RELIGIOUS RIGHTS AND HUMAN RIGHTS: THE PLACE OF A RIGHT TO EXIT

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Abstract

Within a diverse democratic society, some communities and organizations may have internal values which fit poorly with the official values of the community. In the past, we saw this represented by, inter alia, religious dissidents to a national religion. Today, the values of human rights form an important thread in the official values of democratic societies. How far should dissident religious communities be allowed to deviate from these values both in their teachings and their religious practice? The position of the United States and the United Kingdom will be compared; leading to the conclusion that a meaningful right to exit, while essential in relation to membership of a minority community, is also relevant to exit from a human rights endorsing official culture by members of minority communities.

DİNÎ HAKLAR VE İNSAN HAKLARI: ÇIKIŞ İÇİN BİR HAKKIN KONUMU

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Özet

Kozmopolit demokratik toplumda, bazı cemiyet ve organizasyonlar resmi değerlerle çok az örtüşen değerlere sahip olabilirler. Geçmişte, bunun diğer şeylerin yanı sıra, ulusal dinle çelişen dinlerle temsil edildiğini gördük. Bugün, insan hakları değerleri demokratik toplumların resmi itibarları için önemli bir tehdit hâlini almıştır. Bu muhalif dinî cemiyetler kendi öğretileri ve dinî uygulamalarından bu değerlere evirilmeye ne kadar izin verecektir? Bu tebliğde ABD ve İngiltere'nin durumu karşılaştırılacak, resmi değerlerle azınlık toplulukları ve onların bireylerinin hakları arasındaki ilişki incelenecektir.

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The fact of religious plurality in a jurisdiction does not carry with it the necessary implication of religious pluralism – that is, the acceptance by the jurisdiction of the legitimate existence of diverse religious communities and organizations. It is quite possible, and historically not uncommon, for the state to use its authority to support a particular religious community to the exclusion of all others. This exclusion can be seen with some justification as a form of state enforcement of orthodoxy in religious issues. To take an example from English history, we can see much of the post-Reformation history of law and religion in England as a move from near absolute identification of the Church of England with the State, through gradual toleration of an increasing number of dissident communities, towards a position where the State seeks to adopt some form of neutral stance to a wide range of religions within the jurisdiction.

Modern European states, even those with State Churches, do not at first glance seem to be committed to the legal enforcement of orthodoxy in the same way as the early English state. If, however, we shift our focus from metaphysical doctrines, such as the existence and characteristics of God, to philosophical and social values, a commitment to orthodoxy soon appears. Some tenets of this orthodox creed include: everyone has the right to life, so that it is wrong to take human life except in very narrow circumstances; everyone has the absolute right to be free from torture; everyone has the right to a private life, subject to restrictions justified by specific reference to other interests; everyone has the right to express themselves freely, again subject to specific restrictions. The key textual sources for this creed are, of course, the texts of modern international human rights law from United Nations documents such as the UDHR and ICCPR, to the restatement of these grand principles in regional instruments such as the ECHR. As with many religious documents, the initial texts are brief, and leave much unsaid. But we are able to have recourse to the opinions of scholars on their meaning and, increasingly, the interpretation of the texts by authoritative national, regional, and international determinative bodies.

It is difficult to imagine a modern European state using state power in support of metaphysical doctrines and values – for instance by punishing denial of transubstantiation; or forbidding autonomous conversion from 'true religion' to 'error'. It is, however, difficult to imagine a modern European state choosing not to support the values of the human rights creed outlined above. Indeed, failure to do so can result in liability in international law under both the global documents and – more tellingly for a region engaged in a broader unification project – under the ECHR. The question then is not whether modern European states can use state power to enforce orthodoxy, as they clearly can and do, but rather how far the states enforcement of the human rights creed itself requires abstinence from the use of state power in some circumstances. To draw an analogy from the Islamic heritage of Europe, let us consider for a moment the status of dhimmi.[1] This provided for a limited form of protection for some non-Islamic minorities within Islamic states. The position of these communities was itself derived from Islamic law, rather than from some other source which served to restrict the full reach of Islamic law. The dhimmi system did not constitute a limit on Islamic law, but was rather an expression of it. To return to the central theme, how far does a proper working out of human rights thinking require the state to allow the functioning of communities which are, prima facie, not in communion with the broader human rights community?

That is the central concern of this paper. It is too early in this research project to provide even an outline answer to this difficult question. Instead, I seek to outline my thinking on a perspective which may provide a fruitful line on inquiry. I begin by considering three established ideas of the right of exit in relation to human rights and religion. The three areas to be discussed are the right to exit a workplace, the right to exit a religious community, and the right of such a community to exit a jurisdiction. I develop discussion in these three areas through illustrative use of jurisprudence and critical debate from the European Union, and in particular the United

[1] For a recent reflection on this status, see D Gartenstein-Ross, "No other Gods before me: Spheres of influence in the relationship between Christianity and Islam", (2005) 33 Denver Journal of International Law and Policy 223.

Kingdom, and from the United States, particular at the federal level. I then draw upon this discussion to outline the idea of the right to exit liberal society as a fundamental religious right.

Three Instances of the Right to Exit in a Religious Context

A common problem arises when an individual employee is faced with a conflict between their religious beliefs and practices and their workplace obligations to their employer. Much of the litigation resolves around the issue of working hours, rather than other obligations.[2] If the general requirement of the workplace is that all employees work on Saturday, but an employee has a religious objection to working on Saturday, how is this dispute to be resolved? One way to resolve the dispute is to put the emphasis on negotiation between the employee and their employer. In many cases, no doubt, this negotiation can resolve the tension between religious and employment commitments in a way both parties can live with. But ultimately, by this view, if it is not possible to negotiate an arrangement that allows the employee to balance their twin commitments, the employer is under no obligation to accept an arrangement with which they are unhappy, simply to allow the employee to preserve their religious practices while remaining an employee. When negotiations have failed it is for the employee to decide whether to meet their workplace obligations at the expense of their religious ones, or vice versa.

There are two ways to present this in a positive light. One is to emphasise this moment of decision as itself an exercise of the rights of an autonomous human being. In Adair v US,[3] for instance, the US Congress had passed a measure which made it a criminal offense for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labour organisation. Harlan J, delivering the opinion of the Court, saw the legislation as:

> "an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of ones own labour; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good."[4]

Another is to focus on the possibility that an employee will choose to prioritise their religious practices and leave their incompatible employment, and to see this possibility as an exercise of religious rights. We can see this in the ECHR system, where a number of decisions of ECHR organs have seen the right to leave incompatible employment as the ultimate guarantee of an employees religious liberty.[5] Many of these cases have arisen in the context of state churches, where the government employee faced with a conflict between workplace obligations and religious beliefs is in a peculiarly religious workplace. In Knudsen v Norway, for instance,[6] the Commission was required to consider the application of a vicar of the Norwegian State Church who had been dismissed from his job, but permitted to continue carrying out religious functions, although not as a State employee. The vicar had refused to carry out what he described as "the State's part of his office" as a protest against domestic abortion law. The Commission first noted that a right to hold office in the Norwegian State Church or otherwise was not as such guaranteed under the Convention, but accepted that in certain circumstances dismissal of a disobedient State employee could raise an issue under the Article. One of the grounds upon which the Commission rejected the vicar's application was that:

> "If the requirements imposed upon him by the State should be in conflict with his convictions, he is free to relinquish his office as clergyman within the State Church, and

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[2] See Andrew M. Campbell, 'Annotation: What constitutes employer's reasonable accommodation of employee's religious preferences under Title VII of Civil Rights Act of 1964', (ALR Federal, 2004).
[3] Adair v US, 208 US 161 (1908) SCt.
[4] Ibid, at 172.
[5] See further T. J. Gunn, "Adjudicating rights of conscience under the European Convention on Human Rights" in J.D. van Vyver and J. Witte, Religious Human Rights in Global Perspectives : Legal Perspectives, (Kluwer, 1996) 305, at 315.
[6] Knudsen v Norway (1986) 8 EHRR 48 (Eur.Cm.H.Rts.).

> the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience, and religion".

Other cases endorsed the view that the ultimate safeguard for a cleric's religious freedom was their ability to leave their church, and the idea was extended to religious organisations in Hautanemi and Others v Sweden.[7] Here, the applicants complained that use of a particular liturgy had been forbidden in the applicant parish. The Commission found that the parish had the ability to claim Article 9 rights as an association with religious aims acting on behalf of its individual members, and went on:

> "The prohibition was thus aimed at providing rules for the liturgy used in Finnish-speaking parishes belonging to the Church of Sweden. It has not been established that the applicant parish would be prevented from leaving the Church of Sweden if it were unable to accept the liturgy of that Church".

Although the clergy cases can be read narrowly, ECHR organs have shown a willingness to extend this idea - of freedom to leave employment as freedom of religion - to non-religious situations. In Ahmad v United Kingdom,[8] which concerned a clash between a school teacher's working hours and their religious obligations, one ground for the Commission rejecting the applicants claim was that he had given up his claim for exemption from the normal working hours when he "freely accepted employment which could have resulted in conflict with his religious obligations".[9] In Kontinnen v Finland,[10] the applicant was an employee of the State railway who sought to refrain from working during normal hours, as a religious practice. He was disciplined, persisted in this practice, and was eventually dismissed after his employer was unable to redeploy him to a post which would not involve the conflict. The Commission accepted that public servants may be able to base a Convention claim on dismissal from their posts, but rejected this application on a number of grounds, including that: "having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion".[11]

We should not be misled by the reference to 'ultimate' in these excerpts. In the generic workplace, the ECHR treats the right to exit the workplace as the only guarantee of the individuals freedom of religion.[12] This is hardly unique to religious rights. The ECHR contains a specific provision dealing with the right to choose employment. Article 4 provides that no one shall be held in slavery or servitude, or be required to perform forced or compulsory labour. In effect, then, the religious rights clauses of the ECHR add little to the human rights of the employee qua employee.

Key legal systems have gone beyond the right to exit by introducing a legal right to accommodation of religious practices in the workplace. That is, the right of some employees to insist that their religious interests be taken into account by providing special treatment within the workplace. I will briefly consider two key jurisdictions: the United States at the federal level, and the European Union at Union level and as articulated in UK law.

The US Constitution includes a significant constitutional guarantee to ensure that 'no religious test shall ever be required as a qualification to any office or public Trust under the United States'.[13] A particularly influential strand in the adoption of this clause was that of equality

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[7] Hautanemi and Others v Sweden (1996) 22 EHRR CD155 (Eur.Cm.H.Rts.).
[8] Ahmad v United Kingdom (1981) 4 EHRR 123 (Eur.Cm.H.Rts.).
[9] S. Stavros, "Freedom of religion and claims for exemption from generally applicable, neutral laws: Lessons from across the pond?", (1997) European Human Rights Law Review 6, 607 at 616.
[10] Konttninen v Finland (1996) 87 Decisions and Reports, 68 (Eur.Cm.H.Rts.).
[11] Ibid, para.1. See also Stedman v United Kingdom, op.cit; Kostetski v The Former Yugoslav Republic of Macedonia (2006) HUDOC (Eur.Ct.H.Rts, Chamber).
[12] More ambitious decisions have involved special workplaces – see Buscarini and Others v San Marino (1999) HUDOC (Eur.Ct.H.Rts., Grand Chamber); Larissis and Others v Greece (1998) 27 EHRR 329 (European Court of Human Rights (Chamber)).
[13] US Constitution, article VI, clause 3.

between diverse religions – the prohibition on religious tests put all sects on a level with regard to the federal government, and allowed all citizens to be eligible for federal office.[14] The Constitution, even after the adoption of the Bill of Rights including the First Amendment, did not however address the issue of religious difference in the private, or even the state, workplace. Neither did it explicitly empower the federal legislature, the Congress, to legislate in this area.

Authority for the principal legislation in this area has been grounded, and not without contention,[15] in the express power of Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'.[16] The most significant legislation for our purposes is the Civil Rights Act 1964, most significantly in Title VII. Title VII prohibits discrimination on the grounds of race, color, religion, sex or national origin by private or public employers with 15 or more workers, and as amended includes an important requirement of reasonable accommodation of religious practices. As originally enacted, Title VII did not explicitly create a duty of accommodation. In 1966 the EEOC, the most important federal body working in this area, interpreted Title VII to require an employer to accommodate religious practices if it did not cause a 'serious inconvenience to the conduct of their business'. A year later the EEOC required less from an employer, with the amended guidelines requiring accommodation if it did not impose an 'undue hardship on their business'. The legitimacy of this interpretation of the existing legislation was doubted by the courts,[17] and in 1972 Congress amended Title VII to include the duty to accommodate.[18]

The duty to accommodate arises at the point where an employee fulfils his or her preliminary obligation to disclose the religious need, but the employer cannot avoid the duty to accommodate by simply avoiding hiring adherents of a given religion. Accommodation can, however, be refused and 'any legitimate business reason will suffice as long as it is not a pretext for discriminatory conduct'.[19] The duty is not very onerous,[20] and one commentator has seen judicial interpretation of the duty as having 'essentially relieved the secular employer of its statutory duty to reasonably accommodate the religious employee'.[21] Nonetheless, this federal law makes it clear that, within those workplaces covered by Title VII, the right to exit is not the only religious right. Instead, there is a right to insist upon reasonable accommodation in order to resolve the conflict between religious and workplace commitments. Some employees have been successful in making use of this law to force workplace change, rather than exercise their right to exit.[22]

Moving closer to home, the 2000 framework Directive,[23] extended the EU antidiscrimination regimes to 'direct or indirect discrimination based on religion or belief, age or sexual orientation'.[24] In relation to religious discrimination, the Directive does not require employment or continued employment of persons unable or unwilling to perform the essential functions of the post concerned.[25] Although there is a reference to reasonable accommodation in relation to disability, the Directive contains no such reference in relation to religion.

Nonetheless, the Directive lacks the defining detail and power of the analogous federal

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[14] Witte, ACE, 49.
[15] Contrast Hammer v Dagenhart, 247 US 251 (1918) SCt; United States v Darby, 312 US 100 (1940) SCt; Wickard, Secretary of Agriculture et al v Fulbum, 317 US 111 (1942) SCt.
[16] US Constitution, Article I, section 8.
[17] See Dewey v Reynolds Metal Co., 402 US 689 (1971) S.Ct.
[18] Civil Rights Act of 1964, Title VII, s.701(j). See also s.703, 717.
[19] Michael S. Ariens and Robert A. Destro, 'Religious liberty in a pluralistic society', Durham NC, Carolina Academic Press, 1996 at 650.
[20] See Trans World Airlines Inc v Hardison et al, 432 US 63 (1976) SCt.
[21] David L Gregory, 'Government regulation of religion through labor and employment discrimination laws' in James E Wood and Derek Davis (eds), The role of government in monitoring and regulating religion in public life, Waco, J.M. Dawson Institute, 1993 at 128-9.
[22] For instance EEOC v Ilona of Hungary, 108 F.3d. 1569 (7th Circ, 1997).
[23] Council Directive 2000/78/EC.
[24] Ibid, at (12).
[25] Ibid, at (17).

legislation, and instead lays out the goals of national legislation. In the legislation which seeks to partly meet UK obligations under the Directive,[26] there are two provisions which reflect the core idea of a right to reasonable accommodation. The general provision defines discrimination to include generally applicable employment requirements which put persons of the claimants religion at a particular disadvantage, puts the claimant at that disadvantage, and which cannot be shown to be a proportionate means of achieving a legitimate aim.[27] Although the language of reasonable accommodation is not used, it is clear that reasonable accommodation is the reverse of applying a general requirement which is disproportionate or directed at a legitimate aim. We can see this through the specific provision of the legislation which states that requiring a Sikh to wear a safety helmet instead of their religiously mandated turban on a construction site is a requirement that 'shall be taken to be one which cannot be shown to be a proportionate means of achieving a legitimate aim'.[28]

To summarise, we have seen that the ECHR, as an example of human rights law, relies upon the right to exit – the right to be free of involuntary labour commitments – as not only the ultimate but almost the only safeguard for religious rights in the generic workplace. This approach is so minimalistic that it is perhaps unsurprising to see law derived from a different source used to require reasonable accommodation of religion in the workplace. For the employee, the right to exit has never been challenged as necessary; but is no longer seen as sufficient.

We may be seeing a similar evolution in thinking concerning the right to exit from a religious community. Membership of a religious community may come into conflict with the religious beliefs and practices of an individual. The most obvious example is where an individual has ceased to share the core beliefs of that community, and no longer wishes to identify with it. In such an instance, human rights law seeks to protect the right of the individual to cease to be a member of that community, and perhaps to join another. The ICCPR provides: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[29] The Declaration on the Elimination of All Forms of Intolerance and of Discrimniation Based on Religion or Belief 1981,[30] contains an identical guarantee.[31] Although the wording of these guarantees do not explicitly refer to the changing of religion, it would seem implicit in the reference to adopting a religion or belief.[32] It may be that the lack of an explicit guarantee here is in part because of tensions arising where a religious tradition does not incorporate such a broad freedom for members to dissociate themselves from it.[33]

Turning to the European Convention, Article 9(1) provides that the right of freedom of thought, conscience and religion "includes freedom to change his religion or belief".[34] Cases on change of religious affiliation under the Convention have tended to cluster around issues raised by proselytism. The Article "affords protection against indoctrination of religion by the State",[35] and can also require the State to protect the individual against such indoctrination by third parties.[36] Not every effort to bring about change in religious belief, and hence affiliation, engages this duty. The State may take action "to protect a person's religious beliefs and dignity from attempts to influence them by immoral and deceitful means", or other forms of "improper proselytism".[37] In the first case to develop this idea, the Court found that the conduct which the

[26] Employment Equality (Religion or Belief) Regulations 2003.
[27] Ibid, s.3.
[28] Ibid, s.26(1).
[29] ICCPR Article 18(2).
[30] Hereafter the 1981 Declaration.
[31] 1981 Declaration Article 1(2).
[32] Human Rights Committee, General Comments 22, para.5.
[33] Consider D.E. Arzt, "Heroes or heretics: Religious dissidents under Islamic Law", (1996) 14(2) Wisconsin International Law Journal 349.
[34] ECHR Article 9(1).
[35] Angelini v Sweden (1988) 10 EHRR 123 (Eur.Cm.H.Rts.)
[36] Kokkinakis v Greece (1994) 17 E.H.R.R. 397 (Eur.Ct.H.Rts.); Otto-Preminger-Institut v Austria (1994) 19 EHRR 34 (Eur.Ct.H.Rts.)
[37] Kokkinakis v Greece.

State sought to restrict did not constitute improper proselytism,[38] but in a later case the court upheld restrictions on proselytism by officers in the military on the basis that the hierarchical structures of military life made it difficult for a subordinate to rebuff the approaches of a ranking officer so that "what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power."[39]

The ECHR has thus been found to offer protection to the maintenance of current religious beliefs and affiliations against improper pressure from others, and it would seem only logical that this protection would also protect the adoption and maintenance of new religious beliefs and affiliations against such improper pressure. This would include, at the minimum, the right to leave the former religious community.

The right to leave a religious community is seen by many commentators as essential to the human rights of members of that community. It is often stressed that this must be a meaningful rather than a formal right. As Spinner-Halev puts it, this can carry with it implications of 'freedom from physical abuse, decent health care and nutrition, the ability to socialize with others, a minimum education … and a mainstream liberal society'.[40] As with the development of workplace law discussed above, however, some authors are now arguing that, while they do not oppose a right to exit as necessary for individual liberty, they do not consider it as sufficient to preserve the rights of the autonomous human being.[41]

So far, we have been concerned with exercise a right to exit by the individual – the key holder of human rights. Human rights regimes recognize, however, that the holder of human rights is embedded within relationships with other human beings, and that sometimes protection of the rights of an organization or community constitute a sound way of protecting the rights of individuals. This is true even of associations which do not exist to assist in the exercise of particular human rights – for instance even an association to support a football team engages the human rights of its members in relation to their right to association. Some associations, however, exist to allow the exercise of other human rights, and protection of these associations can be vital to the protection of the human rights of their members.[42] Taking a US example, in the key decision of Boy Scouts of America et al v Dale,[43] the Boy Scouts were a private, not-for-profit organization engaged in instilling its system of values in young people. It asserted that homosexual conduct was inconsistent with these values. Dale was an assistant scoutmaster who lost his position when the Boy Scouts learnt that he was an avowed homosexual and gay rights activist. He alleged discrimination under the state public accommodation law by the Boy Scouts on the grounds of sexual orientation. The State Supreme Court agreed – in particular they held that the application of the law did not violate the Boy Scouts right of expressive association as his inclusion did not significantly affect their members' ability to carry out their purposes. The Supreme Court disagreed, and found that to require the Boy Scouts to reinstate Dale would violate their First Amendment right of expressive association.

Here, the key question concerns conflict between a collective – which for ease of exposition we will consider to be a religious organisation – and the broader state. How should this conflict be resolved?

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[38] Kokkinakis v Greece.
[39] Larissis and Others v Greece (1998) 27 EHRR 329 (European Court of Human Rights (Chamber)) para. 51.
[40] J Spinner-Halev, 'Autonomy, association and pluralism', in Avigail Eisenberg and Jeff Spinner-Halev (ed), Minorities within minorities: Equality, rights and diversity, Cambridge CUP, 2005 at 161.
[41] C Chambers, 'All must have prizes: The liberal case for interference in cultural practices', in P. Kelly (ed.), Multiculturalism reconsidered: Culture and Equality and its critics, Cambridge, Polity Press, 2002.
[42] Roberts, Acting Commissioner, Minnesota Department of Human Rights et al v United States Jaycees, 468 US 709 (1983) SCt; New York State Club Association Inc v City of New York et al, 487 US 1 (1987) SCt..
[43] Boy Scouts of America v Dale, 530 US 640 (1999) SCt.

In his masterly ongoing discussion of religious liberty in the United States, Witte identifies one early strategy for resolution. He sees early State action as a balance of "the general freedom of all private religions with the general patronage of one common public religion – increasingly relying on the frontier as a release valve for the tensions between this private religious freedom and public religious patronage".[44] The existence of the frontier was key to this balance – minority religious communities who could not tolerate restrictions upon their religious practice by the majority community, or accept the preeminence of the public religion, moved "sometimes at gunpoint, to establish their own communities on the frontier"[45]. As America became more pluralized, and the frontier more populated, this balance became increasingly difficult to maintain, and state authorities began to clamp down on dissidents who would not, or could not, exercise their right to emigrate.

This may be illustrated through a brief discussion of the position of the Church of Jesus Christ of the Latter Day Saints (hereafter the LDS). After the organization of the LDS in New York in 1830 there were a rapid succession of moves, including following violence and murder against members, culminating in members of the LDS beginning to move west in 1846, eventually settling the Salt Lake region. Physical removal from areas where LDS beliefs and practices were not tolerated became impractical, and the LDS came under increasing control as the US consolidated its territorial reach. The teachings and practices of the early LDS had considerable potential to lead to conflict, including as they did 'theocracy, anti-capitalist economic experiments, and participation in politics as a church'.[46] The flash point proved to be polygamy.[47] In a trio of cases in the late 19th century the Supreme Court upheld government action intended to restrict the practice and preaching of polygamy by the LDS – upholding a criminal conviction for bigamy,[48] another for a conviction for false swearing of an oath renouncing polygamy which was required of all electors,[49] and the third concerning the government's dissolution of the LDS Church's corporate charter and confiscation of its property.[50] In October 1890 the general conference of the LDS ended the practice of plural marriage, and established a better relationship with the federal authorities.

There are serious theoretical problems with requiring members of a minority religious community to relocate in order to be true to their religion and beliefs, not least in the light of ethnic cleansing. They need not detain us today however, given that my focus is upon religious communities whose values are incompatible with international human rights. The reach of international human rights is global and, as the rights are derived by virtue of human status may not be subject even to that territorial limit. Even if it is legitimate to require a religious community to physically exit a jurisdiction to protect their religious beliefs and practices, there is no meaningful way in which this act can be exercised against the global human rights creed under consideration.

The right to juridical exit as an exercise of human rights?

Our discussion so far has indicated the importance of the right to exit for an individual faced with a conflict between their religious beliefs and practices and the requirements of a larger community, whether workplace or religious. In relation to the workplace, this right has increasingly been seen as necessary, but not sufficient, to protect religious liberty. Whether this is also the case for the religious community remains hotly contested, but at least some argument

[44] Witte, ACE, 117.
[45] Witte, ACE, 119.
[46] C.L.Harper and B.F. Le Beau, "The social adaptation of marginal religious movements in America", (1993) 54(2) Sociology of Religion 171.
[47] See further J.L. Clayton, 'The Supreme Court, Polygamy and the enforcement of morals in Nineteenth Century America: An Analysi of Reynols v United States', (1979) 12 Dialogue 46; C Wiesbrod, 'The law and reconstituted Christianity: The case of the Mormons', in J McLaren and H Coward (eds.), Religious conscience, the State and the Law: Historical contexts and contemporary significance, State University of New York Press, Albany, 1999.
[48] Reynolds v US, 98 US 145 (1878) SCt.
[49] Davis v Beason, 133 US 333 (1890) SCt.
[50] Mormon Church v US, 136 U.S. 1 (1890) SCt.

can be made that "in fact, the freedom of a employee to leave a discriminatory employer is far greater than is the freedom to leave of a member of a culture or religious group", and so the insufficiency of the exit right is even clearer in this context.[51] We then briefly considered the idea of community exit, and outlined the disappearance of an effective right to physical exit with the growth of international human rights law.

With the loss of physical exit as a practical possibility, one possibility might be to retire exit as a possible solution to conflict between the values of the community and the legal order. But, if I may draw an analogy with the individual examples given earlier, we would not see physical exit as the only exit right entitled to protection. To take an example from the workplace, if a home worker was required to work on a religious holiday and unable to terminate the employment relationship in order to prioritise their religious commitments, we would regard this as a violation of the exit right. Similarly, from the religious community, if a member of the community were allowed to leave the physical place of worship for the community, or the locale in which the community is settled, but remained subject to legal pressure to continue to pay for the upkeep of that community, and was required to enter their former community identity in the national census, would we not see this as implicating their exit right? When we refer to individuals, we use exit in a multiple sense, going well beyond physical relocation. I would suggest that this should also apply to community exit.

The seeds of this approach can already be found in one area of Anglo-American law, that of discrimination in the workplace. In enacting Title VII, Congress provided a special exemption for religious organizations from obligations concerning religious discrimination.[52] No explicit exemption was provided for other grounds, for instance race. Similarly, in the UK the early non-discrimination regime provided a special exemption for religious organizations in relation to discrimination on the grounds of sex,[53] but not on the grounds of race. In both jurisdictions, however, the courts were prepared to craft a more broadly based exception which allows religious organisations to exit from the regime of employment law in relation to their clergy. In the United States this ministerial exemption is derived principally from the constitutional concern to avoid excessive entanglement of church and state,[54] but in the UK it was based upon the absence of an intention by the parties that the state should be involved in determining the content of their relationship.[55] If the parties were willing for the state to be involved in the relationship, however, it was possible even for a clerical relationship to be governed by contract law, and hence employment law.[56]

Developing a coherent idea of juridical exit for religious communities is unlikely to be straightforward. Nonetheless, it seems to me that it allows use, in a principled way, of the growing literature on the right to exit from a religious community. This literature are has already begun to engage with key issues such as how we evaluate when the opportunity to exit is a meaningful one; the benefits which membership in a community carry; the causal connection of membership and self-respect; and when exit is not a sufficient right, but rather continued membership of the community should be guaranteed, even if it compels change within the community itself. All of these issues arise in relation to the approach I have outlined here.

Although I think that the idea of community juridical exit may prove a fruitful avenue to approach the problem of clashing religious and human rights values, I need to make it clear that

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[51] Chambers, op.cit., at 163.
[52] See Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints et al v Amos et al, 483 US 327 (1986) SCt.
[53] Sex Discrimination Act 1975 s.19 (UK).
[54] See McClure v The Salvation Army, 460 F.2d. 553 (1972, 5th Circuit).
[55] As demonstrated by a pair of cases concerning the Salvation Army –; Rogers v Booth [1937] 2 All ER 751 (CA).
[56] Consider Percy v Church of Scotland Board of National Mission, [2005] UKHL 73. For a review of the earlier cases, see P.W. Edge, "The employment of religious adherents by religious organisations", in P.W. Edge and G. Harvey (eds.), Law and Religion in Contemporary Society: Communities, Individualism, and the State, (London: Ashgate Press, 2000).

this right to exit, as for the individual in the workplace, is not sufficient to protect religious liberty. There are two significant ways in which the right to exit is insufficient. Firstly, it places the focus squarely on the particular community involved in a distinct transaction, rather than as a religious group in a broader social context. The efficacy of the right to leave seems weaker when we consider a pattern of such choices. Consider, for instance, a requirement that all bidders for public funding to support education were required to teach that religion was a purely private matter of taste. Secondly, religious communities may be placed in a position where choosing between their religious beliefs and involvement with the legal order in a way which is not simply a hard choice, but so hard a choice as to be unacceptable in a plural democracy.

Conclusions

I have deliberately not sought to engage with key authors such as Kymlicka, Barry, and Parekh, in this paper. Instead, I have sought to suggest that such an engagement is relevant not just to the question of how far religious communities should be required to accept human rights values, but how far legal orders looking to human rights should be required, by those very rights, to tolerate the values and practices of such religious communities.