Galston's liberal pluralism model. I suggest that Galston's model is preferable to the other two models. In the concluding section, I combine the arguments in sections II and III and outline a couple of principles which I believe should inform the judicial decisions in cases involving religious organizations' internal governance and operation.

II. The Plausibility of the Idea of Sovereign Autonomy

Should the constitutional protection of religious freedom include recognition of the "sovereign autonomy" of religious institutions in certain areas of their internal operation to the extent that state intervention in those areas is entirely precluded? Is it plausible to speak of religious institutions as having "sovereignty"—as opposed to merely having "rights"—in conducting their internal affairs? In my view, the first step in addressing these questions is

to clarify what is at stake in invoking the concept of sovereignty as the lens through which to analyze issues related to the autonomy of religious organizations.

Victor Muñiz-Fraticelli points out that there are two ways of defining sovereignty: the analytical and the historical. The analytic definition of sovereignty as provided by Preston King and quoted by Muñiz-Fraticelli is as follows: a sovereign is "an *ultimate arbitral agent*—whether a person or a body of persons—entitled to make decisions and settle disputes within a political hierarchy with some degree of finality…[which] implies independence from external powers and ultimate authority or dominance over internal groups."[3] The second way of defining sovereignty is by enumerating the concrete powers of a sovereign, which is the "historically contingent way of defining sovereignty."[4] Relying on these two ways of defining sovereignty, Muñiz-Fraticelli suggests that we can sensibly speak of "a concession of sovereignty" or "a transfer…of sovereign authority" when a non-state agent has a right, which cannot be revoked by the state, to exercise arbitral authority over "a domain traditionally counted among the marks [of] sovereignty."[5]

In considering the plausibility of framing the question of the autonomy of groups in terms of sovereignty, what is at stake, then, is whether the "ultimate arbitral authority" of groups and associations within their respective spheres of competence should be recognized.[6] Proponents of the sovereign autonomy of groups and associations believe that organized groups are entitled to make some "final and unappealable decisions," the

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[3] Victor Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford, United Kingdom: Oxford University Press, 2014) at 102-103. [Emphasis added].

[4] *Ibid* at 103.

[5] *Ibid* at 104.

[6] *Ibid* at 30.

credibility of which cannot be challenged by the state or other actors.[7] They believe that groups' ability to make such decisions without interference is a necessary condition of a meaningful conception of associational autonomy. As Muñiz-Fraticelli suggests: "no possibility of associational autonomy remains if all possible controversies in a society must be refereed by the same judge; an organized group must be allowed to make some final and unappealable decisions with regard to its interests, its goods, and its members if it is to retain its autonomy."[8]

In my view, it is not unreasonable to say that religious institutions are entitled to ultimate arbitral authority over their internal affairs, especially those that are "distinctively religious" in nature.[9] Arguably, this idea has long been recognized by the United States Supreme Court. For example, the idea that religious institutions have the right to make some "final and unappealable decisions" was vividly present in *Watson v. Jones*,[10] a case decided by the U.S. Supreme Court in 1871. Consider this oft-quoted paragraph in the majority opinion:

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted

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[7] *Ibid* at 116.

[8] *Ibid*.

[9] The term "distinctively religious activities" was used by Ira Lupu and Robert Tuttle in a recent article, where they suggest that "corporate entities with asserted religious identities deserve exceptional treatment only with respect to their distinctively religious activities." Ira C. Lupu and Robert W. Tuttle, "Religious Exemptions and the Limited Relevance of Corporate Identity" in Micah Schwartzman et al., eds, *The Rise of Corporate Religious Liberty* (Oxford [UK] ; New York: Oxford University Press, 2016) 373 at 375.

[10] 80 U.S. 679 (1871)

> questions of faith within the association, and for the ecclesiastical government of the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to its government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions of questions arising among themselves, *that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.*[11]

The Court emphasized that decisions by religious tribunals with regard to questions of faith and the ecclesiastical government of association members and officers are untouchable and cannot be reversed by civil courts.

The *Watson* principle—civil courts are bound to accept the decisions of the highest authority within a religious association on questions of faith and ecclesiastical government of members and officers—has been reaffirmed by the Court in several later cases. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*,[12] the Court declared that the principle of *Watson*, originally stated as a common law norm, was mandated by the First Amendment of the U.S. Constitution, thereby making the principle a constitutional rule. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[13] the Court held unconstitutional the "departure-from-doctrine" approach to church property disputes, under which the courts award the disputed

[11] *Ibid* at 728-729.

[12] 344 U.S. 94 (1952).

[13] 393 U.S. 440 (1969).

church property to the faction that remains faithful to the original doctrines of the church.[14] The "departure-from-doctrine" approach violated the *Watson* principle because it would require the courts to decide "controverted questions of faith" in the course of resolving church property disputes, including the content and meaning of the original doctrines and whether the particular stance of a church faction is consistent with those doctrines. Lastly, in *Serbian Eastern Orthodox Diocese v. Milivojevich*,[15] the Court held that the civil courts have no right to examine whether the decisions of the highest ecclesiastical tribunal of a church are "arbitrary"—in the sense that the decisions were not made in accordance with the church's own laws and norms.[16] The concluding paragraph of the majority opinion in that case reiterated the Court's position in *Watson*: "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them."[17]

The doctrine of "ministerial exception" is a prime example of the recognition of the ultimate arbitral authority of religious institutions as well as an important application of the *Watson* principle. This doctrine immunizes religious institutions from state inquiries about decisions concerning the employment of ministers. Under the ministerial exception,

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[14] *Ibid* at 449-450.

[15] 426 U.S. 696 (1976).

[16] *Ibid* at 713.

[17] *Ibid* at 724-725. For a detailed examination of the three cases mentioned in this paragraph, see Richard W. Garnett, "A Hands-Off Approach to Religious Doctrine: What Are We Talking About?" (2009) 84:2 Notre Dame Law Review 837 at 842-850.

religious institutions are allowed to hire or dismiss their ministers on grounds that are otherwise impermissible, such as religion, gender, and sexual orientation. Moreover, it exempts religious institutions from the application of antidiscrimination laws regardless of whether their decisions were made out of a commitment to their religious beliefs—it does not matter whether a church has a genuine religious reason, as opposed to a pretextual one, for firing a minister.[18] The U.S. Supreme Court recently confirmed the doctrine's legitimacy in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[19] The Court emphasized in this unanimous decision that churches' decisions to hire or dismiss ministers are entirely outside of state jurisdiction, stating that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[20] The authority to select and control ministers belongs to the church alone because ministers are the "official messengers" of religious entities that bear the burden of transmitting such entities' spiritual messages through their words and actions.[21] As Ira Lupu and Robert Tuttle point out, messengers and messages are inseparable, and allowing secular courts to probe into whether a church's decision to fire a minister is based on a religious or pretextual reason would place the secular authorities "in dangerous proximity to control the content of the institution's

[18] See Ira C. Lupu & Robert W. Tuttle, "Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders" (2009) 7 The Georgetown Journal of Law & Public Policy 119 at 128.

[19] 132 S. Ct. 694 (2012).

[20] *Ibid* at 709.

[21] Ira C. Lupu & Robert Tuttle, "The Distinctive Place of Religious Entities in Our Constitutional Order" (2002) 47 Villanova Law Review 37 at 62.

message, including aspects of that message that are clearly outside the boundaries of the state's competence."[22]

Based on these judicial decisions and principles, it seems reasonable to say that religious institutions are entitled to have and exercise ultimate arbitral authority over matters related to the interpretation of religious doctrine and ecclesiastical government of ministers and members. Secular courts should normally abstain from hearing cases that fall into these distinctively religious areas of the institutions' internal operation. It is in this sense that we can plausibly speak of the "sovereign autonomy" of religious institutions and that its legitimacy must be recognized.

Opponents of the idea of sovereign autonomy of religious institutions are concerned that its implementation could wreak havoc on civil society and undermine the project of human rights protection. Robin West, for example, is highly critical of the U.S. Supreme Court's decision in *Hosanna-Tabor.* West sees the ministerial exception recognized by the Court as an example of what she calls "exit rights."[23] As she explains, the point of "exit rights" is to "exempt their holders from legal obligations which are themselves constitutive

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[22] *Ibid* at 91. This intimate relationship between ministers and the spiritual messages of a church was also emphasized by the majority opinion in *Hosanna-Tabor*: "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of *those who will personify its beliefs*. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's *right to shape its own faith and mission* through its appointments." (*Hosanna-Tabor*, *supra* note 19 at 706. Emphasis added.)

[23] It should be noted that the term "exit rights" has been a much-discussed notion in the literature of political theory analyzing the tensions between the rights of minority groups and the rights of the more vulnerable members (such as women and children) within the groups. I discuss some of these literature in section III below. However, West used and defined the term in a way that is distinct from how it was generally understood in the political theory literature.

of some significant part of civil society and to thereby create, in effect, separate spheres of individual or group sovereignty into which otherwise binding legal norms and obligations do not reach."[24] Another example of exit rights identified by West is the exemption of Amish parents from the obligation to send their children to public schools.[25] West claims that the separate spheres of sovereignty created by exit rights can give rise to a number of serious problems. First of all, the weaker members of groups and communities would be stripped of legal protections otherwise available to them. Additionally, exit rights tear the national community apart by "divid[ing] us between those who are and those who aren't obligated; those who are and those who aren't exempt; those who are and those who aren't subject to the authority of the state."[26] Lastly, exit rights undermine "civil rights aspiration—an aspiration of inclusion and belonging."[27]

This final point is the primary focus of West's essay. She suggests that civil rights acts that impose obligations of nondiscrimination "collectively constitute, rhetorically, our shared societal commitment to rid our workforce and our schools, and therefore our larger social world as well, of discriminatory animus and the effects of that animus."[28] Therefore, allowing religious organizations and others to discriminate is to "break faith with and to undermine the shared national project of creating a world of equal opportunity and full

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[24] Robin West, "Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract" in Micah Schwartzman et al., ed., *The Rise of Corporate Religious Liberty* (Oxford [UK] ; New York: Oxford University Press, 2016) 399 at 402-403.

[25] See *ibid* at 409.

[26] *Ibid* at 412.

[27] *Ibid* at 418.

[28] *Ibid* at 400.

participation that is free of racism and sexism and their related effects."[29] In other words, recognition of sovereign autonomy of religious institutions over certain internal affairs, such as the selection of ministers, comes with a great cost—sacrificing civil society's aspirations for equality and inclusion.

It is unquestionable that civil rights aspirations are noble and should be a constitutive characteristic of a liberal society. However, civil rights aspirations can come into conflict with other liberal values, particularly the value of autonomy, when every association and community within a liberal state is compelled to embrace a robust form of equality as part of their group ethos. Toward the end of her essay, West remarks that exit rights "give their holders rights to *live separately, and differently, from the rest of us*, freed from the obligations of otherwise shared norms of general applicability."[30] While West suggests that giving people the right to live differently is undesirable, this right is arguably what lies at the heart of liberalism. As Jeff Spinner-Halev points out, the freedom of individuals to live and act differently was what concerned John Stuart Mill when he wrote *On Liberty*:

> When he wrote *On Liberty*, Mill was quite worried that a stagnant culture stifled all attempts at encouraging individuality. He maintained that liberal democracies should protect and promote those who act differently from the mainstream. Mill celebrated people who were different; he wanted people to depart from public opinion and from mainstream practices and norms.[31]

Spinner-Halev continues by applying Mill's concern to contemporary liberal society:

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[29] *Ibid* at 400-401.

[30] *Ibid* at 416 (emphasis added).

[31] Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (Baltimore: Johns Hopkins University Press, 2000) at 54-55.

> When the mainstream is liberal, however, it is the nonliberals, such as religious conservatives, who depart from many cultural norms and practices today. A liberal theory that fails to recognize the right to be different and live a life of faith and obedience is not consistent enough with the liberal ideas of liberty and pluralism.[32]

Some people make a conscious choice to organize their lives, including their associational lives, around the religious ideals in which they believe. Their ways of life might be quite different and their religious conceptions of the good might not be easily understood, let alone appreciated, by outsiders. However, the autonomous choices these people make in forming a community and pursuing a particular way of life must nonetheless be respected by a liberal state that is committed to protecting individuals' freedom to lead their lives as they see fit. As Spinner-Halev suggests, a liberalism aimed at ending all forms of discrimination is one that is "in danger of becoming imperialistic, by trying to root out all forms of life that are non-liberal."[33] This particular form of liberalism, arguably expressed in West's essay, ignores people's desires to live their lives in accordance with their deepest convictions.

An example of how a lopsided emphasis on equality can undermine the value of autonomy is seen in Quebec's proposed Bill 94, which would have banned the wearing of niqab by people delivering or receiving public services.[34] The intended legislative purpose of this bill was to promote gender equality and state neutrality toward religion.[35] However,

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[32] *Ibid* at 55.

[33] Jeff Spinner-Halev, "Autonomy, association and pluralism" in Avigail Eisenberg & Jeff Spinner-Halev, ed., *Minorities within Minorities* (Cambridge; New York: Cambridge University Press, 2005) 157 at 161.

[34] Bill 94, An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions, 39th Legislature, 1st Session, Quebec, 2010.

[35] See Vrinda Narain, "Taking 'Culture' out of Multiculturalism" (2014) 26:1 Canadian Journal of Women and the Law 116 at 141.

the voice and agency of Muslim women who wear niqab were not given sufficient regard by those advocating for the proposed bill. As Vrinda Narain points out, public discourse in favor of Bill 94 tended to treat Muslim women as "victims" of the patriarchal norms of their communities.[36] This victim narrative ignores the fact that wearing a veil or niqab may be viewed as "a mode of female resistance and agency. It may be seen as an assertion of women's identity and autonomy and their resistance and challenge within the wider political context."[37] At least some Muslim women voluntarily choose to wear a veil or niqab as an expression of their identity, and their agency in so doing must be acknowledged by the state. Ignoring these women's voice and concerns while trying to impose the norm of gender equality does not serve to empower them; instead, it disrespects their ability to make autonomous choice regarding issues that are of profound importance to them.[38]

Critics may respond by saying that in situations where members of a religious organization claim that their rights have been violated by the organization, individual autonomy cannot be realized without state intervention. In such situations, members do not agree to the ways in which they are treated by their organizations and may very well hope that the state intervene to protect their rights. In *Hosanna-Tabor*, the dismissed teacher Cheryl Perich's right to equality in employment was apparently violated when the Christian school forced her to resign due to her physical disability and later terminated her in retaliation for her attempt to take legal action against the school. She completely rejected the

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[36] See *ibid* at 147 ("We need to complicate the simplistic understanding of the veil forwarded by the state to justify Bill 94. The veil is understood as signifying victimhood, passivity, and lack of agency, while those seeking to ban it are portrayed as progressive and liberal, intent on rescuing women from their oppressive customs.")

[37] *Ibid* at 150-151.

[38] For a similar argument, see Spinner-Halev, *supra* note 33 at 166.

decision made by the school and sought to be reinstated to her former position. In this case, a person within a religious organization suffered a discriminatory treatment to which she did not agree, so why should courts still defer to the authority of the religious organization and avoid interfering with the employment decision?

Courts should defer to the church's authority because any judicial inquiry into its decisions with regard to the selection of its ministers could risk imposing the courts' view about religious doctrine and theology on the church.[39] Had the Court in *Hosanna-Tabor* refused to recognize the ministerial exception and proceeded to investigate whether the dismissal of Perich was based on a religious or pretextual reason, the Court would have had to ask: do the church's beliefs include a doctrine that members of the church should not sue each other? Or, going deeper into the roots of the conflict, the question could be: do the church's beliefs allow, or even require, firing a minister who is suffering from physical disability? It is not entirely unthinkable that a judge may come to the conclusion that, in light of Jesus' command that we love our neighbor as ourselves, it is impossible for a Christian church to genuinely believe that a minister should be excluded from the service once he or she has fallen ill. However, this is a purely theological judgment. If a court were to rule in favor of the minister based on such a view, this would amount to secular authorities imposing a particular theological understanding on the church. The imposition of the state's religious views on religious institutions is what characterizes a totalitarian regime, and not a liberal state. This is a red line that should not be crossed by the secular authorities of a liberal state.

[39] The U.S. Supreme Court determined that Cheryl Perich was not only a teacher but also a commissioned minister. See *Hosanna-Tabor*, *supra* note 19 at 707-708. This is an important factor which distinguishes this case from a similar case which will be discussed later in section III. C. In that case, no evidence suggests that the dismissed teacher should be regarded as a minister.

In my view, it is this concern—avoiding replacing the theological understanding of a religious institution with that of the state—that demands a noninterference approach to a church's employment decisions with regard to its own ministers.

Another scholar who is critical of the ministerial exception is political theorist Cécile Laborde. Laborde argues that judicial review of ministerial employment decisions would not necessarily lead to impermissible entanglement of church and state, as long as courts limit their investigation to the question of *sincerity*—whether the church sincerely believes it has a religious reason to dismiss a minister. She writes: "When courts inquire into whether a religious reason is used as a pretext for an employment decision, they are not automatically becoming entangled in theological questions over which they do not have competence. In discrimination cases, the question is not whether the asserted reason is true, but whether the defendant believed it to be true when he took the challenged action: it is an inquiry into sincerity, of the kind that is common in cases of individual freedom of religion."[40]

It is true that verification of sincerity is significantly less problematic than judicial resolution of theological questions and that it falls within the legitimate jurisdiction of civil courts. However, it remains unclear how Laborde's approach can successfully and effectively avoid the problem of judicial entanglement with religion. As the U.S. Supreme Court points out in *Hosanna-Tabor*, ministers of a church are those who "personify" the beliefs of the church.[41] A church's spiritual message is defined not only through scriptural text, foundational documents, and practices, but also through persons who serve as its

[40] Cécile Laborde, *Liberalism's Religion* (Cambridge, Massachusetts: Harvard University Press, 2017) at 193.

[41] *Hosanna-Tabor*, *supra* note 19 at 706.

ministers. A message can become completely different if taught by a different person. If we agree that a church has an exclusive jurisdiction over the content and contour of its spiritual message, then we must recognize its ultimate arbitral authority over the question of who will represent and preach that message. Forcing a church to change its ministerial employment decisions—or punishing it for making those decisions—risks triggering an involuntary change in the church's religious message. This, in my view, is an excessive and impermissible entanglement with religion. To avoid such a problem of entanglement, there is no alternative to the approach of ministerial exception, which insulates a church's decisions with regard to its ministers from any state inquiry.

III. Three Models of Jurisdictional Autonomy

I have argued that it is legitimate to recognize sovereign autonomy of religious institutions in certain areas of their internal operation. In this section I examine and compare three theoretical models of jurisdictional autonomy of groups and associations proposed by political theorists. Let me be clear at the outset about what I think an appropriate model of jurisdictional autonomy is *not* about: "state legitimation of a differentiated citizenship through the creation of a parallel system of law that is explicitly discriminatory," as seen in religious personal laws system in India.[42] One theoretical model that comes close to such a social and political arrangement is Chandran Kukathas's liberal archipelago model; I discuss why this model should be rejected. Lucas Swaine's semisovereignty model can also be

[42] Vrinda Narain, "Critical Multiculturalism" in Beverley Baines et al, ed., *Feminist Constitutionalism: Global Perspectives* (Cambridge; New York: Cambridge University Press, 2012) 377 at 387.

regarded as lending some support to such an arrangement of parallel systems of law. However, I argue that the main problem with the semisovereignty model is that part of the model's requirements with regard to education of children might be too demanding to be acceptable to conservative religious communities. William Galston's liberal pluralist theory strikes me as a more justifiable model for the jurisdictional autonomy of religious groups. But I will make one suggestion on how Galston's model can be slightly adjusted to better balance the religious organization's claim to freedom of religion and individuals' claim to nondiscrimination.

A. The liberal archipelago model

Chandran Kukathas uses the metaphor of "archipelago" to illustrate the nature of the good political society he envisions. In this metaphor, political society is conceived of as "an area of sea containing many small islands. The islands in question, here, are different communities or, better still, jurisdictions, operating in a sea of mutual toleration."[43] It is a society consisting of a variety of groups and communities who have "jurisdictional independence" from the state and one another.[44] In such a society, groups and communities are given nearly unconditional autonomy over internal affairs. Most strikingly, the liberal archipelago model would allow some practices of illiberal religious communities that most people find cruel and profoundly inhumane. In discussing what his tolerationist regime

[43] Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003) at 22.

[44] *Ibid* at 31.

would amount to in practice, Kukathas refers to the following communal practices as examples of what would be allowed under such a regime:

> [T]here would in such a society be (the possibility of) communities which bring up children unschooled and illiterate; which enforce arranged marriages; which deny conventional medical care to their members (including children); and which inflict cruel and 'unusual' punishment.[45]

Elsewhere he also discusses the practices of clitoridectomy and ritual scarring by some communities without hinting any possibility of state intervention to prevent these oppressive practices from being carried out.[46] In a nutshell, this is a society of, as Kukathas himself acknowledges, "islands of tyranny in a sea of indifference."[47]

Under Kukathas's tolerationist regime, the only condition required of groups and communities is that they respect members' right to choose to leave the group. According to Kukathas, respect for the right to exit serves as the basis upon which the authority of groups and communities can be established, which, in turn, precludes any interference from the wider society.[48] Relying on freedom of exit as a strategy to address the issue of accommodation of illiberal groups is not in itself controversial, at least among the so-called "toleration liberals."[49] What sets Kukathas's argument apart from those of others is his

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[45] *Ibid* at 134.

[46] *Ibid* at 135, 141.

[47] *Ibid* at 137.

[48] See *ibid* at 96-97.

[49] "Toleration liberals" is a term used by Professor Daniel Weinstock to refer to the liberals who think that "social groups whose mores and practices do not align squarely with those of the (presumably liberal) majority should be accommodated to some significant degree to live their lives as they see fit, even when this involves ways of raising children and of enacting gender roles that members of the majority find morally problematic." Daniel M. Weinstock, "Value Pluralism, Autonomy, and Toleration" in Henry S Richardson &

minimalist view of freedom of exit. According to him, a person's right to exit is not violated as long as he or she is not physically forced to remain; whether or not the cost of exit is so high as to constitute an invisible obstacle to exiting is, for him, an irrelevant question.[50] What is more, he argues that groups and communities are free to raise the cost of exit to prevent members from leaving. Kukathas writes: "[The right of exit] is honoured insofar as the association of which an individual is a part does not prevent that individual from leaving, and insofar as that association is not recognized by other associations (such as the state or other states) as having any right to prevent its members from leaving. *And raising the cost of exit does not count as prevention*."[51]

To see what such a minimalist view of the right of exit would entail in reality, let us consider a fundamentalist Christian group in Taiwan, the New Testament Church (NTC). The New Testament Church was originally founded in Hong Kong in the early 1960s and later spread to Taiwan in 1965.[52] During the 1970s, the church members began to settle on a mountain in Taiwan's Kaohsiung County—which they call Mount Zion—and have since formed a vibrant and highly self-sufficient community on the mountain.[53] In 1997 the NTC pulled its children from the public school system and homeschooled them within the community.[54] The government's educational authorities have asked the church to register as

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Melissa S Williams, ed., *Moral Universalism and Pluralism* (New York: New York University Press, 2009) 125 at 142.

[50] See Kukathas, *supra* note 43 at 107.

[51] *Ibid* at 109 (emphasis added).

[52] Murray A. Rubinstein, "The New Testament Church and the Taiwanese Protestant Community" in Murray A. Rubinstein, ed, *The Other Taiwan: 1945 to the Present* (Armonk, N.Y.: M.E. Sharpe, 1994) 445 at 450.

[53] *Ibid* at 451-452.

[54] See "錫安山教徒子女集體退學" ["Children of the adherents of the Mount Zion sect withdrew from the

a formal home education institution in accordance with relevant educational regulations, but the church refused to comply.[55] The key factor that underlies the NTC's refusal to register is its belief that no middle ground exists between the secular educational system and the "God-centric" educational ideal to which the church adheres.[56] From the church's perspective, any form of registration or cooperation with the state would make it a part of the secular educational system that its members view as evil and corrupt. One of the most important consequences of the NTC's refusal to register as a formal homeschooling institution is that the children of the community are unable to obtain government-recognized educational credentials. This generates a significant cost of exit for children born and raised in the community. Without the proper educational credentials, people who grow up in the NTC community cannot reasonably expect to be able to obtain a desirable job in the wider society, should they decide to leave the church community. However, the NTC leadership's decision not to register the church as a home education institution is entirely justified under Kukathas's minimalist view of the right of exit, even if this decision raises the cost of exit to such an extent that it would be virtually impossible for members to leave the community. The minimalist view of the right of exit would prevent the state from intervening to require the church to comply with the regulations regarding homeschooling.

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schools collectively"] *聯合報 United Daily* (6 May 1997) A6.

[55] See 臺北市政府 97.02.19 府訴字第 09770065600 號訴願決定書 [Decision no. 09770065600, the Administrative Appeals Commission of the Taipei City Government (19 February 2008)]. (The decision upheld a monetary penalty the Taipei City government imposed on the NTC members who did not send their children to schools nor accept the advice of the officials to register the church as a formal home education institution.)

[56] See NTC's website for their view of the nature of secular education: http://www.zion.org.tw/zion/chinese/eh_eng/eh_01_distort.html (accessed 29 October 2018).

However, the minimalist view of the right of exit must be firmly rejected. Kukathas seeks to justify the view that groups and communities should be free to raise the cost of exit on several grounds, all of which are unconvincing. First, Kukathas believes that freedom of exit and cost of exit are two different issues that can be neatly distinguished from each other. He illustrates this point with the following example:

> If I leave my present career to become a professional boxer I run the risk of failure in my new endeavour. This risk rises to the extent that the new path I have chosen is in a field in which competition is severe, and failure common. And it rises again when a well-known champion is released from prison to reenter the arena. Yet this increase in risk does not diminish my freedom to take the risk—even if it makes it more likely that I decide not to make the attempt.[57]

I agree that the existence of high cost (or risk) of exit does not necessarily justify state intervention. However, there is an important factor that distinguishes the example given by Kukathas from the case of children in the NTC community. I see no difficulty in accepting that in Kukathas's example no intervention is required to make this person's giving up of his present career less risky. Despite the high cost of exit, he nonetheless has to bear the cost by himself. The reason for this is obvious: he has to bear the cost of exit by himself because becoming a professor in the first place is his own choice. But what about the children growing up in a religious community that denies them a proper education and would even not allow them to obtain educational credentials recognized by the government? The cost of exit for them is extremely high and, more importantly, was not incurred by their own choices or actions. They are the victims of a decision made by community leaders that substantially

[57] Kukathas, *supra* note 43 at 108.

raised the cost of exit. They should not be held responsible for their highly risky future as the person in Kukathas's example should.

Kukathas's second justification for allowing groups and communities to raise the cost of exit is that preventing them from doing so may violate the freedom of conscience of the majority of group members. Will Kymlicka has argued that a formal right of exit alone is far from sufficient to protect the liberty of conscience of the dissenting members of a group. At the very least, Kymlicka suggests, the protection of dissenting members' liberty of conscience means that "it is important that the community not have the right to make the costs and risks of exiting the group prohibitive."[58] He asks: "Why allow the group gratuitously to increase the cost of exit, simply in order to discourage dissenters from acting on their conscience?"[59] In response, Kukathas argues that "[t]he reason no greater protection should be offered at this level, however, is that it is not only the consciences of dissenters that are at stake. The conscientious beliefs of the majority or the dominant also have weight. They may conscientiously believe that what the minority thinks or wants to do is wrong. They may also believe that they have a duty to preserve the integrity of the community."[60]

It is true that the conscientious beliefs of the majority also have weight and that their conscientious rights should not be trumped by those of dissenting members. However, respecting a person's conscientious beliefs does not mean that he or she can have a right to harm others. In the case of the conflict between the majority and individual dissenters over the legitimacy of a particular group practice, I agree that dissenters should simply leave the

[58] Quoted in *ibid* at 115.

[59] Quoted in *ibid*.

[60] *Ibid* at 116.

group if their conscientious beliefs conflict with those of the majority—rather than demand that the group transform that practice according to the dissenters' preferences—so as not to do harm to the majority. However, it is not clear why the majority can be allowed to gratuitously increase the cost of exit for dissenters, making their future in wider society more difficult and riskier. It is not clear why a community is entitled to punish or hurt those who are leaving just to set an example for other community members. The majority's liberty of conscience does not grant them license to harm the interests of dissenting members.

In sum, groups and communities should not have the right to freely raise the cost of exit to prevent members from leaving. It is unfair to require someone to bear the costs and disadvantages generated by others rather than by his own actions. And the protection of a group majority's liberty of conscience does not grant the majority a right to inflict harm on dissenting members.

Many of the practices listed in the quotation at the beginning of this sub-section that Kukathas believes should be allowed under a tolerationist regime have the effect of raising the cost of exit. Raising children to be unschooled and illiterate and denying them conventional medical care are perhaps the most obvious examples. Enforcing arranged marriages could also have the effect of preventing exit, especially when those who are forced into marriage have not reached adulthood. As Spinner-Halev observes, "early marriages can make it nearly impossible to leave one's community. It is hard to leave an insular community in many circumstances. This difficulty becomes almost an impossibility for a girl who is married at age 15 and has children soon after."[61] To the extent that Kukathas's tolerationist

[61] Spinner-Halev, *supra* note 31 at 79.

regime would permit groups practices that impose prohibitive costs of exit on their members, turning groups and communities into virtual prisons, it is an illegitimate political regime.

B. The semisovereignty model

Another theoretical model that would recognize some degree of sovereign autonomy for religious communities is Lucas Swaine's semisovereignty model. It is important to emphasize that Swaine is mainly concerned with what he calls "theocratic communities." He defines a theocratic community as "one in which persons endeavor to live according to the dictates of a religious conception of the good that is strict and comprehensive in its range of teachings."[62] Swaine provides five examples of theocratic communities within the United States: Pueblo Indian villages, Old Order Amish settlements, the Village of Kiryas Joel, Mormon polygamist communities, and the former city of Rajneeshpuram in Oregon.[63]

The framework of semisovereignty proposed by Swaine would allow theocratic communities to acquire "a significant measure of legal autonomy."[64] Under such a framework, theocratic communities would be free to lay down internal laws and regulations with regard to a wide range of civil matters, such as membership, marriage, and property.[65] Additionally, theocratic communities would have the right to discipline their members by meting out criminal punishment to those who were unwilling to obey community rules.[66]

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[62] Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006) at 72.

[63] *Ibid* at 73-74.

[64] *Ibid* at 99.

[65] See *ibid*.

[66] *Ibid*.

However, the extent to which communities may impose punishment is limited; they are prohibited from inflicting "serious corporal or capital punishments, or excessively cruel discipline, or punishments such as extended isolation or imprisonment that may extend for a long duration and whereby members may be denied their freedom of exit."[67] Within these limitations, the authorities of theocratic communities are permitted to punish members in order to maintain the normative order of the community.

To further bolster the legal autonomy of theocratic communities, Swaine proposes some procedural limitations designed to shield the communities from lawsuits that challenge the legitimacy of their practices and institutions. These procedural limitations include "narrowing the scope of issues on which suit may be brought and reducing the range of parties able to take legal action against theocratic communities."[68] This is the most important feature that distinguishes semisovereignty from the more common strategy of religious accommodation. According to Swaine, "[a]ccommodation standards cannot prevent public or private parties from bringing suit against theocratic communities and their practices, and those standards also require that religious groups continually must fight for exemptions from existing and imminent laws."[69] In contrast, under the standards of semisovereignty, "government and private parties both would be limited in the kinds of legal procedures they could bring to bear against theocratic communities."[70] Under the accommodation framework, theocratic communities have to continuously fight in the court for their right to be exempted from certain obligations imposed by state laws. This can result in communities being

[67] *Ibid*.

[68] *Ibid* at 113.

[69] *Ibid* at 103.

[70] *Ibid*.

involved in court proceedings that are extremely expensive and can drag on for years. The pressures of litigation, financial as well as mental, are not helpful to theocratic communities' dedication to constructing their own normative worlds.[71] By preempting or dramatically reducing the possibility of lawsuits being initiated against theocratic communities, the semisovereignty model seeks to create favorable conditions for these communities to pursue their religious conceptions of the good in a relatively stable and secure environment. Theocratic communities will indeed be more likely to thrive under the semisovereignty framework.

However, the main problem with this model is that religious communities must meet certain conditions in order to be granted semisovereign status, and some of these conditions are quite demanding. As Swaine acknowledges: "Quasi sovereignty has a list of requirements that applicant communities would have to meet, regarding a complete institutional plan of action, educational requirements for children, taxation, and the like, all of which would likely be viewed as burdensome and undesirable by the people in question."[72] Swaine's proposed "educational requirements for children" are, in my view, especially problematic and may preclude many otherwise eligible communities from acquiring semisovereign status.

To gain semisovereign status, a theocratic community would need to teach its children about the value of toleration.[73] Educators in theocratic communities would be required to make children understand that there are people in the world who hold different religious

[71] See *ibid* at 85-86.

[72] *Ibid* at 115.

[73] See *ibid* at 96-97.

beliefs and have varying conceptions of the good. Children would need to be taught about "the integrity of other ways than their own"[74] as well as to realize that "others can come to their beliefs conscientiously and thoughtfully."[75] In Swaine's view, these are all important elements of an education that is committed to teaching the value of toleration. Interestingly, in addition to these elements, Swaine also hints that "sympathetic engagement with ethical diversity" would be promoted as a result of his educational scheme. He first suggests that principles of liberty of conscience should be taught to members of theocratic communities including children.[76] He then claims that the inculcation of these principles would naturally lead members of theocratic communities to support "educating youth in ways that promote sympathetic engagement with ethical diversity."[77] In essence, he seems to suggest that a natural outcome or effect of his educational scheme, which requires the teaching of principles of the liberty of conscience, would be the fostering of the virtue of sympathetic engagement with ethical diversity in children of theocratic communities.

"Sympathetic engagement with ethical diversity" is a notion proposed by Eamonn Callan in *Creating Citizens*.[78] Callan explains that "[t]he relevant engagement must be such

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[74] *Ibid* at 96.

[75] *Ibid* at 97.

[76] See *ibid* at 96 ("Educators could bolster this understanding by impressing on young members how principles of liberty of conscience support rights and freedoms permitting their community to exist, prompting students to consider why liberty of conscience may be important to them.") and at 97 ("For with a proper inculcation of the three principles of conscience, a more minimal, solid ground for respecting others can be fostered in children of theocratic communities.")

[77] *Ibid* at 97-98. ("First of all, theocrats might not object to educating youth in ways that promote sympathetic engagement with ethical diversity if principles of liberty of conscience were inculcated respectfully and conscientiously in members of theocratic communities. *For the principles lend themselves naturally to such a treatment*…") (emphasis added).

[78] Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford; New York:

that the beliefs and values by which others live are entertained not merely as sources of meaning in *their* lives; they are instead addressed as potential elements within the conceptions of the good and the right one will create for oneself as an adult."[79] Furthermore, sympathetic engagement with ethical diversity would involve "some experience of entering imaginatively into ways of life that are strange, even repugnant, and some developed ability to respond to them with interpretive charity, even though the sympathy this involves must complement the toughmindedness of responsible criticism."[80] An education designed to foster sympathetic engagement with ethical diversity would encourage children to "enter imaginatively into" alternative ways of life. Children would be encouraged to approach other people's beliefs and values in a favorable light and to treat these beliefs and values as elements of the conceptions of the good they may potentially adopt in the future.

It seems to me that few theocratic communities would willingly accept an educational scheme designed to foster sympathetic engagement with ethical diversity. This is because having sympathy for *X* normally makes a person very close to accepting or affirming the value of *X*. It may therefore be unrealistic to expect people who believe that those outside their community hold false beliefs and live corrupt and immoral lives to teach their children to engage sympathetically with those behaviors and lifestyles. The NTC community in Taiwan, a typical theocratic community as defined by Swaine, would likely never agree to teach a curriculum designed to cultivate children's ability to imaginatively enter into ways of life they find morally reprehensible. In fact, one reason the NTC pulled its children out of

Clarendon Press, 1997).

[79] *Ibid* at 133 (emphasis in original).

[80] *Ibid*.

public schools is that it did not want them to engage with and be influenced by different moral worldviews taught in the public schools. If such a curriculum is a condition for gaining semisovereign status, I doubt how many conservative religious communities deeply concerned about their children's religious education and training would be willing to teach this curriculum in exchange for acquiring semisovereign status. Of course, Swaine does not explicitly suggest that fostering sympathetic engagement with ethical diversity is one of the goals of his educational scheme. But he does seem to suggest that the cultivation of such a virtue is what his educational scheme would naturally give rise to. From the perspective of conservative religious communities, there might be a reasonable concern that such an educational standard, once implemented, could significantly interfere with their effort to educate children in accordance with their religious convictions.

I have no objection to the idea that children in religious communities should be taught about the virtues of toleration and respect for others. But toleration, I believe, is a matter of degree: high standards of toleration exist as well as more basic standards.[81] It seems to me that we can surely find a less demanding standard than the standard that requires the fostering of sympathetic engagement with ethical diversity. One example of a less demanding standard is proposed by William Galston: "Toleration rightly understood means the principled refusal to use coercive state power to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone."[82] In contrast to developing sympathy for different values and beliefs, this form of toleration asks that people refrain

[81] I take this formulation from Spinner-Halev, *supra* note 31 at 30 ("Autonomy, as Raz says, is a matter of degree: some people will have more of it and some less of it.")

[82] William A. Galston, "The Idea of Political Pluralism" in Henry S Richardson & Melissa S Williams, ed., *Moral Universalism and Pluralism* (New York: New York University Press, 2009) 95 at 98.

from resorting to coercive power to impose their views on others. It requires people to recognize others' constitutional right to hold beliefs and engage in activities of which they may disapprove. This standard of toleration is more basic. Children in religious communities should at least be taught to accept this view of toleration. Teaching the virtue of toleration based on such a view would on the other hand be a less intrusive educational approach than requiring religious communities to promote sympathetic engagement with ethical diversity in their curricula.

C. The liberal pluralism model

The third model of jurisdictional autonomy of religious groups I would like to discuss is William Galston's liberal pluralism model. Galston supports the claim of political pluralists that "our social life comprises multiple sources of authority and sovereignty."[83] In fact, political pluralism is one of the three core elements of Galston's theory of liberal pluralism (the other two being expressive liberty and value pluralism).[84] In a later essay, he suggests that there are multiple "spheres of authority" that can be generated by individuals and associations, and those spheres place limits on the scope of state authority. According to Galston, examples of spheres of authority include the following: parental authority over the upbringing of children,[85] the authority of religious tribunals within churches over issues of faith,[86] and the authority of individual conscience against mandatory flag salute and

[83] William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2002) at 36.

[84] See *ibid* chapter 3.

[85] See Galston, *supra* note 82 at 110.

[86] See *ibid* at 111.

military drafts.[87] However, Galston does not deny that there are occasions in which parental authority and individual conscience must give way to governmental regulation based on legitimate public interests.[88] He makes it clear that he is *not* suggesting that there are "neatly separated, hermetically sealed spheres, each of which is dominated by a single set of claims."[89] His theory is therefore distinct from Kukathas's liberal archipelago model in which groups and communities are conceived of as separate islands. What Galston is against is the idea of "a single dominant authority" that has overriding power in all circumstances.[90]

An important characteristic of the liberal pluralism model is that it does not abandon the interest balancing approach as a way to address disputes between the state and religious organizations. Some defenders of religious autonomy believe that religious organizations will not have sufficiently robust protection if their claims are continually subjected to judicial interest balancing.[91] Galston does not go that far as to argue against the legitimacy of judicial interest balancing. On the contrary, he believes that the "compelling state interests" analysis is an appropriate means to determine whether state intervention in group life is justified.[92]

However, it is necessary to understand that a core concern underlying Galston's argument is that a liberal polity should pursue a policy of "maximum feasible

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[87] See *ibid* at 112-115.

[88] See *ibid* at 110, 119-120.

[89] *Ibid* at 121.

[90] *Ibid*.

[91] See e.g. Kathleen A. Brady, "Religious Group Autonomy: Further Reflections about What is at Stake" (2006-2007) 22 Journal of Law and Religion 153 at 173. ("[R]estrictions on religious group autonomy should not be the result of a balancing approach even one that would only limit group autonomy in cases of significant social harm. As I have argued above and will discuss further below, such an approach risks restricting group freedom for reasons that are not, in fact, compelling or even persuasive in the long run.")

[92] See Galston, *supra* note 83 at 125-126.

accommodation" for groups and associations that want to live according to their own norms without interference.[93] In Galston's theory, as I see it, it is this concern that directs the ways in which the "compelling state interests" analysis should be carried out. Because groups and associations should be afforded the maximum accommodation that is feasible, only a few narrowly defined public interests would qualify as "compelling" enough to justify public intervention. These public interests, according to Galston, include the following: protection of human life ("no free exercise for Aztecs"),[94] protection of normal development of physical capacities,[95] ensuring group members have a meaningful right of exit,[96] and the teaching of the virtue of tolerance.[97] Therefore, it can be said that the default position of liberal pluralism model is noninterference; state intervention in group life and practices is warranted only under exceptional circumstances.

An important case discussed by Galston in articulating his argument is the case of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc*.[98] In that case, a teacher employed at a Christian school was informed that her contract would not be renewed after she told her principal that she was pregnant. The school's nonrenewal decision was based on the religious belief that "mothers should stay home with their preschool children."[99] After the teacher contacted a lawyer and sought to take legal action against the school, she was immediately

[93] *Ibid* at 20.

[94] *Ibid* at 23.

[95] *Ibid*.

[96] *Ibid* at 122-123.

[97] *Ibid* at 126-127.

[98] 477 U.S. 619 (1986).

[99] *Ibid* at 623.

suspended and eventually terminated.[100] She then filed a complaint with Ohio Civil Rights Commission, claiming that the school's nonrenewal decision constituted sex discrimination.[101] After investigation, the Commission sent a settlement letter to the school which would have required the school to reinstate the teacher with back pay.[102] (It is worth noting that the ministerial exception, discussed previously in section II, is not applicable in this case, because no evidence in this case suggests that the teacher was also a commissioned minister.)

Clearly, this case involves a conflict between the teacher's right to be free from discrimination on the basis of gender and the school's claim to freedom of religion. Galston suggests that in such a case, a liberal pluralist polity would prioritize the claim of religious freedom over the claim of nondiscrimination. He writes that "[a]lthough the Court ducked the issue, I believe a reasonable case can be made in this instance for giving priority to free exercise claims. I say this in part because of an unarticulated background feature of this case, and of liberal society in general—namely, the existence of a wide array of other employment options."[103] Galston suggests here that a key factor in balancing the claims of religious freedom and nondiscrimination is whether the dismissed teacher had other employment options. If she had an opportunity to be employed elsewhere but chose to work as a teacher in a religious school, she has an obligation to comply with the school policies including religious tenets.

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[100] *Ibid.*

[101] *Ibid* at 623-624.

[102] *Ibid* at 624.

[103] William A. Galston, "Two Concepts of Liberalism" (1995) 105:3 Ethics 516 at 533.

Feminist political philosopher Susan Okin strongly disagrees with this strategy for solving the conflict in this case. Okin points out that Galston's solution would subject the teacher to "involuntary exit," with no chance for her to continue to work at the school.[104] In Okin's view, involuntary exit is undesirable and is even worse than merely having a formal right of exit because it would result in the dissenting member's opportunity to effect change from within the group being totally eliminated.[105] She suggests that the right of exit should not be used to "justify oppression or the silencing of dissent within a group" and to "reinforce conservative tendencies within the group."[106] To protect the teacher's ability to influence and transform the beliefs of the school, she must be given a right to stay within the school rather than being subject to involuntary exit. However, I find such a suggestion unreasonable because it would render freedom of association meaningless. Freedom of association allows like-minded people to come together and form a group to practice what they believe in without interference. The group members' shared beliefs are the very basis upon which they associate with one another and are an integral part of group identity. That basis would inevitably suffer erosion if a group is forced to accept someone who refuses to recognize those shared beliefs. Compelled acceptance of dissenters would also cause the group to gradually lose its distinct identity. A Protestant church, for example, would cease to be Protestant if it is obliged to welcome Catholics and respect their rights to initiate change from within the church. As Christopher Lund argues, "a church's right to religiously

[104] Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit" (2002) 112:2 Ethics 205 at 214.

[105] See *ibid*. See also *ibid* at 226. ("For this kind of forced exit especially prevents those within the group who might want to liberalize it from the inside from having any chance of doing so.")

[106] See *ibid* at 214.

discriminate in membership and staff is nothing less than its bare right to exist."[107] Freedom of association would mean nothing to a group if it is deprived of "its bare right to exist" by being forced to admit dissenters into the group (or allow them to continue to stay within the group).

On the other hand, while I agree with Galston's conclusion that priority should be given to free exercise claims in this case, I cannot fully accept his reasoning. Specifically, I think religious organizations would be granted rights that are too broad in employment matters if whether or not alternative employment options exist was the *only* determining factor in the process of balancing the conflicting interests in this case. Nearly every employment decision made by religious organizations could be exempt from the regulation of anti-discrimination norms if individuals claiming discrimination could be viewed as (potentially) having employment opportunities elsewhere. Religious organizations would have a broad right to autonomy in requiring that every employee within an organization—regardless of the employee's level or duties—conform to organizational religious standards. This does not seem to me to be a proper way of balancing two fundamental constitutional rights: freedom of religion and the right to be free from discrimination. I would therefore recommend the inclusion of one more factor in the consideration of how to properly balance the conflicting interests in this and similar cases. This factor can be expressed in the form of the following question: does the job position in question contribute significantly to the fulfillment of the organization's religious mission?

[107] Christopher C. Lund, "In Defense of the Ministerial Exception" (2011) 90 North Carolina Law Review 1 at 24.

This is an important factor that must be taken into consideration because it helps determine the extent to which a school community's right to freedom of religion is interfered with. As the Supreme Court of Canada recognized in *Loyola High School v. Quebec (Attorney General)*,[108] religious schools have the right to engage in "the collective manifestation and transmission of [religious] beliefs."[109] This right would be seriously interfered with if a religious school were prohibited from requiring employees whose jobs contribute significantly to fulfilling the school's religious mission to observe and comply with its religious standards. There is no doubt that teachers in religious schools play a key role in advancing the schools' religious missions. They are the key actors in transmitting religious beliefs not only through their teaching but also, and more importantly, by serving as role models for students.[110] On the other hand, there are employees in religious schools—accounting clerks or gardeners, for example—who do not bear the main responsibility of transmitting religious beliefs. Schools' right to collectively manifest and transmit religious beliefs would be interfered with to a lesser degree if the state requires that employment decisions regarding such positions be governed by anti-discrimination norms. Returning to the case of *Dayton Christian Schools*, I agree that priority should be given to the claim of freedom of religion over that of nondiscrimination because, had the school been required to

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[108] 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[109] *Ibid* at para 61.

[110] See *Caldwell et al. v. Stuart et al*., [1984] 2 S.C.R. 603 at 618. ("As has been pointed out, the Catholic school is different from the public school. In addition to the ordinary academic program, a religious element which determines the true nature and character of the institution is present in the Catholic school. To carry out the purposes of the school, full effect must be given to this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education.")

reinstate a teacher who did not practice its doctrine, its right to manifest and transmit religious beliefs would have been seriously violated.

My suggestion that the factor of "contributing significantly to the fulfillment of religious mission" be included as part of interest balancing process could be met with the so-called "chilling effect" objection. In his concurring opinion in *Corporation of Presiding Bishops v. Amos*,[111] Justice Brennan argues that case-by-case determination of whether the nature of a particular job activity within a religious nonprofit organization is religious or secular may chill religious activity. He writes:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs… Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well.[112]

While I accept that the danger of chilling religious organizations is real, I do not think it is so great to such an extent as to remove the need to determine the nature of a job activity in judicial interest balancing. As Justice Brennan recognizes, there are some activities in religious organizations which most people would agree can be characterized as being

[111] 483 U.S. 327 (1987).

[112] *Ibid* at 343.

integral to the organizations' religious missions ("those activities about which there likely would be no dispute"). In the context of religious schools, these activities include, at least, the functions of teachers and higher-ranking administrators. Religious schools can legitimately require these two types of employees to fully comply with their religious standards, even if it means the preclusion of the application of nondiscrimination norms to such positions. Reasonable disagreement may exist over whether positions other than these two types can be characterized as contributing significantly to the fulfillment of a school's religious mission. However, as long as religious schools' right to require the full religious compliance by these two types of employees is secured, the schools are well-placed to achieve their religious missions. Therefore, the suggestion that determining the nature of job activities on a case-by-case basis would lead to the chilling and possible secularization of religious organizations is unfounded.

In sum, I suggest that in balancing religious organizations' claim to freedom of religion and individuals' claim to nondiscrimination, we need to consider both whether the employee has other employment options and whether his or her job duties contribute significantly to the fulfillment of the organization's religious mission. I believe this strikes a better balance between the conflicting interests in cases such as *Dayton Christian Schools.*

IV. Concluding Remarks

I have discussed the justifications for and models of the jurisdictional autonomy of religious organizations. The discussion in this chapter points to a couple of principles which I believe should form the basis upon which the conflicts involving religious organizations'

internal operation are to be addressed. First, courts should refrain from adjudicating internal disputes of a religious organization if intervention would result in the courts addressing religious questions or taking sides in a dispute that is ecclesiastical in nature. This is the primary ground that justifies the ministerial exception. A civil court determined to investigate if a ministerial employment decision was based on a religious rather than a pretextual reason would inevitably end up addressing questions related to religious doctrines, as we have seen in section II. With respect to other conflicts or disputes that do not involve the risk of secular authorities addressing religious questions, courts should apply a balancing framework consistent with Galston's liberal pluralist approach in dealing with the conflicts. Typical examples of this type of conflicts include those arising from the employment decisions by religious organizations concerning the non-ministerial staff, and government regulation of educational standards and curriculum of a religious community and its schools. In the employment disputes involving the non-ministerial staff, I suggest that the consideration of whether the functions of a job position contribute significantly to an organization's religious mission should complement the consideration of whether other employment options are available in balancing competing claims of religious freedom and nondiscrimination.

These are the general principles regarding the autonomy of religious organizations which I think could help produce a more sound judgment if taken into account by the courts. In the next chapter, I will examine several important religious autonomy cases in Canada and explain how these principles should be applied in practical cases.

Chapter 4. The Jurisdictional Conception of Church Autonomy and Canadian Jurisprudence

I. Introduction

This chapter discusses Canadian jurisprudence on religious autonomy in light of the theoretical discussion in chapter 3. In the concluding section of chapter 3, I outlined two general principles which I argue should form the basis upon which to address the conflicts involving religious organizations' internal operation. The first principle suggests that courts should refrain from adjudicating an internal dispute of a religious organization if the intervention would result in the courts addressing religious questions. The second principle states that it is legitimate for the state to intervene in disputes or conflicts that do not involve the risk of secular authorities addressing religious questions, and that a balancing framework consistent with William Galston's liberal pluralist approach should be applied in dealing with such conflicts. My aim in this chapter is to further develop and elaborate these two principles through an examination of Canadian cases.

The main arguments of this chapter are as follows. Religious organizations ought to have an exclusive jurisdiction in the areas of the employment of ministers and membership qualifications because the decisions of religious authorities in these two areas are closely connected to religious doctrine. The prohibition on secular determination of questions related to religious doctrine prevents the courts from interfering with the decisions of religious organizations in these two areas. The decisional authority of a religious organization is much more restricted when it comes to the employment of non-ministerial

staff, especially when the organization operates in the public sphere and receives public funding. Likewise, the freedom of religious communities in carrying out religious education should be limited by public interests in the teaching of tolerance and in preserving community members' meaningful right of exit.

I begin by discussing the prohibition on secular determination of religious questions, which was strongly affirmed in the Supreme Court of Canada's landmark decision in *Syndicat Northcrest v. Amselem.* I examine the context in which this principle was proposed in *Amselem* as well as its further development in *Bruker v. Marcovitz* (section II). I then apply this principle to two cases that involve the employment disputes between religious organizations and their ministers: *Kong v. Vancouver Chinese Baptist Church*, which was decided by the Supreme Court of British Columbia, and *McCaw v. United Church of Canada,* which was decided by the Court of Appeal of Ontario. I argue that the courts' judgments in both cases violated the prohibition on secular determination of religious questions (section III). I go on to analyze membership disputes within religious organization in section IV. Two cases are discussed in this section. The first case is *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, decided by the Court of Appeal of Alberta. The second case is the Supreme Court of Canada's recent decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, where the Court refuses to take jurisdiction over a disfellowship decision by a religious organization. In section V, I turn to examining employment disputes between religious organizations and their non-ministerial employees. The example I consider in this section is the case of *Ontario Human Rights Commission v. Christian Horizons*. The main issue I explore there is whether a religious nonprofit organization that receives substantial public funding should be allowed to hire only co-

religionists (section V). Finally, I examine the Supreme Court's decision in *Loyola High School v. Quebec (Attorney General)* and consider the proper limitations that can be placed on the ways in which religious communities carry out religious education (VI).

II. The Prohibition on Secular Determination of Religious Questions

A. *Syndicat Northcrest v. Amselem*

The principle that secular courts are prohibited from adjudicating religious disputes was clearly laid down in *Syndicat Northcrest v. Amselem*.[1] The claimants in *Amselem* were Orthodox Jews who were residents in a condominium in Montreal and who wished to set up individual succahs (a small temporary hut) on their own balconies to celebrate the Jewish festival of Succot. The syndicate of co-ownership rejected their request to erect the succahs on the grounds that any decoration or construction on a balcony was prohibited by the declaration of co-ownership. The Orthodox Jewish residents argued that this prohibition violated their freedom of religion, as setting up their own succahs during the festival of Succot was, they believed, mandated by the Jewish religion.

A core issue in this case was whether freedom of religion protects the practice of erecting a succah on one's own balcony. There exists a controversy as to whether such a practice is indeed required by the Jewish religion or if it is a matter of personal preference. The majority of the Supreme Court adopted a subjective approach in addressing this issue. The subjective approach holds that for a particular practice to fall within the ambit of the protection of freedom of religion, the individual who engages in that practice only needs to

[1] 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

demonstrate that she *sincerely believes* that the practice is required by her religion.[2] She does not need to prove that the practice is part of the "objectively defined religious obligations"[3] or is "required by official religious dogma or is in conformity with the position of religious officials."[4]

The majority justified the subjective approach partly by pointing out the problems inherent in the alternative objective approach. A serious problem of the objective approach is that it would lead to "[s]ecular judicial determinations of theological or religious disputes." Writing for the majority, Justice Iacobucci suggests:

> In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.[5]

Later in the opinion, Justice Iacobucci added that: "In my view, when courts undertake the task of analysing religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious

[2] *Ibid* at para 46.

[3] *Ibid* at para 24.

[4] *Ibid* at para 46.

[5] *Ibid* at para 50.

'obligation' …they enter *forbidden domain*. It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine."[6]

The trial court in this case violated this principle by probing into, and making a determination on, the issue of whether the Jewish religion imposes an obligation requiring Jews to set up their own succahs. What is even more problematic is the fact that the trial judge reached a conclusion on this issue by favoring the expert testimony of one Rabbi over that of another Rabbi.[7] By choosing between conflicting expert testimonies on a contentious religious question, the trial judge in effect took sides in a dispute that was purely ecclesiastical in nature.

While the legitimacy of the principle that courts should avoid adjudicating religious disputes seems self-evident, I would still like to briefly explain what I see as an underlying rationale of this principle, as much of the following discussion depends on this principle. As we have seen in chapter 3, the U.S. Supreme Court in *Watson v. Jones* stated that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[8] It seems to me that the notion that "the law knows no heresy" lies at the heart of freedom of religion. Historically—the European Middle Ages in particular—religious persecutions stemmed in a large part from the state assuming the responsibility to decide religious questions or to enforce the Church's decisions with regard to those questions. The modern liberal state founded on the principle of secularism, by contrast, is characterized by the rejection of such responsibility.[9] Questions such as the orthodoxy of a religious belief or

[6] *Ibid* at para 67 (emphasis added).

[7] *Ibid* at para 23.

[8] 80 U.S. 679 (1871) at 728.

[9] See Ira C. Lupu & Robert W. Tuttle, *Secular Government, Religious People* (Cambridge, UK: Wm. B.

the centrality of a particular practice in a belief system should be left exclusively to religious believers and communities to debate among themselves.

Now, it is true that in the context of a contemporary liberal society, state-supported religious persecution or oppression is extremely rare if not totally impossible. However, there is still a risk that judicial determination of religious questions could result in religious freedom of a religious group being significantly limited. Imagine that there are denominations A and B who have been bitter rivals and each group thinks the other's theological views are terribly wrong. When a case was being litigated in the court, a pastor of denomination A was asked to give expert testimony on how a section in the religious text should be interpreted. The court later determined that the pastor's interpretation was less credible than a different interpretation. The court's determination gave denomination B an opportunity to spread information warning people not to join A, because, they said in the tracts they distributed, a court has decided that A's religious teaching is not to be believed. Needless to say, denomination A's freedom to propagate and to continue to develop itself would thus be significantly interfered with, all because the court made a religious judgment unfavorable to them.

What I want to emphasize through this imagined example is that there is a risk that a court's determination with regard to religious expert evidence could be used by the opponents of a religious group to undermine the integrity of that group. Therefore, the prohibition on secular judicial determination of religious questions is not simply a matter of the lack of competence on the part of the judiciary.[10] In my view, the prohibition is based

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Eerdmans Publishing, 2014) at 27.

[10] *C.f.* Richard W. Garnett, "A Hands-Off Approach to Religious Doctrine: What Are We Talking About?"

more importantly on the concern for the protection of religious freedom. Even if a judge is knowledgeable about religion, the concern for freedom of religion should nonetheless compel her to make a conscious choice to refuse to be involved in any religious dispute.

Returning to this case, the dissenting opinion written by Justice Bastarache and joined by Justice LeBel and Justice Deschamps favors the objective approach. According to Justice Bastarache, the objective approach requires that there must be a "genuine connection" between a claimant's practice and the precepts of the religion to which he belongs for that practice to be qualified for the protection of freedom of religion.[11] Sincere belief alone is not sufficient to attract the protection; a claimant must further prove that his belief (that a particular practice is mandatory) is in fact based on a precept of his religion. However, the discussion in this dissenting opinion with regard to how the objective approach should be applied in this case is quite short, especially with regard to whether Mr. Amselem's belief is indeed based on a religious precept.[12] The brevity of the discussion raises the question whether the objective test would be satisfied as long as a claimant can point to a scriptural text which, through a plain reading of the text, gives support to the claimant for his or her practice. However, other parts of the opinion seem to suggest that merely presenting a scriptural text is not enough; an interpretation of that text is also required. For example, Justice Bastarache maintained that "a religion is a system of beliefs and practices based on certain religious precepts."[13] He also wrote: "Religious precepts constitute a body of

(2009) 84:2 Notre Dame Law Review 837 at 857-858 (arguing that judicial incompetence is not an entirely satisfactory justification for why secular courts should not render religious decisions.)

[11] *Amselem, supra* note 1 at para 135.

[12] See *ibid* at para 163.

[13] *Ibid* at para 135.

objectively identifiable data that permit a distinction to be made between *genuine religious beliefs* and personal choices or practices that are unrelated to freedom of conscience."[14] In my view, it is necessary that a precept be interpreted before it can be verified as part of the "system of beliefs" and "genuine religious beliefs" of a religion. It is possible that a precept in a religious text could be interpreted as *not* constituting part of the genuine religious beliefs of a religion. For example, there might be a situation where requirement X laid down in a religious text is "overruled", or significantly narrowed in its scope of application, by command Y which is revealed in the later part of the text. An individual's claim that his practice is based on X would be no more than personal subjective understanding if few of his fellow believers think that X is still a valid requirement in their religion. The point I want to make here is that there remains a need for religious interpretation in the objective approach.

A need for interpretation of religious text necessarily entails a need for religious expert testimony. This is consistent with Justice Bastarache's view that expert testimony is useful, for it helps establish "the fundamental practices and precepts of a religion the individual claims to practise."[15] But, as we have seen, an obvious problem with expert testimony with regard to religious beliefs is that there can be conflicting testimonies which interpret the same portion of the scripture in considerably different ways. However, Justice Bastarache's dissenting opinion did not explain how this problem—and the inevitable judicial endorsement of one religious interpretation rather than another—should be dealt with. As I see it, the concern raised by the majority with regard to secular judicial determinations of theological disputes has not been met with a proper response in this dissenting opinion.

[14] *Ibid* (emphasis added).

[15] *Ibid* at para 140.

B. *Bruker v. Marcovitz*

The principle that civil courts should abstain from adjudicating religious disputes once again became a focus of attention in the Supreme Court's decision in *Bruker v. Marcovitz*.[16] A key issue in *Bruker* concerned the justiciability of an agreement voluntarily entered into by the divorcing parties to remove religious barriers to remarriage. During their divorce, Ms. Bruker and Mr. Marcovitz, both of whom were practicing Jews, negotiated and signed a "Consent to Corollary Relief" ("the Consent") under the assistance of their respective legal counsel. Paragraph 12 of the Consent stated that the parties agree to "appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon a Decree Nisi of Divorce being granted."[17] A *get* is a Jewish divorce which can only be granted by a husband. Without obtaining a *get* from her husband, a Jewish woman is considered to be remaining in a marriage relationship and cannot remarry within her faith. Despite having made a commitment in the Consent to grant a *get*, Mr. Marcovitz refused to make good on his promise for 15 years. Ms. Bruker filed a lawsuit seeking compensation for damages resulting from Mr. Marcovitz's breach of the Consent.[18]

A basic yet difficult question presented before the Supreme Court was whether or not Paragraph 12 of the Consent was within the jurisdiction of the civil courts. Could the agreement in Paragraph 12 be enforced by the civil courts through the remedies of damages,

[16] 2007 SCC 54, [2007] 3 SCR 607 [*Bruker*].

[17] *Ibid* at para 39.

[18] *Ibid* at paras 25-26.

or was it immune from judicial scrutiny because it involves an obligation that is religious in nature? Would a court violate the prohibition laid down in *Amselem* with regard to secular judicial determination of religious disputes if it takes jurisdiction over the contractual obligation of the husband to grant a *get*?

The Court ruled that Paragraph 12 of the Consent was justiciable. Writing for the majority, Justice Abella concluded: "The fact that Paragraph 12 of the Consent had religious elements does not thereby immunize it from judicial scrutiny. We are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope."[19]

I agree with the majority's position. I think that the exercise of jurisdiction by the Court over the agreement to provide a *get* does not violate the prohibition on secular adjudication of religious disputes. There is no apparent risk in this case that the Court would have no choice but to make a religious or theological judgment in order to resolve the conflict. Judicial intervention in this case would not result in the Court having to take sides in a dispute over the meaning and requirement of a religious doctrine, as was the case in *Amselem*. At the time when Ms. Bruker and Mr. Marcovitz made the agreement, neither of them disputed (or had a different understanding on) if and how the procedure of obtaining a *get*

[19] *Ibid* at para 47.

should be carried out under the Jewish law. In taking the jurisdiction and ultimately enforcing the agreement, the Court did not make any religious or theological judgment. Rather, it simply accepted the judgment made by the divorcing parties themselves on how they should deal with the issue of *get*.

Furthermore, Ms. Bruker and Mr. Marcovitz, both of whom were religious Jews, can be said to have turned the matter of removing religious barriers to remarriage from a matter purely internal to the Jewish community into an "external" one by making a civil contract intended to be enforced by secular courts. The internal/external distinction is fundamental in the theoretical discussion on the scope of religious autonomy. Defenders of the autonomy of religious organizations believe that there is a strong case against state intervention in the internal relations of religious communities.[20] On the other hand, few, if any, of them would go so far as to argue that the state may not take jurisdiction over the conflicts arising from the relationship between a religious community and the outsiders. By entering into a civil contract under the assistance of lawyers, the divorcing parties clearly indicated an intent that they would like to rely on a legal mechanism recognized by the wider society, thereby declining to subject their relationship entirely to the internal dispute resolution processes of their community. The relationship between Ms. Bruker and Mr. Marcovitz formed on the

[20] See e.g. Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy" (1981) 81:7 Columbia Law Review 1373 at 1403. ("An orgnization's claim to autonomy is strongest with respect to internal affairs, including relationships between the organization and all persons who have voluntarily joined it…If one is ill-treated by his church, he can leave it; if he feels bound by faith or conscience to stay in, the government can offer him no remedy.) (Footnote omitted.)

basis of a civil contract should be regarded as one having an "external" rather than "internal" character, and therefore it properly attracts judicial attention.

The majority's position on the justiciability of the husband's obligation has been criticized by Richard Moon, who believes that judicial consideration of religious rules and practices is unavoidable in this case. Moon writes:

> Justice Abella seemed to assume that in this case the contract could be enforced without the court having to delve into religious doctrine. She thought that Mr. Marcovitz's promise was clear and unambiguous. She noted that he offered no religious reasons for his failure to perform his undertaking and that, in any event, Judaism recognized no reasons to refuse consent. Yet Abella J. could make this determination only after considering the rules and practices of the religious community. The obvious question is whether she approached this task as a secular public actor seeking to identify the social practices of a religious community or as a member of that community and a participant in the debates about the proper understanding of its rules. It seems likely that her knowledge of Jewish law and practice gave her some comfort in deciding that the religious law was clear on this issue. We are left to wonder, however, what she might have done had there been some dispute (or had she recognized there was some dispute) within the Jewish community about whether a husband was ever justified in withholding his consent.[21]

Note that in this quote Moon referred to two separate actions by Mr. Marcovitz: making a promise to give a *get* and later refusing to fulfill his promise. Moon's argument that Justice Abella's determination is necessarily based on her understanding of religious rules of the Jewish community focuses on the second action of Mr. Marcovitz, namely, his refusal to

[21] Richard Moon, "Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion" (2008) 42 The Supreme Court Law Review 37 at 44-45.(Footnotes omitted).

comply with the obligation. But in Justice Abella's analysis, the issue of whether Mr. Marcovitz has religious reasons to refuse to comply with his obligation is examined not as part of the discussion on justiciability but as part of the discussion on whether his freedom of religion would be violated if the obligation is enforced. With regard to Justice Abella's consideration of *whether or not Mr. Marcovitz's promise is justiciable*, I do not believe that her judgment on this issue was based on her understanding of religious rules of the Jewish community. It seems clear to me that in reaching the conclusion that the Court has jurisdiction over Mr. Marcovitz's promise, Justice Abella did not rely on a particular religious understanding to vindicate her argument.[22]

On the other hand, it is true that when discussing whether there was any religious justification for Mr. Marcovitz's refusal to comply with his obligation, Justice Abella's knowledge about the Jewish religion may have played a role in her determination, especially when she suggested that "[Mr. Marcovitz]'s religion does not require him to refuse to give Ms. Bruker a *get*."[23] This is indeed a religious judgment, and Moon rightly points out that had there been some dispute within the Jewish community on whether a husband can refuse to comply with his obligation, Justice Abella would have had to choose between different religious interpretations. However, I think this is a problem that can be overcome. It seems to me that the religious judgment made by Justice Abella is a result of deviating from the subjective approach adopted by the majority in *Amselem* and resorting instead to the objective approach. The objective approach, as we have seen, asks whether there is a

[22] See *supra* note 19 and the accompanying text for Justice Abella's argument regarding why Mr. Marcovitz's promise is justiciable.

[23] *Bruker*, *supra* note 16 at para 69.

religious precept on which an individual's practice or action is based. Justice Abella's suggestion that the Jewish religion does not require a husband to refuse to give a *get* can be seen as an application of the objective approach. If, by contrast, a court strictly adheres to the subjective approach and asks whether the individual has a sincere belief that his religion requires him to behave in a certain way (e.g. to refuse to give a *get*), I see no need for the court to make a religious or theological judgment.

In sum, it is my view that the agreement between Ms. Bruker and Mr. Marcovitz can be enforced by a civil court without "having to delve into religious doctrine." Justice Abella's determination on the justiciability of the husband's obligation is not based on a particular understanding of religious rules. A strict adherence to the subjective approach in examining whether the husband's freedom of religion would be violated by judicial enforcement of the contract would avoid the need for making a religious judgment on the precepts and requirements of a religion.

Justice Deschamps, who wrote the dissenting opinion, was also strongly opposed to the Court's exercise of jurisdiction over Mr. Marcovitz's obligation to provide a *get*. In the opening paragraph of her dissenting opinion, Justice Deschamps stated: "The question before the Court is whether the civil courts can be used not only as a shield to protect freedom of religion, but also *as a weapon to sanction a religious undertaking*. Many would have thought it obvious that in the 21st century, the answer is no. However, the conclusion adopted by the majority amounts to saying yes. I cannot agree with this decision."[24] Later in

[24] *Bruker*, *supra* note 16 at para 101 (emphasis added).

the opinion she reiterated this point by saying that judicial enforcement of the husband's obligation amounts to "sanctioning the violation of a religious precept."[25]

Contrary to Justice Deschamps's view, I believe the Court in this case was not asked to sanction religious precepts or to enforce obedience to an ecclesiastical decree, but simply to enforce a civil obligation the husband chose to enter into. Justice Deschamps's framing of the main question in this dispute (whether the coercive power of the courts can be used as a weapon to sanction the religious law) makes sense only if we assume that the voluntarily made agreement between the two divorcing parties does not exist. It is true that she did not see Paragraph 12 of the Consent as constituting a validly formed contractual obligation.[26] But I find it difficult to understand why the fact that Mr. Marcovitz voluntarily made a commitment to grant a *get* has never been given proper regard in the dissenting opinion.[27] The impression one gets from reading the dissenting opinion is that the opinion approached the issues in this case almost as if Mr. Marcovitz had never made a formal promise to Ms. Bruker concerning the *get*. However, ignoring the existence of a voluntary civil agreement and the husband's consent to it does not represent a way of showing respect to religious individuals and religious communities. On the contrary, it disrespects their agency and their identity as citizens who enjoy equal rights and an equal status as secular citizens. As Rosalie Jukier and Shauna Van Praagh point out: "Contractual obligations law reminds us that the interpersonal agreements and relations at the heart of civil law include those of religious

[25] *Ibid* at para 180.

[26] See *ibid* at paras 162-176.

[27] The only exception is found in para 166, where Justice Deschamps acknowledges that "[t]here is no doubt that the undertaking was agreed to by both parties. They were legally capable of contracting and they gave their consent."

individuals. They too can tell their stories, articulate their needs, fulfil their promises, and claim their damages, even if those stories and obligations and damages are necessarily linked to religious identity."[28] What is really at stake in this case, in my view, is the equal rights of religious individuals to make use of a civil contract as an instrument to arrange their lives and allocate the rights and obligations between them. By refusing to recognize the enforceability of the agreement between Ms. Bruker and Mr. Marcovitz, the dissenting opinion falls short of honoring such equal rights.

This section provided an analysis of the principle that civil courts are prohibited from determining religious questions as revealed and developed in *Amselem* and *Bruker*. While the Supreme Court of Canada's discussion on this principle has been carried out mainly in the context of freedom of religion of individuals, the principle has important implications for the autonomy of religious organizations as well. As I noted in chapter 3, the principle is the primary ground that justifies the doctrine of ministerial exception. In the next section, I explain in more detail the connection between the principle and the ministerial exception by examining two Canadian cases that involve the dismissal of ministers of religious institutions.

III. The Ministerial Exception

The ministerial exception is a legal doctrine developed in American jurisprudence that immunizes religious organizations from employment-related claims brought by their

[28] Rosalie Jukier & Shauna Van Praagh, "Cvil Law and Religion in the Supreme Court of Canada: What Should We Get out of Bruker v. Marcovitz?" (2008) 43 The Supreme Court Law Review 381 at 396.

ministers. The U.S. Supreme Court affirmed the legitimacy of this doctrine in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, holding that "the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'…is the church's alone."[29] An important justification for the ministerial exception is that judicial inquiry into religious organizations' decisions with regard to hiring or firing ministers will inevitably lead to the problematic result of secular determination of religious questions.[30] The following two cases are examples of how such a problem would arise if the courts do not recognize the ministerial exception in dealing with the employment disputes between religious organizations and their ministers.

A. *Kong v. Vancouver Chinese Baptist Church*

The factual background of *Kong v. Vancouver Chinese Baptist Church*,[31] a case decided by the Supreme Court of British Columbia, is as follows. The former Senior Pastor of Vancouver Chinese Baptist Church (VCBC) filed suit against the church after he was removed from his position, seeking damages for wrongful dismissal. VCBC claimed that its decision to remove the pastor, Reverend Kong, was "intrinsically ecclesiastical in nature," and therefore a civil court lacks jurisdiction over such a decision.[32] The Supreme Court of

[29] 132 S. Ct. 694 (2012) at 709.

[30] See Ira C. Lupu & Robert W. Tuttle, "Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders" (2009) 7 The Georgetown Journal of Law & Public Policy 119 (especially 141-144.)

[31] 2014 BCSC 1424 (*Kong 2014*, dealing with the jurisdictional question); 2015 BCSC 1328 (*Kong 2015*).

[32] See *Kong 2014*, *supra* note 31 at para 32 ("The VCBC submits that a church's removal of its spiritual leader is intrinsically ecclesiastical in nature. It follows, the church argues, that this is an ecclesiastical issue over which the court has no jurisdiction other than to ensure that the church has proceeded in accordance

British Columbia found that the relationship between Rev. Kong and VCBC was one of employment and that the pastor should be accorded the same level of protection under the employment law as other employees.[33] The court accordingly determined that it has jurisdiction to adjudicate the dispute of whether Rev. Kong was wrongfully removed from his ministerial position. Clearly, this determination is contrary to the ministerial exception.

In a separate judgment, the court found that VCBC was "unduly insensitive" in the manner of its dismissal of Rev. Kong, which caused mental distress to the pastor. The court awarded $30,000 as a compensation for Rev. Kong's mental distress along with an award of 12 month's pay in lieu of notice.[34]

The court's finding that VCBC was unduly insensitive in dismissing Rev. Kong is based on the following actions by VCBC's leadership which the court found inappropriate. In a regular Members' Meeting of the church, a number of documents which contain church leaders' observations critical of the ways in which Rev. Kong communicated with other pastoral staff were released to the congregation.[35] And then in a Special Members' Meeting called to consider whether Rev. Kong should continue to serve as the Senior Pastor, a member of the church leadership suggested to the congregation that Rev. Kong "has not acted as good shepherd based on John 10."[36] The court found that such an assertion—that Rev. Kong is not a good shepherd—was one of the reasons that caused Rev. Kong's mental

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with the principles of natural justice.").

[33] See *ibid* at para 50 ("There is nothing, in short, that in my view should deprive the Rev. Kong of the protection that other employees enjoy in contemporary Canadian society.").

[34] See *Kong 2015*, *supra* note 31 at paras 4-5.

[35] See *ibid* at paras 17-20.

[36] *Ibid* at para 23.

distress: "The case at bar is serious with respect to the mental distress caused to Rev. Kong. Although not prolonged…it went to his social (dishonest) and religious (not a good shepherd) innateness. Rev. Kong felt hurt and shame."[37] In other words, from the court's perspective, VCBC's leadership should not have made this allegation in the church's process of dismissing Rev. Kong.

However, I believe the court crossed an important line when it found fault with the above-mentioned actions by the church leaders, especially their assertion that Rev. Kong has not acted as good shepherd. According to VCBC's internal regulations, removal of the Senior Pastor requires a membership vote.[38] The church leadership's observation that Rev. Kong is not a good shepherd provides a relevant and important basis for the evaluation of the suitability of Rev. Kong by the membership. The context in which this assertion was made is also appropriate—it was made in a Special Members' Meeting where the congregation gathered to consider whether Rev. Kong should continue to serve in the church. By awarding a compensation for Rev. Kong's mental distress, the court in effect punished VCBC's leadership for making an ecclesiastical judgment and for presenting it to the congregation for consideration. However, making such a purely ecclesiastical judgment—whether or not a pastor is a good shepherd—falls under the exclusive jurisdiction of a church. A civil court has no authority or jurisdiction whatsoever to interfere with that judgment. Furthermore, such a judgment was based on a spiritual standard revealed in the scripture (John 10). Imposing a punishment for making that judgment implies a disapproval of the spiritual standard on the basis of which that judgment was made. But what constitutes an

[37] *Ibid* at para 65.

[38] See *ibid* at para 38.

appropriate spiritual standard by which a church determines the suitability of a pastor is, without doubt, a religious question. A church should be given broad freedom in formulating an answer to that question and should not be forced to revise or redefine its answer under the pressure of the state.

In my view, this case was wrongly decided. A church should not be punished by the state for making a purely religious judgment regarding one of its ministers. A civil court should not second-guess a religious body's choice of the spiritual standard by which it evaluates the suitability of its pastors. In this case, the court should have recognized the ministerial exception and refused to consider Rev. Kong's claim of wrongful dismissal.

B. *McCaw v. United Church of Canada*

In *McCaw v. United Church of Canada*,[39] the Ontario Court of Appeal restored a minister to his pastoral position, declaring that the decision of his church to remove him was invalid. Ronald McCaw was an ordained minister of the United Church of Canada who served in a congregation in North Bay, Ontario. In 1984, the church authorities initiated an inquiry into Mr. McCaw's ministerial service which ultimately led to the removal of Mr. McCaw from the Presbytery and Conference rolls of the church.[40] However, the Ontario Court of Appeal determined that the decision of the church to remove Mr. McCaw was null and void on the ground that the church did not follow its own rules in making the decision. In particular, the court found that the Presbytery of the church failed to comply with a

[39] (1991) 4 OR (3d) 481, 82 DLR (4th) 289.

[40] *Ibid* at paras 6-7.

provision in the church's Manual which stipulates that the Presbytery may recommend the removal of a minister from the Presbytery and Conference rolls if the minister "refuses or neglects to take a directed program for the improvement of pastoral skills" (hereinafter "the refusal condition").[41] In the court's view, the violation of this requirement rendered the Presbytery's recommendation to remove Mr. McCaw and the Conference's subsequent acceptance of the recommendation invalid. The court ordered that Mr. McCaw be restored to the rolls of Presbytery and Conference and awarded him a compensation for the salary and benefits which he would have received had he not been removed from the rolls.[42]

A critical issue in this case was whether or not "the refusal condition" as required in the church's Manual has been met. The church's position was that this condition had been met after Mr. McCaw failed to enter into a dialogue with Presbytery to discuss what kind of programs would be appropriate for him to help improve his pastoral skills. From the perspective of the church, the failure on the part of Mr. McCaw to enter into such a dialogue with Presbytery amounted to a refusal or neglect to take a directed program for the improvement of his pastoral skills.[43] However, the court did not accept this interpretation of "the refusal condition," adopting instead a narrower view of the provision. In the court's opinion, "[i]t is only the refusal to take a directed program which would legally justify Presbytery in making a recommendation under s. 176(c)ii(7). That provision does not, by its terms, authorize Presbytery to recommend the removal of a minister's name from the rolls because of a refusal to enter into dialogue with it."[44] Essentially, what the court did here was

[41] *Ibid* at para 5.

[42] *Ibid* at para 34.

[43] See *ibid* at para 17.

[44] *Ibid* at para 18.

substituting the church's understanding and interpretation of the church's own law for its view of the law.

Whether or not the civil courts should defer to a church's interpretation of its own laws is an issue open to debate.[45] What I want to emphasize here is that the Ontario Court of Appeal's rejection of the church's interpretation in this case produced a particularly problematic result, that is, the reinstatement of Mr. McCaw as a minister of the United Church of Canada. The problem of reinstating a minister can be analyzed from at least two angles. First, a number of American legal scholars have pointed out that reinstating a person to his or her ministerial position raises an Establishment Clause issue.[46] As Douglas Laycock explains, "government-appointed clergy were a symptom of the established church, and

[45] One approach to this issue is to give broad deference to the ways in which religious organizations interpret their law. This is the approach adopted by the U.S. Supreme Court in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). See *ibid* at 712-713. ("The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were "arbitrary" was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures in arriving at those decisions. We have concluded that whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes, no 'arbitrariness' exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.").

On the other hand, one could argue that judicial examination of whether a church has complied with its own law in making an internal decision would not necessarily pose a problem, provided that the courts are not required to address religious questions as part of such examination. I am more inclined to accept this approach as it is consistent with the first of the two principles that I mentioned in the introduction of this chapter.

[46] See e.g. Christopher C. Lund, "In Defense of the Ministerial Exception" (2011) 90 North Carolina Law Review 1 at 38-39.

judicial orders reinstating clergy are a form of government-appointed clergy."[47] Separation of church and state means first and foremost that the secular state does not have the authority to decide who is fit or unfit to serve as the ministers of a church. When the Court of Appeal ordered that Mr. McCaw must be restored to the Presbytery and Conference rolls of the United Church of Canada, it can be said to have "appointed" a minister for the church and made a determination that Mr. McCaw is fit to continue to serve as a minister of the church. Such an order raises the concern of a state-controlled ministry and would, to use the words of the majority opinion in *Amselem*, "unjustifiably entangle the court in the affairs of religion."[48]

Second, imposing an unwanted minister on a congregation could also violate the religious freedom of individual congregation members. As Chief Justice McLachlin and Justice Moldaver suggest in their concurring opinion in *Loyola High School v. Quebec (Attorney General)*,[49] the flourishing of the individual aspect of religious freedom depends on the protection of the collective aspect of religious freedom. They write: "The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith."[50] Collective worship and observances occupy a significant place in an individual's religious life. And needless to say, a minister or a pastor plays a central role in

[47] Douglas Laycock, "Church Autonomy Revisited" (2009) 7 The Georgetown Journal of Law & Public Policy 253 at 262.

[48] *Amselem*, *supra* note 1 at para 50.

[49] 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[50] *Ibid* at para 94.

those worship and observances. If a believer comes to her church every week, only to find that the person who preaches from the pulpit does not have any authority to speak on behalf of the church and God, her religious well-being will necessarily suffer. If a church cannot freely and autonomously decide who will serve as its ministers, freedom of religion of individual members of the church will also be negatively affected.

The two cases discussed in this section demonstrate the problems associated with judicial intervention in employment disputes between religious organizations and their ministers. In *Kong*, the Supreme Court of British Columbia punished a church for making a purely religious judgment. In *McCaw*, the Court of Appeal of Ontario ordered that a dismissed minister be restored to his ministerial position, thereby making a determination on who is fit to serve as a minister in the United Church of Canada. In both cases, the principle that civil courts should abstain from determining religious questions was violated. This is the main reason why the ministerial exception must be recognized, as the doctrine will prevent the courts from being drawn into addressing religious questions, which are an essential part of the disputes between religious organizations and their ministers.

IV. Membership Disputes

The prohibition on secular determination of religious questions also has implications for religious autonomy in the area of membership disputes. Judicial intervention in membership disputes within religious organizations could lead to a change in the spiritual message of an organization by changing the membership composition of the organization.

To see this point, let us consider the case of *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta.*[51]

A. *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*

This case concerns an internal dispute of a Sikh organization regarding its membership qualifications. The organization is an incorporated religious society located in Edmonton called Siri Guru Nanak Sikh Gurdwara ("the religious society"). The authorities of the religious society denied membership to 80 applicants because they were believed to support Mr. Sandhu and Mr. Hundle to be elected as members of the society's Executive Committee. Mr. Sandhu and Mr. Hundle brought an application to wind-up the religious society pursuant to S.25 (1) of the *Religious Societies' Land Act* of Alberta ("*RSLA*"),[52] claiming that the applicants had been improperly denied membership.

S. 25 (1) of the *RSLA* authorizes a court to order the winding-up of a religious society "for cause or on any grounds for which a corporation might be dissolved or liquidated and dissolved by the Court under Part 17 of the *Business Corporations Act*."[53] As we can see, this provision treats an incorporated religious society as the same as a business corporation in regard to the cause and grounds for dissolution. And according to S.215 (1) of the *Business Corporations Act* ("*BCA*"),[54] one of the grounds for which a court may order the dissolution of a corporation is when "the powers of the directors of the corporation or any of its affiliates

[51] 2015 ABCA 101, 382 DLR (4th) 150 [*Sandhu*].

[52] *Religious Societies' Land Act*, RSA 2000, c R-15 [*RSLA*].

[53] *RSLA, ibid*, s 25 (1).

[54] *Business Corporations Act,* RSA 2000, c B-9 [*BCA*].

are or have been exercised *in a manner that is oppressive* or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer,…"[55] A judge of the Court of Queen's Bench of Alberta found that the religious society's rejection of 80 membership applications constituted oppressive conduct, as the decision was made based on political reasons rather than reasons legitimately related to the objectives of the society.[56] However, the judge did not order the religious society to wind-up as he thought such a remedy would be "too drastic."[57] Instead, the judge opted for a remedy which is also permitted by the *BCA*—he ordered a restructuring of the society's process for approving applications for membership, and amended the society's bylaws.[58]

The Court of Appeal of Alberta upheld the decision of the Court of Queen's Bench. It is worth noting that the Court of Appeal's judgment pointed out that a different standard of what constitutes "oppression" may be required if a dispute among the members of a religious society is religious in nature. It opined: "To be clear, the test for oppression may differ where the nature of a dispute among the members of a religious society is, at its heart, religious. Membership in a society is not fundamentally a religious issue, even where the society exists for spiritual purposes, whereas here it is governed by a constitution and bylaws."[59] I want to focus on the statement in this quote that membership in a religious society is not a religious issue. Contrary to the Court's view, I argue that membership in a religious organization is in fact a religious issue, and judicial intervention in a membership

[55] *BCA, ibid,* s 215 (1) (emphasis added).

[56] See *Sandhu*, *supra* note 51 at paras 21-22.

[57] *Ibid* at para 26.

[58] See *ibid* at paras 27-30.

[59] *Ibid* at para 52.

dispute within a religious organization could result in what Douglas Laycock called "government-induced changes in religion."[60]

Laycock points out that a religious organization's doctrine is by nature fluid and susceptible to change.[61] People who constitute a religious organization normally have a variety of views on important theological and moral issues, even while they are necessarily bound together by some common, basic religious beliefs. The interaction of these different views within a religious organization may lead to a situation in which the once-dominant view has less and less support among the members of the organization while an alternative view becomes more prevalent. In light of the fluidity of religious doctrine, Laycock warns against state interference with the autonomy of religious organizations in personnel affairs, as it amounts to an interference with "the very process of forming the religion as it will exist in the future."[62] Forced employee substitutions in a religious organization by the state may have a cumulative effect on the future development of the organization's religious doctrine. Therefore, one of the dangers of state interference with church affairs is that it can trigger "government-induced changes in religion" and "disrupt the free development of religious doctrine."[63]

Such a danger seems apparent in the present case. This case involves not just a few members or prospective members but 80 of them. This is a significant amount as the religious society had only about 95 members at the time when the dispute arose.[64] More

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[60] Laycock, *supra* note 20 at 1392.

[61] *Ibid* at 1391.

[62] *Ibid*.

[63] *Ibid* at 1392 (internal quotation marks omitted).

[64] See *Sandhu*, *supra* note 51 at para 72.

importantly, the decision on whether or not these 80 applicants will be accepted into the society has a direct impact on who will be elected to the Executive Committee of the society. Consequently, it seems to me that judicial intervention in this case which changed the membership composition of the religious society will necessarily have an effect on the trajectory of the future development of the group's spiritual message. Judicial intervention in the membership dispute in this case is problematic from the perspective of freedom of religion, as the ways in which a religious organization formulates and develops its doctrine and spiritual message should be off-limits to the state.

Furthermore, it is not clear whether the courts' exercise of jurisdiction in this case is justifiable in light of the Supreme Court's decision in *Lakeside Colony of Hutterian Brethren v. Hofer*.[65] In *Lakeside Colony*, the Supreme Court affirmed the legitimacy of the principle that the courts may exercise jurisdiction over the membership decisions by a voluntary association when such decisions affect the property rights or civil rights of the expelled members.[66] Applying that principle to this case, there was no evidence that the religious society's rejection of the membership applications had affected the property or civil rights of the 80 applicants. An individual does not have a right to demand a voluntary association to accept her as a member of the association. With regard to Mr. Sandhu and Mr. Hundle, it is true that they had an interest in whether or not the membership applications were accepted. Their interest in a positive decision on these membership applications was that the new members would presumably support their bid for the positions in the Executive Committee. But strictly speaking, such an interest concerns only the status of the two gentlemen in a

[65] [1992] 3 SCR 165, 97 DLR (4th) 17 [*Lakeside Colony*].

[66] *Ibid* at para 6.

voluntary religious association. It is not clear to me how this interest can be interpreted as implicating their property or civil rights. An individual's place and status within a religious organization is not an issue that properly attracts judicial attention. For if a person is not satisfied with his role and position in the religious organization to which he belongs, he always has a choice to leave the organization and find another one in which he is able to get more appreciation from others for his views and abilities. As long as he has a right to exit, the state does not need to concern itself for his place or status within a voluntary association.

In sum, judicial intervention in this case—especially the restructuring of the society's process for approving applications for membership—is unjustifiable because (1) it could bring about a change in the society's spiritual message, and (2) the society's original decision to reject the membership applications did not affect anyone's property or civil rights. In my view, the courts should refrain from interfering with the society's original decision and simply leave it to the dissenter group to decide whether they would like to stay in the religious society or go out and form another organization in accordance with their beliefs and values.

B. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*

In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*,[67] the Supreme Court of Canada held that it has no jurisdiction to review the decision of a Jehovah's Witnesses congregation to disfellowship one of its members. The Court

[67] 2018 SCC 26 [*Wall*].

emphasized that "religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute."[68]

In April 2014, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses expelled a long-time member, Mr. Randy Wall, on the grounds that he committed certain sinful behavior and was not sufficiently repentant. The expulsion decision was upheld by an Appeal Committee composed of elders from neighboring congregations and by the Watch Tower and Bible Tract Society of Canada. Mr. Wall then filed an application for judicial review of the expulsion decision. A central issue before the court was whether or not civil courts have jurisdiction to review a religious tribunal's decision to expel a member from the church. A chambers judge of the Court of Queen's Bench concluded that the decision was reviewable because it had an economic impact on Mr. Wall.[69]

The Court of Appeal of Alberta affirmed the chambers judge's conclusion. The court held that civil courts have jurisdiction to review a religious association's membership decision even if the expelled member's property or civil rights are not affected by the decision. According to the Court of Appeal, it is sufficient to establish a court's jurisdiction when either of the following conditions is met: (1) a breach of the rules of natural justice is alleged; (2) the member has exhausted the organization's internal dispute resolution processes.[70]

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[68] *Ibid* at para 39.

[69] See *Wall v. Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 11 (decision by the Court of Appeal of Alberta).

[70] *Ibid* at para 16.

The position adopted by the Court of Appeal was an obvious deviation from the criteria endorsed by the Supreme Court in *Lakeside Colony*, as it would allow the courts to take jurisdiction over membership decisions of religious organizations regardless of whether property or civil rights are at stake. Moreover, the suggestion that judicial review is available once the member who was expelled by his or her church has exhausted the organization's internal processes would in effect subject ecclesiastical tribunals to the supervision of secular courts. On this view, secular courts stand above ecclesiastical tribunals and are considered to be superior to those tribunals. This position is in direct opposition to the jurisdictional conception of church autonomy, which claims that religious organizations ought to have ultimate arbitral authority over their internal affairs, especially those that are distinctively religious in nature.

The Supreme Court rejected such a position and reaffirmed the *Lakeside Colony* criteria. Writing for a unanimous court, Justice Rowe suggested: "Indeed, there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures."[71]

Importantly, the Court not only endorsed the legitimacy of the *Lakeside Colony* criteria, but also made certain clarifications on when and how the criteria should be applied.

[71] *Wall*, *supra* note 67 at para 24.

First, according to the *Lakeside Colony* criteria, courts may exercise jurisdiction over the membership decision by a voluntary association when such decision engaged property and civil rights of the expelled member, as we have seen. In such circumstance, courts can review the group's decision to see if it was made in accordance with the procedural rules of the group, with proper regard to the principles of natural justice, and without *mala fides*.[72] However, the Court in *Wall* further noted that the courts should refrain from determining whether the procedural rules of a religious group have been properly followed if the rules "involve the interpretation of religious doctrine."[73] This is because civil courts "should not decide matters of religious dogma" and "have neither legitimacy nor institutional capacity to deal with [theological or religious] issues."[74] These statements reinforce the *Amselem* principle that courts should abstain from determining religious questions.

Second, the Court suggested that a legally enforceable contract between a voluntary association and its members can serve as a basis for judicial intervention.[75] That is, courts may intervene to review the decisions of a religious organization if the relationship between the organization and its members is governed by a legal contract. But Justice Rowe was careful in pointing out that, for the courts' jurisdiction to be established, both the organization and the members must have a clear intention to form legally binding contractual relations; the mere fact that a person adheres to a religious organization is not sufficient to attract judicial intervention when a dispute arises. Justice Rowe wrote: "In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract

[72] See *Lakeside Colony*, *supra* note 65 at para 10.

[73] *Wall*, *supra* note 67 at para 38.

[74] *Ibid* at para 36.

[75] See *ibid* at para 28.

by merely adhering to a religious organization…Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations."[76] The idea that the existence of a validly formed legal contract provides grounds for the courts to intervene is in line with *Bruker*, where the Court ruled that the agreement between the divorcing parties with regard to *get* is enforceable, as it was part of a civil contract "intended to have legally enforceable consequences."[77]

The *Wall* decision is a clear recognition of the principle that a church has an independent and exclusive jurisdiction over the issue of their own membership. As shown by cases like *Kong*, *McCaw*, and *Sandhu*, there seems to have been a tendency in the lower courts in Canada to intervene in the internal personnel affairs of religious organizations. The Supreme Court's decision in *Wall* is significant in that it reverses such interventionist tendency and recognizes that certain affairs of religious organizations fall outside the jurisdiction of state authority. In my view, the *Wall* decision may go down in history as a crucial turning point in the Canadian jurisprudence on religious autonomy.

In the next section I proceed to examine the employment disputes between religious organizations and their non-ministerial employees. The case against judicial intervention in this area is much weaker than in the areas of the employment of ministers and membership qualifications. This is especially true when the religious organization in question is an

[76] *Ibid* at para 29.

[77] *Bruker*, *supra* note 16 at para 47.

organization that operates in the public sphere and receives public funding, as is the case of Christian Horizons.

V. Non-Ministerial Employees

A. *Ontario Human Rights Commission v. Christian Horizons*[78]

Christian Horizons is an Ontario-based Evangelical Christian ministry that provides residential care for individuals with developmental disabilities. In 1992, it established a "Life Style and Morality Statement" ("L & M Statement") and made it a condition of employment for all its employees. The L & M Statement contained a prohibition on certain forms of sexual behavior, as they were deemed incompatible with Christian counselling ideals, standards and values. Among those prohibited sexual behavior was homosexual activity. This became a key factor that triggered the litigation between Christian Horizons and a lesbian employee, Ms. Heintz.

Ms. Heintz was a support worker at Christian Horizons and entered into a same-sex relationship four years after she began her employment. Because her same-sex relationship was in violation of the L & M statement, which she signed when she accepted the employment with Christian Horizons, she was eventually forced to resign. Ms. Heintz then filed a complaint with the Ontario Human Rights Commission against Christian Horizons, alleging that she had been discriminated on the basis of sexual orientation and that the requirement to sign the L & M statement violates section 5(1) of *Human Rights Code* of

[78] 2010 ONSC 2105, 319 DLR (4th) 477 [*Christian Horizons 2010*].

Ontario, which confers a right to equality in employment.[79] Christian Horizons claimed that it falls within the "special employment" clause of subsection 24(1)(a) of the Code, which permits, among others, a religious organization to hire only co-religionists (in this case, persons who are willing to comply with the L & M Statement), provided that (1) it is primarily engaged in serving the interests of persons identified by creed, and (2) the qualification is a reasonable and bona fide qualification given the nature of the employment.[80] Therefore, one of the core issues of this case concerns whether the requirement that Ms. Heintz sign and comply with the L & M Statement was a reasonable and bona fide occupational qualification ("BFOQ") given the nature of her employment as a support worker.[81]

In dealing with the issue of whether the compliance with the L & M Statement (more precisely, its prohibition on involving in a same-sex relationship) constitutes a BFOQ, the Ontario Divisional Court relied on the decision of the Supreme Court of Canada in *Ontario*

[79] Section 5(1) of the Code stipulates: "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability." RSO 1990, c H.19, s 5 (1).

[80] Section 24(1)(a) of the Code stipulates: "The right under section 5 to equal treatment with respect to employment is not infringed where, (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment." RSO 1990, c H.19, s 24 (1)(a).

[81] Equally controversial in this case is whether Christian Horizons qualifies as an organization that is "primarily engaged in serving the interests of persons identified by their…creed." The Human Rights Tribunal of Ontario and the Ontario Divisional Court offered different answers to this question. But, due to the length of this chapter, this issue will not be considered in the following discussion.

(Human Rights Commission) v. Etobicoke (Borough)[82] to suggest that, for a particular requirement to be a BFOQ, "[i]t has to be tied directly and clearly to the execution and performance of the task or job in question."[83] The job in question is support worker at a Christian organization which aims to provide a unique Christian environment for people with developmental disabilities. As far as the duties of a support worker is concerned, the court determined that "[t]here is nothing about the performance of the tasks (cooking, cleaning, doing laundry, helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments) that requires an adherence by the support workers to a lifestyle that precludes same-sex relationships."[84] With regard to the capability to work in and help maintain a Christian home environment, the court held that there was no evidence that Ms. Heintz refused to participate in activities such as hymn singing and Bible reading.[85] The court concluded that the prohibition of the involvement in a same-sex relationship was not a BFOQ for support workers who work at Christian Horizons, and this prohibition must be deleted from the L & M Statement.[86]

A crucial factor in this case which was given insufficient attention in the court's opinion is the fact that Christian Horizons receives substantial funding from the government. The court's ruling was on the appeal of a decision made by Human Rights Tribunal of Ontario ("the Tribunal") in 2008. In that decision, the Tribunal found that "[a]lthough there was some evidence that Christian Horizons receives support through donations and bequests, it

[82] [1982] 1 SCR 202, 132 DLR (3d) 14.

[83] *Christian Horizons 2010, supra* note 78 at para 90.

[84] *Ibid* at para 104.

[85] *Ibid* at para 101.

[86] *Ibid* at para 118.

was not disputed that the residential programs are effectively 100 per cent funded through the developmental services programs of the Ministry of Community and Social Services."[87] The amount of government funding Christian Horizons receives annually is approximately $75 million.[88]

Financial support from the state for religious organizations to carry out their activities is a game-changer in the consideration of how they should be treated, even for some of the "toleration liberals." For example, Jeff Spinner-Halev suggests: "Government funds should not directly support programs that discriminate in their hiring practices or in whom they serve…Since the liberal state should treat its citizens equally, its money should not be used to support discrimination. Certainly, a public university cannot decide that it will refuse to hire women, or gays, or witches, or atheists. A private university that receives government funds to pay its faculty should not be able to discriminate either; neither should the Salvation Army use public money to hire an employee in a discriminatory fashion. An institution that wants to discriminate in its hiring practices should not rely on public funds to hire its employees."[89] This position is a wholesale rejection of any form of religious discrimination in employment by religious organizations that receive public funding.

However, I do not think this view is entirely reasonable. Such a position contradicts a central argument made by Spinner-Halev himself in support of a nonintervention policy with regard to religious organizations. Spinner-Halev criticizes the accounts of cultural recognition developed by Joseph Raz and Will Kymlicka for assuming that every cultural

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[87] (2008), 65 C.C.E.L. (3d) 218 at para 45 [*Christian Horizons 2008*].

[88] *Ibid* at para 54.

[89] Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (Baltimore: Johns Hopkins University Press, 2000) at 187.

community within a liberal state must adhere to the standards of autonomy.[90] He thinks these accounts are problematic because they would reduce the pluralism of society and would result in people having fewer life choices.[91] However, it seems to me that a categorical rejection of differential treatment in employment by religious organizations that receive public funding would also undermine social pluralism and restrict people's choices.

For example, in Spinner-Halev's view, it seems that a publicly funded religious charity should not be allowed to discriminate on the basis of religion even for its higher administrative positions. But if a religious organization cannot employ only co-religionists for its administrative or executive positions, its unique religious identity would necessarily be threatened. It may end up having only a name of a religious organization but in reality cannot be meaningfully distinguished from other secular nonprofit organizations. Social diversity will suffer loss if the public square is occupied only by secular or quasi-secular organizations.

Some may argue that it is not a bad thing that the public square is totally occupied by secular organizations as long as those who are in need of social service (such as those who are developmentally disabled) are properly cared for. A response to this argument is that, to take the present case for example, there is evidence which shows that Christian Horizons has made a valuable contribution to the social service for the individuals with developmental disabilities. According to the finding of the Tribunal, "Christian Horizons was an agency with a particular willingness and ability to accept some of the most challenging placements

[90] See *ibid* at 24-25.

[91] See *ibid* at 55.

from institutions and, in more recent years, from other community living agencies."[92] And it is not unreasonable to suggest that the quality service provided by Christian Horizons may have something to do with its view that caring for those in need is not only a social work but also a Christian ministry. That is, the identity of Christian Horizons as a religious organization along with its religious values might have been a crucial factor for its success in providing a quality and exceptional service for individuals with developmental disabilities. Requiring Christian Horizons to shed itself of religious values by disallowing the organization to hire any employee on the basis of religion may thus cause harm to the welfare of society as a whole.

Prohibiting Christian Horizons from hiring any employee on the basis of religion will also limit people's choices. Christian Horizons is known for providing a distinctively Christian option for residential care. It offers a unique option for Christian families who want their loved ones to be cared for in an environment filled with religious atmosphere. This option could very well disappear once the organization is ripped of its religious identity and forced to hire without any discrimination.

I agree that financial resources of a liberal state should not be used in a way contrary to core liberal values. On the other hand, a categorical rejection of any differential treatment in employment by religious organizations is also undesirable, as it will reduce social pluralism to the detriment of the well-being of the society, and restrict people's (especially religious citizens') choices. In view of these considerations, I would suggest an alternative approach

[92] *Christian Horizons 2008, supra* note 87 at para 59.

to the regulation of the employment practices of Christian Horizons. Such an approach would:

- Allow the organization to hire co-religionists for administrative positions but not lower-level positions such as that of support worker.
- Allow the organization to display religious symbols in the community living residences it operates.
- Allow the organization to continue the daily religious activities such as prayer and bible reading and weekly religious services in its residences. However, participation in those activities should not be made as a condition of employment for support workers. The organization may need to rely on outside volunteers who can lead the religious activities and observances and accompany the residents during the time of those activities.

I believe this approach strikes a better balance between the public interest in nondiscrimination and the importance of preserving a diverse public square and giving citizens more options with regard to residential care for individuals with developmental disabilities.

VI. Education

In this section I discuss state regulation of religious education and its limits by examining the Supreme Court of Canada's landmark decision in *Loyola High School v.*

Quebec (Attorney General).[93] I will focus my discussion on two things. First, after presenting the basic facts of this case, I will address a disagreement between the majority opinion and the concurring opinion regarding the issue of whether the religious school should be required to teach ethical positions of other religions from a neutral perspective. Second, I will use this case as a context to consider the legitimacy of the minimum conditions for a meaningful right of exit proposed by William Galston.

A. *Loyola High School v. Quebec (Attorney General)*

The litigation between Loyola High School, a Jesuit educational institution in Montreal, and the Quebec government, was a result of the implementation of a compulsory curriculum called "Ethics and Religious Culture" (ERC), which "teaches about the beliefs and ethics of different world religions from a neutral and objective perspective."[94] The ERC program was established in 2005 by Quebec's Bill 95 (*An Act to amend various legislative provisions of a confessional nature in the education field*).[95] Since 2008, it has become a mandatory course to be taught in all elementary and secondary schools of the province—public and private schools alike—and at all grade levels.

The purpose of establishing the ERC program was to replace Catholic and Protestant religious instruction in Quebec's public schools. Prior to the implementation of the program, public schools in Quebec provided students with three options with regard to religious education: Catholic Religious and Moral Instruction, Protestant Moral and Religious

[93] 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[94] *Ibid* at para 1.

[95] SQ 2005, c.20.

Instruction, and Moral Education.[96] But after 2008, parents are no longer able to choose for their children a religious education along denominational lines; all students in Quebec are now required to take the common program established by the government for their study of religion, regardless of their religious adherence.[97] The confessional approach to religious education was abandoned in favor of a cultural approach.

In March 2008, Loyola High School sent a letter to Quebec's Ministère de l'Éducation, du Loisir et du Sport (MELS), asking to be "exempt from the requirements of teaching the ethics and religious culture program during the 2008-2009 school year."[98] But as indicated more clearly in Loyola's second letter, the intention of the school was not to withdraw altogether from the teaching of the ERC course, but to teach this course using its own program, instead of the program established by the Minister. From the school's perspective, "the religious nature of the school prevented it from teaching Catholic beliefs or other religions from a 'neutral' or detached perspective."[99] Loyola's exemption request was based on section 22 of the *Regulation respecting the application of the Act respecting private education*,[100] which allows an educational institution to teach compulsory subjects with its own program provided that it is deemed by the Minister to be equivalent to the ministerial program.

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[96] Spencer Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec" (2011) 38:3 Religion & Education 212 at 218.

[97] *Ibid* at 219.

[98] 'Loyola's First request to the Minister' (March 30, 2008)

[99] *Loyola, supra* note 93 at para 27.

[100] RRQ 1981, c E-9.1, r.1.

The Minister, however, determined that the Loyola's program was not equivalent to the ministerial program on the grounds that, among others, it does not follow a cultural approach to teach the two main goals of ERC: recognition of others and pursuit of the common good.[101] Loyola then filed a lawsuit against the Minister's decision that denied their exemption request.

In *Loyola High School v. Quebec (Attorney General)*, the Supreme Court of Canada set aside the Minister's decision and ruled in favor of Loyola High School. Justice Abella wrote the majority judgment for the Court while Chief Justice McLachlin and Justice Moldaver co-authored a concurring opinion. Both the majority opinion and the concurring opinion agree that the Minister's decision denying Loyola's exemption request interferes seriously with the religious freedom of members of the school community.[102] Both opinions recognize that Loyola is entitled to teach the Catholic religion and Catholic ethics from a religious perspective.[103] However, they part company on the issue of whether Loyola should be allowed to teach about the ethics of other religious traditions from a Catholic rather than a neutral perspective.

1. Teaching about the ethical positions of other religions

On this particular issue, the majority judgment holds that Loyola should teach and discuss other ethical frameworks as objectively as possible, rather than through the lens of Catholic ethics and morality. Teaching the ethical positions of other religions in Loyola

[101] See *Loyola, supra* note 93 at para 28.

[102] See *ibid* at paras 58-70 (majority), and paras 143-151 (concurring).

[103] See *ibid* at para 80 (majority), and para 154 (concurring).

should produce the result of other religions being recognized as "differently legitimate belief systems," as Justice Abella suggests.[104] In contrast, Chief Justice McLachlin and Justice Moldaver maintain that "Loyola's teachers cannot be expected to teach ethics or religious doctrines that are contrary to the Catholic faith in a way that portrays them as equally credible or worthy of belief."[105] On this view, Loyola's teachers are allowed to claim in a ERC class that some ethical positions are not as credible as Catholic teachings on ethical questions; some religious doctrines and worldviews are not as worthy of belief as the Catholic faith. This is not to say that the teachers can denigrate or demonize the beliefs and worldviews held by others. Ethical positions and doctrines of other religions must be presented and discussed in a respectful way, as the concurring opinion emphasizes.[106] However, Loyola's teachers do not need to maintain a strictly neutral posture. They are free to critically evaluate the ethical positions that are at odds with the Catholic faith during the ERC's classroom discussion.

It seems to me that the concurring opinion's position is more justifiable. In my view, the majority's stance on this issue contravenes the principle of state neutrality. The educational goal of recognizing other religions as "differently legitimate belief systems" can be seen as a form or an expression of "a pluralist view of religions." In the literature of the philosophy of religion, a pluralist view of religions refers to a position which holds that "all the major religions have true revelations in part, while no single revelation or religion can claim final and definitive truth."[107] From such a pluralist perspective, "all religions are

[104] *Ibid* at para 75.

[105] *Ibid* at para 162.

[106] See *ibid.*

[107] Gavin D'Costa, "The Impossibility of a Pluralist View of Religions" (1996) 32:2 Religious Studies 223 at

viewed as more or less equally true and more or less equally valid paths to salvation."[108] However, the validity of this particular view of religions has been strongly challenged by Gavin D'Costa, who argues that "pluralism must always logically be a form of exclusivism and that nothing called pluralism really exists."[109] He examined the works of several advocates of religious pluralism and found that they are all "committed to holding some form of truth criteria and by virtue of this, anything that falls foul of such criteria is excluded from counting as truth (in doctrine and in practice)."[110] Applying D'Costa's observation to the present case, we may say that the apparent pluralism promoted by the majority is in fact another form of exclusivism. For upholding the view that other religions are "differently legitimate belief systems" necessarily means that the idea that Catholicism offers a better answer to questions related to how one should live, and the pedagogical approach it entails, must be rejected. Because of its tendency to exclude contrary views, a pluralist view of religions cannot be rightfully seen as a neutral perspective but should rather be seen as a comprehensive doctrine. Therefore, by establishing the goal of recognizing other religions as "differently legitimate belief systems" and imposing it on a Catholic school, the majority opinion is in effect replacing one comprehensive doctrine (Catholicism) with another (a pluralist view of religions). This is hardly the genuine neutrality that is required of a liberal state.

Justice Abella's concern was that if children do not accept that other religions are differently legitimate belief systems, they would not be able to develop proper respect for

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224.

[108] *Ibid*.

[109] *Ibid* at 225.

[110] *Ibid* at 225-226.

people with different religious beliefs.[111] I fully agree that it is legitimate to require religious schools to teach the values of respect and tolerance for others. But as I mentioned in chapter 3, there are different standards with regard to the teaching of tolerance. A high standard is to require the schools to cultivate an attitude of sympathetic engagement with ethical diversity in children. A more basic standard, one that is proposed by Galston, is to make children understand that toleration means "the principled refusal to use coercive state power to impose one's view on others and therefore a commitment to moral competition through recruitment and persuasion alone."[112] In my view, this standard necessarily entails that children in a religious school should be taught to respect the fundamental rights and freedoms of others as guaranteed in the constitution. They need to learn to respect the fundamental rights of others because the religious community to which they belong depends on the same sets of rights—freedom of religion and freedom of association in particular—for protection against outside intervention. Respecting other citizens' constitutional rights therefore reflects a respect for one's own rights.

In addition, children also need to learn to accept that any law or public policy that restricts the rights of citizens cannot be grounded solely in religious reasons. When religious citizens advocate for a law that restricts human conduct, they must provide at least some publicly accessible reasons for their support for that law.[113] Advocating for a coercive law on the basis of one's religious convictions alone is morally problematic because it amounts

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[111] See *Loyola, supra* note 93 at para 75.

[112] William A. Galston, "The Idea of Political Pluralism" in Henry S Richardson & Melissa S Williams, ed., *Moral Universalism and Pluralism* (New York: New York University Press, 2009) 95 at 98.

[113] See John Rawls, "The Idea of Public Reason Revisited" (1997) 64:3 The University of Chicago Law Review 765.

to imposing one's religion on other citizens who do not share those convictions.[114] This violates the principle of toleration as toleration means, at the very least, that one should not force others to accept his or her views.

In my view, the requirement of teaching the values of respect and tolerance for others is met as long as teachers are committed to educating children to respect the constitutional rights of other citizens, and to learn to rely on public reasons to justify their positions in public political discussion. It is not necessary nor reasonable that teachers of a religious school be required to portray other religions as "differently legitimate belief systems."

2. The minimum conditions for a meaningful right of exit

I would also like to use the Loyola case to consider an important critique of Galston's view on the conditions for a meaningful right of exit made by Daniel Weinstock. Galston argues that civil associations are entitled to broad autonomy to order their internal affairs as they see fit, provided that their members have a secure and meaningful right to exit the associations.[115] According to Galston, a meaningful right of exit consists of at least four elements. First, members of a community must be aware of the existence of the alternative ways of life ("knowledge conditions"). Second, they need to have the ability to assess the value of these alternative ways of life ("capacity conditions"). Third, they should not be subject to the brainwashing or deprogramming efforts by others ("psychological

[114] See generally Robert Audi, "The Place of Religious Argument in a Free and Democratic Society" (1993) 30 San Diego L. Rev. 677.

[115] William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2002) at 122.

conditions"). Fourth, they need to have the ability to participate in other ways of life should they choose to leave their communities ("fitness conditions").[116]

Weinstock suggests that these conditions represent a position that is in fact more in line with autonomy liberalism rather than toleration liberalism, despite that Galston's liberal pluralist theory places much emphasis on toleration and diversity.[117] He argues that in order to satisfy these conditions, the state would have to put in place "a compulsory educational program with an avowedly perfectionist agenda" and enforce it in religious communities.[118] Taking as an example a community whose vision regarding the proper gender role preaches that women's sole responsibility is to raise children and take care of the household, Weinstock suggests that the state-imposed curriculum would have to make children aware of a different vision of gender role in which women have a wider life prospects. Not only so, the curriculum would also have to "present the community's vision of the proper role of women as false."[119]

However, my view is that such an intrusive educational program is not necessarily required if Galston's conditions for a meaningful right of exit are to be met. It seems to me that it is possible to find an educational program that falls short of a perfectionist educational standard but nonetheless satisfies the conditions of a meaningful right of exit. In my opinion, an example of such a program can be found in the ERC program established by Loyola High

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[116] *Ibid* at 123.

[117] See Daniel M. Weinstock, "Value Pluralism, Autonomy, and Toleration" in Henry S Richardson & Melissa S Williams, ed., *Moral Universalism and Pluralism* (New York: New York University Press, 2009) 125 at 144-145.

[118] *Ibid* at 144.

[119] *Ibid.*

School. In their concurring opinion, Chief Justice McLachlin and Justice Moldaver conduct a careful review of Loyola's ERC program and they conclude:

> Justice Abella notes in her reasons that "the normative core of Loyola's proposed curriculum is the doctrine and belief system of the Catholic Church" (para. 25). This may be true, but it doesn't tell the whole story. Surrounding that normative core is a rich and full exploration of non-Christian religious beliefs, and of ethical perspectives that do not mirror Catholic moral teachings. Leaders from other religious communities are welcomed into the classroom to ensure a robust understanding of other faiths and traditions, beyond the neutral description of religious customs and practices envisioned by the ERC Program. Students are allowed, even encouraged, to critique Catholic moral teachings. There is nothing to suggest Loyola's proposal is in any way ill suited to achieve the two key objectives of the ERC Program: recognition of others and the pursuit of the common good. Nor does it fail to address the competencies of understanding religion, reflecting on ethical questions, and engaging in dialogue.[120]

Based on this summary of Loyola's ERC program, it seems to me that it is a program that is sufficient to satisfy Galston's conditions for a meaningful right of exit. First, the program exposes students to religious and moral diversity, thereby satisfying the "knowledge conditions." Second, students are encouraged to think critically on ethical issues and are allowed to disagree with the position of the Catholic Church. This meets the "capacity conditions," which emphasize the ability to assess different points of view and alternative ways of life. Third, if students are "allowed, even encouraged, to critique Catholic moral teachings," they are surely not being brainwashed by the school. Lastly, it appears that

[120] *Loyola, supra* note 93 at para 129.

Loyola has no difficulty in satisfying the "fitness conditions," as the school has produced many alumni who have made important contributions in the society.

If it is reasonable to say that Loyola's ERC program is good enough to satisfy Galston's conditions for a meaningful right of exit, then it follows that those conditions are not too burdensome for religious communities to accept. The Loyola case shows us how a religious community can, on its own initiative, establish and dispense an educational program which embodies the core elements of those conditions. The state will not impose an undue burden on religious communities in requiring them to fulfill those minimum conditions.

On the other hand, any standard that requires less than the conditions proposed by Galston will not be able to guarantee meaningful exit rights for children. For example, consider the standard suggested by Spinner-Halev:

> The right to exit from insular communities suggests some limits to what these communities can do. They cannot prevent members from leaving their community, which means they must educate their children—both girls and boys—to a large enough degree so they can leave their community if they wish. This does not mean calculus and French lessons…; it means reading and rudimentary knowledge in math and science. Members of insular communities should have the basic skills to join the larger community if they wish.[121]

As we can see from this quote, Spinner-Halev's standard emphasizes what Galston calls the "fitness conditions"—the ability to participate effectively in some ways of life in the wider society. What is missing in this standard, however, is the "knowledge conditions" and the

[121] Spinner-Halev, *supra* note 89 at 79.

"capacity conditions."[122] Under Spinner-Halev's standard, the school in a conservative religious community would not be required to teach the children in a way that makes them aware of alternative life-options and that allows them to evaluate the value of those options. From the perspective of a liberal state, the risk involved in this standard is that children who receive an education according to such a standard may end up finding they have little choice but to live the life their parents and community members want them to live.

As Weinstock points out, there are at least three institutional agents that are influential in shaping children's upbringing: family, civil society associations, and schools.[123] He contends that children's right to a sufficiently open future will be violated if none of the three institutional agents is devoted to contributing to the development of children's autonomy. This will create a "totalising environment" for children's upbringing,[124] placing them at the high risk of being raised in an "unacceptably asymmetrical way," which means that a child's upbringing has emphasized disproportionately one aspect of human flourishing to such an extent that the development of the other aspects of human flourishing is entirely precluded.[125] Indeed, under Spinner-Halev's standard, religious schools would become an institution that simply reinforces what has been taught to the children in family and in civil society associations such as churches. Children who are surrounded by institutional agents that mutually reinforce each other's teachings can hardly

[122] I assume that this standard would meet the "psychological conditions," meaning that it would not allow any brainwashing or deprogramming efforts in insular communities.

[123] Daniel M. Weinstock, "A Freedom of Religion-Based Argument for the Regulation of Religious Schools" in Benjamin L. Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford; Portland, Oregon: Hart Publishing, 2016) 167 at 173.

[124] *Ibid* at 179.

[125] *Ibid* at 172.

be said to have a chance to develop ability along other dimensions of human flourishing other than the one that is emphasized repeatedly by those agents. Without being given a "window" to alternative options of life, children will not have a real opportunity to leave the community and life they were born into.

In sum, I believe the four sets of conditions proposed by Galston represent a reasonable requirement which ensures that children in religious communities have a meaningful right of exit and does not impose an undue burden on the communities. A standard that requires less than those conditions will not give the children a real option to exit, thereby violating their right to a sufficiently open future.

VII. Conclusion

What is the scope of religious organizations' jurisdiction which is not subject to the authority of the state? The discussion in this chapter shows that the answer to this question varies depending on which particular area of the organizations' internal operation is involved. The authority of religious organizations in the areas of employment of ministers and membership qualifications must be respected by the courts. Judicial interference with the decisions of religious authorities in these two areas tend to draw the courts into addressing religious questions or disrupt the free development of an organization's spiritual message. In these two areas, the state should indeed treat religious organizations as independent jurisdictions and defer to the judgments of religious authorities.

By contrast, religious organizations that operate in the public sphere and receive public funding do not deserve such deference. They should not be allowed to hire only co-

religionists except for the administrative positions. It is also unreasonable to treat religious communities as independent jurisdictions in the area of education. Even though I believe religious communities should be subject to a less stringent standard with regard to the teaching of toleration, there is no denying that the cultivation of the virtue of tolerance and respect for others is a compelling state interest which justifies a degree of state intervention in educational affairs. The state is also justified in requiring religious communities to dispense a curriculum which would ensure the children have meaningful rights of exit. The curriculum of religious communities must be able to satisfy the four sets of conditions proposed by Galston so as to make exit a real option for children.

Chapter 5. Towards a New Paradigm: Applying the Jurisdictional Conception of Church Autonomy to the Taiwanese Context

I. Introduction

In this concluding chapter, I explore the practical implications of the jurisdictional conception of church autonomy for Taiwan's regulatory scheme for religious organizations. Before delving into an examination of concrete policy issues, I consider in section II a potential concern about the plausibility of the project of applying the jurisdictional conception of church autonomy to Taiwan, regarding the compatibility of this conception of religious freedom with Taiwan's particular cultural context. The main section of this chapter, section III, consists of three law reform proposals which I believe are entailed by the recognition of the jurisdictional autonomy approach to religious freedom. I first examine the legitimacy of a draft bill, entitled *Religious Groups Act*, and conclude that such a draft bill should not be passed into law. Second, I defend the right of a Catholic university to require compliance by all members of the university (students, staff, and faculty members) with its religious rule of conduct. Third, I call for the deregulation of religious schools as a way to defuse current social tension arising from the heated public debate on same-sex marriage and the LGBTQ sex education. I conclude by emphasizing the need for Taiwan to move away from the current approach to the regulation of religious organizations, which is characterized by state paternalism, and towards the jurisdictional approach to religious autonomy.

II. A Potential Concern about Applying the Jurisdictional Conception of Church Autonomy to Taiwan

The central argument of this thesis is that state regulation of religious organizations in Taiwan should be guided by the jurisdictional conception of church autonomy (JCCA). However, a significant issue that must be addressed is the extent to which this conception of religious autonomy is compatible with Taiwan's socio-cultural context. Jean Cohen, in an influential article critiquing the jurisdictional approach to religious freedom advocated by Steven Smith and others, points out that this approach is predicated on a "two-world theory of jurisdictional separation." [1] The two-world theory claims that there are "separate jurisdictional domains divided between two autonomous…corporate bodies and sovereigns—Church (God) and State (King)."[2] Importantly, Cohen notes that the theory "is Christian and theological, premised on the idea that the ultimate source of authority for both realms (regnum and sacerdotium) is God."[3] Such a political-theological theory is not new; it traced its roots to the "medieval political theological doctrines of the corporation and of sovereignty first developed in the aftermath of the Papal Revolution of the late eleventh and twelfth centuries," [4] which involved a power struggle between Pope Gregory VII and Emperor Henry IV for control over the entire Western church.[5] This particular historical event and the two-world theory that emerged from it has been discussed repeatedly and

[1] Jean L. Cohen, "Freedom of Religion, Inc.: Whose Sovereignty?" (2015) 44:3 Netherlands Journal of Legal Philosophy 169 at 176. (Emphasis omitted).

[2] *Ibid*.

[3] *Ibid*. (Footnote omitted).

[4] *Ibid* at 190-191.

[5] Richard W. Garnett, "The Freedom of the Church" (2006) Notre Dame Law School Legal Studies Research Paper No. 06-12 1 at 1.

affirmatively in the works of the proponents of freedom of the church as a way to challenge the comprehensive jurisdiction of the state.[6] Besides scholarly discussion, the U.S. Supreme Court also "subtly resurrect[ed]" this old two-world theory of jurisdictional separation in *Hosanna-Tabor*, when Chief Justice Roberts gave an account of the history of the 1215 Magna Carta and Henry VIII's the Act of Supremacy in 1534,[7] situating the issue of the freedom to select ministers in the historical context of "the old jurisdictional battles between church and state."[8]

If Cohen's observation that the jurisdictional conception of church autonomy is predicated on the *old two-world theory* is accurate, and I believe it is, then the question that follows is: is it appropriate to apply a legal theory of religious autonomy deeply rooted in Western history and Christian theology to a non-Western society such as Taiwan? Wouldn't the gap between the jurisdictional conception of church autonomy and the actual cultural context of Taiwanese society be so great as to make the application of the former to the latter implausible?

However, as should be clear from the discussion in the preceding chapters, my defense of the position that religious organizations ought to enjoy jurisdictional autonomy in certain areas of their internal operation is not contingent on any particular historical context. The

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[6] See e.g. Steven D. Smith, "Freedom of Religion or Freedom of the Church?" in Austin Sarat, ed, *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* (Cambridge [UK] ; New York: Cambridge University Press, 2012) 249; Garnett, *supra* note 5; Paul Horwitz, "Church as First Amendment Institutions: Of Sovereignty and Spheres" (2009) 44 Harvard Civil Rights-Civil Liberties Law Review 79 (justifying legal sovereignty and immunity of religious institutions on the basis of the sphere sovereignty theory developed by the Dutch theologian Abraham Kuyper.)

[7] 132 S. Ct. 694 at 702 (2012).

[8] Cohen, *supra* note 1 at 175.

version of jurisdictional conception of church autonomy that I defend consists of two general principles. Both principles can be justified independently of any historical events or theology; both can be justified from a liberal perspective.

Let me quickly recap the content of the two principles before explaining their connection with liberalism. The first principle is that civil courts should abstain from taking jurisdiction over an internal dispute of religious organization if the intervention would result in the courts addressing religious questions ("the first principle of JCCA"). The second principle states that in the absence of the risk of secular authorities addressing religious questions, the courts may intervene in disputes or conflicts arising from the internal governance of religious organizations, but the courts should apply a balancing framework consistent with William Galston's liberal pluralist approach when dealing with such conflicts. The judicial review framework affirmed by Galston is the compelling state interest test. And in Galston's view, only four types of public interests are compelling enough to justify state interference with internal governance of religious organizations: the protection of human life, the protection of normal development of physical capabilities, ensuring group members have a meaningful right of exit, and the teaching of the virtue of tolerance ("the second principle of JCCA").[9]

The first principle can be understood as an application of John Locke's classic argument about the separation of spiritual and temporal spheres. In *A Letter Concerning Toleration*, Locke powerfully advanced the thesis that "all the Power of Civil Government relates only to Mens Civil Interests, is confined to the care of the things of this World, and hath nothing

[9] See chapter 3 notes 94-97 and the accompanying text.

to do with the World to come."[10] One of the rationales for this position is that, according to Locke, genuine religious beliefs can never be generated as a result of coercion. He wrote: "the care of Souls cannot belong to the Civil Magistrate, because his Power consists only in outward force; but true and saving religion consists in the inward persuasion of the Mind, without which nothing can be acceptable to God."[11] Civil courts would become appellate courts of ecclesiastical tribunals if they were allowed to adjudicate religious disputes and address religious questions, violating Locke's doctrine that the civil magistrate has no jurisdiction over the care of souls or other-worldly concerns. Thus, it seems clear that any political society founded on liberal principles should accept and honor the requirement that civil authorities, including courts, should have nothing to do with questions and controversies that belong to the spiritual realm.

The second principle of JCCA is premised on a presumption against state interference with freedom of association, on the condition that membership in the association is voluntary. Such a presumption against state interference is, according to Brian Barry, an essential liberal principle. Barry notes,

> The fundamental liberal position on group rights, which received its classic formulation in *On Liberty*, is that individuals should be free to associate together in any way they like, as long as they do not in doing so break laws designed to protect the rights and interests of those outside the group. There are only two provisos. The first is that all the participants should be adults of sound mind. The second is that their taking part in the activities of the group should come about

[10] John Locke, *A Letter Concerning Toleration*, James Tully ed. (Indianapolis: Hackett Publishing Company, 1983) at 28.

[11] *Ibid* at 27.

as a result of their voluntary decision and they should be free to cease to take part whenever they want to.[12]

The crucial question, of course, is how to determine the "voluntariness" of group membership. It may not be reasonable to say that an individual's continued adherence to a group is voluntary if the group sets up barriers to exit or intentionally raises the cost of exit to prevent group members from leaving. This concern prompted a debate among liberal theorists on the extent to which the state can intervene to ensure individuals within the groups and communities have a "meaningful" or "realistic" option of exit.[13] A particularly important aspect of this debate concerns how to protect the interest of children who were born into conservative religious communities and the ways in which the education conducted by these communities can be regulated.[14] In this regard, I have argued that the curriculum of religious communities must be able to satisfy the four sets of conditions for a meaningful right of exit proposed by Galston, which is a relatively high standard compared to those suggested by other toleration liberals.[15]

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[12] Brian Barry, *Culture and Equality : An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001) at 148.

[13] For contrary views in this debate, see William A. Galston, "Two Concepts of Liberalism" (1995) 105:3 Ethics 516; and Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit" (2002) 112:2 Ethics 205. The book *Minorities within Minorities* has a number of important articles that discuss the legitimacy of the exit rights approach to the conflicts between group rights and individual rights. See Avigail Eisenberg & Jeff Spinner-Halev eds, *Minorities within Minorities: Equality, Rights, and Diversity* (Cambridge; New York: Cambridge University Press, 2005).

[14] See e.g. Daniel M. Weinstock, "A Freedom of Religion-Based Argument for the Regulation of Religious Schools" in Benjamin L Berger & Richard Moon eds, *Religion and the Exercise of Public Authority* (Oxford; Portland, Oregon: Hart Publishing, 2016) 167.

[15] See chapter 4, VI. A. 2.

The point I want to emphasize, though, is that fundamental liberal values and principles include a commitment to freedom of association and a presumption against state interference with that freedom. It is true that the enjoyment of freedom of association is conditional upon some basic requirements designed to protect the rights and interests of individual members, especially their right to exit the group. But those basic requirements do not, and should not, overrule the presumption that voluntary associations within a liberal state enjoy a broad freedom to organize their internal life as they wish.

Since the jurisdictional autonomy approach that I defend consists of two general principles both of which can be justified from a liberal perspective, nothing prevents them from being accepted and recognized in Taiwan, which is also a liberal democratic society.

Another reason why I think the project of applying the jurisdictional conception of church autonomy to Taiwan is plausible has to do with the fact that there have already been some discourses in Taiwan's constitutional jurisprudence that are consistent with the conception. For example, as we have seen in chapter 2, Justice Wang He-Xiong proposed in his concurring opinion in J.Y. Interpretation No. 573 several doctrines and principles which he believed are required by a "bright-line" separation between the state and religious groups. One of the principles he proposed requires the courts to abstain from hearing cases involving the interpretation of religious doctrine. He wrote: "Judicial power should be limited in cases involving the interpretation of religious doctrine or internal organizational matters of religious institutions. These matters fall within the realm of self-determination of religious institutions and are not subjects that can be addressed by the courts."[16] This view echoes the

[16] J.Y. Interpretation No. 573 (27 February 2004, J. Wang He-Xiong, concurring).

first principle of JCCA. As we have also seen, Justice Chen Shin-Min asserted in his concurring opinion in J.Y. Interpretation No. 728 that religious groups are entitled to "the highest level of constitutional protection" which is not enjoyed by other voluntary associations.[17] In addition, he argued that certain constitutional guarantees of fundamental rights—such as the constitutional protection of the right to gender equality—are not necessarily enforceable if they have the effect of limiting the autonomy of religious organizations, especially when it comes to clergy appointments within religious organizations.[18] In my view, Justice Chen's suggestions are consistent with the second principle of JCCA, as the compelling state interest test is a standard of judicial review that would indeed afford the highest level of constitutional protection to religious groups.

Because of the existence of these arguments made by the two former justices, I do not see the project of applying the jurisdictional conception of church autonomy to Taiwan as imposing something entirely new or foreign on Taiwan. Rather, what I hope the current research would ultimately lead to is a further development and enrichment of these arguments through an engagement with the ongoing theoretical and judicial debates with regard to religious autonomy in other parts of the world, particularly the U.S. and Canada.

In the next section, I proceed to consider the ways in which the jurisdictional conception of church autonomy that I defend can change the contour of Taiwan's regulatory scheme for

[17] J.Y. Interpretation No. 728 (20 March 2015, J. Chen Shin-Min, concurring).

[18] *Ibid*. In making this argument, Justice Chen referred to the traditional practices in Catholicism and Islam of allowing only male members to serve as priests and clerics and suggested that it is unjustifiable for the state to interfere with such practices based on gender equality.

religious organizations if it is recognized as a guiding framework for state-religion relationship in Taiwan.

III. Law Reform Proposals

A. Religious Groups Act

The draft bill entitled *Religious Groups Act* (*RGA*)[19] is intended to be a new basic law governing religious organizations in Taiwan, replacing the outdated *Act of Supervision of Temples and Shrines* (*ASTS*).[20] As we have seen in chapter 1, the draft *RGA* has roots in the unfavorable social climate for religion in 1996, in which year several high-profile religious scandals were brought to light and triggered public outcry calling for the imposition of tougher regulations on religious organizations.[21] The government proposed several different drafts of the *RGA* in the past two decades, but the legislature failed to pass any of the drafts into a formal law. In July 2017, when the Democratic Progress Party government indicated its intention to pass the draft bill, it was met with fierce opposition from religious

[19] Zongjiao Tuantifa Caoan (宗教團體法草案) [*Religious Groups Act* (draft)] (May 8, 2015) (R.O.C.).

[20] Jiandu Simiao Tiaoli (監督寺廟條例) [*Act of Supervision of Temples and Shrines*] (promulgated and effective Dec. 7, 1929) (R.O.C.).

[21] See chapter 1, IV. A.

organizations, especially Buddhist and Daoist organizations.[22] The government was forced to back down and promise that the draft bill would not be passed without consensus.[23]

1. Former justices' objection to the legislative initiative

With regard to the question of the legitimacy of this draft bill, I support a position that has been advanced by both Justice Wang He-Xiong and Justice Chen Shin-Min, namely, such a bill is undesirable because it could seriously violate freedom of religion. As I have noted in chapter 2, although J.Y. Interpretation No. 573 struck down two provisions of the *ASTS*—a law that imposes serious constraints on the ways in which Buddhist and Daoist organizations use their property—the majority judgment of that Interpretation did not question the legitimacy of the *ASTS* as a whole.[24] In contrast, Justice Wang's concurring opinion in that Interpretation expressed a clear and strong objection to legislative initiatives aimed at regulating the internal affairs of religious organizations. He wrote: "The state should not intervene in the internal affairs of religious organizations, which should be regulated by religious organizations themselves. If the state is allowed to comprehensively regulate the way a religious group organizes, the content of their religious activities, or the

[22] See Huang Li-Mien, "佛、道兩教大團結 抗議宗教團體法" ["Buddhist and Daoist groups united in protesting against the *Religious Groups Act*"] *中國時報 China Times* (27 July 2017). See also Luo Shao-Ping, "全台佛教界代表今決議反對內政部推動宗教團體法立法" ["Representatives of Buddhist organizations from all over Taiwan making resolution today against the Ministry of Interior's campaign to pass the *Religious Groups Act*"] *聯合報 United Daily* (18 August 2017).

[23] See Huang Hsu-Sheng, "宗教團體法 葉俊榮：共識前暫緩推動" ["Yeh Jiunn-Rong (Minister of Interior): Suspend the effort to pass the *Religious Groups Act* until consensus is reached"] *中央社 Central News Agency* (1 September 2017).

[24] See J.Y. Interpretation No. 573 (27 February 2004).

group's internal administration, this would no doubt result in state predominance over religion. Religious beliefs would thereby be fixed in the particular value mode or goal determined by the state."[25]

Justice Chen holds a similar view on this issue. In an article written prior to his appointment to the Court, Justice Chen (who was a professor of law at that time) suggested that a legislative restriction on religious freedom is justifiable only if it is grounded in an "apparent and significant" public interest.[26] In other words, public interests of an ordinary nature would not be sufficient to justify a regulation restricting religious freedom. It follows that very few activities and internal affairs of religious organizations can be justifiably subject to state regulation, since only a limited range of pubic interests are able to provide legitimate grounds for state intervention. Therefore, Justice Chen argued, it is unnecessary to enact comprehensive legislation to regulate religious affairs, because many provisions in such legislation would likely be deemed unconstitutional.[27]

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[25] *Ibid* (J. Wang He-Xiong, concurring).

[26] See Chen Shin-Min, "憲法宗教自由的立法界限─評「宗教團體法」的立法方式" ["Constitutional Protection of Religious Freedom and Limitations on Legislative Power: A Comment on the Draft Bill of 'Religious Groups Act'"] (2006) 52:5 The Military Law Journal 1 at 12. According to Justice Chen, the state's interest in "maintaining peace among religions" is an apparent and significant public interest. He points out that an example of the regulation that is based on such state interest and should thus be deemed legitimate is Art. 246 of Taiwan's *Criminal Code*, which stipulates: "A person who publicly insults a shrine, temple, church, grave, or public memorial place shall be sentenced to imprisonment for not more than six months, short-term imprisonment, or a fine of not more than three hundred yuan." See Chen Shin-Min, *憲法學釋論 (修正八版)* [*A Treatise on Constitutional Law, 8th ed.*] (Taipei: Chen Shin-Min, 2015) at 319-320.

[27] *Ibid* ("Constitutional Protection of Religious Freedom") at 12.

2. A distinction between good and bad religions

In what follows, I argue that religious organizations registering under the *RGA* can to some extent be thought of as "state-certified religious organizations." As we will see below, the government attempts to use benefits and even privileges as incentives for religious organizations to register and incorporate under this law. On the other hand, the law subjects registered religious organizations to strict supervision and regulation with regard to the management of property and the qualifications of leadership of religious corporations. The positive goal of such a "carrot-and-stick" approach is to ensure the healthy and continued development of religious organizations, as indicated by Article 1 of the draft bill.[28] On the negative side, religious organizations are expected to become less of a source of social problems under the proper management and supervision of the state.[29] It seems to me that such a regulatory scheme has some characteristics of a state certification or approval system, whereby the quality of a product is guaranteed by the examination and monitoring process of the state. I argue that the underlying message of the *RGA* seems to be that religious organizations that register and incorporate under this law are "good" and trustworthy religions (i.e. good religious products).

With regard to incentives for registration, Chang Chia-Lin and Tsai Shiou-Jing have made a list of four categories of benefits that will be granted to the religious organizations registering under this law: (1) tax exemptions; (2) exoneration of religious organizations that illegally possess state-owned land; (3) permission to establish affiliated religious training

[28] Art. 1 of the *RGA* provides: "This law is enacted to protect freedom of religious belief and to preserve the healthy development of religious groups."

[29] Recall that the legislative background of this draft bill is closely connected with the so-called "religious chaos" in 1996. See chapter 2, IV. A.

institutes; (4) permission to register and incorporate for those groups that use apartments (as opposed to stand-alone buildings) as places of worship.[30] Of the four categories of state benefits, the exoneration of religious organizations that illegally possess state-owned land is especially noteworthy because it could raise the concern of unequal treatment between religious organizations and secular organizations. Many Buddhist organizations in Taiwan chose to build their temples in the mountainous region. According to Lin Rong-Jhih, Secretary-General of the Chinese Buddhist Temples Association, the practice of building temples in remote areas in the mountains is closely related to Buddhist religious doctrine, as the practice makes possible the fulfillment of the requirement of "leaving the world" (出世), which is an integral part of Buddhist monastic life.[31] However, many parts of the mountainous land on which Buddhist temples are built belong to the state and cannot be used and developed without permission. This means that currently many temples and monasteries in the mountains are in fact illegal constructions on state-owned land.[32] Now, if the *RGA* is passed, Buddhist organizations that own these temples will be given a right to purchase or rent the land rather than being punished or prosecuted for illegally possessing the land.[33]

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[30] Chang Chia-Lin & Tsai Shiou-Jing, "國家對〈宗教團體法草案〉的思維與詮釋" ["The State's View and Interpretation of the draft Religious Groups Act"] in Chen Zhi-Jie & Wang Yun eds, *法治的侷限與希望: 中國大陸改革進程中的台灣、宗教與人權因素* [*The Limit and Hope of Legalism: The Issues of Taiwan, Religion, and Human Rights in China's Reform*] (Taipei: Angle Publishing House, 2015) 187-192.

[31] Interview of Lin Rong-Jhih on *Our Island*, Taiwan Public Television Service (21 June 2010). (http://ourisland.pts.org.tw/content/有山則靈%EF%BC%8C 佔山則贏%EF%BC%9F) (accessed 3 November 2018).

[32] See "社論：宗教沒有特權" ("Editorial: Religions ought not have special rights") *台灣時報 Taiwan Times* (14 March 2015).

[33] Art. 26, *RGA*.

This will be a special privilege enjoyed only by religious organizations and not by secular organizations.

On the other hand, there are several provisions in the *RGA* that restrict the freedom of religious corporations to manage their internal affairs. First, Article 15 of the law prohibits religious corporations from appointing someone who has committed certain criminal offenses or unlawful acts in the past as the chairperson of the corporation.[34] It seems clear that this provision violates the doctrine of ministerial exception, which requires the state to take a hands-off approach to the selection of leaders of religious organizations. Second, Article 20 prohibits religious corporations from disposing of or encumbering the property with which they incorporate except in certain extraordinary circumstances.[35] As Chang and Tsai point out, what this provision implicitly suggests is that the real estate of religious organizations are "public property" the use and management of which should be subject to the state supervision, instead of "private property" that religious organizations can freely determine what to do with.[36] Articles 23 to 25 of the bill deal with financial transparency of religious corporations. Article 23 imposes an obligation on religious corporations to submit

[34] Art. 15, *RGA*. The criminal offenses listed in Article 15 include those related to organized crimes, sexual assaults, and violation of sexual moralities. The unlawful acts the commitment of which disqualifies a person from being appointed as the chairperson include "having been dishonored for unlawful use of credit instruments" or "having been declared bankruptcy and the relevant rights have not been reinstated."

[35] Art. 20, *RGA*. Those circumstances include: (1) the need to demolish and relocate the buildings of religious corporations due to public construction projects. (2) A religious corporation plans to reconstruct or remodel their real estates on the original site, or to relocate and reconstruct their real estates, and such a plan has been approved by the competent authority. (3) Unexpected conditions arises which generate the need to dispose of the property, and the religious corporation's plan for so doing has been approved by the competent authority.

[36] Chang & Tsai, *supra* note 30 at 207.

an annual financial report.[37] Article 24 stipulates that if religious corporations receive donations, they should make the information on how the donations are used, or will be used, accessible to donors within six months.[38] Article 25 requires religious corporations that hold fundraising events to publicize a report indicating how much money has been raised as well as the expenditure and costs for holding the events.[39]

As these provisions reveal, part of government's intention in enacting the *RGA* is to make religious organizations more transparent and trustworthy through regulation by this law. However, it can be expected that some religious organizations would decide not to register under the *RGA* because of the burdensome obligations and limitations imposed by the law. (It is not mandatory for religious organizations to incorporate under this law). The resulting effect is that a distinction will be created between two types of religious organizations: those that register under this law and those that do not. To some extent, such a distinction amounts to a distinction between "good" and "bad" religions, with the religious organizations that do not register under this law being regarded as less well-regulated and less trustworthy.

In fact, the Taiwanese government has not been unfamiliar with the practice of distinguishing between good and bad religions. As Jianlin Chen observes, a salient characteristic of state management of religion in Taiwan is the effort of the government to try to "promote and reward religion that it considers as 'good'."[40] Chen points to the example

[37] Art. 23, *RGA*.

[38] Art. 24, *RGA*.

[39] Art. 25, *RGA*.

[40] Jianlin Chen, *The Law and Religious Market Theory: China, Taiwan, and Hong Kong* (Cambridge [UK]; New York: Cambridge University Press, 2017) at 91.

of a set of normative expectations that religious organizations have to meet if they hope to obtain an epigraph written by the President. According to Article 10 of the "Key Points for the Granting of President's Inscription", religious organizations are eligible for such a recognition if they meet the following criteria: "having made a significant contribution in improving customary practices or local construction, having assisted the government implement certain laws and policy, being active and effective in providing social services, and being the center of faith of the region/ locale."[41] Some of these criteria also exist in other statutes and regulations as basis for determining whether religious organizations are qualified for certain state benefits, including exemption of religious premises from land tax.[42]

Another interesting example is the so-called "Good People and Good Gods" movement (好人好神運動), which is currently being promoted by Taiwan's Ministry of the Interior. According to the website set up by the Ministry to promote this movement, the core idea of the movement is to call on religious believers to "show public-mindedness and social responsibility, and manifest the goodness arising from the nature of religious beliefs."[43] The website highlights seven categories in which religious believers should be mindful of the public welfare and their social responsibility: environmental protection, ecological preservation, animal protection, public safety, public order and morality, gender equality, and financial soundness. In each of the seven categories, the government cites some

[41] Quoted from *ibid* at 98 (footnote omitted).

[42] See Art.8, Sec. 9, 土地減免規則 [Land Tax Reduction and Exemption Regulations]: "Land used by religious organizations that are *beneficial to social customs and education* and that are registered as an NPJP or as temples… shall have full exemption." (Emphasis added).

[43] See <https://religion.moi.gov.tw/Goods/About?ci=3> (accessed 3 November 2018).

instances in which the actions of some religious organizations have caused problems to the public welfare.[44] The negative examples are followed by government instruction on how the problems can be prevented and if there are any alternative measures to the problematic religious practices. What is especially noteworthy is that the government recognizes and commends one religious organization in each of the seven categories which it regards as setting a good example in that particular respect.[45] Although this governmental campaign does not come with any form of punishment or material benefits, the government nonetheless grants symbolic favor to some religious organizations while disparaging the practices of other organizations.[46]

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[44] For example, with regard to the topic of ecological preservation, the government criticizes some religious groups' practice of setting animals free as part of their religious rituals. It points out that a careless release of animals into wild area could cause the disruption of ecological balance and might also be harmful for the animals that are released. See <https://religion.moi.gov.tw/Goods/Content?cid=1&ci=3&id=2> (accessed 3 November 2018).

[45] The religious group commended by the government in the category of gender equality is the "Female Ba-Jia-Jiang of the Holy Heavens Temple." Ba-Jia-Jiang, or eight generals, is a religious activity commonly conducted in the rituals of folk religions in Taiwan. During the parade of various gods of folk religions, eight individuals would dress up as "eight generals" who serve as bodyguards for the gods. Traditionally, only male members can be selected to perform the role of eight generals. But the "Female Ba-Jia-Jiang of the Holy Heavens Temple" is the first religious group in Taiwan that selects eight females to conduct the performance of Ba-Jia-Jiang. The government commends the group as "breaking gender stereotype and promoting the awareness of the importance of gender equality." See <https://religion.moi.gov.tw/Goods/Content?cid=1&ci=3&id=19#> (accessed 3 November 2018).

[46] The "Good People and Good Gods" movement is reminiscent of a program enacted more than 40 years ago by the Committee for the Revival of Chinese Culture. The Committee was established in 1967 by the KMT government in response to the Cultural Revolution in mainland China and was tasked with preserving and reviving traditional Chinese culture in Taiwan. In 1970, it enacted a program called "Models for citizens' rites and ceremonies", which "attempted to shape religious practice by stressing the importance of good manners and simple (that is, not lavish or expensive) rituals." (Paul R. Katz, "Religion and the State in Post-war Taiwan" (2003) 174 The China Quarterly 395 at 403). The Committee promoted this program and other cultural policies by drawing up handbooks the contents of which "were widely publicized through the mass

In my view, the *RGA* has the similar effect of identifying and recognizing good religions as the governmental regulations and campaign mentioned above. Viewing from the perspective of the *RGA*, the "good" religions are those religious organizations whose leaders meet certain moral standards and whose handling of financial affairs is transparent, as a result of their compliance with the law. The "bad" religions, by extension, are those that choose not to incorporate under this law and refuse the government's supervision of the management of their internal affairs. However, the obvious problem with creating a distinction between good and bad religions—even if the distinction is merely symbolic—is that the government would violate the principle of state neutrality by endorsing some religious groups over others. As Justice O'Connor of the U.S. Supreme Court famously argued in her concurring opinion in *Lynch v. Donnelly*,[47] "Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[48] Government endorsement of some religious groups is an affront to the dignity of members of other religious groups, as they are rendered second-class citizens by the state.

3. The state's concern for the healthy development of religious organizations

Furthermore, the state need not be concerned about the "healthiness" of religious organizations. The healthy development and the continued operation of religious

media, as well as at schools and government offices." (*Ibid*).

[47] 465 U.S. 668 (1984).

[48] *Ibid* at 688.

organizations, claimed by the government as a general rationale for the *RGA* and more specifically as legislative intent of the regulation concerning property management,[49] are not among the compelling state interests which Galston believes could justify state intervention in the internal affairs of religious organizations. On the flip side, even while it is true that religious organizations like any other human associations can at times produce social problems and even violate human rights, existing laws such as the *Criminal Code* already provide the state with effective tools to impose sanctions and punishments and prevent the harmful behavior within religious organizations from happening again.

To illustrate, let us consider a tragic incident that occurred in 2013 within the Sun Moon Bright Group (日月明功), a small quasi-religious group in central Taiwan.[50] The group was formed initially as a dancing class led by Chen Chiao-Ming. It gradually transformed into a spiritual growth group as Chen started to include yoga and qigong as part of the class and preach her attitudes about life during group discussion sessions. On the weekends, Chen would invite about 20 core members with their families to her manor in the countryside for activities involving mutual sharing and encouragement, further strengthening close ties, and a family-like atmosphere, among the members of the group.[51] With the level of the group's cohesiveness becoming more intensified and the personal authority of Chen becoming ever more unquestionable, the group began to develop the practice of disciplining members and especially children. When the members' children were found to engage in inappropriate

[49] See art.1 of the *RGA* and the "explanation" section attached to the text of art. 20 of the *RGA*.

[50] The following account of the incident is based on a recent study of the group by Professor Jen-Chieh Ting. See Jen-Chieh Ting, "一個失控的成長團體:日月明功個案初探" ["A Growth Group Going Out of Control: A Preliminary Case Study on the Sun Moon Bright Group"] (2016) 30 Reflexion 229.

[51] *Ibid* at 239.

behavior, they would be required to attend a group meeting where they would be interrogated by adult members. The interrogation was usually accompanied by corporal punishment such as slapping the children in the face.[52] In May 2013, a group member's son, who was 18 years old at that time, was disciplined by the group because he was suspected to have taken drugs. Under Chen's instructions, several group members beat the teen severely and then locked him up in a small room in Chen's manor and gave him little food to eat. He died two weeks later.[53] In December 2014, Chen was sentenced to 13 years in prison for the death of the teen, and two members of the group who were responsible for the beating were sentenced to 4 years and 3 years and 10 months in prison, respectively.[54] The group stopped operating after Chen was taken into custody by the police.[55]

This is indeed a tragic and heart-breaking incident. There is simply no justification at all for a religious group to torture a teen to death. But the point I want to make is that when crimes are committed by religious groups and their leaders, the state can and did impose serious punishment through the enforcement of the *Criminal Code*.[56] Criminal prosecution and punishment can effectively cause the total collapse of a group, as this case shows. The long prison term handed to Chen will set an example for the leaders of other religious organizations, warning them to be careful in their treatment of group members. Therefore, it

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[52] *Ibid* at 246.

[53] "日月明功 共犯虐死少年" ["Accomplices in the Sun Moon Bright Group tortured a teen to death"] *蘋果日報 Apple Daily* (6 December 2013).

[54] Jason Pan, "Religious leader sentenced" *Taipei Times* (10 December 2014).

[55] Ting, *supra* note 50 at 262.

[56] Chen was convicted under Art.302 Sec.2 of Taiwan's *Criminal Code*, which stipulates: "If death results from [a person being taken into custody illegally], the offender shall be sentenced to life imprisonment or imprisonment for not less than seven years."

seems to me that there is no need to enact a special law aimed at religious organizations for the purpose of preventing them from violating the rights and interests of group members.

To summarize the discussion in this section, it is my view that the draft *RGA* should not be passed into law. The bill will convey a message that those religious organizations that register under it is good and trustworthy religions. In other words, it will convey a message of endorsement of some religious organizations over others. In addition, it is unjustifiable for the state to restrict religious autonomy based on the concern for the healthy development of religious organizations. Strict enforcement of the *Criminal Code* and vigorous prosecution of criminals will be sufficient for the task of preventing incidents like the one discussed above from happening again.

B. Freedom of religiously affiliated universities to require compliance with their religious rules of conduct

1. Recent controversies surrounding Fu Jen Catholic University

I now turn to the freedom of religiously affiliated universities to establish a religiously based rule of conduct and require compliance with it by the members of the school. I examine this issue against the background of the recent controversies surrounding Fu Jen Catholic University (FJCU) in Taiwan. FJCU was originally established in Beijing in 1925 as Fu Jen Academy. After World War II, it was re-established in Taiwan in 1961. It is one of the three Catholic universities in Taiwan and currently has around 27,000 students. In a university ranking report published in July 2018, FJCU was ranked as the third best university for arts

and humanities in Taiwan.[57] In recent years, the university became the focus of public attention several times for its insistence on the priority of Catholic values over other concerns.

In 2000, by a narrow vote of 38-36, FJCU's administrative committee passed a resolution which warranted the dismissal of faculty members whose speech or conduct fails to honor the values and beliefs reflected in a Catholic Church document issued in 1990, the *Ex Corde Ecclesiae*, or the "Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities".[58] The resolution was widely criticized by Taiwan's academic community, as it was seen as a means by which the university sought to restrict academic freedom in discussing controversial social issues such as abortion. Even Professor Hsu Yu-Dian, a well-known defender of religious freedom in Taiwan, was against the adoption of this resolution. In an article written in 2003, he argued that, except for institutions established specifically for religious training purpose such as seminaries, religiously affiliated universities and colleges generally have no claim to the constitutional protection of freedom of religion.[59] He suggested that private schools approved by the state are comparable to administrative bodies in that their power and authority in conducting educational activities are delegated by the state.[60] In exercising this state-delegated, public authority, private

[57] See "2018 台灣最佳大學排行榜" ["Ranking of Top Universities in Taiwan 2018"], 遠見雜誌 *Global Views Monthly* (2 July 2018). < https://www.gvm.com.tw/school/rankings/2018/?utm_source=OfficialSite&utm_medium=GV_banner_305x60&utm_campaign=1807_rankings#top> (accessed 3 November 2018).

[58] See Duan Lin, "對輔仁大學事件的幾點意見" ["Some Thoughts about the Fu Jen Catholic University Controversy], 41 Taiwanese Sociological Association Newsletter 14 (2001).

[59] Hsu Yu-Dian, "學術自由在宗教大學的實踐─天主教大學憲章案的合憲性探討" ["The Application of Academic Freedom in Religious Universities: An Exploration of the Constitutionality in the Catholic University Charter Controversy"] 32:3 NTU Law Journal 65 at 94 (2003).

[60] *Ibid* at 97-98.

schools including FJCU must respect the religious freedom of students and faculty members and should not make religious compliance a condition of admission or employment.[61]

In 2015, a group of students attempted to disrupt a religious ceremony held within the campus by FJCU, claiming that the school's requirement that they attend the ceremony violated their religious freedom.[62] The ceremony was an annual event known as "Respect Gods and Worship Ancestors" and had been held every year for about four decades. Not all students were required to attend—the university's practice was to ask 30 students from each department to participate in the event, and students could decide among themselves who would attend the event.[63] However, this practice did not prevent some students from asserting that this event was coercive and that their religious conscience had been seriously violated. In advancing their claim, the students appealed to Article 7 of Taiwan's *Private School Act* (*PSA*),[64] a regulation that traces its roots to the anti-Christian movement in the 1920s, as we have seen in chapter 1. Article 7 of the *PSA* prohibits private schools—except "religious training institutes"—from forcing students to participate in religious rituals or take religious courses. The students claimed that FJCU's requirement that they attend the "Respect Gods and Worship Ancestors" event was a violation of this regulation.

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[61] *Ibid* at 107.

[62] "輔大祭天敬祖「浣腸花」發起抵制" ["Student group 'Huan Chang Hua' boycotts FJCU's Respect Gods and Worship Ancestors ceremony"], *中國時報 China Times* (24 March 2015).

[63] "反強制參加祭禮　輔大生爭信仰自由" ["Refusing to be forced to attend a religious ceremony, students at FJCU fight for freedom of belief"], *政大大學報 NCCU Uonline* (26 March 2015).

[64] Sili Xuexiao Fa 私立學校法 [*Private School Act*] (promulgated and effective Nov. 16, 1974, as amended June 18, 2014) (R.O.C.).

The most recent controversy of the university arose in the context of public debate on same-sex marriage in Taiwan. Since a new legislature was formed in February 2016, there have been effort from both major parties, the governing Democratic Progressive Party and the opposition Kuomintang, to pass an amendment to the *Civil Code* that would legalize same-sex marriage. The initiative to legalize same-sex marriage quickly led to the polarization of social opinions, and large-scale demonstrations were held by both supporters and opponents of same-sex marriage.[65] In November 2016, the Pastoral Care Office of FJCU sent an email to the students and faculty members explaining why, according to Catholic beliefs and doctrines, same-sex marriage should not be legalized. Originally meant to be a letter circulated only within the university, it became a target of criticism after it was revealed by the media. A prominent legislator, Xu Yong-Ming, denounced the letter as discriminatory and demanded that the Ministry of Education revoke funding for the university.[66] Although the Ministry did not take this suggestion seriously, for religious communities in Taiwan, this episode is alarming because it raised a possibility—however slim it was—that a religious institution could be punished for its religiously informed speech, even if the intended audience of the speech are members of the institution rather than the general public.

As a Catholic institution, FJCU naturally takes as its goal the maintaining of its Catholic identity and the deepening of its commitment to Catholic values. But as we can see from

[65] I will discuss some of the anti-gay-marriage organizations and the mass demonstrations they staged in section C below.

[66] You-Cheng Chou, "輔大反同性戀 徐永明：可繼續拿教育部補助嗎？" ["Fu Jen Catholic University opposes LGBT; Xu Yong-Ming: Can the University continue to receive funding from the Ministry of Education?"], *聯合報 United Daily News* (6 November 2016).

these controversies, such an effort has been repeatedly challenged—by scholars, students, and legislators. A core issue that runs through these controversies is whether or not FJCU is entitled to lay down a religiously based community standard—which requires compliance with its religious values and a certain degree of participation in religious ceremonies—that every member of the university has to follow. Of course, FJCU itself has not aimed for a *comprehensive* application of its religiously based standard or rule of conduct. For example, the compliance with the *Ex Corde Ecclesiae* is a condition of employment for faculty members but not a condition of admission for students. And the university does not require that every student attend the annual "Respect Gods and Worship Ancestors" event; the requirement is rather that *some* students from each department attend. However, I would like to take a step back from the factual context of FJCU and consider the stronger claim that a religiously affiliated university has a right to establish a religious rule of conduct that every member of the school community has to follow.

2. A comparative perspective— *Law Society of British Columbia v. Trinity Western University*

In what follows, I explore the legitimacy of this claim by examining the recent decision of the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University*.[67] In that decision, and in its companion decision of *Trinity Western University v. Law Society of Upper Canada*,[68] the Court held that refusing to allow religious believers to establish an educational institution governed by a religious code of conduct is not a

[67] 2018 SCC 32 [*Law Society of B.C.*].

[68] 2018 SCC 33 [*Law Society of Upper Canada*].

significant interference with religious freedom. Even though the Court's conclusion in these decisions does not lend support to the claim that religiously affiliated universities are entitled to require compliance with a religious rule of conduct, it is still useful to examine the Court's reasoning because doing so allows us to identify some of the most important objections to that claim.

Let me first set out the facts of the two cases. Trinity Western University (TWU), an evangelical Christian postsecondary institution in British Columbia, seeks to open a law school which requires prospective members of the school to sign and comply with a Community Covenant Agreement (the Covenant) as a condition of attendance or employment. The Covenant reflects fundamental evangelical Christian beliefs and includes a prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman."[69] TWU's proposed law school was approved by the Federation of Law Societies of Canada as well as by several provincial law societies, including the Law Societies of Alberta, Saskatchewan, New Brunswick, Prince Edward Island and the Yukon. However, the Law Societies of British Columbia and Ontario decided not to accredit the proposed law school on the ground that the Covenant discriminates against LGBTQ students. The Supreme Court of Canada affirmed the decisions of both law societies not to accredit the law school, finding that the limitation on religious freedom of the members of TWU community as a result of those decisions is "of minor significance."[70]

The majority gave two reasons why the limitation on religious freedom in this case was of minor significance. First, the majority maintained that a mandatory rule of conduct is not

[69] *Law Society of B.C., supra* note 67 at para 1.

[70] *Ibid* at para 87.

"absolutely required" for the project of creating a religious learning environment. "[T]he limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant."[71] Second, the majority held that, for students who wish to attend TWU law school, studying in a religious learning environment is in fact a *preferred but not necessary* means for their spiritual growth.[72] Relying on Chief Justice McLachlin's opinion in *Alberta v. Hutterian Brethren of Wilson Colony*,[73] the majority made a distinction between two categories of religious practices: (1) practices the interference of which verges on "forced apostasy"[74], and (2) practices that are "optional or a matter of personal choice."[75] The majority suggested that studying law in a religious learning environment is a practice that falls into the second category—it is optional in nature.[76]

With regard to the first argument—the "not absolutely required" argument—, the majority seemed to assume that a religious educational environment would only be minimally affected without a mandatory covenant. In my view, the problem with this

[71] *Ibid* (emphasis in original).

[72] *Ibid* at para 88.

[73] 2009 SCC 37, [2009] 2 S.C.R. 567 [*Hutterian Brethren*].

[74] *Law Society of B.C., supra* note 67 at para 90 (citing *Hutterian Brethren*).

[75] *Ibid* at para 88 (citing *Hutterian Brethren*).

[76] *Ibid* at para 90.

argument is that it does not properly appreciate the significance of norms to religious communities.

As Robert Cover points out, insular religious communities such as the Amish and the Mennonites "sought a refuge not simply *from* persecution, but *for* associational self-realization in nomian terms."[77] What they pursued or fought for, in other words, was a "norm-generating autonomy."[78] To these communities, religious freedom would become pointless if it does not grant them an autonomy to establish their own norms and live according to those norms. While TWU is not an insular community, it seems to me that the desire to establish a community governed by religious norms and precepts is also essential to TWU's self-definition. This is evident in the following statement in the Covenant defining the university as being "made up of Christian administrators, faculty members and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts."[79]

In addition, a key difference between religious communities and secular communities is, according to Cover, the degree to which the former establish their own normative world. Cover writes: "Sectarian communities differ from most—if not all—other communities in the degree to which they establish a *nomos* of their own. They characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norms. More importantly, they identify their own paradigms for lawful behavior and reduce the state to just one element, albeit an important one, in the normative

[77] Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983) 97 Harvard Law Review 4 at 31 (emphasis in original).

[78] *Ibid*.

[79] *Law Society of B.C., supra* note 67 at para 71 (quoting TWU's Community Covenant Agreement).

environment."[80] Applying this observation to the present case, we can say that requiring TWU to remove the mandatory covenant from its admissions policy arguably amounts to taking away a fundamental feature that distinguishes a religious educational community from a secular educational community. This can negatively affect the cohesiveness of TWU community. The majority stated firmly that "[t]he ability of religious adherents to come together and create *cohesive communities of belief and practice* is an important aspect of religious freedom under s.2(a)."[81] However, it is not clear to me that, without a religiously based norm expressing and upholding the core values and behavioral standard of the community, if it is still possible for TWU to create and maintain a *cohesive* community of faith. The university may end up becoming more like "a community of communities," where many sub-groups with divergent ideals and values co-existing with one another within the school boundaries.

As noted above, the majority's second argument is premised on the distinction between religious practices the interference of which comes close to "forced apostasy" and religious practices that are "optional or a matter of personal choice." However, this amounts to a distinction between what lies at the center of religious beliefs and what lies on the periphery. This is clearly a theological determination which should never be made by a secular court. As we have seen in chapter 4, the Court in *Syndicat Northcrest v. Amselem* pointed out that "when courts attempt to define the very concept of religious 'obligation'…they enter forbidden domain."[82] It seems clear to me that the majority in this case entered forbidden

[80] Cover, *supra* note 77 at 33 (emphasis in original).

[81] *Law Society of B.C., supra* note 67 at para 64 (emphasis added).

[82] 2004 SCC 47, [2004] 2 S.C.R. 551 [*Amselem*] at para 67.

domain by determining that the religious practice at issue—studying law in a religious learning environment—is merely optional (i.e. not obligatory) in nature.

Moreover, the majority ignored the fact that an optional religious practice can still generate significant spiritual benefits for religious adherents. For example, suppose that there is a religious believer who decides to spend one year after his graduation from college to receive training in learning the Bible as well as gospel-preaching. This religious individual believes that, although this practice of dedicating a period of time for spiritual training is not required by the Bible, it can contribute to his spiritual growth in a way far more significant than a regular visit to the church on Sundays, which is a required practice. Preventing him from joining such a one-year training would cause him to lose a great opportunity to grow spiritually, despite the fact that the practice is optional. A significant loss of spiritual benefits as a result of state action is, in my view, a significant interference with religious freedom. From this perspective, it does not matter whether or not attending TWU's proposed law school is merely a preference for prospective students; as long as these students sincerely believe that this practice would generate significant spiritual benefits for them, taking away an opportunity to engage in such a practice should be seen as constituting a significant interference with their religious freedom.

Justice Rowe's view toward the Covenant is even more unfavorable. In his concurring opinion, Justice Rowe suggested that the requirement that all who attend TWU's proposed law school adhere to the Covenant is *not* protected by freedom of religion guaranteed in s. 2(a) of the *Canadian Charter of Rights and Freedoms*. He first pointed out that freedom of religion does not include a right to constrain the conduct of others: "Where the protection of s. 2(a) is sought for a belief or practice that constrains the conduct of nonbelievers—in other

words, those who have freely chosen not to believe—the claim falls outside the scope of the freedom."[83] He then characterized the requirement of compliance with the Covenant by all members of TWU's law school as imposing religious obligations on outsiders: "The claimants seek to…requir[e] adherence to the Covenant by all who attend the proposed law school. Their attempt to do so is not protected by the *Charter*. This is because—by means of the mandatory Covenant—the claimants seek to require others outside their community to conform to their religious practices. I can find no decision by this Court to the effect that s. 2(a) protects such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto."[84]

However, this view is untenable because it fails to take into account the fact that no one will be forced to attend TWU's proposed law school. If a person does not like the Covenant, he can choose not to apply to TWU's law school; there are many other alternatives available to him. But if he chose to attend the school, recognizing the existence of the Covenant and agreeing to be bound by it, then it would be impossible to speak of him as being "coerced" to conform to the behavioral standard required by the Covenant.[85] And regardless of an individual's religious identity, she became part of the TWU community when she voluntarily joined the school, which means that from that point on, she is no longer an outsider. It follows that the school's requirement that she respect and honor the beliefs and practices reflected in the Covenant can hardly be seen as imposing religious obligations on someone outside

[83] *Law Society of B.C., supra* note 67 at para 239.

[84] *Ibid* at para 242.

[85] Chief Justice McLachlin made the same point in her concurring opinion. See *ibid* at para 133.

the community. The mandatory Covenant only binds those who identify themselves as members of the TWU community by virtue of their voluntary agreement to join the school.

In sum, it is my view that refusing to allow religious believers to form a law school governed by a mandatory religious covenant is a serious interference with religious freedom. The decisions of the Law Society of British Columbia and the Law Society of Upper Canada placed a limit on the "norm-generating autonomy" of the TWU community, and such autonomy is critical for creating and maintaining a cohesive religious community. On the individual level, taking away the opportunity to attend a law school governed by a mandatory covenant could also deprive prospective students of a significant spiritual benefit. Moreover, TWU's Covenant should be seen as an internal rule having effect only on those who consent to join the school community, rather than something that imposes religious obligations on outsiders.[86]

[86] It should be noted that I agree with the majority judgment's *conclusion* that the decision not to approve TWU's proposed law school represents a proportionate balance between the limitation on religious freedom and the statutory objectives governing the Law Society of British Columbia (LSBC). I acknowledge that a significant public interest is at stake in this case. According to the enabling statute of the LSBC, the *Legal Profession Act*, it has a duty of upholding "the public interest in the administration of justice." (*Ibid* at para 32). As the majority judgment suggests, upholding this public interest "necessarily includes upholding a positive public *perception* of the legal profession." (*Ibid* at para 40). It is undeniable that approving a law school the admissions policy of which is discriminatory against LGBTQ individuals could give rise to the perception that the principle of equal treatment for all—a hallmark of the justice system and legal profession in a liberal society—has been compromised. Preventing such a negative perception from being generated is admittedly a legitimate and pressing concern which is able to outweigh the religious freedom of the TWU community. What I disagree with is the majority's suggestion that the limitation on religious freedom in this case is of minor significance.

3. Application

I examined *Law Society of B.C.* in some detail because I think what TWU and FJCU have been pursuing is the same thing: the right to establish a religiously based rule of conduct and require students, staff, and faculty members to comply with it. If prohibiting TWU law school from requiring compliance with the Covenant constitutes a serious interference with religious freedom, then prohibiting FJCU from requiring the school members to adhere to the principles and values reflected in *Ex Corde Ecclesiae* would also constitute a serious interference with religious freedom. The question that follows is, in the context of the controversies related to FJCU, are there any rights and interests which may justify the state intervention in the effort of the university to establish and require adherence to a religiously based rule of conduct? In the first controversy mentioned above, what is at stake is the freedom of expression of FJCU's faculty members. It is clear that the resolution adopted by FJCU's administrative committee imposed a limit on the right of some teachers to freely express their opinion on certain issues such as abortion and same-sex marriage. In the second controversy, it is the religious freedom of individual students that might have been violated by the FJCU's requirement that they attend the annual religious ceremony.

These are controversies where the second principle of JCCA should apply. That is, in the event that these internal conflicts between FJCU and its faculty members and students ultimately make their way to the courts, I would suggest that the courts address these conflicts based on the compelling state interest test. The rationale of applying the compelling state interest test in cases involving internal conflicts of religious organizations is that, according to Galston, groups and associations in a liberal society are entitled to a broad right to order their internal affairs without state intervention, provided that they do not "coerce

individuals to remain as members against their will, or create conditions that in practical terms make departure impossible."[87] As long as the freedom of exit of individual members is properly guaranteed, then the state should adopt a noninterference policy toward the internal governance of religious organizations.

A situation in which the legitimacy of the exit rights approach might be significantly reduced is, as Nancy Rosenblum points out, when a religious organization possesses great economic leverage to such an extent that nonmembers find that they do not have a real option not to work for the organization. Rosenblum notes: "At some point, a religious association, especially when it is a dominant establishment and economic force in a region, may wield *practically inescapable economic power* over members and nonmembers."[88] Individuals who do not share the religious beliefs of the locally dominant religious organization (such as the Mormon Church in Utah) may have no choice but to seek employment in the organization out of the pressure to earn a living. However, this is not the situation in Taiwan. Religiously affiliated universities and colleges in Taiwan only account for a small portion of the total number of higher educational institutions. According to government statistics in 2017, 13 out of 129 universities in Taiwan are religiously affiliated.[89] This means that for a person looking for a teaching position, there are other options available to her should she

[87] William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK ; New York: Cambridge University Press, 2002) at 122.

[88] Nancy L. Rosenblum, "*Amos*: Religious Autonomy and the Moral Uses of Pluralism" in Nancy L. Rosenblum, ed., *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, N.J.: Princeton University Press, 2000) 165 at 186 (emphasis added).

[89] The statistics is retrieved from the website of the Ministry of Education Department of Statistics (https://stats.moe.gov.tw/qframe.aspx?qno=MQAxAA2). The 13 religiously affiliated universities include 3 Catholic universities, 5 Protestant Christian universities, and 5 Buddhist universities.

find it difficult and undesirable to abide by FJCU's religiously based norms. The same is true for a high school student considering which university she should apply to. The concern that an individual would be "coerced" to participate in a religious ceremony or be "restricted" in how she teaches about a controversial social issue is not real, for two reasons: (1) joining a religiously affiliated university in the first place is an individual's own choice; and (2) religious educational institutions in Taiwan cannot be said to be possessing and wielding an "inescapable economic power" that would render the freedom of exit (or entrance) meaningless.

Therefore, it seems reasonable to apply the compelling state interest test to analyze the conflict of interests in the first and the second controversy related to FJCU. Since these two controversies do not implicate the four types of public interests identified by Galston as compelling enough to justify state intervention, the right of FJCU to require compliance with its religiously based rule of conduct should be upheld.

In the third controversy, a legislator floated the idea that the state should not fund a university that holds discriminatory views against LGBTQ people. Now, the legislator's proposal would have a legitimate point if FJCU has a rule that prohibits its members from engaging in same-sex relationship, as the one contained in TWU's Covenant. That is, I agree that it may be legitimate for a liberal state to deny funding to an educational institution that seeks to restrict the sexual behavior of LGBTQ individuals, because the freedom to engage in such behavior is central to their identity and dignity.[90] However, what that legislator took

[90] See *Bob Jones University v. United States*, 461 U.S. 574 (1983), a well-known case in which the U.S. Supreme Court upheld the decision of Internal Revenue Service to revoke the tax exempt status of a religious university which prohibited interracial dating among students.

aim at was not a school policy that actually restricts LGBTQ individuals' behavior but a letter that simply expressed Catholic beliefs with regard to same-sex marriage. The practice of communicating and explaining its religious beliefs to the members of the school community is one of the most basic ways in which a religiously affiliated university maintains its religious ethos within the community. It would be a gravely disproportionate measure to financially punish FJCU for merely making clear to its members what it actually believes in.

C. The Regulation of Religious Schools

1. Religious schools as de facto public schools

Religious schools at elementary and secondary levels in Taiwan are currently subject to strict policies and regulations that in many ways turn them into "de facto public schools," as I have argued in a previous study.[91] First of all, religious schools in Taiwan do not have the right to dismiss their teachers based on religious concerns. For example, a Catholic school in Taipei was fined substantially for dismissing two teachers—both of whom were Mormon—on the grounds that they were disrespectful of the Catholic faith. One of the teachers allegedly interfered with a priest's teaching in a theology class and the other invited students to participate in Mormon activities. The government of Taipei imposed a fine on the school, as it deemed the school's decision constituted illegitimate discrimination against

[91] Rung-Guang Lin, *Nurturing Religious Citizens for the Public Sphere: An Examination of the Public Regulation of Religious Schools in Taiwan* (LLM Thesis, McGill University Institute of Comparative Law, 2014) [unpublished] at 1.

the two teachers' religious identity, violating the equal opportunity in employment guaranteed by Article 5 of Taiwan's *Employment Services Act*.[92]

In addition, religious schools are obliged to use textbooks and teaching materials that are on the state-approved list. The current textbook publication system in Taiwan is known as "one curriculum standard, multiple textbook versions" system. The system operates as follows: the Ministry of Education (MOE) first develops a curriculum standard for primary and secondary education. Following this, privately run publishing companies invite scholars and experts to draft a textbook according to the curriculum standard. The publishing companies send their textbook drafts to a "textbook review and approval committee" established by the MOE for approval. Schools—public and private alike—can then choose from a list of the textbooks that are approved by the committee.[93] For religious schools, the problem with this system is that religious values and perspectives normally will not be reflected in the curriculum standard developed by a secular government, not to mention that some parts of a secular educational standard can directly come into conflict with conservative religious values. Therefore, it is unlikely that religious schools can find a textbook from the state-approved list that matches their goal of passing on religious beliefs to the children they educate.

Religious schools are also prohibited from making religious courses part of their mandatory curriculum and from requiring compulsory attendance at religious ceremonies and activities, as a result of Article 7 of the *PSA*. As we have seen in section B, some students

[92] See Man-Ning Wu & Hsuan-Yu Chen, "宗教因素停聘老師 學校重罰" ["A school fined substantially for dismissing teachers on the basis of religion"], *聯合報 United Daily* (20 October 2011).

[93] See art. 8 and art. 8-2, 國民教育法 [*Primary and Junior High School Act*] (R.O.C.).

of FJCU relied on that Article to buttress the legitimacy of their action in challenging the school for holding an annual religious ceremony and for asking some—but not all—students to attend. The prohibition laid down by Article 7 of the *PSA* would no doubt undermine the goal of religious schools to establish a learning environment filled with religious atmosphere.

There is one aspect in which religious schools in Taiwan are totally distinct from public schools, and that is the financial assistance they receive from the state: only around 2 to 5 percent of funding for private religious schools comes from the state.[94] This is but a meager amount of public funding especially when compared to the funding schemes for private schools in some Western societies. For example, it is reported that in Québec, "students attending private schools [at both elementary level and secondary level] are eligible to receive from the state approximately 60 percent of per-pupil funding provided to public schools."[95]

2. A recent development—religious intervention in public school education

I would like to examine the legitimacy of these regulations with regard to religious schools again in this thesis. However, my discussion here is informed by a recent development in the state-religion relationship in Taiwan which has not been fully considered in my previous study: recent religious intervention in public school education, particularly gender-equality education. Let me first explain the origins and developments of this religious movement in the past several years.

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[94] Lin, *supra* note 91 at 86.

[95] Bruce Maxwell et al, "Interculturalism, Multiculturalsim, and the State Funding and Regulation of Conservative Religious Schools" (2012) 62:4 Educational Theory 427 at 442-443.

In 2011, a group of conservative Christian leaders formed a social advocacy group called "True Love League."[96] The League has a clear goal, and that is to advocate against the implementation of LGBTQ sex education in elementary and middle schools. In that year, some public school teachers who were Christians began to realize that they were now required to teach LGBTQ sex education as part of the gender-equality education for at least four hours every semester. These teachers expressed their concern to the leaders of their churches, seeking advice and considering strategies to change this situation.[97] Meanwhile, some Christian non-profit organizations that had been working closely with public schools in dispensing a course called "Life Education" found that they became gradually marginalized in the public educational system.[98] For example, the Department of Education of Kaohsiung City Government sent an official letter to all elementary and middle schools in the city, asking them to stop inviting groups that hold traditional views on sex and marriage—including the inappropriateness of premarital sex and abortion—to give a talk to students in the schools.[99] The rise of recognition of LGBTQ rights and the concomitant marginalization of religion in public schools deeply concerned conservative Christian

[96] These Christian leaders include a famous professor at FJCU's seminary and pastors from two megachurches in Taiwan, the Bread of Life Christian Church and the Hsin-tien Covenant Church. See Hsuan-Ping Li, *守護誰的家？初探台灣『護家運動』的反同策略與論述* [*Guarding Whose Home? A Preliminary Study of Taiwanese Pro-Family Movement*] (MA Thesis, Soochow University, 2018) [unpublished] at 50.

[97] *Ibid* at 52.

[98] *Ibid.*

[99] Jia-Ling Wu & Jia-Hui Chang, "高市教育局發「禁守貞」公函　台灣教育被誰「綁架」了？" ["Kaohsiung City Government Department of Education issues an official letter disapproving abstinence; who 'kidnapped' Taiwan's education?"] *基督教今日報 Christian Daily* (26 September 2012).

churches in Taiwan, prompting them to intervene in the public sphere to campaign against such a trend.

The True Love League criticized the current gender-equality curriculum for deconstructing the traditional male/female dichotomy and for advocating for sexual liberation. The League also strongly disagreed with the ways in which the issue of LGBTQ rights was framed in the curriculum guidelines. They believed that the discussion of that issue in the curriculum guidelines was ideologically driven, as the guideline in their view was trying to inculcate particular beliefs and values of LGBTQ rights activists with regard to sexual relationship, marriage, and family.[100] Along with other organizations in the anti-gay camp formed in recent years, the League demanded that what they deem as "inappropriate" content of sex education be removed from public school curriculum. They also demanded that civil society associations representing parents' interests be given more power in the process of reviewing the curriculum.[101]

Their message appears to have resonated with a large number of people in Taiwan. In November 2013, the anti-gay camp launched a mass demonstration in reaction to the news that some legislators proposed an amendment to the *Civil Code* that would legalize same-sex marriage. The organizer of this event claimed that over 300,000 people participated in the demonstration.[102] According to Ke-hsien Huang, a professor of sociology at National

[100] See Li, *supra* note 96 at 56-57. For a brief summary of arguments both for and against the implementation of the gender equality curriculum, see Loa Iok-sin, "Gender Equality Curriculum Criticized," *Taipei Times* (5 May 2011).

[101] See Li, *supra* note 96 at 61-64.

[102] "30 萬人嗆聲 反同性婚；同志拚場 吶喊婚姻平權" ["300,000 people voice strong disapproval of same-sex marriage; LGBT groups hold a demonstration simultaneously to cry out for marriage equality."], *中國時*

Taiwan University, this demonstration was "the largest protest undertaken by religious groups in Taiwanese history [and] symbolizes a crescendo in the recent public transformation of Christianity in Taiwan." [103] In December 2016, anti-gay-marriage organizations staged another large-scale demonstration, this time attracting around 200,000 participants.[104] As indicated by the slogan of the demonstration, "marriage and family up to the people; children's education up to the parents", the protestors demanded that same-sex marriage should not be legalized without a referendum and that LGBTQ sex education be removed from the curriculum because it runs counter to their interests as parents.[105]

In February this year (2018), one of the anti-gay organizations, the Alliance for the Happiness of the Next Generation, submitted three national referendum proposals which would ask the voters to determine the legitimacy of same-sex marriage and LGBTQ sex education. The referendum proposal on LGBTQ sex education reads: "Do you agree that schools at elementary and junior high levels should not conduct the education about homosexuality mandated by the *Enforcement Rules for Gender Equity Education Act*?"[106] On November 24, 2018, where Taiwanese voted in 10 referendums alongside nine-in-one local elections, the proposal opposing LGBTQ sex education passed by 7,083,379 votes to

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報 China Times (1 December 2013).

[103] Ke-hsien Huang, "'Cultural Wars' in a Globalized East: How Taiwanese Conservative Christianity Turned Public during the Same-Sex Marriage Controversy and a Secularist Backlash" (2017) 4 Review of Religion and Chinese Society 108 at 110.

[104] Mian-Jie Yang et al, "反同婚 拒修法 北中南護家大會師" ["Pro-family organizations hold rallies in three different cities to protest against same-sex marriage and the legislature's attempt to revise the law"], *自由時報 Liberty Times* (4 December 2016).

[105] *Ibid*.

[106] The text of each of the three referendum proposals can be found on the Alliance's website: <https://taiwanfamily.com/103177> (accessed 3 November 2018).

3,419,624.[107] The Alliance for the Happiness of the Next Generation urged the Ministry of Education to stop conducting LGBTQ sex education in schools to fulfill the will of the people reflected in the referendum, but the Ministry has not made clear what it will do in relation to LGBTQ sex education.[108]

3. The "reciprocal pluralism" model

As we can see from the discussion above, the current relationship between the state and religion in the educational sphere in Taiwan is characterized by a phenomenon of mutual interference: the state interferes with religious education on the one hand and religious organizations interfere with public school education on the other. Seen from the perspective of the jurisdictional conception of church autonomy, we may say that both the state and religious organizations crossed the boundaries into each other's rightful jurisdiction; both sides infringed each other's legitimate authority in determining how children in their educational institutions should be educated. The current state of affairs in Taiwan is in contrast to the "reciprocal pluralism" model proposed by Alvin Esau.[109] The model emphasizes mutual tolerance rather than mutual interference and is, in my view, a better

[107] See the official referendum results announced by Taiwan's Central Election Commission: http://referendum.2018.nat.gov.tw/pc/en/00/m00000000000000000.html (accessed 4 December 2018).

[108] See Alliance for the Happiness of the Next Generation, "愛家公投通過後的法律效力是什麼？請看愛家公投發起人解說" ["What are the legal effects of the passed pro-family referendums? The initiators of the pro-family referendums explain."] https://taiwanfamily.com/104152 (accessed 4 December 2018).

[109] See Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 110.

alternative to the current mode of interaction between the state and religious organizations in Taiwan's educational sphere.

The "reciprocal pluralism" model requires, first, that the outside law of the state adopt an "abstention approach" in its interaction with the inside law of religious communities. Esau writes: "Under the abstention model, the outside law would develop a rule against taking any jurisdiction over some matters that should be left within the scope of the inside law, as to both adjudication and non-violent enforcement. In essence, the court would not apply the outside law to the case, nor would it apply the inside law and enforce it through the sword of the state."[110] As Esau further explains, matters that should be left exclusively within the jurisdiction of religious institutions include "hiring and firing of clergy" and "disciplining members."[111] This is no doubt a clear expression of the jurisdictional autonomy approach defended in this thesis.[112]

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[110] *Ibid* at 125.

[111] *Ibid* at 126.

[112] But I should note that I disagree with Esau's view with regard to the legitimacy of a couple of decisions by the Supreme Court of Canada. First, he seems to see the Court's decision in *Lakeside Colony of Hutterian Brethren v. Hofer* as a counter-example of his abstention approach (see *ibid* at 125-126). However, I believe it is legitimate for the courts to exercise jurisdiction when the property or civil rights of members of religious communities are at stake, except in cases involving the employment of ministers. Second, Esau considers *Bruker v. Marcovitz*—in which the Court ruled that the agreement by the divorcing parties to remove religious barriers to remarriage is justiciable—as a blow to the abstention approach (see *ibid* at note 73). But the jurisdictional conception of religious autonomy I defend accepts decision in *Bruker* as unproblematic because (1) the exercise of jurisdiction by the Court in this case does not violate the prohibition on secular judicial determination of religious disputes; and (2) the divorcing parties can be said to have turned the matter of removing religious barriers to remarriage from a matter purely internal to the Jewish community into an "external" one by making a civil contract intended to be enforced by secular courts. See the discussion in chapter 4, II. B.

At the same time, however, Esau argues that state abstention in relation to religious affairs must be accompanied by a "reciprocal respect" on the part of religious communities for a liberal polity.[113] This means that religious groups should recognize and respect the reality of a multicultural society rather than attempt to turn a liberal polity into a theocracy or a Christendom. Speaking from a religious insider's perspective,[114] Esau's advice to his fellow religionists is:

> So even if we are intolerant within our religious community, expecting our members to conform to our religious views, we should be tolerant and inclusive in the public sphere rather than attempt to implement our comprehensive view of morality on all members of society. Thus, without contradiction, we might support same-sex marriage as a matter of liberal equality within public law and, at the same time, oppose on theological grounds any move within our church community to sanction or bless same-sex unions or marriages.[115]

Thus, the "reciprocal pluralism" model envisions a private sphere in which religious institutions have jurisdictional authority over their internal affairs, *and* a public sphere free of the fundamentalist impulse which seeks to impose religious norms and morality on members of the wider society.

For this picture of "reciprocal pluralism" to be realized in Taiwan, the first step, I suggest, is to make religious schools more like religious schools, as opposed to de facto public schools. An interesting yet somewhat puzzling phenomenon in Taiwan is that many

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[113] Esau, *supra* note 109 at 132.

[114] *Ibid* at 120. ("Speaking now from my perspective as a person whose identity is rooted in Anabaptist soil, …")

[115] *Ibid* at 133 (footnote omitted).

religious parents do not send their children to religious schools. One of the findings of my previous research is that the percentage of students in Catholic elementary or secondary schools who are Catholics is approximately 1 to 3 per cent.[116] The majority of students in Catholic schools do not have any particular religious faith. This percentage is roughly the same as that of the population in Taiwan who identify themselves as Catholic, which, according to a survey in 2015, is 1.5 per cent.[117] What this shows is that Catholic schools in Taiwan have not been very successful in attracting students who are, or whose parents are, Catholic. Even though Taiwan's Catholic community is a minority group, if most of the Catholic parents had chosen to send their children to a Catholic school, the percentage of Catholic students in Catholic schools would have been much higher.

In my view, an important factor that contributes to this phenomenon is the lack of meaningful difference between religious schools and public schools in Taiwan, as a result of the strict policies and regulations discussed above. If I were a Catholic parent, I would also have the same hesitation about sending my children to a Catholic school. This is because if I enroll my children at a Catholic school, I would have to pay for the expensive tuition fees of a private school in return for an education which is only *slightly different* from that of the public schools. Very few people, I suspect, are willing to pay twice as much for their children's education only to find out that the textbooks used in a private religious school are the same as those used in public schools, and, in addition, there is no guarantee that teachers

[116] See Lin *supra* note 91 at 102. This figure is based on my email exchange with teachers from three Catholic schools in 2013 and 2014, see *ibid* chapter 4, note 47.

[117] Yang-chih Fu, 台灣社會變遷基本調查計畫 2015 第七期第一次 ["2015 Taiwan Social Change Survey (Round 7, Year 1)"] at 168. (Available from Survey Research Data Archive, Academia Sinica. doi:10.6141/TW-SRDA-R090054-1.)

in religious schools have a deep religious commitment (since religious schools are prohibited from hiring and firing teachers on the basis of religion). Therefore, from a financial point of view, the most reasonable decision, even for a parent who cares about the religious upbringing of his or her children, is to send the children to public schools.

Since their children go to public schools, it is quite natural that religious parents became concerned about what is being taught in the public schools. Asking religious parents to stop interfering with public school education including gender equality education amounts to asking them to stop caring about the upbringing of their own children. Therefore, I suggest that one potential way to defuse the current tension generated by the implementation of LGBTQ sex education is to deregulate religious schools, so that sending their children to religious schools becomes a more attractive option for religious parents. Of course, some religious parents will still enroll their children at public schools even after the deregulation of religious schools. But at least the case against religious parents and organizations crossing boundaries into the realm of public school education will be much stronger. To put it differently, it seems unfair to criticize religious parents and the organizations they formed for interfering with educational policies in the public sphere, when they do not even enjoy a secure private sphere in which they can educate their children in accordance with their religious beliefs without state intervention.

4. What religious schools should (and what they should not) be required to teach

In my view, deregulation of religious schools means that the schools are entitled to the following rights: (1) the right to require religious compliance by teachers and higher-ranking administrators; (2) the right to be exempt from the textbook approval system and use a faith-

centric textbook; and (3) the right to make religious courses part of the mandatory curriculum and require compulsory attendance at religious ceremonies and activities, on the condition that students (and their parents) are fully informed about these courses and activities before their enrollment.

In what follows, I focus on the right of religious schools to use a faith-centric textbook, as it requires further elaboration on what should—and what should not—be included into such a textbook and, more broadly, the curriculum dispensed by religious schools. Exemption from the textbook approval system means that religious schools will not be required to use a textbook written according to the curriculum guideline established by the Ministry of Education. It will allow religious schools to use textbooks and other teaching materials that discuss historical events or controversial social issues in the light of religious beliefs and values. However, it does not follow that any state supervision with regard to the content of the textbooks used by religious schools is unjustifiable. On the contrary, from a liberal point of view, there is a minimum standard that the education provided by religious schools has to meet, even if that education does not to have to be fully in line with a secular curriculum guideline.

As I argued in chapter 4, freedom of religious institutions in carrying out religious education can be legitimately limited by public interests in the teaching of tolerance and preserving children's meaningful rights of exit.[118] With regard to the teaching of tolerance, I suggested there that children in religious schools should be taught to respect the fundamental rights and freedoms of others as guaranteed in the constitution.[119] In Taiwanese

[118] See chapter 4, VI.

[119] See chapter 4, VI. A. 1.

context, this means that J.Y. Interpretation No. 748[120]—in which the Constitutional Court of Taiwan recognized freedom of marriage of same-sex couples for the first time in its history—must be included as part of the educational curriculum taught by religious schools.

Let me pause here for a moment to give a brief summary of this landmark decision, which was issued in May 2017. In J.Y. Interpretation No. 748, the Constitutional Court of Taiwan held that the provisions with regard to marriage in Taiwan's *Civil Code* that "do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life" are "in violation of constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7."[121] The Court pointed out that extending the protection of freedom of marriage to same-sex couples will not affect the existing rights and interests of heterosexual couples. Not only so, "the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage."[122] With regard to right to equality, the Court suggested that restricting marriage to the union between a man and a woman violates equal protection because such restriction is not "substantially related to" the public interests which the government claimed would justify disallowing same-sex couples to marry.[123]

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[120] J.Y. Interpretation No. 748 (24 May 2017). An English translation is available at <https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748.> (accessed 3 November 2018).

[121] *Ibid* at para 1 (Holding).

[122] *Ibid* at para 13.

[123] *Ibid* at para 15. The government claimed that the restriction can be justified on the basis of two important public interests: the state's interest in "protecting reproduction" and the interest in "safeguarding the basic ethical orders." The Court, however, found that there is no substantial connection between these two public interests and the current regulation in the *Civil Code* which disallows marriage of two persons of the same

Despite a strong affirmation of the constitutional legitimacy of freedom of marriage of same-sex couples, the Court eventually provided some latitude for the legislature to determine which legal mechanism should be adopted to protect the rights and interests of these couples. The majority opinion maintained: "It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the *Civil Code*, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage for two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life."[124] It is this concession which provides grounds for anti-gay-marriage organizations to launch a campaign for a referendum to call for the enactment of "a special law" that governs the rights and obligations of same-sex couples, instead of amending the *Civil Code* to recognize same-sex marriage.[125]

Returning to the educational curriculum of religious schools, I suggest that J.Y. Interpretation No. 748 must be taught in religious schools, so as to allow students to understand and accept that same-sex couples are entitled to the same level of constitutional protection as heterosexual couples.

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sex. See *ibid* at para 16.

[124] *Ibid* at para 17.

[125] One of the three referendum proposals submitted by the Alliance for the Happiness of the Next Generation asked: "Do you agree that the rights of same-sex couples in co-habitation on a permanent basis should be protected in ways other than amending the *Civil Code*?" On November 24, 2018, it passed by 6,401,748 votes for and 4,072,471 against. See the official referendum results announced by Taiwan's Central Election Commission: http://referendum.2018.nat.gov.tw/pc/en/00/m00000000000000000.html (accessed 4 December 2018.)

To ensure children have meaningful rights of exit, the curriculum dispensed by religious schools should make children aware of different religious traditions and ways of life other than that of their parents. However, religious schools have the right to teach about these different religious beliefs and life options from a religious perspective rather than a neutral perspective. This is the position of the concurring opinion written by Chief Justice McLachlin and Justice Moldaver in *Loyola High School v. Quebec (Attorney General)*.[126] Instead of being "forced to remain neutral… in the face of ethical positions that do not accord with the Catholic faith,"[127] teachers in religious schools should be allowed to propose what they think is the "right answer" to the question of how to live one's life. But importantly, I believe there is a distinction between *proposing* what one regards as the right answer to moral questions and *imposing* that answer on others. It is unacceptable that religious schools force students to adhere to religious norms and values without any possibility of disagreement.[128] Children cannot be said to have a meaningful right of exit if their ability to disagree and to think for themselves is totally stifled during the years of their school education.

On the other hand, what religious schools should not be required to do in dispensing an education is to actively "foster in children skeptical reflection" on religious precepts and the

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[126] 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola High School*].

[127] *Ibid* at para 155.

[128] Loyola High School's alternative ERC program seems to be a good example of how an educational program that emphasizes religious teachings can still allow students to disagree with those teachings. According to a document submitted to the Court by Loyola, the school claims that its students "are free to criticise the position of the Catholic Church on any given issue and will be graded on the basis of the quality of their reasoning, not on the basis of adherence to the Catholic position in preference to other positions." *Ibid* at para 125.

ethical beliefs that flow from those precepts.[129] The learning environment provided by religious schools would become no different from that of public schools if it cannot be free from "the corrosive influence of modernist skepticism."[130] I believe this means that religious schools have the right to refuse to teach certain aspects of sex education that are at odds with their religious beliefs. Some aspects of sex education currently taught in Taiwan's public schools which religious parents believe are ideologically driven need not be taught in private religious schools. Otherwise there can be no assurance that children's religious identity will very likely be strengthened rather than weakened by receiving an education in religious schools and hence no incentive for religious parents to send their children to religious schools.

In sum, it is my view that religious schools deserve to enjoy robust protection to carry out education in accordance with their religious beliefs, subject only to the public interests in teaching the virtue of tolerance and preserving children's rights of exit. Religious schools should be a place where parents can reasonably expect that the religious values they cherish will be passed on to their children without excessive state interference. Only after a secure private zone is created for religious parents to transmit their religious beliefs will the demand that they stop attempting to interfere with public school education become more legitimate.

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[129] William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge; New York: Cambridge University Press, 1991) at 253.

[130] *Ibid* at 254.

IV. Conclusion: From State Paternalism to Jurisdictional Autonomy of Religious Organizations

This thesis started by arguing that the "religion as a problem" discourse—which characterizes religion as a problem that must be contained and controlled for the benefit of society as a whole—is a fundamental element of the relationship between the state and religion in Taiwan.[131] Such a discourse provides an important ground for the formulation of a number of *paternalistic* state policies and regulations with regard to religious organizations. For example, the "guidance of religious activities" is explicitly listed as one of the policy objectives of Taiwan's Ministry of Interior Department of Civil Affairs.[132] As Jianlin Chen observes, "It is telling that this 'guidance' of religious activities is meant to be substantial and beyond mere compliance of existing law."[133] He further notes that "even to this day, guidance of religious activities is interpreted by the government as instructing religious organizations so that they do not contradict prevailing social values such as environmental protection, public morals, and gender equality."[134] Likewise, Chang Chia-Lin and Tsai Shiou-Jing emphasize that what the *Religious Groups Act* as a whole reflects is a paternalistic attitude on the part of the state, who at once grants benefits to religious organizations and restrict the ways in which they conduct internal activities.[135] The paternalistic concern with regard to religion is also a notable feature of the majority opinion in J.Y. Interpretation No. 573. There, the Court noted that a law designed to regulate

[131] See chapter 1.

[132] Chen, *supra* note 40 at 90.

[133] *Ibid*.

[134] *Ibid* at 91.

[135] Chang & Tsai, *supra* note 30 at 213.

religious activities can survive judicial review if it is enacted "to preserve the freedom of religion" or other significant public interests.[136] I have argued that the term "to preserve the freedom of religion" is best understood as meaning "to ensure the healthy development of religious organizations."[137]

The central argument of this thesis is that we need to move away from the current approach to the regulation of religious organizations, which is characterized by state paternalism, and move towards a new paradigm which recognizes the jurisdictional autonomy of religious organizations. The jurisdictional autonomy approach emphasizes that religious organizations are entitled to a zone of freedom in which they can carry out their internal affairs without state interference. Even if the government has (or claims to have) some "good intention" in regulating or guiding religious organizations, certain internal activities of religious organizations—such as hiring and firing of ministers and determining whether a person is qualified to be a member—should be regarded as falling completely outside of state jurisdiction.

In the area of education, the jurisdictional understanding of religious freedom would ask us to recognize that there must be a clear distinction between public schools and private religious schools in terms of educational content. Religious schools in Taiwan should no longer be subject to strict policies and regulations that turn them into de facto public schools. Instead, they should be granted robust protection for their autonomy in certain aspects of school operation, including the employment of teachers, the choice of textbooks and teaching materials, and the laying down of requirements with regard to participation in

[136] J.Y. Interpretation No. 573 (reasoning).

[137] See chapter 2, II. A. 2.

religious ceremonies and religious courses. As long as the basic requirements with regard to the teaching of tolerance and protection of rights of exit are met, religious schools deserve to enjoy a broad freedom in their internal operation. The case for respecting the freedom and autonomy of religious schools is especially strong in Taiwanese context, where religious schools receive little financial support from the state. Until the state is prepared to substantially increase the funding for religious schools, they should be largely left alone in carrying out education in accordance with their religious beliefs.

Let me end by making this clear: the jurisdictional autonomy approach that I defend does not amount to establishing a hierarchy of rights where religious freedom trumps other fundamental human rights in all circumstances. In fact, the application of the approach defended in this thesis can result in religious autonomy being limited in some cases. For example, I discussed in chapter 3 an insular religious group in Taiwan called New Testament Church (NTC) and their refusal to register as a formal homeschooling institution.[138] Without a formal registration, children homeschooled within the religious community will not be able to obtain a diploma recognized by the government when they finish their studies. The resulting effect is that many of the children may find themselves having no better option than to stay within the community when they grow up because, without a diploma, it is a matter of fact that they will have little chance of getting a good job in the wider society. Applying the approach that I defend—more specifically, the second principle of JCCA—to this case means that state authorities must enforce the NTC's obligation of registering as a formal homeschooling institution so as to ensure that the children within the church have a meaningful right of exit—that is, to ensure that they have a real option of leaving the

[138] See chapter 3, III. A.

community. This is an example of how the approach that I defend would demand that religious freedom give way to other fundamental rights and freedoms in some circumstances, despite its general orientation of supporting the claims to religious autonomy.

Appendix

The Act of Supervision of Temples and Shrines[*]

Article 1

Buildings occupied by monks/nuns, regardless of their name or title, will be referred to and regarded as temples.

Article 2

The temple, its property and possessions will be under supervision of this act, besides other specifications in the law.

Possession in caption refers to statues, idols, worship and musical instruments, talismans, scripture, sculptures, paintings and any antiques long possessed/preserved by the temple.

Article 3

Temples under the clauses listed below, will not be affected by this act:

1. Administered by the Government.

2. Administered by local pubic organizations.

3. Founded and administered by private persons.

Article 4

Temples which are neglected will be administered by the local autonomy group.

Article 5

Temple property and possessions ought to be declared and registered with the local administration.

Article 6

[*] This version of English translation of the *ASTS* is provided by Taiwan's Ministry of Justice on its website. See: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0020027 (accessed 15 November 2018).

Ownership of all property and possessions will be retained by the temple and managed by the trustee monk/nun.

Trustee monk/nun refers to any monk or nun who has management authority, whatever their title or ranking may be.

However, they cannot take charge as trustee monk/nun if they are not citizens of the Republic of China.

Article 7

Trustee monks/nuns are not to use incomes derived from temple property except for the purpose of giving religious instruction, upholding the commandments and other miscellaneous expenses with proper usage.

Article 8

A temple's fixed properties and possessions are not to be disposed of, or altered, unless and until the decision has ratified and approved by its related religious association, and thereafter submitted to the jurisdictional government administration for permission.

Article 9

The sum of expenses and/or income and benefits organized by the temple should be reported to the jurisdictional government administration semi-annually and made public.

Article 10

It is incumbent that a temple initiates benefits or charities in accordance with its financial status.

Article 11

For violation of the fifth, the sixth or the tenth articles of this act, the jurisdictional government administration will dismiss the trustee monk/nun. Violation of the seventh and the eighth articles will result in banishment from the temple or prosecution in a court of law.

Article 12

This act is not applicable to temples in Tibet, Xi-Kang, Mongolia and Qing-Hai.

Article 13

This act becomes effective on their date of publication.

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