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THE RIGHT TO AUTONOMY IN RELIGIOUS AFFAIRS: A COMPARATIVE VIEW

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Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact, religion virtually always has a communal dimension, and religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.

It is true, as Professor **Minnerath** has shown,² that the notion of religious autonomy has had a much more varied history in Europe than it has in the United States, but coming to terms with this core notion is vital to protection of religious freedom on both sides of the Atlantic. The significance of the issue is probably best attested by the sheer number of highly qualified experts who attended the conference that has given rise to this volume. The difficulty is that

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² *Minnerath*, 381, 384-90. (For convenience, and to save space, I will refer throughout to papers in this volume merely by author. Page references are to page numbers in this volume.)

the notion has evolved along very different trajectories in different legal systems. Those trajectories are encrusted with precedent, with varying verbal formulae, with rival theoretical conceptualizations, with charged remembrances of hard cases which have varied from system to system and which in the end have drawn circles of differing circumferences around the protected sphere of religious autonomy in each of our cultures.

The aim of my paper is not merely to present an American view, but to grapple from a comparative perspective with the deeper transnational and in that sense trans-positive issue of religious autonomy that every legal system committed to the protection of religious freedom must resolve in some manner. In the process, I will describe some of the major American approaches to protecting this sensitive domain, but what will become clear is that the American system has been cast into deep uncertainty regarding the doctrinal tools available for this task due to a highly problematic decision rendered by our Supreme Court in 1990 in *Employment Division v. Smith*.³ Briefly stated, that decision held, with only minor qualifications, that a general and neutral law trumps a religious freedom claim.⁴ To restate the problem from a German perspective, as described in Professor **von Campenhausen**'s paper,⁵ it is as though our Supreme Court held that religious freedom in America is bounded by the "limits of the law that applies to all",⁶ except that it assumed that whatever law a majority happens to pass, so long as it is neutral and general, sets the boundary not only of religious autonomy, but for religious freedom in general. This is of course a sharp contrast to the German interpretation of "limits of the law that applies to all".⁷ In effect, subject to formal rule of law constraints, the recent American approach subjects religious freedom to the tyranny of the majority, or at least to the inadvertent insensitivity of the majority. However guilty Americans may normally be of evangelizing for their own system, this is clearly not likely to be the case on the religious autonomy issue. In that sense, many of the Americans attended the Trier conference looking for alternative tools, alternative theories, alternative approaches to protecting this core aspect of religious freedom.

European interests in religious autonomy are as likely to flow from concerns about subsidiarity and protecting traditional church-state structures as from interest in harmonization or law reform. From this vantage point, the American

³ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁴ See *Employment Division v. Smith*, 494 U.S. at 877-81, 885-86.

⁵ *von Campenhausen*, 82.

⁶ *Id.* The quoted phrase is the "sense-changing formula" of Article 137(III) of the Weimar Constitution, as incorporated by Art. 140 of the German Basic Law.

⁷ *Id.* at 82-84.

experience has typically seemed distinctly irrelevant if not positively threatening to Europeans, because the radical separation of church and state mandated by the Establishment Clause of the First Amendment to the United States Constitution⁸ seems hopelessly at odds with most European church-state arrangements. Paradoxically, however, my analysis suggests that it is precisely this clause which provides the best support in American legal theory for protecting religious autonomy. Stated differently, there is a significant convergence of shared intuitions about the importance of religious autonomy in the United States and Europe, and this convergence is to be explained in part by aspects of the American system that Europeans have typically viewed as most non-European.

In part, this paradox can be explained by the fact that Europeans tend to view the American non-establishment principle through the filter of European experience with separationist movements growing out of the secular Enlightenment. These movements were often blatantly hostile to organized religion. In contrast, the non-establishment principle as experienced in the United States, far from being a source of official hostility toward religion, is better understood, among other things, as an institutional technique for safeguarding religious autonomy. Interpreted in that way, the concerns behind the American Establishment Clause converge with core European concerns about religious autonomy.

There are obviously significant differences in application. European systems are much less worried than the American system about the various strands of heteronomy (loss of autonomy) that are inevitably tied to state subsidization of religious life. But Europeans share the core concern with Americans of delineating the crucial sphere of autonomy within which religious groups are insulated from all forms of state heteronomy. Moreover, the hazard posed by our *Smith* case, that supposedly democratic majorities may pass legislation that in fact constrains religious autonomy, lurks at the edges of religious freedom everywhere.⁹

⁸ The U.S. Constitution provides, “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof”. U.S. Const., amd. I. For a general discussion on church-state relations in the United States, see, e.g., *Daniel O. Conkle*, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and Uncertain Future*, 75 Ind. L. J. 1 (Winter 2000).

⁹ The recently enacted Austrian Law Concerning the Legal Personality of Registered Religious Communities (RRBG) described by *Brigitte Schinkele*, at 566, may be an example. See Bundesgesetzblatt [BGB] 19/1988 “Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften” [Federal Law Concerning the Legal Status of Religious Confessional Communities]. (For a critical

In the limited space available here, I cannot hope to do justice to the wealth of ideas in the various papers that have been submitted, and the even broader range of issues that need to be addressed to develop a comprehensive comparative analysis of this field. I hope to sketch the general topography of the problem area we are addressing and highlight areas that need greater elaboration during the conference. I will then suggest how varying interpretations of American doctrinal tools would draw the boundaries of the protected sphere of religious autonomy, and how these compare with some of the European approaches evident in the papers.

I. THE IDEA OF RELIGIOUS AUTONOMY

At the outset, it is necessary to clarify what is meant by the notion of religious autonomy. In a broad sense, the term “autonomy” has become a synonym for “liberty” or “freedom”, and in that sense, religious autonomy might simply be taken as another term used to describe the general right of religious freedom that is codified in various international agreements and national constitutions. Several of the conference papers have conceptualized religious autonomy in this manner, and have accordingly provided a fairly broad picture of the nature of religious freedom in their respective countries.¹⁰

analysis of the law, see *Christopher J. Miner*, Comment, *Losing My Religion: Austria’s New Religion Law in Light of International and European Standards in Religious Freedom*, 1998 *BYU L. Rev.* 607.) Obviously, Schinkele herself argues for a much more careful test for determining when a law can justifiably restrict autonomy and equal treatment, but the law itself, if it survives constitutional scrutiny in Austria (and Strasbourg) appears to use ordinary legislative means to restrict non-recognized churches from engaging in otherwise protected activities. See *id.* at 569-576, 579. Similarly, the notion under Article 6 of the Dutch Constitution states that “everyone shall have the right to manifest freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law” could open up similar problems, though this seems unlikely in the Netherlands. See *van Bijsterveld* at 61. The question is whether the phrase “without prejudice to his responsibility under the law” would be construed along the lines of the American *Smith* decision to mean that any law, even those not predicated on a pressing social need, could override religious freedom claims.

¹⁰ See, e.g., *Andries, van Bijsterveld, Lash, Martínez-Torrón, Mortensen, Roudik*. Michael Ariens treats the “broad-ranging autonomy granted in American law to ‘churches’ and ‘religious organizations’”, but focuses on institutional problems. Johan van der Vyver provides a general theoretical approach to the notion of autonomy by placing in the context of “sphere sovereignty” analysis flowing from the Calvinist tradition. While addressing broader issues, these authors obviously all focus on autonomy in the narrower sense identified in the text in portions of their papers.

For purposes of our deliberations, however, it will be useful to focus on the idea of religious autonomy in a narrower sense. Thus, as Mark **Chopko** formulates the issue, church autonomy means “the right of religious communities (hierarchical, connectional, and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government”.¹¹ Similarly, Perry **Dane** understands “the legal problem of religious autonomy” to refer to

the effort by secular law to make sense of religious self-governance, particularly institutional or communal self-governance. In the United States, contexts in which religious autonomy is at issue include classic disputes over church property and personnel, in which secular courts have to gauge their deference to organs of governance within the religious community. They also include more recently developing questions over the extent to which regulatory regimes such as labor law, civil rights law, and even malpractice and defamation and contract law, can intervene in the internal relations of religious institutions and communities.¹²

As Craig **Mousin** notes, religious autonomy in this sense is vital because it “permits religious organizations to define a specific mission, to decide how ministry and ecclesiastical government fulfill their mission and to determine the nature and extent of institutional interaction with the larger society”.¹³

From a German perspective, the notion of religious autonomy is linked to the “right of self-determination for churches”, which Professor **von Campenhausen** describes as “the third column of the system of state-church relations of the [German] constitution”.¹⁴ This notion is articulated in Article 137(III) of the Weimar Constitution, as incorporated into the German Basic Law by Article 140: “Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all”.¹⁵ The notion of

¹¹ *Chopko* at 96.

¹² *Dane* at 119-20.

¹³ *Mousin*, at 401.

¹⁴ *von Campenhausen* at 77.

¹⁵ Technically, the German notion of “Autonomie” goes beyond the independent power of churches to establish their own internal laws, and includes their right to have entity status in public settings that can be structured according to the conceptions of the particular religion. These self-conceptions need not conform to the structures of normal association law. Elsewhere, von Campenhausen describes Autonomie in this sense as an attribute of public corporations (Körperschaften des öffentlichen Rechts); I am not clear whether he believes religious associations that lack this higher status are vested with Autonomie in

autonomy covered by this self-determination right is very broad. It is not limited to “internal” religious affairs, since religious mandates by their nature extend into the public arena. For this reason, **von Campenhausen** emphasizes that the self-determination right covers matters that are the religious organization’s *own*.¹⁶ That is, they are matters that come distinctly within the religious organization’s sphere, which is understood to extend beyond mere internal affairs. The mission and self-understanding of churches have great weight in determining what counts as their “own” affairs.¹⁷ The Federal Constitutional Court has held that “what is meant by a church’s own affairs is determined particularly by how the church itself views its own affairs, although the competence to take a final decision on the basis of the Basic Law is still reserved for the state courts”.¹⁸ Significantly, the right to assert this autonomy is not restricted to the religious organization itself, but extends to related entities involved in carrying out its tasks. Thus, “[t]he right of self-determination . . . is not merely attributed to the church itself and its legally independent part, but instead it is something common to all institutions which are connected in some way or another with the church regardless of the legal framing of these links. This is true so long as according to their self-identity, their goals or duties are suitably carried out and are held to be true mandates of the church”.¹⁹

The autonomy right in the German system is afforded even greater scope because of the broad reading given to its outer limit: “the law applicable to all”. This is in fact a very old phrase, tracing back to the 18th Century, when limiting state regulation of religion to generally applicable neutral laws was a mark of progress with respect to freedom of religion.²⁰ Over the course of the 19th and 20th Century, however, dominant interpretations of the phrase have given it a meaning that is highly protective of religious values. Essentially, the notion now is that in passing laws, the lawgiver is required to be sensitive to constitutionally protected values, including the value of religious autonomy, as understood from the perspective of the religious community. Therefore, as **von Campenhausen** states, “a law that applies to all is only one which is *mandatory* for a peaceful

this technical sense. See *von Mangoldt et al.*, *Das Bonner Grundgesetz Kommentar*, Rdn. 75, at 187 (München: 3d. rev. ed. 1991).

¹⁶ *von Campenhausen* 79.

¹⁷ *Id.* at 79.

¹⁸ *Gerhard Robbers*, *State and Church in Germany*, in: *Gerhard Robbers* (ed.), *State and Church in the European Union* 57, 63 (1996).

¹⁹ *Id.*, citing BVerfGE 70, 138/162.

²⁰ For me, one of the most trenchant criticisms of the American *Smith* decision is that it in effect turns the clock back 200 years. I suppose an originalist might take comfort in that, but in fact, we have had 200 years of experience suggesting that the rule of law alone, as important as it is, is not an adequate source of protection for religious minorities.

communal life in a state, which is neutral towards religion and ideology thus respecting the independence of the religious communities”.²¹ Where the lawgiver fails to expressly exempt religious needs, it becomes necessary to balance the religious interests as understood by the religious organization against other state interests to determine which should prevail.²² Among other things, this view of religious autonomy has given the churches substantial latitude in handling employment issues in accordance with religious beliefs despite countervailing general labor laws.²³

The German view is worth describing at some length because it constitutes a broad and compelling conception of autonomy. Within the constellation of German constitutional norms, it has a distinctive grounding. That is, it is clearly viewed as being related to but distinct from the general religious freedom norm articulated in Article 4 of the Basic Law. This is a reminder of an issue faced in many of our legal systems: how does the religious autonomy right relate to the more general religious freedom right?²⁴ One of the questions faced throughout

²¹ *von Campenhausen* at 84.

²² *Id.* at 84-85.

²³ See *Joachim Wieland*, *Die Angelegenheiten der Religionsgesellschaften*, 25 *Der Staat* 321, 337-39 (1986).

²⁴ Several of the papers wrestle with this issue, albeit from rather different perspectives depending on the legal system. Thus, *Schinkele* noted that it must be “stressed that the individual and corporate element of religious freedom are closely linked. Thereby the institutional guarantee appears as a necessary emanation of the human right of religious freedom”. *Id.* at 568-69. Drawing on this insight to criticize the recently passed Registered Religious Communities Law, *supra* note 9, she concludes that if institutional guarantee is an emanation from basic religious freedom, there is no ground for making the distinction between different categories of religious communities. This would be incompatible with state neutrality. *Id.* at 574-75. In Poland, *Mazurkiewicz* notes that “[t]he adoption of the principle of autonomy and independence means also the rejection of the concept of denominational state as well as the state domination over the Church. The principle of co-operation points to the impossibility of isolating totally the two legal orders which meet within the same one man if he is a state citizen and a member of the Church at the same time. Hence, the two institutions cannot simply ignore each other. Situations may happen where legal actions made on the basis of legal norms instituted by one of them will produce legal effect also in the second of the two legal orders”. *Id.* at 367-68. Also picking up on the connection between cooperation and autonomy, but emphasizing this more as a factor differentiating religious groups, *Martínez-Torrón* notes that autonomy is a notion “which can be applied only to [religious] communities. It is the concept of religious freedom as Church autonomy, i.e. the protection of the auto-normative and auto-organizational capacity of religious confessions – which implies – at least in current Western societies – the acknowledgement and, perhaps, cooperation of the State”. The highest degree of autonomy is granted in Spain through the agreement system; “the real distinctions between religious confessions comes by way of the

this volume is how other systems compare with the very broad protections Germany provides. I have also found myself emphasizing the German model as a comparison point for the United States system, because it helps impose a framework against which the fifty-plus American jurisdictions can be compared.

At the other extreme from Germany are systems where there is still a vigorously established church, as in Greece, more flexible establishments, or countries in transition from authoritarian rule. Autonomy issues seem to arise in very different ways in these systems. Professor **Papastathis** summarizes the situation as follows for Greece:

Both the prevailing and all the creeds in general enjoy self-administration. I do not use the term “autonomy”. In Greek legal terminology, an “autonomous” organization – such as religion in general – signifies that it acts on its own initiative and responsibility, without being supervised.²⁵

Non-supervised administration is simply not part of the picture in Greece. Much of **Papastathis’** paper is accordingly a description of the supervision mechanisms that govern both the prevailing Orthodox and other religions. His conclusion is that “the various [non-Orthodox] cults enjoy a broader self-administration in comparison with that of the Orthodox Church”. While the believers in the other religious communities would likely disagree with this judgment, his paper paints in a rather stark way the extent to which bureaucratization alone, to say nothing of outright state supervision and approval processes, can reduce the autonomy of a state church to the vanishing point. In this sense, the decision of Sweden (unfortunately not represented in the present volume) to disestablish says much about the need that even a privileged state church may feel for the need for autonomy.²⁶

Hill, writing from the perspective of the Church of England, notes a variety of worries attendant on passage of the Human Rights Act 1998, which makes the European Convention of Human Rights directly applicable in the law of the

agreements. . .”. *Id.* at 353, 351. *Long* makes a similar point about Italy, but focuses more on the relative complexity of individual and corporate religious freedom. He summarizes the contrast as follows: “individual religious freedom is protected according to the average standards of modern Constitutions, while the system concerning protection of religious confessions’ autonomy is much more structured”. *Id.* at 336.

²⁵ *Papastathis* at 425.

²⁶ *Kenneth Stegeby, An Analysis of the Impending Disestablishment of the Church of Sweden*, 1999 *BYU L.Rev.* 703.

United Kingdom.²⁷ In part the worries flow from the fact that as part of its privileged position, the Church of England legislates by Measures, which will count as primary legislation once the Human Rights Act comes into force next fall, meaning that they must be construed so as to make them compatible with the Convention.²⁸ Leaving such international worries aside, **Hill** sees a picture that is in some ways similar to (though nowhere near as intrusive as) that in Greece: the Church of England, precisely because it is the State Church, faces all manner of interference that other churches, which are organized simply as private associations, do not face.²⁹ **Minnerath** suggests that for a variety of historical and doctrinal reasons, Catholics were more insistent on institutional autonomy with respect to the state,³⁰ and as a result tended to enjoy more autonomy than established Protestant churches where Catholicism was “the unique religion of the State”.³¹

Merilin **Kiviorg** paints a picture of an Estonia clearly moving toward a condition of enhanced religious freedom in general, and religious autonomy in particular. But the road is beset with obstacles. First, the term “autonomy” itself is “difficult to define, and as result, the question of autonomy in Estonia is more than unclear”.³² The exact source of the definitional difficulty is uncertain, although one senses that in fact, the underlying problem is that for a substantial period, the country has simply lacked meaningful experience with authentic religious autonomy. The term is equated with “the right to issue regulations”, but this is mistakenly equated with state regulations, which in turn yields questions about “permissible delegation”.³³ Estonia is clearly working with German models of some kind – apparently a borrowing of Weimar-type public corporations (*Körperschaften des öffentlichen Rechts*) in 1937³⁴ – but is struggling with technical questions about how the public-private interface works in this area as a technical matter. The existing law and proposed draft legislation on religious associations contain a number of problematic provisions, which may be even more problematic if they are applied by a state bureaucracy that envisions the provisions governing registration of religious associations as a control mechanism rather than a vehicle for facilitating religious autonomy.

²⁷ *Hill* at 267.

²⁸ *Id.* at 268. Comparative experience from other European Union countries with established churches may prove helpful here.

²⁹ *Id.* at 270.

³⁰ *Minnerath* at 382.

³¹ *Id.* at 384.

³² *Kiviorg* at 287.

³³ *Id.*

³⁴ *Id.*

One provision of the currently applicable Churches and Congregation Act (the “CCA”) that is a rather paradoxical constraint on religious autonomy is its requirement of democratic structure. **Kiviorg** notes that under the CCA, “[m]any basic requirements for democracy within the church and congregation are mandatory: openness of the membership, existence of an elected executive, equality of members before the law, right to participate in the elections to the executive and for official posts, right to leave the church or congregation by notifying beforehand the church or congregation executive”.³⁵ This problematic provision was fairly typical in the legislation of former socialist bloc countries. At first blush, it may seem counterintuitive to suggest that tolerance for undemocratic religious structures is in fact more democratic than insisting that religious organizations be pervasively democratic. But matters of religious polity (whether they be hierarchical or democratic) are central matters of religious belief, and refusal to respect them strikes at the heart of religious autonomy. Accordingly, most countries are quite clear that religious autonomy allows religious communities to select forms of organization without regard to their democratic character.³⁶

What each of the foregoing examples – Greece, United Kingdom, and Estonia – show are the difficulties for the notion of autonomy that are associated with thinking about and dealing with autonomy issues within the framework of categories drawn from the public side of the public/private distinction. The German public corporation is from this perspective a brilliant interface device: it provides public trappings for religious organizations without encumbering them (too much) with the burdens, interference, and overbureaucratization of formal established church status.

II. THE COMPARATIVE SCOPE OF RELIGIOUS AUTONOMY

One of the fundamental questions a comparative study of religious autonomy faces is whether there is a “common core” of religious activity that has been identified across cultures as deserving attention. This descriptive core is different than the normative core of what ought to be protected, but it may suggest a starting point. To use the terminology suggested by **van der Vyver**,

³⁵ *Id.* at 291, citing Articles 8 and 9 of the Estonian Churches and Congregation Act.

³⁶ *Schanda* makes it clear that this bug has been worked out in the Hungarian system: “Churches do not have to have a democratic structure like it is the case with associations (church charters can be anti-democratic)”. *Id.* at 556. The same is true for Italy. *Long* at 332, 337. Also see *Konrad Hesse*, *Das Selbstbestimmungsrecht der Kirchen und Religionsgemeinschaften* in: *Josef Listl/Dietrich Pirson* (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* 521, 557-58 (2d ed.1994).

the question is how broad is the sphere within which religious autonomy is sovereign? Are there categories of religious activity that can be said to be consistently shielded, so as to avoid the need to get into subjective balancing questions? Balancing of some kind, either express or tacit, may be inevitable at boundaries, but are there clear cases? Professor **von Campenhausen** contends that while the borderline between what lies within the range of religious communities' own affairs and those which are either "common" or subject to the state was disputed in the past, "[i]n practice, today it is not difficult to determine the *area of [a religious community's] own matters*".³⁷ Is this really true? Is it true across cultures? Can we help each other get a clearer sense for what ought to belong to this category and why?

Note that at least in the European setting, subject to adjustments allowed by "margins of appreciation",³⁸ identifying such a domain may have powerful normative impact under the European Convention of Human Rights. As noted in the limitations clause of Article 9 of the European Convention,

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are *necessary in a democratic society* in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.³⁹

If there is a fairly well established domain of protected religious autonomy that is discernible in several credible democratic countries, it becomes very difficult to argue that state interference that imposes limitations on autonomy in such a domain is "necessary in a democratic society". It would accordingly appear to follow, under Article 9(2) of the European Convention, that it is not permissible to limit manifestations of religion, including institutional manifestations, in the area in question.

With these considerations in mind, it is helpful to look at the range of issues that might constitute the core of exclusively religious affairs or what the Germans refer to as "own affairs" (*eigene Angelegenheiten*). Based on various papers submitted, I prepared the table that follows. It describes at least in part the range

³⁷ *von Campenhausen* at 79.

³⁸ See, e.g., *Case of Cha'are Shalom ve Tsedek v. France*, 27417/95 (Europ. Ct. Human Rts. June 27, 2000) pp. 69, 84; *Case of Manoussakis v. Greece*, 18748/91 (European Ct. Human Rts. Sept. 26, 1996) p. 44 ; *Case of Kokkinakis v. Greece*, 14307/88 (Europ. Ct. Human Rts. May 25, 1993) p. 47.

³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(2) (emphasis added).

of issues that may qualify for the inner domain of religious autonomy. The table is quite incomplete in many respects – among other reasons because the field is vast and conference authors did not cover in detail the full range of autonomy issues. Had authors been specifically charged with providing information for each of the “boxes” on my chart, a more comprehensive picture may have been provided. In fact, however, it was only after reading the various papers that the list of “boxes” emerged. Some papers focused on one set of issues; others focused on others. Thus, the grid is necessarily incomplete and ad hoc. Nonetheless, I believe the grid is worth reproducing, because it starts to suggest the range of issues that arise in connection with the right to religious autonomy. As the table began to unfold, I realized that it corresponded in many respects to the OSCE commitments that are recorded in the 1989 Vienna Concluding Document,⁴⁰ so I noted the relevant commitments in an “OSCE” column. Note that there are a few rows with respect to which there are no OSCE entries. Typically these are rows for the most central of all and thus least controversial matters of religious autonomy. These would appear to be implicitly covered by the general provisions of principle 16a promoting tolerance, etc. But I have left them blank for the present. Clearly, this is a preliminary attempt, one that can hopefully be used to form the basis of further study.

One of the difficulties with any such chart is that it necessarily oversimplifies. In fact, many core religious activities radiate outward into adjacent “non-core” domains. Thus, core educational and charitable activities inevitably shade into arguably secular matters of education, social service and culture. Similarly, systems disagree on the scope of exemptions that should be allowed to religious organizations in selecting, supervising and otherwise structuring arrangements with their personnel. Personnel performing the functions of ministers and others involved in representing the group or teaching doctrine are generally acknowledged to warrant special treatment as an exclusively religious matter. Debates arise as one moves to other categories, such as personnel who are not

⁴⁰ Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe that were promulgated in 1989. CSCE (now OSCE, for “Organization on Security and Co-operation in Europe”) commitments in the Helsinki Process, by their terms, do not constitute formal legal commitments in the same way that formal treaty obligations such as the Civil and Political Covenant or the European Convention do. They are nonetheless politically binding. See *Arie Bloed*, “Two Decades of the CSCE Process: From Confrontation to Co-operation, An Introduction”, in *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1972-1993*, ed. *Arie Bloed* (Dordrecht, 1993). In this sense, they are a good indication of what a broad range of democratic countries (the U.S., Canada, Europe, and former socialist bloc countries) have committed to do in furtherance of religious freedom.

themselves in ministerial positions but whose work furthers the mission of the religious organization, or lay personnel who perform essentially secular tasks for a religious organizations or one of its affiliated entities that is secular to a greater or lesser degree.

One major area not addressed by the chart is tax and finance issues. With respect to the former, **Gaffney**'s article in this volume provides an excellent overview of American tax issues and their relevance to religious autonomy considerations. The complex issues of European church-state finance systems are obviously relevant, but are for the most part beyond the scope of what is being addressed in this volume. At some point, it would be useful to add parallel analysis of "Spending Power" impacts on religious autonomy – the subtle and not-so-subtle ways that governments condition access to various types of funding on meeting various conditions and requirements that can cause religious groups to undergo significant contortions to qualify.⁴¹

Note that the chart includes certain issues that clearly fall within the ambit of state concerns: namely, how registration/incorporation processes function. I have included the issue here both to provide some connection to discussions at the first European/American exchange in 1998, and because in fact, access to entity status, as the Vienna Concluding Document recognized, is necessary for most religious communities to carry out their core administrative tasks, which in turn are necessary to carrying out their core mission.

Many other things could be noted about the chart, but perhaps most striking are the areas where countries do not allow religious groups full autonomy. Scholars within a country might well disagree on exact amount of religious autonomy afforded in various areas, but the negatives highlighted by the authors in this volume, and thus the chart, provide important areas for further study. Given the OSCE commitments of the countries listed on the chart, one might assume that there should be no negative responses, at least in the areas in which there are explicit OSCE commitments. For that reason, at least a brief elaboration seems in order.

Russia provides an instructive example. Whatever problems local religious organizations *without* links to centralized organizations might have due to the notorious 15-year-rule imposed by the 1997 Russian Law on Freedom of Conscience and Religious Associations, Article 9 of that law at least appears to respect religious autonomy among other things by authorizing central religious

⁴¹ For a discussion of some of the risks, see *Dallin H. Oaks*, Separation, Accommodation and the Future of Church and State, 35 DePaul L. Rev. 1 (1985).

organizations to freely create local subdivisions and subsidiaries with their own legal personality.⁴² The chart indicates that in fact, autonomy is not adequately protected in this area. This is because in fact, contrary to the clear wording of federal legislation, regional Russian laws and practices (at least in some regions) continue to limit these rights. **Roudik** explains in greater detail the tensions between more restrictive regional laws and the 1997 Law.⁴³

Kazakhstan faces an analogous situation. **Podoprigora** notes that because, under national law, religious educational institutions can only be established by the national religious structures, many local authorities prevent local religious groups from organizing Sunday Schools, religious clubs, courses, and educational seminars.⁴⁴

Long notes that in Italy, the charitable and cultural activities of religious groups – both those with agreements and those without – do not enjoy the protections of religious autonomy with respect to civil laws.⁴⁵ Even though some of the agreements, such as those with Jewish groups and the Tavola Valdese, recognize that according to the traditions of these groups, charitable activities are an integral part of the group's religious mission, the Italian state insists that such activities are subject to generally applicable state laws.⁴⁶

Sometimes the scope of autonomy differs depending on the religious group involved. As **Martínez-Torrón** explains, Spain allows the Roman Catholic Church to have paid chaplains and gives legal effect to decisions of its religious courts.⁴⁷ Other agreement communities do not have these benefits, although their religious ministers do have right of free access to military facilities.⁴⁸

Finally, **Torfs** presents an interesting issue in Belgian law. Although he recognizes that most lawyers would assume that Belgium protects internal autonomy fully, and notes that the Belgian constitution prohibits the state from intervening in the appointment of religious ministers, he argues that recent court cases have undermined this protection by deciding whether a religious organization properly followed its own procedures in ecclesiastical

⁴² See generally *W. Cole Durham, Jr./Lauren B. Homer*, Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal, 12 *Emory Int'l L. Rev.* 101 (1998).

⁴³ See *Roudik*, Church Autonomy in the Russian Federation, at 516

⁴⁴ *Podoprigora*, Church Autonomy in Kazakhstan, *supra* at 496.

⁴⁵ *Long*, Church Autonomy and Religious Protection in Italy, *supra* at 333-34.

⁴⁶ *Id.* at 335.

⁴⁷ *Martínez-Torrón*, Church Autonomy and Religious Liberty in Spain, *supra* 354-55.

⁴⁸ *Id.* at 355.

nominations.⁴⁹ Normally, this kind of second-guessing of ecclesiastical decisions would constitute a clear affront to rights of religious autonomy.

III. THE AMERICAN APPROACH TO CHURCH AUTONOMY ISSUES

With the foregoing “topography” of the religious autonomy questions as background, I turn at last to an overview of American approaches to religious autonomy. My sketch will be short, and I will necessarily rely on my American colleagues to fill in gaps. Briefly, I will describe three approaches to protection of religious autonomy that have emerged in United States case law: what might be called a free exercise approach, an establishment approach, and an “internal disputes” approach.

1. THE FREE EXERCISE APPROACH TO CHURCH AUTONOMY

In 1981, Professor Douglas **Laycock** published an important article formulating a theory of church autonomy on the basis of analysis of cases in the labor area.⁵⁰ In the article, he identified three areas protected by the American free exercise clause⁵¹: freedom to carry out religious activities (*e.g.*, to build churches, conduct worship services, pray, proselytize, and teach), the right of churches and other religious communities to conduct religious activities autonomously (*e.g.*, to select their own leaders, define their own doctrines, resolve their own disputes, etc.), and the right of conscientious objection to government policies.⁵² After criticizing efforts to reduce all free exercise analysis to a conscientious objection model,⁵³ and rejecting contentions that Establishment Clause issues might be in play,⁵⁴ Laycock contends that “a right to church autonomy under the free exercise clause focuses on the real interests at stake”.⁵⁵ He then traces the

⁴⁹ *Torfs*, Church Autonomy in Belgium, *supra* at 613-17.

⁵⁰ *Douglas Laycock*, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981). See also Douglas Laycock, Formal, Substantial, and Disaggregated Neutrality Towards Religion, 39 DePaul L. Rev. 993 (1990).

⁵¹ U.S. Const. Amend I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .”). Originally a constraint only on the federal government, the free exercise and establishment portions of the Religion Clause were held to apply to the States as well in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Educ.*, 330 U.S. 1 (1947), respectively.

⁵² *Laycock*, *supra* note 50, at 1388-89.

⁵³ *Id.* at 1390-92.

⁵⁴ *Id.* at 1378-88, 1392-94.

⁵⁵ *Id.* at 1394.

antecedents of church autonomy doctrine in United States precedents, concluding that the “right of autonomy logically extends to all aspects of church operations”.⁵⁶

At the time Laycock wrote his pathbreaking article, an autonomy right grounded in the free exercise clause appeared to provide a very secure anchor for protection of the full range of autonomy issues that we have discussed. Over the years, the Free Exercise Clause had been construed to mean that a burden on religion could not withstand constitutional scrutiny unless it was justified by a compelling state interest that could not be achieved in a less restrictive way.⁵⁷ As the Supreme Court had stated, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion”.⁵⁸ Under this “compelling state interest test”, virtually all of the religious autonomy issues identified on the chart above would be protected, because state interests were seldom sufficiently compelling to override core religious autonomy concerns.

The strength of this free exercise foundation for religious freedom was substantially weakened, however, when the United States Supreme Court rendered its decision in *Employment Division v. Smith*.⁵⁹ As noted earlier, in that case, subject to certain limited exceptions,⁶⁰ the Supreme Court jettisoned the compelling state interest test and ruled that any general or neutral law would override religious liberty claims, however central or peripheral they might be to a belief system.⁶¹ In the years since *Smith* was handed down, Professor Laycock has led the charge to cure the resulting gap in free exercise protection. First, he helped lead an extremely broad coalition of religious and human rights groups who secured the passage of the Religious Freedom Restoration Act (“RFRA”) in

⁵⁶ *Id.* at 1397.

⁵⁷ *Conkle*, supra note 7 (discussing the history of religious freedom in the United States, and how that concept has evolved).

⁵⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

⁵⁹ 494 U.S. 872 (1990).

⁶⁰ Briefly, the exceptions involve “hybrid right” cases (i.e., cases where the claimant’s rights are grounded in religion “plus” some other constitutional right such as free speech, freedom of association, and so forth) (494 U.S. at 881) and discretionary exception cases (i.e., cases where the field being regulated is so extensively pervaded with discretionary exceptions that denial of a similar exception to a religious group would be gratuitous) (*id.* at 884). In these situations, the prior “strict scrutiny” approach still prevails. The precise scope of these exceptions remains unclear.

⁶¹ 494 U.S. 872, 883-88 (1990). Note that one area in which the Supreme Court’s decision in *Smith* arguably broadens religious freedom protection was its conclusion that courts should not get involved in making centrality decisions.

1993.⁶² This enactment was subsequently challenged on the ground that Congress, as a constitutional creature of limited powers, lacked power under the Constitution to pass RFRA. Professor Laycock again took up the laboring oar, and served as lead counsel in the defense of RFRA. In 1997, however, the Supreme Court held that Congress, at least with respect to state encroachments on religious freedom,⁶³ lacked power to enact RFRA, and therefore struck it down.⁶⁴

While there are ongoing efforts to provide patchwork cures to *Smith*,⁶⁵ many of them going on at the state level,⁶⁶ the result is that the strong *free exercise* undergirding for Laycock's autonomy model is substantially weakened. Perry **Dane** contends that in fact *Smith* does not undercut religious autonomy analysis, because it really only rejected highly individualized claims for religious exemptions based on the free exercise clause, whereas by their nature, religious autonomy claims call for across-the-board protections for all religious communities, since all have a vital interest in protecting religious autonomy, and protecting autonomy does not open up the same slippery slope toward anarchy that exemptions for individualized beliefs do.⁶⁷ This is an ingenious argument, but to the extent that what really lies behind the Court's decision in *Smith* is an aversion to judicial activism, it is not clear that the Supreme Court will buy the argument.

⁶² Pub. L. No. 103-141, 107 Stat. 1488 (1993)(codified as amended at 42 U.S.C. 2000bb -1 to -4 (1994).

⁶³ See, *Kikumura v. Hurley*, 222 F.3d 950, 959 (10th Cir. 2001) (holding that RFRA still applies to the federal government); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9th Cir.1999) (same); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 858-59 (8th Cir.1998) (same).

⁶⁴ *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997).

⁶⁵ The initial efforts to respond to the Supreme Court's Boerne decision focused on efforts to pass a general Religious Liberty Protection Act that would be based on constitutional powers such as the Commerce Clause, Spending Power, and aspects of Section 5 of the Fourteenth Amendment that could still sustain congressional lawmaking after Boerne. See Conkle, *supra* note 7. Thus far, however, Congress has settled for passage of two Acts that are more limited in their coverage. See Religious Land Use and Institutionalized Persons Act of 2000, Pub.L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc); 1998 Religious Liberty and Charitable Donation Protection Act, Pub.L. No. 105-183, 112 Stat. 517 (codified at 11 U.S.C. § 544, 548).

⁶⁶ See *Mousin*; see generally, Symposium: Restoring Religious Freedom in the States, 32 U.C.Davis L. Rev. (Spring 1999).

⁶⁷ *Dane* at 122 & n.18.

2. THE ESTABLISHMENT CLAUSE APPROACH

A second approach to grounding religious autonomy has been advocated in the work of Carl **Esbeck**. His paper at this conference summarizes the core elements of his position. As early as the middle 1980s, he had already rejected **Laycock**'s position that the Establishment Clause should be construed to govern situations where *aid* to religion was involved, and not where religion is *burdened*.⁶⁸ In fact, the leading test articulated by the Supreme Court for analyzing Establishment Clause violations has long addressed burdens as well as benefits. Under this test, state action survives Establishment Clause challenge only if:

First, the statute [has] a secular legislative purpose; second, its principal or primary effect must be one that neither advances *nor inhibits* religion; finally, the statute must not foster “*an excessive entanglement with religion*”.⁶⁹

The emphasized language notes the two key areas in which this test keys Establishment Clause violations to state action that inhibits religion (thereby likely benefiting others) or that causes undue interference with religion (thereby undermining religious autonomy).⁷⁰ Esbeck's point is that far from adding a misleading element to Establishment Clause analysis, as Laycock had suggested,⁷¹ the emphasized language captures something that is at the very core of the establishment clause value. In Esbeck's view, the Establishment Clause by its very nature constitutes a *structural* or *jurisdictional* feature of the constitution. It protects religious autonomy indirectly by providing that the United States government lacks power (capacity, constitutional authorization, jurisdiction) to deal with matters that are “inherently religious”.⁷² According to Esbeck, the church autonomy precedents (discussed in the next section), are grounded in this aspect of the establishment clause.

This is a forceful, but not a dominant view at the present time. Moreover, while the theory is designed to have bright-line boundaries, it is not clear exactly

⁶⁸ See *Carl H. Esbeck*, Establishment Clause Limits on Governmental Interference with Religious Organizations, 41 Wash. & Lee L. Rev. 347, 369 (1984). See generally *Carl H. Esbeck*, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (October 1998).

⁶⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)(emphasis added).

⁷⁰ “[E]ntanglement is to be feared not so much because it aids religion, but because it interferes with religion”. Developments in the Law: Religion and the State, 100 Harv. L. Rev. 1740, 1755 (1987).

⁷¹ *Laycock*, supra note 50, at 1380, 1392-94.

⁷² *Esbeck* at 156.

where the boundaries lie. In crucial respects, the Establishment Clause provides even greater protection for religious autonomy than the Free Exercise Clause. There is no need to meet a “burden” requirement in the Establishment Clause context. No showing of coercion is necessary.⁷³ More generally, to use the spatial imagery implicit in the “wall of separation” metaphor, the Establishment Clause creates a buffer zone between the domain of the state and the domain of church autonomy. Free exercise rights abut directly against state power; the absence of power perspective behind Establishment Clause analysis leaves additional breathing space. The state may not be “excessively entangled” with religious institutions.⁷⁴ On the other hand, there may be some respects in which the Esbeck theory does not have as broad an ambit as the earlier “compelling state interest” test under the free exercise clause (although in fact that test never really provided as much protection as one hoped it would). Can religious groups that are not religious organizations *per se* invoke this test successfully in defense of their religious autonomy? Possibly so if their activities are “inherently religious”. But the boundaries seem somewhat uncertain.

3. THE INTERNAL DISPUTES APPROACH

In fact, the United States autonomy cases trace back through a fascinating line of precedents wrestling with a variety of disputes that are internal to a religious organization. The typical situation has involved a schism or division within a church that has led in turn to conflicts over who holds or controls the church’s property.⁷⁵ But as **Dane** notes,⁷⁶ such cases have also arisen in fields such as labor law, civil rights law, malpractice and defamation law.⁷⁷ There is not space to go into the details of these cases here. Essentially, the Supreme Court has considered three alternatives. In some early cases, courts would look at which group in a dispute remained most loyal to the doctrinal tenets held by those who first donated the property to the religious organization. Ultimately, the Supreme Court rejected this “departure from doctrine” test, because it necessarily

⁷³ *Abington School District v. Schempp*, 374 U.S. 203, 221-24 (1963).

⁷⁴ *Lemon*, 403 U.S. at 613.

⁷⁵ See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 718 (1976) (forbidding “detailed review” of internal church affairs); *Kreshik v. Saint Nicholas Cathedral of The Russian Orthodox Church of North America*, 344 U.S. 94 (1952) (striking down state’s effort to override hierarchal church’s ecclesiastical determination of rights to church property). See generally Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 *Ford. L.Rev.* 539 (1986).

⁷⁶ *Dane* at 119-20.

⁷⁷ *Id.* & nn. 2-5.

entangled courts in analyzing questions of doctrine.⁷⁸ In the case that that rendered this decision, the Court preferred another approach, the so-called “deference to polity” view, according to which secular courts simply defer to the decision of the recognized source of authority in the particular church in question. Still a third view was considered in *Jones v. Wolf*.⁷⁹ Under this approach, courts are entitled to decide internal dispute cases in accordance with “neutral principles of law”. That is, as described in *Jones*, to the extent that religious communities have framed normal legal documents like deeds, wills, contracts, and trusts that spell out what is to happen in the case of a dispute, secular courts can interpret these documents as they would any other legal documents, and render decision accordingly.⁸⁰ After *Jones*, secular courts could in effect choose between the “deference to polity” or the “neutral principles” approach; either was constitutional in the view of the Supreme Court.

The neutral principles approach has much initial appeal. It sounds simple, and it helps courts avoid not only substantive entanglement in religious doctrine, but also initial inquiry into questions of church polity, which are after all themselves doctrinal. But there are several practical difficulties. First, what if the lawyers (or non-lawyers) who drafted the instruments to which “neutral principles” analysis applies did not in fact draft the instruments in ways that in fact reflect ecclesiastical realities? This is an all too frequent occurrence. Second, what if no instruments were in fact provided at all? Third, even if the instruments were drafted and were accurate at the time, what if the doctrines of the relevant religious community have shifted over time, so that the documents no longer reflect the realities of life in the religious community? For all of these reasons, the neutral principles approach raises questions.

One particularly consequence of the *Jones* case derives from confusing the “neutral principles” in that case with the “neutral and general laws” referred to in *Smith*.⁸¹ This confusion has arisen when a court can identify secular (i.e., religiously neutral) governing principles, and concludes on the basis of *Jones* that it is free to apply them to a dispute, thereby overriding religious autonomy concerns. Thus, in *South Jersey Catholic School Teachers Association v. St. Teresa of the Infant Jesus Church Elementary School*,⁸² an intermediate

⁷⁸ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

⁷⁹ 443 U.S. 595 (1979).

⁸⁰ See generally *Patty Gerstenblith*, *Civil Court Resolution of Property Disputes among Religious Organizations*, 39 Am. U. L. Rev. 513 (1990).

⁸¹ 494 U.S. 872 (1990).

⁸² 290 N.J. Super. 359, 675 A.2d 1155 (App. Div. 1996).

appellate court in New Jersey, after noting the “longstanding principle of First Amendment jurisprudence [that] forbids civil courts from deciding issues of religious doctrine or ecclesiastical polity”,⁸³ went on to state:

Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the doctrinal issues. . . . In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral principles of law to determine disputed questions which do not implicate religious doctrine. . . . “Neutral principles” are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations.

The Appellate Division’s claim in the foregoing passage is that any hazard to religious autonomy resulting from state action (state-mandated collective bargaining in the *South Jersey* case) can be cured by “reliance on the doctrine of neutral principles”.⁸⁴ Essentially, the Appellate Division assumes that so long as it relies on “wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations”, it is free to impose regulatory burdens on a religious entity.⁸⁵ As developed in the church property jurisprudence of the U.S. Supreme Court, however, the doctrine of neutral principles has a very different meaning. It holds that where a religious body has *exercised its autonomy* by executing standard legal documents such as contracts, wills, trusts, and deeds, courts may apply “neutral principles” to interpret those instruments.⁸⁶ The aim of this doctrine is to assure that courts *defer* to expressions of religious autonomy embodied in secular instruments,⁸⁷ not that they are free to invoke substantive secular norms to dictate the manner in which religious autonomy may be exercised in the first place. Thus, the neutral principles doctrine should not be used to defend imposition of outside resolutions on internal religious disputes.

The exact constitutional provenance of the internal dispute cases is not clear. **Esbeck** clearly believes it is grounded in the establishment clause; **Dane** thinks

⁸³ *Id.* at 390, 675 A.2d at 1171.

⁸⁴ *Id.*

⁸⁵ *Id.*, citing *Elmora Hebrew Center, Inc. v. Fishman*, 125 N.J. 404, 414-15, 593 A.2d 725, 729 (1991).

⁸⁶ *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979).

⁸⁷ See *id.*

it “straddles the Establishment and Free Exercise Clauses”.⁸⁸ In fact, the Supreme Court has not been very explicit on this point. One bit of good news is that the Court in *Smith* expressly noted that it was not disturbing the internal property dispute precedents.⁸⁹ Thus, whether grounded in the Free Exercise Clause or the Establishment Clause, the internal property dispute cases provide a clear and acknowledged foundation for religious autonomy.

The difficulty with this approach, however, is that it may be limited to *internal* disputes. In a forthcoming essay,⁹⁰ Professors Patrick Schiltz and Douglas Laycock suggest that the cases dealing with internal religious disputes are poorly suited for resolving religious employment disputes. In their view, this line of cases have all

involved disputes over interpretation of, or continued adherence to, standards that were internally derived, *i.e.*, that were found in the doctrines or governing documents of the religious organization. By contrast, in most employment disputes, the government itself has made a policy choice and sought to impose that choice on a religious organization – by, for example, dictating that the organization may not make employment decisions on the basis of race or that its employees must be permitted to join unions. Different problems arise when the government is invited to referee an internal dispute within a religious organization – and to do so with reference to the organization's own internally derived standards – than when the government takes it upon itself to regulate religious organizations in pursuit of secular ends. Case law that appropriately safeguards religious liberty in one setting will not necessarily do so in the other.

The difficulty then is that it is not clear how wide the sphere of autonomy protected by the internal dispute cases is. It would plainly be broad enough to handle issues dealing with selection of employees, administration of property, and issues of doctrine and polity, but its coverage in other areas is unclear.

⁸⁸ *Dane* at 123.

⁸⁹ *Smith*, 494 U.S. at 886-87.

⁹⁰ *Patrick J. Schiltz/Douglas Laycock*, Employment, in *The Structure of American Churches* (forthcoming treatise to be published under the auspices of the DePaul Center for Church/State Studies).

4. EMPLOYMENT CASES

Before concluding, then, it will be useful to examine employment cases, which pose the difficult type of autonomy issue that Schiltz and Laycock describe. Autonomy in this area is particularly significant because it is primarily through its personnel (officers, employees and volunteers) that a religious community exercises its religious freedom. In this context, Title VII of the Civil Rights Act of 1964 has particular significance. It was meant to shield the workplace from various types of discrimination by placing prohibitions on employers on the basis of race, sex, religion and national origin.⁹¹ It provides:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employee or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁹²

There are three basic exemptions to Title VII's prohibition of discrimination in the workplace where religion is involved: 1) preferential treatment on religious grounds by religious corporations, organizations and educational institutions;⁹³ 2) preferential treatment in connection with a bona fide occupational qualification (BFOQ);⁹⁴ and 3) preferential treatment by religious schools and learning institutions.⁹⁵ The statutory exemption scheme provides special treatment for one type of entity that is not strictly speaking a religious entity per se, but is often charged with a religious mission – namely, religious educational institutions. For these institutions, the third exemption applies, which provides as follows:

It shall not be an unlawful employment practice for a school, college, university, or other educational institution, or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of

⁹¹ 42 U.S.C. § 2000 (1994).

⁹² 42 U.S.C.S. § 2000e-2(a) (1999).

⁹³ 42 U.S.C. § 2000e-1(a) (1994).

⁹⁴ 42 U.S.C.S. § 2000e-2(e)(1) (1999).

⁹⁵ 42 U.S.C.S. § 2000e-2(e)(2) (1999).

learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution of learning is directed toward the propagation of a particular religion.⁹⁶

The issue for a religious university becomes whether it is considered owned, supported, controlled or managed in whole or substantial part by a religious entity, or whether it has the requisite religious mission. The closer the nexus between the school and the religious corporation or affiliation the easier the answer will be.

The religious exemption does not give religious institutions blanket approval to make hiring and firing decisions without regard to the other provisions of Title VII. In particular, institutions availing themselves of the religious exemption are not thereby justified in making such decisions based on race, sex or national origin.⁹⁷ But where genuine concerns about maintaining the religious environment or otherwise contributing to the religious mission of an institution are at stake, the exemptions should be sufficiently broad.

State law is equally likely to exempt a religious educational institution from granting preferences to adherents of the same faith in its hiring and firing practices, and possibly even more so. A majority of the states provide an exemption for religious organizations or religious educational institutions. The most common form such state exemptions take is similar if not identical to the Title VII language. For example, Arizona's statute provides:

It is not an unlawful employment practice: For any school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is in whole or in substantial part owned, supported, controlled or managed by a particular religion or religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.⁹⁸

⁹⁶ *Id.*

⁹⁷ See, e.g., *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020.

⁹⁸ *Ariz. Rev. Stat. Ann. § 41-1463(F)(2)* (West 1999). Other statutes with similar or identical language include: *D.C. Code Ann. § 1-2503(b)* (Supp. 2001); *Del. Code Ann. tit.*

Other state statutes effectively exempt religious higher education from their coverage by explicitly excluding educational and charitable religious institutions from the definition of “employer”.⁹⁹ Still another state variation is to grant the religious educational institution the right to limit employment to or to grant preference to members of the same religion.¹⁰⁰

The exemption that offers the least amount of protection comes from the states that allow for an exception when there is a bona fide occupational qualification.¹⁰¹ This will not give the automatic exemption that other statutes provide when they specifically except religious educational institutions. Those institutions may find themselves having to prove they deserve a particular exemption on a case-by-case basis, and the exemption will not always protect hiring faithful members of a tradition for more secular positions.

The Title VII exemption scheme was challenged in *Corporation of the Presiding Bishop v. Amos*,¹⁰² which held that the exemptions were not an impermissible establishment of religion. Because the employee in the Amos case was a janitor at a non-profit entity owned by The Church of Jesus Christ of Latter-day Saints (as opposed to being an employee of the Church itself) *Amos* provides authority

19 § 711(f)(2) (Supp. 2000); Ky. Rev. Stat. Ann. § 344.090(3) (Michie 1997); La. Rev. Stat. Ann. § 23:332(H)(2) (West 1998); Md. Ann. Code art. 49B, § 16(g)(3) (Supp. 2000); Mass. Gen. Laws. Ann. ch. 151B § 4(18) (West Supp. 2001); Minn. Stat. Ann. § 363.02 sub.8 (West Supp. 2001); Neb. Rev. Stat. § 48-1103(1) (1998); Nev. Rev. Stat. Ann. § 613.350(4) (Michie 2000); 43 Pa. Cons. Stat. Ann. § 955(h)(10) (West 2000); R.I. Gen. Laws. § 28-5-6(6)(ii) (Supp. 1999); Tex. Lab. Code Ann. § 21.109(a) (West 1996); Utah Code Ann. § 34A-5-106(3)(a)(ii) (Supp. 2000); and Vt. Stat. Ann. tit. 21, § 495(e) (Supp. 2000).

⁹⁹ Indiana’s statute reads: “The term ‘employer’ does not include: . . . any school, educational, or charitable religious institution owned or conducted by or affiliated with a church or religious institution”. Ind. Code Ann. § 22-9-1-3(h)(2) (Michie Supp. 2000). See also 775 Ill. Comp. Stat. Ann. 5/2-101(B)(2) (West 1993); Me. Rev. Stat. Ann. tit. 5, § 4573-A(2) (West Supp. 2000); Mo. Ann. Stat. § 213.010(7) (West Supp. 2001); N.H. Rev. Stat. Ann. § 354-A:2(VII) (Supp. 2000); Wash. Rev. Code Ann. § 49.60.040(3) (West Supp. 2001); and Wyo. Stat. Ann. § 27-9-102(b) (Michie 1997).

¹⁰⁰ Idaho Code § 67-5910(2)(c) (1995); and N.M. Stat. Ann. § 28-1-9(B) (Michie 2000).

¹⁰¹ See Cal. Gov’t Code § 12940 (West Supp. 2001); Fla. Stat. Ann. § 760.10(8)(a) (West 1997); Ga. Code Ann. § 45-19-34 (1990); Kan. Stat. Ann. § 44-1009(a)(1) (2000); Mich. Comp. Laws Ann. § 37.2208 (West Supp. 1998); Mont. Code Ann. § 49-2-303(1)(d) (1997); N.D. Cent. Code § 14-02.4-08 (1997); and Okla. Stat. Ann. tit. 25 § 1302 (West 1987). See also states that provide both the BFOQ exception and other exemptions that may provide more protection. Mass. Gen. Laws. Ann. ch. 151B § 4 (West Supp.2001); Me. Rev. Stat. Ann. tit. 5 § 4572 (West Supp.2000); and N.M. Stat. Ann. § 28-1-7 (A)(1) (Michie 2000).

¹⁰² 483 U.S. 327 (1987).

for the proposition that religious organizations have substantial autonomy to engage in preferential hiring and firing and other employment decisions that take into account both religious beliefs and religious conduct of employees.

IV. CONCLUSION

The right of religious organizations to autonomy in their own affairs is one of the critical features of any regime of religious freedom. Individual rights of conscience are of course crucial and paradigmatic for religious freedom, but unless religious associations have autonomy, the meaning of religious freedom would be substantially diminished. In most religious traditions, there is clearly a communal dimension. Some acts of worship, such as individual prayer or meditation, can be performed in private. But countless religious activities – from core acts of joint worship exercises, to various forms of teaching of religious doctrine (which invariably involves at least a teacher and a student), and through myriad forms of practice and observance in different traditions – are carried out by groups of believers. It is for this reason that the key international instruments dealing with religious freedom have consistently provided that “freedom of thought, conscience and religion” includes “freedom either alone *or in community with others and in public or private*, to manifest his religion or belief in teaching, practice, worship and observance”.¹⁰³ But there cannot be religious freedom for the communal side of religion unless the religious community *qua* community has autonomy. Different religious communities structure their affairs in very different ways, and the texture of religious life takes on very different contours as a result. For a state to impose pressures for a religious community to organize in a particular way, particularly if this is inconsistent with the religious community’s religious beliefs about how it should be organized, would invariably alter the nature of the community, and cause it to be something other than it would be under conditions of freedom.

Of course, there are systems (notably those involving officially established religions) in which religious communities understand themselves in terms of a formal relationship with the state. Moreover, religious communities may acquiesce in certain levels of state regulation in order to obtain various kinds of state support. State controls on appointment of clergy or other matters that would normally fall within the realm of religious autonomy may have been accepted through long tradition and usage in such systems. Even here, however, from the perspective of religious freedom, the apparent state controls have been accepted by the religious community in question, and remain in that sense an

¹⁰³ ICCPR, art. 18(1).

expression of religious autonomy. Such controls should only be permissible to the extent they are accepted autonomously, or to the extent they can otherwise be justified under international instruments – i.e., to the extent they fall within the narrow class of limitations on religious freedom that are justifiable because they further compelling governmental interests or pressing social needs that are necessary in a democratic society and proportionate to the objectives sought to be furthered.¹⁰⁴

The justification for religious autonomy rights extends beyond recognizing the religious rights have a collective dimension that can be protected only through protection of autonomy rights. Individual freedom of religion would be impoverished if the autonomy of religious organizations were left unprotected. Religious communities protect the seedbeds of religious thought and belief. They provide the environment within which religious ideas and experience can be formed, crystallized, developed, transmitted, and preserved. Individual belief would lack its richness, its connectedness, and much of its character-building and meaning-giving power if it were cut off from the extended life of religious communities. Religion is the prototypical “mediating structure” between the individual and the state, and it is its communal nature that allows it to perform its mediating role.¹⁰⁵ Unless religious communities are free to worship, teach, expound, interpret and propagate their own teachings without governmental interference, the individual conscience is likely to feel alienated and cut off. It will not have a home.

There are, of course, situations where individual claims of conscience can collide with the autonomy claims of the religious community. Adequate protections need to be in place to assure that an individual cannot be coerced to remain part of a religious community with which he or she disagrees. But concern for the rights of individuals in such contexts cannot be allowed to be used as a lever to invoke state power to intervene in the internal processes of the religious organization. The right of exit for the dissenter must be protected. General rights to attempt to persuade others, whether within or outside a particular tradition, must also remain open. But the rights to individual conscience do not extend to coercing a religious community to accept religious claims in conflict with those to which the community feels bound.

In light of these considerations, the legal systems of Europe and the United States accord religious autonomy some of its highest protections. It is widely

¹⁰⁴ ICCPR, art. 18; ECHR, art. 9.

¹⁰⁵ See generally Durham/Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. Rev. 421.

understood that as a practical matter, unless religious communities have a broad autonomy right, religious communities are not free to structure themselves and their affairs in ways that are authentic and true to their traditions. There is no doubt that religious organizations enjoy strong protections in their core “inner domains”: with respect to matters of doctrine, ecclesiastical polity, and core ministry. Moreover, a variety of constitutional and international commitments point toward assurance of broad autonomy protections in a range of practical areas critical to administration of religious organizations.

In the highly secularized societies of Europe and America, there is a tendency for secular bureaucrats to think of freedom of religion narrowly in terms of individual claims of conscience, and to forget how vital institutional autonomy is to protection of religious freedom as a whole. Thus, as one examines actual protection of religious autonomy in practical administrative contexts, one begins to note a variety of ways in which the scope of religious autonomy protections are narrowed. These differences may reflect deep-seated cultural variations in the way that freedom of religion is understood and interpreted. But it is also possible that in many cases, decision makers simply have not grasped the full implications of restricting religious autonomy in certain practical contexts. Abstract constitutional theory has devoted insufficient practical attention to the day-to-day practical issues that religious organizations face, and more detailed analysis of such problems is likely to highlight the need for strengthened and broadened protections of religious autonomy. Certainly, that would seem to be one of the underlying themes running through the papers of the Trier conference.

While it is clear that there are significant differences in the ways that various church-state systems deal with the issue of religious autonomy in Europe and America, analysis of the law in this area suggests that there are much stronger patterns of convergence than is sometimes thought. Not only is there agreement on a broad range of practical issues, but also, at a more general level, viewing church-state relations through the filter of religious autonomy highlights the fact that the “separationist” model of the United States is not as far removed from “cooperationist” regimes of Europe as one might think. While there are obvious differences in terms of willingness to permit direct subsidization of and other types of involvement in religious activity by the state, countries on both sides of the Atlantic share the concern of assuring that religious autonomy is protected. In the United States, this goal is often articulated under the rubric, “separation of church and state”. Because of very different cultural background, that phrase can suggest to Europeans an anticlerical orientation that is not intended by the American use of the phrase. Focus on protection of religious autonomy may

make it easier for Americans and Europeans to see key commonalties in their systems. In any event, because of shared concerns and the similarity of underlying problems, the field of religious autonomy is one in which comparative studies are likely to yield fruitful results for years to come.

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