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Religious Freedom and Religious Antidiscrimination

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This article develops a theoretical framework that prompts a new understanding of the role of religious freedom and religious antidiscrimination in human rights law. The analysis proceeds from the prevailing theoretical and doctrinal uncertainty over the relationship between the two rights, which are currently seen as either synonymous or as distinct and in competition. The article develops an account of the moral right to ethical independence and argues that religious freedom and religious antidiscrimination share their main normative basis on that moral right. It is argued that the emphasis of religious freedom and religious antidiscrimination is different though, and that both rights are essential to secure fair background circumstances for the pursuit of different individual plans of life. The proposed framework illuminates the relationship of individual and collective aspects of religious freedom with discrimination law. The analysis has crucial implications for human rights interpretation in cases involving state interference with liberty, not only in relation to religion or belief, but more broadly.

Keywords: ethical independence; freedom of religion; human rights; liberty; religious discrimination

INTRODUCTION

What is the relationship between the right to freedom of religion or belief and the prohibition of discrimination on grounds of religion or belief? The interest of this article in this question arises from a pressing uncertainty over the purpose of the two different provisions and their role in legal practice.[1] In a wide range of recent cases involving, among others, employees prevented from wearing a cross[2] or a headscarf in the workplace,[3] states banning full-face veils in public,[4] and the dismissal of a doctor in a Catholic hospital because he divorced his wife and remarried,[5] the right to freedom of religion and the prohibition of religious discrimination seem to play a similar role before the courts. The academic scholarship, however, currently does not account for why this is the case. It is often assumed that religious freedom and religious anti-discrimination furnish two rival legal approaches to cases of accommodation of conscience; a human rights or 'restrictions' approach, based on freedom of religion or belief, and a discrimination or 'equality' approach, based on antidiscrimination law.[6] Some scholars argue

[1] See eg M. Mitchell, K. Beninger, A. Donald and E. Howard, *Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence* (Equality and Human Rights Commission, March 2015) 11-14.

[2] *Eweida and Others v United Kingdom*, Application nos. 48420/10, 36516/10, 51671/10 and 36516/10, 15 January 2013 at [51].

[3] See eg Opinion of Advocate General Kokott, Case C-157/15, *Achbita v G4S Secure Solutions NV* EU:C:2017:203, [2017] 3 WLUK 334, at [54]; Opinion of Advocate General Sharpston, Case C-188/15: *Asma Bougnaoui, Association de Defense des Droits de l'Homme (ADDH) v Micropole Univers SA*, ECLI: EU:C:2017:204, [2017] ICR 139 at [45]-[47].

[4] See *Belcacemi and Oussar v Belgium*, Application no. 37798/13, 11 July 2017 at [64]-[68]; *S.A.S. v France*, Application no. 43835/11, 1 July 2014 (Grand Chamber) at [79]-[80].

[5] Opinion of Advocate General Wathelet, Case C-68/17, *IR v JQ* EU:C:2018:696 [2018] 9 WLUK 84 at [58]-[62].

[6] See eg Opinion of AG Sharpston, *Bougnaoui v Micropole*, n 3 above, [58]-[67]; R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) MLR 223, 225-228;

that religious freedom and religious antidiscrimination share the aim to protect religion or belief,[7] whereas others claim that they serve distinct or even conflicting purposes.[8] This persistent theoretical uncertainty over the purpose of the two legal rights and the relationship between them has been vigorously criticised. One reason is that it deprives legal practice from clear answers to practical questions about how different provisions protect individual conscience.[9] Another reason is that it often leads the courts to dissolve the two provisions into each other, which can blunt the progressive potential of discrimination law[10] – especially at times when that potential is ever so important. Those are critical issues that require in-depth engagement with the rationale(s) underlying the two legal rights, which remain curiously underexplored in human rights theory.[11]

With the above context in mind, this article aims to identify the normative ground of religious freedom and religious antidiscrimination, and outline their role and relationship. To achieve this aim, this article develops a new theoretical framework that clarifies the purpose of the two separate provisions and their distinct contributions to legal practice. More specifically, the article advances two main arguments. Firstly, it identifies the moral right to ethical independence as the main normative ground of religious freedom and religious anti-discrimination.[12] It is argued that ethical independence protects each person's freedom to form and pursue their own ethical or religious commitments. Crucially, ethical independence does not privilege any religious or ethical commitments as such. Its aim is to secure fair background conditions for the compossible pursuit of different and conflicting plans of life. Thus, the focus of ethical independence is on the legitimacy of state interference with liberty, which can be limited only for some reasons (e.g. to protect others from harm) and not for others (e.g. due to majority bias). It is posited that those features of ethical independence distinguish it from prominent interpretations of personal autonomy and freedom of choice, and that those differences have important implications for human rights practice.

I. Leigh and R. Ahdar, 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75(6) MLR 1064, 1095-1097.

[7] See D. Schiek, 'On Uses, Mis-uses and Non-uses of Intersectionality before the Court of Justice (EU)' (2018) 18(2-3) *International Journal of Discrimination and the Law* 82, 93-96; A. McColgan, *Discrimination, Equality and the Law* (Oxford: Hart, 2014) 66-69.

[8] See R. McCrea, 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us About Religious Freedom, Non-Discrimination, and the Secular State' (2016) 5(2) OJLR 183; E. Brems and L. Peroni 'Religion and Human Rights: Deconstructing and Navigating Tensions', in S. Ferrari (ed), *Routledge Handbook of Law and Religion* (Abingdon: Routledge, 2015) 145-159.

[9] C. McCrudden, 'Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights', in S. Mancini and M. Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge: CUP, 2018) 414-463.

[10] L. Vickers, '*Achbita* and *Bougnaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' [2017] *European Labour Law Journal* 1.

[11] Exceptions include R. McCrea, 'Squaring the Circle: Can an Egalitarian and Individualistic Conception of Freedom of Religion or Belief Co-exist with the Notion of Indirect Discrimination?', in H. Collins and T. Khaitan (eds), *Foundations of Indirect Discrimination Law* (Oxford: Hart, 2018) 149-171; L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2016) 29-44.

[12] The concept of ethical independence appears in Ronald Dworkin's work, but remains underexplored in human rights theory. Although this article cannot defend ethical independence in the abstract, its second section does discuss some of its differences from certain interpretations of autonomy and freedom of choice. See R. Dworkin, *Religion without God* (Cambridge, MA: HUP, 2013); R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: HUP, 2011) 191-219; C. Laborde, *Liberalism's Religion* (Cambridge, MA: HUP, 2017) 197-238.

Secondly, it is argued that ethical independence maps into the legal rights to religious freedom and religious antidiscrimination, which institutionally, albeit imperfectly, specify it. But although religious freedom and religious antidiscrimination share their main normative ground, their emphasis is different. Schematically, the emphasis of freedom of religion or belief is *vertical*; it identifies ethical independence as an important capability in each person and protects it in our dealings with the state and each other. This vertical emphasis is crucial to illustrate why conceptions of equality or fairness that treat everyone's beliefs as equally inconsequential or as a matter of no concern are implausible. On the other hand, the emphasis of religious antidiscrimination is *horizontal*; it aims to secure fair background conditions for ethical independence through addressing patterns of group disadvantage that erode the ability of people to pursue their religious or ethical commitments. Its emphasis is horizontal also because the overall aim of religious antidiscrimination requires reaching beyond individual conscience and taking into account the interaction between different prohibited grounds of discrimination in order to enrich our understanding of wrongful disadvantage in this context.

This article's account is a major theoretical advance on the prevailing interpretations of religious freedom and religious antidiscrimination in legal scholarship, where typically the two rights are portrayed as either synonymous or as distinct and in competition. In a wide range of cases, the proposed account elucidates the specific ways that the two rights complement each other in order to address individual and group disadvantage on grounds of religion or belief. Crucially, the proposed account also clarifies how the courts resolve tensions between religious freedom and religious antidiscrimination, such as those arising whenever belief organisations, based on their right to freedom of religion read in the light of freedom of association, claim exemptions from antidiscrimination law. It is argued that the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) assess the compatibility of different interpretations of freedom of association and freedom of choice with the shared normative ground of the two rights in order to resolve such tensions between them.

Parts of the following discussion refer to cases from the UK courts, the CJEU and the ECtHR. Nevertheless, the overarching theoretical argument is responsive to the broadly similar structure of human rights and antidiscrimination laws across several different legal orders. This article's account can thus apply to any legal context that protects the right to freedom of religion or belief and also prohibits wrongful discrimination on grounds of religion or belief.

The discussion unfolds in four substantive sections. The first section highlights some pressing yet unresolved questions about the purpose and role of religious freedom and religious antidiscrimination, which require engagement with the normative ground of the two rights. In response to that, the second and third sections of the article offer an interpretation of religious freedom and religious antidiscrimination as two complementary parts of a nexus of legal rights that share their main normative ground on ethical independence. More specifically, the second substantive section of the article outlines the moral right to ethical independence and pursues its links with personal autonomy and freedom of choice. The third section explains why religious freedom and religious antidiscrimination share their main ground on ethical independence and analyses their distinct roles and relationship. The final substantive section argues that identifying the shared normative ground of religious freedom and religious anti-discrimination, as well as their distinct emphasis, matters to legal practice in an additional way: it clarifies how the courts can resolve tensions between them.

RELIGIOUS FREEDOM AND RELIGIOUS ANTIDISCRIMINATION: AN UNCERTAIN RELATIONSHIP

The academic scholarship on the relationship between religious freedom and religious anti-discrimination currently meanders uneasily between two paths. Some argue that religious freedom and religious antidiscrimination serve the common purpose to protect religion or belief as an individual and collective form of identity.[13] On that account, religious antidiscrimination is sometimes described as only 'auxiliary' to the substantive right to freedom of religion.[14] That interpretation of the two rights suggests that there is hardly anything that they add to each other; they come across as largely synonymous. Others maintain that religious freedom and religious antidiscrimination serve distinct purposes that must not be conflated.[15] They argue that their main difference is that religious freedom aims to protect individuals from disadvantage on grounds of religion or belief, whereas the prohibition of wrongful religious discrimination is concerned with disadvantage against groups.[16] Those different purposes, it is argued, are incompatible and create tensions between the two rights. On the one hand, from the perspective of European human rights law, the 'individualistic' interpretation of religious freedom in case-law under the ECHR clashes with the 'collective' approach to antidiscrimination under EU law.[17] On the other hand, the focus of antidiscrimination on group disadvantage can undermine the protection of individual conscience under religious freedom and promote a 'sectarian' approach offering greater protection to established forms of belief.[18] Despite their prevalence, both those polar opposite positions, which interpret religious freedom and religious anti-discrimination as either synonymous or as distinct and in competition, are unsatisfactory as they leave pressing questions about the purpose and role of the two provisions unresolved.

The third substantive section of this article will flesh out the reasons why the two legal rights are not synonymous. Meanwhile, the rest of this section will highlight some problems with the argument that religious freedom and religious antidiscrimination can be sharply distinguished based on the fact that the first aims to eliminate individual disadvantage and the second aims at a special form of disadvantage that people can only experience as members of identifiable groups. The problem with that interpretation is that it cannot fully capture the deep normative links between the two rights. Religion (or conscience more broadly) cannot be free if wrongful religious discrimination lingers in education or the workplace. In fact, the role and function of the two rights under European human rights law reflect the deep normative links between them. Indeed, important parts of the existing case-law under the European Convention

[13] McColgan (2014), n 7 above, 66-69.
[14] Schiek (2018), n 7 above, 93-96; D. Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 427, 445.
[15] See eg McCrea (2016), n 8 above; Brems and Peroni (2015), n 8 above, 145-159; M. Malik, *'From Conflict to Cohesion': Competing Interests in Equality Law and Policy* (Equality and Diversity Forum, 2008) 13-20.
[16] McCrea (2018), n 11 above, 149-171; J. Ringelheim, 'Religion, Diversity and the Workplace: What Role for the Law?', in K. Alidadi, M.C. Foblets and J. Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Surrey: Ashgate, 2012) 335-359.
[17] Vickers (2017), n 10 above, 18-25.
[18] McCrea (2018), n 11 above, 155-157.

on Human Rights (ECHR) demonstrate that both rights are concerned with the amelioration of wrongful disadvantage on grounds of religion or belief. This is so regardless of whether the disadvantage in question emerges as an individual wrong or as a pervasive advantage gap between belief groups or as both. Two specific sets of examples can illustrate this point.

Firstly, in a consistent line of cases the ECtHR has held that the right to freedom of religion under Article 9 ECHR[19] does indeed protect belief groups and associations from unjustified state interference with their autonomy. These cases demonstrate that the right to freedom of religion should not be interpreted as being solely individualistic as it in fact protects members of belief groups from facing particular obstacles because of their membership. More specifically, the ECtHR has found violations of Article 9 ECHR in cases where states disadvantaged particular religious groups by unjustifiably denying them legal registration,[20] as well as in cases where the administrative procedures for granting legal status to particular groups were unreasonably delayed.[21] In addition, the ECtHR has also found violations of Article 9 ECHR in cases where state intervention, or lack thereof,[22] aimed to diminish the role of historically unpopular religious groups[23] or denoted indifference towards religious violence targeting members of particular groups.[24] In all those cases the ECtHR infused an analysis of group disadvantage in relation to access to valuable resources, such as the legal-entity status of a belief organisation, into its interpretation of the right to freedom of religion or belief.[25] Thus, such cases suggest that the right to freedom of religion or belief does include some – perhaps rudimentary – protection from wrongful disadvantage on grounds of one's membership of a belief group and that, therefore, its purpose is not solely individualistic. This is *a fortiori* when group disadvantage flouts the individual freedom to manifest religion or belief; when, for instance, belief associations are unjustifiably denied legal recognition[26] or when violence against the members of particular belief groups goes unpunished.[27]

Secondly, a sharp distinction between religious freedom and religious antidiscrimination faces difficulties in explaining the significant doctrinal overlaps between the two rights in the jurisprudence of the ECtHR. In a wide range of cases on limitations on freedom of religion,

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[19] According to Article 9 ECHR, '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. 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.'

[20] *Jehovah's Witnesses of Moscow and Others v Russia*, Application no. 302/02, 10 June 2010.

[21] *Association Les Temoins de Jehovah v France*, Application no. 8916/05, 30 June 2011 (only in French); *Religionsgemeinschaft Der Zeugen Jehovas v Austria*, Application no. 40825/98, 31 July 2008 at [98]; *Church of Scientology Moscow v Russia*, Application no. 18147/02, 5 April 2007.

[22] *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*, Application no. 71156/01, 3 May 2007.

[23] *Biserica Adevărat Ortodoxă Din Moldova (True Orthodox Church) and Others v Moldova*, Application no. 952/03, 27 February 2007; *Metropolitan Church of Bessarabia and Others v Moldova*, Application no. 45701/99, 13 December 2001; *Serif v Greece*, Application no. 38178/97, 14 December 1999.

[24] *Begheluri and Others v Georgia*, Application no. 28490/02, 7 October 2014 at [160]-[165]; *97 Members of the Gldani Congregation of Jehovah's Witnesses*, n 22 above, at [33].

[25] See *Guide on Article 9 of the European Convention on Human Rights* (Council of Europe, 2019) 67-68. Also C. Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2011) 26(1) *Journal of Law and Religion* 321, 339-342.

[26] See n 21 above.

[27] See eg the cases of *Begheluri* and *97 Members of the Gldani Congregation*, n 24 above.

complaints before the ECtHR typically invoke dual legal bases involving both the right to freedom of religion or belief under Article 9 ECHR and the prohibition of religious discrimination under Article 14 read in conjunction with Article 9 ECHR.[28] In such cases, time and again, the practice of the ECtHR suggests that the two rights play very similar roles. More specifically, after examining whether the interference that the applicant(s) complained of amounts to a violation of their right to freedom of religion, the ECtHR habitually eschews a separate examination of the separate complaint of religious discrimination under Article 14 ECHR.[29] As the ECtHR held in *S.A.S.*,[30] this is because the reasons for not finding a violation of the right to freedom of religion – i.e. that the interference in question was prescribed by law, pursued a legitimate aim and was necessary in a democratic society[31] – are equivalent to the reasons that could justify indirect religious discrimination had the complaint been based only on Article 14 taken in conjunction with Article 9 ECHR.[32] More precisely, according to the ECtHR, the 'legitimate aim' requirement under Article 9 is equivalent to the requirement for an 'objective and reasonable justification', which discriminatory rules or policies must fulfil in order to be compatible with Article 14 ECHR.[33] Furthermore, both Article 9 and Article 14 ECHR also require a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised', which once again the ECtHR considers equivalent between the two provisions.[34] This doctrinal overlap between Articles 9 and 14 (read in conjunction with Article 9) ECHR suggests that, regardless of whether the disadvantage in question emerges as an individual wrong (more often the case with complaints under Article 9 ECHR) or as a pervasive advantage gap between belief groups (more often the case with complaints under Article 14 ECHR) or as both, complaints under the two rights invite similar questions of justification and proportionality.[35] Both rights require that the ECtHR carefully scrutinises the reasons behind the complained interference with liberty in order to ensure that its foundation is not the assumption that some religious or philosophical beliefs are superior to others.[36]

The significance of this doctrinal trend could be questioned though. It could be counter-argued that the antidiscrimination guarantee of Article 14 is an insipid right under the ECHR and that, other things being equal,[37] finding a violation of the substantive right to freedom of

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[28] According to Article 14 ECHR: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[29] And vice versa, see eg *Church of Jesus Christ of Latter-Day Saints v UK*, Application no. 7552/09, 4 March 2014 at [37]-[39]; *Koppi v Austria*, Application no. 33001/03, 10 December 2009 at [37].

[30] *S.A.S. v France*, Application no. 43835/11, 1 July 2014 (Grand Chamber).

[31] See Article 9(2) ECHR.

[32] *S.A.S.*, n 23 above, at [160]-[162]; *Dakir v Belgium*, Application no. 4619/12, 11 July 2017 at [63]-[67].

[33] *S.A.S.*, n 23 above, at [160]-[162].

[34] *ibid*

[35] The overlap between the tests under the two provisions emerges also in cases where individual applicants have complained of wrongful religious discrimination, but not of a violation of their right to freedom of religion *per se*, such as the *Ladele* case. See *Eweida and Others v United Kingdom*, n 47 above, at [70]-[72]. See also *Canea Catholic Church v Greece*, Application no. 25528/94, 16 December 1997 where the ECtHR found a violation of Article 14 ECHR, but no violation of Article 9 ECHR.

[36] The idea that the prohibition of discrimination limits the range of permissible reasons for action is familiar in EU discrimination law. See Opinion of Advocate General Maduro, Case C-303/06, *Coleman v Attridge Law* [2007] IRLR 88 at [18].

[37] The ECtHR has held that if there is a clear inequality of treatment, separate examination of Article 14 would be necessary regardless of whether there is a violation of another substantive provision. See *Chassagnou and*

religion or belief extinguishes the necessity to pursue an examination of the separate complaint of religious discrimination.[38] But this point would be begging the question because the ECtHR eschews a separate examination of complaints of religious discrimination also in cases where *no violation* of Article 9 ECHR has been found.[39] This counter-argument would also struggle to explain other important instances of doctrinal overlap between religious freedom and religious antidiscrimination, such as those emerging in cases where the ECtHR has read a duty of reasonable accommodation – which is a distinct duty of antidiscrimination[40] – into the right to freedom of religion.[41] Those doctrinal overlaps suggest that the two rights share the aim to ameliorate wrongful disadvantage on grounds of religion or belief, regardless of whether it emerges as an individual wrong or as a pervasive advantage gap between groups. Crucially, an interpretation of the two rights as entirely distinct cannot fully capture this shared aim.

AUTONOMY, ETHICAL INDEPENDENCE AND FREEDOM OF CHOICE

In response to the difficulties posed by an interpretation of religious freedom and religious anti-discrimination as distinct and in competition, the following two sections track the shared normative ground of the two rights. This particular section outlines the moral right to ethical independence and pursues some of its links with personal autonomy and freedom of choice that are relevant to the specific subject of this article. Building on this section's account, the two subsequent sections will offer an interpretation of religious freedom and religious anti-discrimination as two complementary parts of a nexus of legal rights that share their main normative ground on ethical independence.

The moral wrong that religious freedom and religious antidiscrimination aim to protect us from seems connected to a specific part of our liberty that has to do with our freedom to develop and express our own sense of identity. No one, including the state, should be able to curtail this part of our liberty by imposing prohibitive costs on it just because they disapprove of our beliefs or way of life. But we need to be more specific than that because the claim that people ought not to bear the costs of particular choices – at least not under certain circumstances – does not explain why people are entitled to be free from those costs.

The ideal that people ought to be free to form, revise, and pursue their own conception of the good over a complete life, and that this abstract right is already theirs as a matter of human dignity, is familiar in liberal theory. Joseph Raz captures it in his prominent account of personal autonomy as 'the vision of people controlling, to some degree, their own destiny,

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Others v France, Application nos. 25088/94, 28331/95 and 28443/95 at [89]; *Dudgeon v United Kingdom* [1983] 2 WLUK 243 at [67]; *Jakóbski v Poland*, Application no. 18429/06, 7 December 2010 at [49].

[38] See eg *Eweida*, n 2 above, at [95].

[39] See eg *S.A.S.*, n 4 above, at [161]-[162]. The Joint Dissenting Opinion of Judges Spielmann, Sajò and Lemmens in *Fernández Martínez v Spain*, Application no. 56030/07, 12 June 2014 (Grand Chamber) is notable for its vigorous criticism of the reluctance of the ECtHR to separately examine individual complaints of religious discrimination even in cases where no violation of Article 9 ECHR is found.

[40] De Schutter, *The Prohibition of Discrimination under European Human Rights Law* (European Commission: Directorate-General for Justice, 2011) 14; E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17 *Maastricht Journal of European and Comparative Law* 137.

[41] *Francesco Sessa v Italy*, Application no. 28790/08, 3 April 2012, Dissenting opinion of Judges Tulkens, Popović and Keller at [10].

fashioning it through successive decisions throughout their lives'.[42] Ronald Dworkin identifies an analogous concept, which he calls ethical independence.[43] The moral right to ethical independence protects the substantive responsibility of each person to form and pursue their own idea of what lives are worth living for, and live accordingly.[44] Crucially, the focus of ethical independence is on the legitimacy of state interference with liberty.[45] More specifically, ethical independence is incompatible with restrictions on our liberty for some reasons, such as the fact that a political majority considers some religious convictions superior to others. Ethical independence, however, does not block restrictions on our liberty for other reasons, such as if those restrictions are necessary to protect other people from harm.[46]

It is notable that personal autonomy,[47] ethical independence, ethical integrity[48] and self-determination[49] have proved very influential on the academic literature tracking the normative justification of religious freedom.[50] Although various different conceptions of personal autonomy underlie those concepts, there are important normative links between them. For instance, most of those concepts share the seminal principle that our freedom to define value and govern our lives in response to it is interwoven with the intrinsic value of each human life. People ought to be free to unfold their particularity[51] – their 'sheer capacity to begin', as Hannah Arendt described freedom[52] – in how they organise their lives; how they develop their talents, tastes and interpretations of our common culture; and how they relate to their beliefs and ideals.[53] This relationship emerges clearly in theories that expressly connect personal autonomy with the ethical importance of 'living well',[54] which requires not just designing a life but designing it in response to a personal and independent judgement of value.[55]

Despite their close normative links, there are differences between ethical independence and some of the most influential conceptions of personal autonomy. Two such differences are relevant to this article's account of the relationship between religious freedom and religious

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[42] J. Raz, *The Morality of Freedom* (Oxford: OUP, 1986) 369.

[43] Dworkin (2013), n 12 above, 105-149; Dworkin (2011), n 12 above, 191-219.

[44] Personal responsibility is used in a substantive sense here because it expresses claims about people's actions for themselves and others. It is not used in the sense of 'attributability', namely whether a specific action can be the basis of moral appraisal of the 'responsible' person. See e.g. T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: HUP, 2000) 248-296. The extent to which ethical independence requires that we accept moral responsibility for our actions requires engagement with other values. See M. Zimmerman, 'Responsibility, reaction, and value' (2010) 14 *Journal of Ethics* 103; S. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: HUP, 2006) 91-119.

[45] C. Laborde, 'Dworkin's Freedom of Religion Without God' (2014) 94 *Boston University Law Review* 1255.

[46] R. Audi, 'Religious Liberty Conceived as a Human Right', in R. Cruft, S. Matthew Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: OUP, 2015) 407-423, at 417-420.

[47] See eg K. Greenawalt, *Religion and the Constitution* (Princeton, NJ: PUP, 2006, vol. 1) 3-4.

[48] Laborde (2017), n 12 above, 197-238.

[49] A. Patten, 'Religious Exemptions and Fairness', in C. Laborde and A. Bardon (eds), *Religion in Liberal Political Philosophy* (Oxford: OUP, 2017) 204-220, at 207-209; R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: OUP, 2005) 60-62.

[50] See eg F. Ahmed, 'The Autonomy Rationale for Religious Freedom' (2017) 80(2) MLR 238; J. Calderwood Norton, *Freedom of Religious Organizations* (New York: OUP, 2016) 14-19; R. McCrea, *Religion and the Public Order of the European Union* (New York: OUP, 2010) 110-115.

[51] This connection between individuality and self-development is made in J. S. Mill, *On Liberty* (Oxford: OUP, Oxford's World Classics, 2008) Ch 3.

[52] H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (London: Penguin, 1977) 168.

[53] N. Kirby, 'Two Concepts of Basic Equality' (2017) *Res Publica*, https://doi.org/10.1007/s11158-017-9354-5.

[54] Dworkin (2011), n 12 above, 209-214.

[55] Audi (2015), n 46 above, 417-420; C. Taylor, *The Ethics of Authenticity* (Cambridge, MA: HUP, 1991) 41.

antidiscrimination. Firstly, certain conceptions of personal autonomy take access to a sufficient range of choices to be the main requirement of an autonomous life. On that account, if certain choices or ways of life become unavailable, but the overall range of available choices remains sufficient, our personal autonomy is not compromised, regardless of the reasons why some of those choices have become unavailable.[56] However, as Dworkin argues, ethical independence is different to that conception of personal autonomy because it is concerned with both the fact and the character of limitations on our choices.[57] Ethical independence creates a scheme of responsibility that is incompatible with constraints based on impermissible reasons and considerations, such as the moral preferences of the majority or illegitimate coercion.[58] Those abridge the moral right to ethical independence regardless of whether the overall range of available choices remains sufficient.

Secondly, ethical independence diverges from perfectionist accounts of autonomy. As later parts of this article will discuss in more detail, the courts in cases involving religious freedom or religious discrimination do identify our moral power to form and pursue our own conceptions of the good as a value that is worthy of priority over other legitimate concerns.[59] But they do not commit to any specific conception of autonomy or the good. They do not presuppose an objective conception of what constitutes a valuable choice, which perfectionist accounts of autonomy would require.[60] As Farrah Ahmed argues, a perfectionist conception of autonomy cannot justify the breadth of legal protection that the right to freedom of religion enjoys under the ECHR, which includes practices that do not enhance autonomy, such as those involving autonomy-diminishing resistant beliefs and manipulative proselytism.[61] Perfectionist accounts of autonomy can face similar justificatory deficiencies in cases involving religious discrimination.[62] So, at least in terms of fit with case-law under the ECHR, there are important advantages for a non-perfectionist account of religious freedom and religious anti-discrimination based on ethical independence. A non-perfectionist account would be consistent with one's decision to live an unexamined life or live in conformity with the values or religion of their ancestors, or with being spiritual and live life as a matter of faith or revelation. What is required though is that those choices are personal and authentic, rather than imposed out of fear or coercion.[63]

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[56] An example of that conception comes from some early parts of case-law under the ECHR, where freedom to resign from a job was held to be the 'ultimate guarantee' of the right of employees to freedom of religion. See Vickers (2016), n 11 above, 86-94.

[57] Dworkin (2011), n 12 above, 212; Raz (1986), n 42 above, 377-378.

[58] On that account, ethical independence mainly works in a 'reason-blocking' way. See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: OUP, 2009) 99-120; J. Waldron, 'Pildes on Dworkin's theory of rights' (2000) 29(1) *Journal of Legal Studies* 301.

[59] This is congenial to the idea that there are some basic liberties, which can be limited only for the sake of other basic liberties and have priority over reasons of public good, and then some institutional rules that define and adjust those basic liberties so that they can fit into a coherent scheme. See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) 297.

[60] See eg T. Khaitan, *A Theory of Discrimination Law* (Oxford: OUP, 2015) 60; T. Macklem, *Independence of Mind* (Oxford: OUP, 2006) 142.

[61] Ahmed (2017), n 47 above.

[62] S. Moreau, 'Discrimination Law and the Freedom to Live a Good Life' (2016) 35(5) *Law and Philosophy* 511, 518-523.

[63] C. Taylor, *A Secular Age* (Cambridge, MA: HUP, 2007) 473-505; C. Guignon, *On Being Authentic* (Abingdon, Oxford: Routledge, 2004) 8; A. Ferrara, *Reflective Authenticity* (Abingdon, Oxford: Routledge, 1998) 148-153.

Those are some of the reasons why the rest of this article will argue that the legal rights to religious freedom and religious antidiscrimination share their main normative basis on the moral right to ethical independence. Crucially, an account based on ethical independence focuses on the normative role of the two legal rights as constraints on the sort of reasons that can justify legitimate interference with liberty. This account is therefore different from accounts that justify the two legal rights based on certain individual interests that have to be insulated from (or balanced against) other demands of the general good. Moreover, as the following pages argue, regardless of one's general position on the foundation of human rights, an account based on ethical independence fits UK and European human rights law better than a perfectionist account of the foundation of religious freedom and religious antidiscrimination. However, this is not to suggest that religious freedom and religious antidiscrimination could not be justified by other, e.g. non-perfectionist, conceptions of personal autonomy, or that their normative basis does not include other rationales that supplement ethical independence.[64]

Before returning to freedom of religion or belief and religious antidiscrimination, there are two additional points about ethical independence. Firstly, ethical independence emphasises the connections between liberty and the equal worth of every human life, as well as the moral demands they place on the collective decisions and actions of a political community. The focus of this account is on the opposition of ethical independence not to being influenced by others, but to being dominated.[65] However, the prescriptiveness of ethical independence should not be taken to require its full realisation at any point in our life. Rather, ethical independence is best understood as a property that organically unfolds over time and takes different forms in different stages of one's life.[66] People develop and exercise it to different extents and those differences might matter for some purposes. For instance, from an ethical standpoint we might say that people who let others' expectations, instead of their own commitment to values and convictions, dictate the design of their lives do not live well because their lifestyle lacks authenticity.[67] Nevertheless, the extent to which people develop their ethical independence does not determine the amount of respect that laws or policies should show to them.[68] What matters is not the extent to which we develop our ethical independence, but that our capabilities for well-being, moral agency, responsiveness to value, and love make all humans capable to express and develop it through the trajectory of their lives.[69] That said, there are important

[64] Other rationales include the value of faith, the search for the meaning of life, community membership and maintaining civil peace. See e.g. McCrea (2010), n 50 above, 106-115; F. Ahmed, 'The Value of Faith' (2010) 38 *Religion, State & Society* 169; M. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) 56-58; J. H. Garvey, 'An Anti-Liberal Argument for Religious Freedom' (1996) 7 *Journal of Contemporary Legal Issues* 275; Raz (1986), n 42 above, 250-255.

[65] Dworkin (2011), n 12 above, 132-137.

[66] On moral capacity as a 'range property' see J. Rawls, *A Theory of Justice* (Cambridge, MA: HUP, 1971) 505-506. Also J. Waldron, *One Another's Equals* (Cambridge, MA: HUP, 2017) 120-127.

[67] C. Korsgaard, 'Reflective endorsement', in O. O'Neill (ed), *The Sources of Normativity* (Cambridge: CUP, 1996) 49-90.

[68] Respect is used here in the sense of 'recognition respect', ie recognising the value of ethical independence and acting on that acknowledgment. It is not used in the sense of 'appraisal respect'. See S. L. Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36. Although respect makes good sense as a matter of actions, there is nothing odd in speaking of respect as a feeling or attitude. See J. Raz, *Value, Respect and Attachment* (Cambridge: CUP, 2001) 138-162. Also L. Green, 'Two Worries about Respect for Persons' (2010) 120 *Ethics* 212.

[69] Nussbaum (2008), n 64 above, 168-169; M. Nussbaum, *Frontiers of Justice* (Cambridge, MA: HUP, 2006) 69-92; M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: CUP, 2000) Ch 3. See also Waldron (2017), n 66 above, 215-220. Capabilities and 'functionings' have a similar meaning in the

distributive matters related to ethical independence that require appeal to other values, such as distributive justice.[70] This is not to suggest that ethical independence is just a property; on the contrary, it involves a plurality of relationships, capabilities, personal and communal narratives and identifications, and material and biological structures. The point is that the potential for ethical independence, rather than the extent to which we develop it, is by itself sufficient to ground equal legal rights – such as the right to freedom of religion or belief and the prohibition of religious discrimination – that aim to secure fair background circumstances for the compossible pursuit of different plans of life.

Secondly, an important objection has to be addressed. The objection is that the emphasis of ethical independence on our personal responsibility to define and pursue value conflates foundational ethical choices, such as religion, with other lifestyle choices, such as fashion.[71] Foundational ethical choices are not just a matter of taste. They are integral parts of our identity with analogous power to other immutable or 'naturalised' characteristics.[72] They deserve therefore stronger protection than non-foundational lifestyle choices, which nevertheless the general right to ethical independence does not justify.[73] Of course it would be a mistake to interpret the value of choice in a purely instrumental way. People commit to religious or political ideals not just because they better suit their tastes. We value choice also for reasons related to its symbolic value. Allowing the state to choose our religion, politics, or friends would be demeaning and would suggest that we are incompetent and dependent.[74] But even with non-instrumental reasons for valuing choice taken into account, the objection still stands. It is important to address this objection not only because it aims to establish a morally salient boundary between ethically foundational and non-foundational choices, but also because it advances an important legal claim, namely that ethical independence cannot justify adequate legal protection to foundational ethical choices.

This objection suffers from various important problems, which have been highlighted elsewhere.[75] For instance, it has been argued that the form of our identity cannot in and of itself ground a normative account of how people ought to be treated and what claims they ought to be able to make on others.[76] Instead of grounding such normative claims on an empirical enquiry into the form of our identity, we need a moral argument about why we are entitled to

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context of religious freedom; see J. Wolff and A. De-Shalit, 'On Fertile Functionings: A Response to Martha Nussbaum' (2013) 14(1) *Journal of Human Development and Capabilities* 161, 163-164.

[70] M. Clayton, 'Is Ethical Independence Enough?', in Laborde and Bardon (2017), n 49 above, 137-139.

[71] For an overview of this critique see Ahdar and Leigh (2005), n 49 above, 60-64.

[72] R. Plant, 'Religion in a Liberal State', in G. D'Costa, M. Evans, T. Modood and J. Rivers (eds), *Religion in a Liberal State* (Cambridge: CUP, 2013) 9-37, at 34; A. McColgan, 'Religion and (In)equality in the European Framework', in L. Zucca and C. Ungureanu (eds), *Law, State and Religion in the New Europe* (Cambridge: CUP, 2013) 215-238, at 232; S. Bedi, 'Debate: What is so Special about Religion? The Dilemma of the Religious Exemption' (2007) *Journal of Political Philosophy* 237.

[73] Ethical independence does not aim to protect religion *per se*, but more general commitments to different ideals, eg philosophical, religious, political and moral. See G. Letsas, 'The Irrelevance of Religion to Law', in Laborde and Bardon (2017), n 49 above, 44-55. So, under this article's account, being religious in nature is neither necessary nor sufficient for a practice to fall within the protective scope of human rights law.

[74] This point should not be taken to suggest that instrumental, representative and symbolic reasons for valuing choice are mutually exclusive. See Scanlon (2000), n 44 above, 251-254.

[75] See eg Laborde (2017), n 12 above, 218-221.

[76] S. Shiffrin, 'Egalitarianism, choice-sensitivity, and accommodation', in R. J. Wallace, P. Pettit, S. Scheffler and M. Smith (eds), *Reason and Value: Themes from the Work of Joseph Raz* (Oxford: OUP, 2004) 270-302. Also Dworkin (2011), n 12 above, 44-46 and 220-223.

a particular liberty and how we can interpret and adjust it so that it can fit into a coherent scheme for everyone.[77] However, for the purposes of this article, it is important to focus on a different problem. That is, relating the scope of legal rights to questions of immutability prompts a narrow interpretation of the moral significance of choice that places too much emphasis on the legitimising force of voluntary action. This tendency is clear in cases involving difference of treatment on grounds of religion, where often the underlying assumption is that religious individuals can more easily make choices that would allow them to avoid conflicts, such as those arising between the manifestation of their beliefs at work and general employment regulations, compared to individuals disadvantaged on grounds of immutable personal characteristics.[78] This interpretation resembles what Scanlon calls the *forfeiture* account of choice.[79] Under a *forfeiture* account, a violation of the right to freedom of religion, as well as the wrongfulness of indirect religious discrimination, depends on whether a particular outcome resulted from the conscious choice of an individual where the individual intended to reject specific alternatives. What matters is the fact of choice, rather than the circumstances under which the choice was made.[80] A *forfeiture* interpretation of the moral significance of choice is intuitively appealing in cases involving voluntary agreements, such as employment contracts. The fact that an employee consented to a general employment regulation, such as a neutral dress code, is an important justifying element in the decision-making process. If an employer has done enough to warn her employees about the risk of a conflict between their conscience and specific contractual obligations, then the employees are responsible for any disadvantage they suffer if they breach their contractual obligations. So, under a *forfeiture* interpretation, the conditions that must have been already in place in order for the choice to have elevated moral force recede into the background or look unimportant.

However, the conditions in which individuals might have been placed by negligence or by socioeconomic disadvantage are morally significant. Of course, sometimes the mere fact that someone makes a decision in conditions in which they had a choice of avoiding conflicts between their beliefs and their workplace's regulations may be sufficient. But at other times the conditions in which a certain choice is made are sufficient by themselves to determine the moral conclusion, without the employee's explicit consent being necessary. Arguably, a *forfeiture* account can explain early parts of case-law under the ECHR,[81] where freedom to resign from a job was held to be the 'ultimate guarantee' of the right of employees to freedom of religion.[82] But a forfeiture account does not fit with much more extensive parts of human rights and antidiscrimination law, including several recent cases where the ECtHR shifted its

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[77] See n 59 above.

[78] See eg Opinion of Advocate General Kokott, *Achbita v G4S*, n 3 above, at [45]. A similar assumption was made by Sedley LJ in *Eweida v British Airways* [2010] EWCA Civ 80 at [40]. For a discussion of the theological (mainly Christian) sources of the distinction between religious practice and manifestation, see J.H.H. Weiler, 'Je Suis Achbita' (2017) 28(4) EJIL 989, 994-995.

[79] Scanlon (2000), n 44 above, 251-254.

[80] *ibid*, 258-259.

[81] See eg Lord Bingham's comment in *R v Governors of Denbigh High School* [2006] UKHL 15, (2006) 23 B.H.C.R. 276 at [2].

[82] *Stedman v. The United Kingdom*, Application no. 29107/95, 9 April 1997; *Kontinnen v Finland*, Application no. 24949/94, 3 December 1996. See also S. O. Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights', in Alidadi, Foblets and Vrielink (2012), n 16 above, 33-59.

approach and started weighing the possibility to change jobs in the overall balance when considering whether a limitation on freedom of religion or belief is proportionate.[83] The final substantive section of this article will expand on this point with reference to cases on occupational requirements set by religious organisations. For now, it is notable that a broader interpretation of the value of choice, according to which in order for a decision to be legitimate the conditions have to be right before passing to whether the person's choice or consent is sufficient,[84] fits this area of law much better than a *forfeiture* account. Crucially, this broader interpretation of the moral significance of choice is normatively required by ethical independence. As earlier parts of this section discussed, ethical independence requires taking into account not only if someone had the opportunity to make a decision between alternatives, but also whether any of those alternatives were unfairly restricted. Thus, a broader interpretation of the value of choice has the advantage of allowing the conditions under which a choice is made to be considered separately from the fact of choice itself and be given the independent significance appropriate to them. In this way, it places limited emphasis on questions of immutability in the determination of the level of legal protection that a certain practice or belief ought to enjoy.

This partial sketch of ethical independence is meant to offer a conception that, though incomplete, is sufficient for the overall purpose of this article: to support the view that the legal rights to religious freedom and religious antidiscrimination share their main normative basis on the broader moral right to ethical independence; to clarify their role and relationship; and to indicate how tensions between them can be resolved.

COMMON NORMATIVE ROOTS, DIFFERENT EMPHASIS

At first sight, an interpretation of religious freedom and religious antidiscrimination as two legal rights sharing their main normative foundation can justify their doctrinal overlaps in European human rights law, which the first substantive section of this article highlighted. This section argues that religious freedom and religious antidiscrimination share their main normative ground on ethical independence. The two legal rights are not synonymous though. They specify ethical independence in distinct ways, by placing their emphasis on different parts of the moral right. This section's overall aim is to clarify both the relationship between religious freedom and religious antidiscrimination, and their distinct contributions to legal practice.

Religious freedom and individual identity

Schematically, the difference in the emphasis of religious freedom and religious anti-discrimination on ethical independence is geometrical. On the one hand, the emphasis of the right to freedom of religion or belief is *vertical*. It identifies ethical independence as an important capability in each human person and protects it in our relationships and dealings with the state and each other.[85] The legal framing of religious freedom in European human rights

[83] See eg *Eweida*, n 2 above, at [83]. The last section of this article will discuss this point in more detail.
[84] Scanlon calls this the 'value of choice' account. See Scanlon (2000), n 44 above, 256-267.
[85] Nussbaum (2008), n 64 above, 168-170. In that sense, ethical independence is the good that the law protects through the legal rights to freedom of religion or belief and religious antidiscrimination. This is in two ways

law, with its absolute protection of the right to believe and change one's beliefs,[86] reflects the need to secure core aspects of this capability from coercive interference. Beyond those core protections, it is also well-entrenched that religious freedom is incompatible with rules whose ground is the assumption that one set of beliefs is superior to or more virtuous than others;[87] and that it is illegitimate for state authorities to control how individuals should live through deliberately shaping an ethical culture more suited to the moral preferences of the majority.[88] Those paradigm features of the right to freedom of religion or belief highlight its vertical emphasis on individual identity; and more specifically on our personal responsibility to define value and live in accordance with our ethical commitments. As the previous section of the discussion argued, this concern for individual identity is required by ethical independence.

Crucially, the injustice that individuals suffer when their right to freedom of religion is violated is noncomparative.[89] A disproportionate interference with religious freedom violates the right regardless of whether the same treatment is accorded to members of other belief groups or, indeed, to anybody else.[90] For example, in cases such as *Eweida*,[91] where an individual employee claimed that wearing a cross visibly at work, in breach of the uniform dress code of British Airways, fell within the scope of her right to manifest her religion under Article 9(2) ECHR, the ECtHR does not decide how religious freedom should be distributed. This has already been decided: it should be distributed equally.[92] In cases like *Eweida*, the ECtHR is outlining the scope of the individual right to manifest religion or belief under the Convention; it is not deciding whether an individual has the same right to manifest their beliefs as others. The ECtHR does that through an interpretive argument that engages with the values underlying the right to freedom of religion, as well as the values underlying the legitimate aim of the interference in question; that is, the values underlying the policy of neutrality of British Airways in *Eweida*,[93] or the values underlying the aim of 'living together' that the French government used in *S.A.S.*[94] to justify the ban on the wearing of full-face veils in public.[95] That is why identifying the normative ground of the legal right to freedom of religion is so important,

different to the argument that the law uses religion as a 'proxy' through which it protects various different and loosely identified goods associated with religion; see e.g. A. Koppelman, 'Conscience, Volitional Necessity, and Religious Exemptions' (2009) 15 *Legal Theory* 215. It is different, firstly, because it identifies the good that the law aims to protect and, secondly, because the legal relevance of religion is derivative from the underlying objective to protect ethical independence. Being derivative does not mean though that religious freedom is less important. See J. Nickel, 'Who Needs Freedom of Religion?' (2005) 76 *University of Colorado Law Review* 94.

[86] See Article 9(1) ECHR; Article 18 ICCPR.

[87] See eg *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 A.C. 246 at [22]. Also *Moscow Branch of the Salvation Army v Russia*, Application no. 72881/01, 5 October 2006 at [58].

[88] See F. Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30(6) *Cardozo Law Review* 2575. This is compatible with various different models of church-state relations, including those involving states whose cultural identity is of a religious symbology, provided that religious freedom and antidiscrimination are strictly protected. See J.H.H. Weiler, 'Freedom of Religion and Freedom from Religion: the European model' (2013) 65(2) *Maine Law Review* 760.

[89] J. Feinberg, 'Noncomparative Justice' (1974) 83(3) *Philosophical Review* 297.

[90] Laborde (2017), n 12 above, 228-229.

[91] *Eweida and Others v United Kingdom*, n 47 above, at [89]-[95].

[92] Nussbaum (2008), n 64 above, 72-115.

[93] Weiler (2017), n 78 above, 996-1002.

[94] See *S.A.S.*, n 4 above.

[95] I. Trispiotis, 'Two Interpretations of Living Together in European Human Rights Law' (2016) 75(3) CLJ 580.

because this way the courts can give the weight appropriate to it.[96] Of course, the ECtHR, in reaching a decision on whether *Eweida* has a right to wear a cross at work, draws on its previous judgments in similar cases. But those are only used to guide the judgment of the ECtHR with regards to noncomparative principles in this area of human rights law, such as toleration,[97] impartiality,[98] and the value of religion to the individual concerned.[99] The decision of the ECtHR in *Eweida* does not depend on a comparison between her claim and the religious (or non-religious) claims for accommodation that others have put forward in similar cases. The injustice arising from a violation of her right to religious freedom remains noncomparative.

Although the primary aim of religious freedom is to correct personal wrongs arising from its violations, the right is not solely individualistic. Recall the discussion in the first substantive section of this article, which showed that Article 9 ECHR does protect individuals from the disadvantage they may suffer because of their membership of a belief group. This is primarily when group disadvantage erodes the individual freedom to manifest religion or belief, such as when states fail to protect individuals from violence because of their group membership,[100] or when belief groups and associations, which are central to the collective enjoyment of religious freedom, are unjustifiably denied legal status.[101] Thus, religious freedom does address relative group disadvantage, albeit only to the extent that it can plausibly lead (or contribute) to violations of Article 9 ECHR. As it will be further discussed below, my focus on those specific features of religious freedom aims to highlight its distinct contribution to legal practice and how it complements religious antidiscrimination in addressing disadvantage on grounds of religion or belief.

Religious antidiscrimination and distributive justice

On the other hand, the emphasis of religious antidiscrimination is *horizontal*. The horizontal emphasis of religious antidiscrimination reflects that the primary legal duty not to discriminate is essentially a duty of distributive justice.[102] More specifically to the argument of this article, religious antidiscrimination generates duties on agents operating under 'quasi-public' sectors[103] – such as education, employment and the provision of goods and services[104] – to distribute benefits and opportunities in ways that do not unfairly disadvantage individuals on grounds of religion or belief. Unlike religious freedom, which protects our ability to form and pursue our own ethical or religious commitments, the main purpose of religious anti-discrimination is to ensure that the 'background circumstances' are fair for people to pursue

[96] C. McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9(1) I•CON 200, 226; L. Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 *Ecclesiastical Law Journal* 280, 298-299.
[97] *Eweida*, n 2 above, at [94].
[98] *ibid* at [81].
[99] *ibid* at [94].
[100] *Begheluri*, n 24 above, at [160]-[165]; *97 Members of the Gldani Congregation*, n 22 above, at [33].
[101] *Association Les Temoins de Jehovah*, n 21 above; *Jehovah's Witnesses of Moscow*, n 20 above.
[102] H. Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) MLR 16; J. Gardner, 'Discrimination as Injustice' (1996) 16(3) OJLS 353, 359-363. The secondary duties of religious antidiscrimination, ie how primary duties are administered, are duties of corrective justice.
[103] Those agents can be public or private. See Khaitan (2015), n 60 above, 65.
[104] See Equality Act 2010.

their commitments.[105] Religious antidiscrimination aims to secure access to important opportunities, such as employment or education,[106] which individuals can find diminished because of their (supposed) religion or belief. In that sense, religious antidiscrimination and religious freedom are deeply interconnected, as beliefs cannot be free if wrongful religious discrimination lingers in education or the workplace.[107] These deep normative links reflect the shared moral ground of the two rights, which they imperfectly specify in distinct ways.

Unlike the noncomparative approach that courts take in cases involving complaints under religious freedom, the definition of direct and indirect religious discrimination in EU and UK discrimination law does invite comparisons.[108] Wrongful religious discrimination can occur when there is another (actual or hypothetical) person who receives (or would receive) more favourable treatment at one's hands.[109] Comparisons can unveil distributive disparities, such as when membership in a belief group statistically correlates with pervasive disadvantage for its members in the labour market.[110] Such disparities, which are constitutive of the wrong in religious discrimination rather than merely evidential,[111] require careful scrutiny to determine whether a rule or practice is discriminatory either because it disproportionately burdens individuals with particular religious or ethical commitments,[112] or because it arises from majority bias.[113] Nevertheless, religious antidiscrimination does not yield only questions of comparative justice,[114] which come with their own sets of problems – especially with regards to choosing the right comparator in cases where no appropriate comparators are available.[115] As discrimination law correctly sets out, for there to be religious discrimination, no *actual* comparator is required. Rather, the courts seek actual (or construct hypothetical) comparators to determine whether the alleged discriminator treated someone less favourably because of the religion or belief of the recipient of the less favourable treatment.[116] In that sense, through their engagement in comparisons the courts implicitly invoke the purpose of religious antidiscrimination.[117] That purpose is, broadly speaking, to reduce the instances of wrongful

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[105] E. Brems, 'Objections to Antidiscrimination in the Name of Conscience or Religion: A Conflicting Rights Approach', in Mancini and Rosenfeld (2018), n 9 above, 277-280.
[106] *Thlimmenos v Greece*, Application no. 34369/97, 6 April 2000 (Grand Chamber) at [39]-[47].
[107] Vickers (2017), n 10 above, 5.
[108] On direct religious discrimination see Art 1, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000 ('Employment Equality Directive'); s. 13, UK Equality Act 2010. On indirect religious discrimination see Art 2(b), Employment Equality Directive; s. 19, UK Equality Act 2010.
[109] P. Jones, 'Religious Exemption and Distributive Justice', in Laborde and Bardon (2017), n 49 above, 163-177.
[110] See eg Office of National Statistics, *Full story: What Does the Census Tell Us about Religion in 2011?* available at www.ons.gov.uk/ons/dcp171776_310454.pdf. See also Vickers (2016), n 11 above, 1-13.
[111] Gardner (1996), n 92 above, 364.
[112] See n 97 above. In cases of indirect religious discrimination, disproportionate group impact is prima facie evidence of discrimination, which may be rebutted if the rule or practice in question pursues a legitimate aim and is proportionate.
[113] Laborde (2017), n 12 above, 229-238.
[114] For the argument that wrongful discrimination is not essentially comparative see D. Hellman, 'Equality and Unconstitutional Discrimination', in D. Hellman and S. Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford: OUP, 2013) 51-70. For the opposite argument see Jones (2017), n 109 above.
[115] S. Fredman, *Discrimination Law* (Oxford: OUP, 2011) 168; A. McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal Treatment" and the Role of Comparisons' [2006] EHRLR 650.
[116] *Eweida*, n 2 above, at [104]-[105].
[117] See D. Réaume 'Dignity, Equality, and Comparison', in Hellman and Moreau (2013), n 114 above, 7-27.

religious discrimination in order to secure fair background circumstances for people to pursue their religious or ethical commitments.

The wrongfulness of religious discrimination requires further analysis, which cannot take place here. Nevertheless, there is an important point about disadvantage that has to be discussed at this point. Earlier on it was argued that although the emphasis of religious freedom is on individual identity, it does address group disadvantage whenever it leads or contributes to its violations. Religious antidiscrimination works in the reverse way: it aims to eliminate wrongful advantage gaps between religious groups but does so primarily through correcting interpersonal wrongs arising from its violations.[118] It is important to flesh out this point with reference to indirect religious discrimination. Indirect religious discrimination occurs when an apparently neutral provision, criterion or practice puts persons having a particular religion or belief at a particular disadvantage compared to other persons unless that provision, criterion or practice pursues a legitimate aim and is proportionate.[119] What constitutes 'particular' disadvantage requires further explication though as there can be *plural* and *individual* interpretations of it. A *plural* interpretation of 'particular' disadvantage, which is associated with the wording of the EU Directive 2000/78, requires what Sedley LJ calls in *Eweida* 'plural disadvantage',[120] namely that an identifiable, even if small, actual group of people should have been put at disadvantage in order for the claimant to fall within the scope of indirect discrimination.[121] Conversely, an *individual* interpretation of 'particular' disadvantage, which is more prominent in cases under the ECHR, entails that 'particular' only requires that the immediate cause of the disadvantage is proximate enough to a protected characteristic; for instance, as the ECtHR held in *Ladele*, that the discriminatory practice in question was 'directly motivated' by the claimant's religion.[122] Under both interpretations of 'particular' disadvantage, a plausible prima facie case of indirect religious discrimination only requires that the applicant proves correlation between her disadvantage and group membership, and not causation.[123] But their main difference is that an *individual* interpretation places limited normative emphasis on the responses of other people sharing the claimant's beliefs to the specific provision, criterion or practice under scrutiny.

A *plural* interpretation of 'particular' disadvantage is congenial to the general concern of discrimination law with distributive justice, which aims to address unfair distributions of resources between groups, rather than individuals. That said, antidiscrimination law is concerned with both systemic and particular disadvantage; that is, it aims to address both relative group disadvantage and the particular impact of discriminatory rules or practices on the individuals affected respectively.[124] The allocation of liabilities arising from discrimination law reflects this double purpose. Antidiscrimination duties prohibit acting to the detriment of members of particular protected groups by requiring duty-bearers to act in accordance with

[118] C. O'Cinneide, 'Justifying Discrimination Law' (2016) 36(4) OJLS 909, 926.
[119] See s. 19, Equality Act 2010; Art. 2(1)(b) Employment Equality Directive.
[120] *Eweida v British Airways* [2010] EWCA Civ 80, [2010] ICR 890 at [15]. See also *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287 at [14].
[121] See also *Mba v Merton London Borough Council* [2013] EWCA Civ 1562, [2014] 1 WLR 1501 at [35].
[122] *Eweida and Others v United Kingdom*, n 47 above, at [103].
[123] T. Khaitan and S. Steel, 'Legitimacy of Indirect Discrimination Law', in Collins and Khaitan (2018), n 11 above, 205.
[124] Khaitan (2015), n 60 above, 168.

distributive justice.[125] But although the primary legal duty of antidiscrimination is a duty of distributive justice, considerations of corrective justice, i.e. restoring the discriminatee to his prior to discrimination position, do arise at the remedial phase. In the context of religious anti-discrimination, this corrective justice element is crucial for solitary believers who would be at disadvantage if membership of an actual, instead of a hypothetical, group was required in order for them to fall within the protective scope of indirect religious discrimination.[126] So, although a *plural* interpretation of 'particular' disadvantage correctly identifies the need to address group disadvantage, it underestimates the corrective justice elements of antidiscrimination law. By contrast, an *individual* interpretation fits better the dual purpose of antidiscrimination to address relative group disadvantage through correcting interpersonal wrongs.

There is more to be said about how the combination of distributive and corrective justice in discrimination law unfolds in religious antidiscrimination, but this cannot be discussed here. It is crucial to emphasise that the different emphasis of religious freedom and religious anti-discrimination can give the misleading impression that the two rights are normatively separate. Indeed, the horizontal emphasis of religious antidiscrimination on relative group disadvantage distinguishes it from the vertical emphasis of religious freedom on individual identity. Nevertheless, underlying both rights is a shared main purpose, which is to address those forms of disadvantage that unfairly restrict the space required by ethical independence.

Finally, the emphasis of religious antidiscrimination is horizontal in an additional way. It links this area with other parts of discrimination law, which imbues the nexus formed by religious freedom and religious antidiscrimination with valuable legal concepts used in relation to other protected grounds of discrimination. Two specific examples of cross-fertilisation can be briefly discussed here. Firstly, research on intersectional discrimination has shown that wrongful discrimination can often occur through the interaction between different prohibited grounds.[127] An intersectional approach is particularly relevant to religious discrimination – especially with regards to religion, gender and racial and ethnic origin – and can add significant nuance to the interpretation of the right to freedom of religion by the courts.[128] Especially in the aftermath of the judgments of the CJEU in *Achbita*[129] and *Bougnaoui*[130] – both of which concerned Muslim women who were dismissed because they wanted to wear a headscarf to work – it has been forcefully argued that an interpretation of religious antidiscrimination that focuses only on religion as individual identity overlooks the effects that the interaction between gender and religion can have on socio-economic disadvantage.[131] Secondly, the social model

[125] Gardner (1996), n 102 above. The focus is not on whether the duty-bearer inflicted the disadvantage in question through her past behaviour. See K. Lippert-Rassmusen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: OUP, 2014) 54-74.

[126] N. Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74(2) MLR 287, 302-304.

[127] I. Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72(5) MLR 723.

[128] Schiek (2018), n 7 above, 93-96; T. Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice', in Alidadi, Foblets and Vrielink (2012), n 16 above, 103-121.

[129] *Achbita v G4S*, n 3 above.

[130] *Bougnaoui v Micropole*, n 3 above.

[131] E. Howard, 'EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward?' (2018) 18(2-3) *International Journal of Discrimination and the Law* 60; Schiek (2018), n 7 above; Weiler (2017), n 78 above.

of disability, with its focus on the 'lived experience' of disadvantage,[132] encourages more engagement with the lived experiences of individual members of belief groups in order to understand their own perspectives in greater depth.[133] This is particularly valuable to improve our understanding of how apparently neutral rules or practices can burden individuals with particular beliefs. In some of those ways, religious antidiscrimination can realise its progressive potential only by looking beyond the vertical emphasis of religious freedom on individual identity, and by infusing powerful concepts of equality and disadvantage, which have emerged in other areas of anti-discrimination law, into law and religion.[134]

Summing up: distinct contributions

The discussion so far aimed to clarify the relationship between religious freedom and religious antidiscrimination by arguing that they are neither conflicting nor synonymous. It was argued that the two legal rights specify the moral right to ethical independence in distinct ways; religious freedom through its vertical emphasis on individual identity and religious anti-discrimination through its horizontal emphasis on securing a fair framework for the compossible pursuit of individual religious and ethical commitments. Crucially, this argument illuminates the distinct contributions of the two rights to legal practice. Firstly, identifying the vertical emphasis of religious freedom on individual identity is critical because, without it, anti-discrimination could be erroneously taken to be compatible with treating everyone's faith as equally inconsequential or as a matter of no concern.[135] Secondly, the horizontal emphasis of religious antidiscrimination shows that although the state cannot guarantee the success of any individual life plans, it has responsibility to secure a fair framework for the compossible pursuit of life plans based on different religious or ethical commitments. That responsibility requires addressing patterns of group disadvantage that erode the ability of people to pursue their own life plans. It also requires reaching beyond individual identity and taking into account the interaction between different prohibited grounds of discrimination, as well as people's 'lived' experiences, in order to enrich our understanding of wrongful disadvantage in this context.

TENSIONS BETWEEN RELIGIOUS FREEDOM AND RELIGIOUS ANTIDISCRIMINATION

This section argues that identifying the shared normative ground of religious freedom and religious antidiscrimination, as well as their distinct emphasis, matters to legal practice in an additional way: it clarifies how the courts can resolve tensions between the two rights. Religious freedom and religious antidiscrimination seem to be on a collision course with one

[132] See eg A. Lawson and M. Priestley, 'The Social Model of Disability: Questions for Law and Legal Scholarship?', in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Abingdon: Routledge, 2016) 3-16.

[133] See E. Brems, *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: CUP, 2014).

[134] McCrudden (2018), n 9 above, 416; Vickers (2017), n 10 above.

[135] See eg A. Patten, 'The Normative Logic of Religious Liberty' (2017) 25(2) *Journal of Political Philosophy* 129, 149-150. This levelling-down objection would not apply if equality was used in a deontic rather than a teleological sense, or if priority is used instead of equality. See S. Fredman, 'Substantive Equality Revisited' (2016) 14(3) I•CON 712, 720-723; D. Parfit, 'Equality and Priority' (1997) *Ratio* 202.

another whenever belief organisations take employment decisions that discriminate on grounds of religion or belief. On grounds of their right to freedom of religion read in the light of freedom of association,[136] belief organisations enjoy certain autonomy rights, which aim to protect their collective identity.[137] Tensions between religious freedom and religious antidiscrimination arise in cases where belief organisations deploy their autonomy rights to set 'occupational requirements'[138] that favour employees with specific beliefs or entail a heightened degree of doctrinal loyalty for employment in certain posts. In order to resolve such tensions between religious freedom and religious antidiscrimination, the courts have to outline the scope of the autonomy rights enjoyed by belief organisations. This section argues that in cases involving occupational requirements the CJEU and the ECtHR outline the scope of the autonomy rights of belief organisations by appeal to the shared normative ground of religious freedom and religious antidiscrimination. The courts follow an interpretive approach that takes into account the compatibility of different conceptions of the values of freedom of association and freedom of choice with ethical independence.

Cases under the ECHR reflect the shared concern of religious freedom and religious anti-discrimination with the stability and organisational autonomy of belief groups.[139] The ECtHR has consistently stressed that states must act neutrally and impartially to ensure harmony between opposing groups;[140] that state interference with religious leadership, even in cases involving tensions within a divided community, must be avoided;[141] that there is no state discretion to determine whether a group's beliefs, or the means it uses to manifest those beliefs, are legitimate;[142] and that dissenters, whose activities might jeopardise the unity of a community of believers, enjoy a 'right to exit' their group, but limited rights other than that under the ECHR.[143] What underlies cases that read freedom of religion or belief in the light of freedom of association is the principle that whenever the state arbitrates on religious dogma, persecutes political or religious beliefs, or appoints religious leaders, it violates core aspects of autonomy and ethical independence, such as the right of individuals to belong to identificatory groups and be able to feel 'pride' in their membership.[144] But beyond those paradigm instances of violation, there is reasonable disagreement with regards to other considerations of justice,

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[136] See eg *Hasan and Chaush v Bulgaria*, Application no. 30985/96, 26 October 2010 (Grand Chamber) at [62].

[137] There is disagreement over which organisations can count as belief organisations and therefore enjoy human rights protections.; see e.g. *Burwell v Hobby Lobby Stores* (2014) 134 S. Ct. 2751. For the purposes of EU and UK law, certain private organisations can indeed qualify for some of those protections. See *IR v JQ*, n 5 above.

[138] Article 4, EU Employment Equality Directive.

[139] See *Metropolitan Church of Bessarabia v Moldova*, Application no. 45701/99, 13 December 2001 at [118] and [129]; *Canea Catholic Church v Greece*, Application no. 25528/94, 16 December 1997. A similar approach can be traced in UK law; see eg J. Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in R. Adhar (ed), *Law and Religion* (Surrey: Ashgate, 2000) 133.

[140] See *Sindicatul "Păstorul Cel Bun" v Romania*, Application no. 2330/09, 9 July 2013 (Grand Chamber) at [165]; *Hasan*, n 136 above, at [78]; *Leyla Şahin v Turkey*, Application no. 44774/98, 10 November 2005 at [107].

[141] *Serif v Greece*, Application no. 38178/97, 14 December 1999 at [52]-[53]. The US Supreme Court reached a similar conclusion in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 US 171.

[142] *Fernández Martínez v Spain*, Application no. 56030/07, 12 June 2014 (Grand Chamber) at [129].

[143] *Miroļubovs and Others v Latvia*, Application no. 798/05, 15 September 2009 (only in French) at [80]; *Svyato-Mykhaylivska Parafiya v Ukraine*, Application no. 77703/01, 14 June 2007 at [146].

[144] Raz (1986), n 42 above, 254. Also J. Calderwood Norton, *Freedom of Religious Organizations* (New York: OUP, 2016) 43-45.

such as whether the state can, for instance, interfere with the hiring decisions of belief groups and associations, or whether it is justified to 'carve out' some space for the autonomy rights of religious organisations in discrimination law.[145]

Some challenge the assumption that the democratic state enjoys jurisdictional supremacy over religious organisations and argue that state authority is limited by a broad right of Churches to autonomy.[146] However, as will be highlighted below, this *jurisdictional*, 'two-worlds'[147] theory of separation of religious groups from state authority does not fit the jurisprudence of the European courts. It also suffers from other problems, which can only be briefly mentioned here. One problem is that when the state persecutes specific beliefs or associations, its actions are wrongful not because they trespass on the jurisdiction of religious associations. They are wrongful in a more rudimentary sense; they are wrong because they violate core individual and collective entitlements to liberty and autonomy. Another important problem with the claim that Churches ought to enjoy jurisdictional autonomy is that it entails that religion, unlike other beliefs, is *uniquely* entitled to preferential accommodation through immunities and privileges from law. However, as the second substantive section of this article argued, an account of religious freedom and religious antidiscrimination based on ethical independence cannot justify unique privileges to religion. Non-religious conceptions of the good life are as much protected by the moral right to ethical independence as religious ones.

Even if we agree that the democratic state does not share its sovereignty with other institutions, and therefore has legitimacy to resolve contested questions about the scope of religious autonomy,[148] we still need to examine whether respect for the right to freedom of religion or belief, read in the light of freedom of association and antidiscrimination, can justify any special protections for belief organisations. If the autonomy rights of belief organisations do not derive from an expansive, jurisdictional right to religious autonomy, then one can legitimately inquire how courts determine the scope of those autonomy rights. It is posited that, at least in cases involving occupational requirements, the CJEU and the ECtHR answer that question by appeal to the shared overall purpose of religious freedom and religious anti-discrimination. The CJEU and the ECtHR follow an interpretive approach, which takes different conceptions of freedom of association, such as the *jurisdictional* conception mentioned earlier, and freedom of choice, such as the *forfeiture* conception discussed in the second substantive section of this article, and then assesses their compatibility with ethical independence.[149]

At this point it is important to discuss some recent cases on occupational requirements in order to delineate the interpretive approach of the CJEU and the ECtHR whenever religious freedom and religious antidiscrimination are in tension. According to the CJEU and the

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[145] J. Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: OUP, 2010) 125.

[146] See S. Smith, 'The Jurisdictional Conception of Church Autonomy', in M. Schwartzman, C. Flanders and Z. Robinson (eds) *Corporate Religious Liberty* (Oxford: OUP, 2016) 19-37; D. Laycock, 'Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause' (2006) 81 *Notre Dame Law Review*; M. W. McConnell, 'Accommodation of Religion: An Update and a Response to Critics' (1992) 60 *George Washington Law Review* 685.

[147] J. Cohen, Freedom of Religion Inc: Whose Sovereignty?' (2015) 44(3) *Netherlands Journal of Philosophy* 169.

[148] J. Cohen, 'Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism', in Laborde and Bardon (2017), n 49 above, 83-103.

[149] For a similarly interpretive, albeit substantively different, approach see Laborde (2017), n 12 above, 160-175; Cohen (2015), n 147 above; Nickel (2005), n 85 above, 956-959.

ECtHR, the autonomy rights of belief organisations can justify only limited exemptions from discrimination law. More specifically, under both UK and EU discrimination law, an organisation whose ethos is based on religion or belief may lay down an occupational requirement related to religion or belief,[150] albeit only when there is a 'direct link' between the occupational requirement imposed by the employer and the activity concerned.[151] As the CJEU held in *Egenberger*, this direct link is key to strike a 'fair balance' between the autonomy rights of organisations whose ethos is based on religion or belief, on the one hand, and the right of workers to religious antidiscrimination on the other.[152] The direct link between the occupational requirement imposed by the employer and the activity concerned can be established either by reference to the nature of the activity (e.g. roles contributing to an organisation's mission of proclamation), or by reference to the context in which the activities are to be carried out (e.g. roles representing an organisation to third parties).[153] Establishing a direct link requires, more specifically, that the occupational requirement in question is genuine and legitimate. According to the ruling of the CJEU in *Egenberger*, that means that professing the religion or belief on which the ethos of the organisation is founded must be linked to, and be important for, the manifestation of that ethos or the exercise of the organisation's right to autonomy.[154] The occupational requirement in question must also be justified, which the CJEU has interpreted as a duty on the organisation imposing the requirement to show that the risk of causing harm to its ethos or its right to autonomy is probable and substantial, so that imposing such a requirement is necessary.[155]

It is notable that in *Egenberger* the CJEU stressed repeatedly that in cases involving the justifiability of an occupational requirement under Article 4(2) of the Employment Equality Directive 2000/78 (hereinafter EED), the role of national courts is not to rule on the ethos of the organisation in question. Rather, national courts have to 'objectively' verify whether the occupational requirement in question is genuine, legitimate and justified 'having regard to the ethos of the church or organisation' in question.[156] Thus, the CJEU correctly acknowledges that secular courts lack competence to inquire into esoteric theological disputes or practices.[157] But even though the employment decisions of religious organisations are often closely linked to their theological standards, an argument based on their competence interests is not sufficient to deny the authority of secular courts altogether.[158] Even though secular courts do not have competence to arbitrate in theological disputes, they do have competence to investigate whether theological reasons are used only as a pretext for wrongful discrimination.[159] For

[150] Art 4(2) Employment Equality Directive. For a similar perspective from UK equality law see M. Gibson, 'The God "Dilution": Religion, Discrimination and the Case for Reasonable Accommodation' (2013) 72(3) CLJ 578; R. Sandberg and N. Doe, 'Religious Exemptions in Discrimination Law' (2007) 66(2) CLJ 302.
[151] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257, [2018] 4 WLUK 204 at [63].
[152] *ibid* at [51]-[52].
[153] *ibid* at [62].
[154] *ibid* at [65]-[66].
[155] *ibid* at [67].
[156] *ibid* at [63]-[64].
[157] The UK courts follow a similar approach. See e.g. A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38(1) *Industrial Law Journal* 1.
[158] See D. Golemboski, 'Judicial Evaluation of Religious Belief and the Accessibility Requirement in Public Reason' (2016) 35(5) *Law and Philosophy* 435.
[159] Opinion of Advocate General Tanchev, *Egenberger*, n 151 above, at [110].

whether a belief organisation believed that a certain occupational feature was ethically required in a particular case is a question of sincerity, not a question of validity of the ethos in question. In this regard, it is a question capable of being decided by secular courts.[160]

In practice, the *Egenberger* criteria entail that belief organisations can resort to religion or belief as a genuine, legitimate and justified occupational requirement only in limited cases involving core liturgical, ritual and doctrinal teaching positions.[161] This restrictive interpretation of the scope of a genuine occupational requirement was reaffirmed in *IR v JQ*.[162] The dispute in *IR v JQ* arose when a Catholic charitable organisation which manages a private hospital dismissed one of the doctors working there.[163] The doctor, who also held a managerial position in the hospital, was dismissed because he divorced his wife and then remarried, in violation of the applicable canon law.[164] One of the questions before the CJEU was whether Article 4(2) EED allows belief organisations to definitively decide what constitutes 'acting with loyalty' to their ethos, and whether they could also impose a 'scale of loyalty' for employees in managerial positions, based on their beliefs.[165] The CJEU applied the *Egenberger* criteria that require a direct link between the occupational requirement and the activity concerned,[166] as well as that the requirement of professing a certain religion or belief is genuine, legitimate and justified.[167] It was held that adherence to Roman Catholic beliefs on the indissoluble nature of religious marriage was not necessary for the promotion of the ethos of the hospital, given that the occupational activities of the employee in question was to give medical advice and manage the internal medicine department.[168] Crucially, the CJEU also held that a genuine occupational requirement cannot justify expecting different degrees of loyalty from employees holding similar positions of responsibility in the same organisation, when the difference is solely based on their religion or belief.[169] The private hospital in *IR v JQ* employed non-Catholics in managerial positions of similar medical responsibility to the dismissed doctor's. That fact alone showed that adherence to the Catholic notion of marriage did not constitute a genuine occupational requirement in the circumstances of the case because the hospital could not possibly demonstrate that that requirement was necessary to avoid a probable and substantial risk of undermining its ethos or right to autonomy under Article 4(2) EED.[170]

In a similar vein to the rulings of the CJEU in *Egenberger* and *IR*, cases under the ECHR denote that the autonomy rights of belief organisations can justify only limited exemptions from religious antidiscrimination. According to the ECtHR, an occupational requirement of doctrinal loyalty would be compatible with the Convention only if it is strictly necessary to protect the autonomy rights of the belief organisation in question, and if it is also proportionate.

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[160] The ECtHR does occasionally rule on questions of sincerity of an individual's beliefs. See e.g. *Kosteski v the Former Yugoslav Republic of Macedonia*, Application no. 55170/00, 13 April 2006 at [39].
[161] See Rivers (2010), n 145 above, 122-125. Also Vickers (2016), n 11 above, 139-142.
[162] *IR v JQ*, n 94 above.
[163] The CJEU held that for the purposes of Article 4(2) EED organisations whose ethos are based on religion or belief can be private, albeit only under certain circumstances. See *JQ v IR*, n 94 above, at [40]-[41].
[164] *ibid* at [25]-[28].
[165] *ibid* at [33].
[166] *ibid* at [50].
[167] *ibid* at [51]-[53].
[168] *ibid* at [58].
[169] *ibid* at [59].
[170] *ibid* at [59]-[60].

In *Schüth*, the applicant was a parish organist at a Roman Catholic Church.[171] He was dismissed for having an extramarital affair in violation of Catholic regulations. Similarly to *Schüth*, the applicant in *Obst*, who was the European Director of Public Relations for the Church of Jesus Christ of Latter-day Saints, was dismissed from his post because of an extramarital affair.[172] However, despite the fact that both cases concerned dismissal from a Church for engaging in extramarital affairs, the ECtHR was unanimous in finding a violation of Article 8 ECHR in *Schüth*, but no violation in *Obst*. The reason was that the role of the applicant in *Obst*, which was to represent the Church as the director of its public relations department, necessitated a heightened duty of loyalty to the church's teaching. Such a degree of doctrinal loyalty was not necessary in the case of the parish musician in *Schüth*.[173] For similar reasons to *Obst*, the ECtHR also found no violation in *Siebenhaar*, which involved the dismissal of a teacher in a Protestant kindergarten because of her active involvement in a religious group different to her employer's.[174] According to *Siebenhaar*, as well as subsequent cases such as *Fernández Martínez*[175] and *Travaš*,[176] posts involving the teaching of religious education are justifiably linked to core functions of religious organisations and their doctrine.[177] Thus, holding employees in those posts under a heightened duty of doctrinal loyalty does not necessarily violate their rights to freedom of religion, respect for private life and religious anti-discrimination, provided that the sanctions in question do not go beyond what is strictly necessary to eliminate any risk for the autonomy of the organisation in question.[178] It is notable that there is disagreement over whether particular aspects of an employee's deviation from their duty of loyalty, such as the mere publicity of it,[179] could pose enough of a risk to the credibility and autonomy of an organisation that dismissal is justified. Overall, however, what the jurisprudence of the ECtHR and the CJEU share in principle is that whenever a belief organisation, in exercising its right to autonomy, sanctions (or otherwise disadvantages) an employee, the national courts must ensure that the interference with the employee's individual rights does not go beyond what is strictly necessary to eliminate a real and substantial risk for the autonomy of the organisation in question.[180]

What emerges particularly clearly in cases under the ECHR and EU law is that disputes about the fairness of any balancing exercise between the autonomy rights of belief organisations, on the one hand, and the right of workers to antidiscrimination, on the other, must give rise to effective judicial review.[181] Most basically, this right to judicial review

[171] *Schüth v Germany*, Application no. 1620/03, 23 September 2010 (only in French).
[172] *Obst v Germany*, Application no. 425/03, 23 September 2010 (only in French).
[173] *Schüth*, n 128 above, at [71].
[174] *Siebenhaar v Germany*, Application no. 18136/02, 3 February 2011 (only in French).
[175] *Fernández Martínez v Spain*, Application no. 56030/07, 12 June 2014 (Grand Chamber) at [119].
[176] *Travaš v Croatia*, Application no. 75581/13, 4 October 2016 at [93].
[177] The ECtHR has distinguished those cases from cases involving teaching positions that are unrelated to religious education, which are not able to justify a heightened degree of loyalty as a legitimate occupational requirement. See *Vogt v Germany*, Application no. 17851/91, 26 September 1995.
[178] See eg *Fernández Martínez*, n 175 above, at [132] and [136]; *Travaš*, n 133 above, at [102].
[179] Dissenting Opinion of Judges Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz, in *Fernández Martínez*, n 175 above. Notably, the Grand Chamber of the ECtHR was split nine to eight.
[180] According to the ECtHR, a mere allegation that there is a 'potential' threat to the autonomy of the organisation in question would not be sufficient. See *Sindicatul 'Păstorul cel Bun' v Romania*, Application no. 2330/09, 9 July 2013 (Grand Chamber) at [159].
[181] *Egenberger*, n 151 above, at [48]-[54].

generates a positive obligation on Member States to enact effective mechanisms, such as employment tribunals, with competence to adjudicate on employment disputes that arise from occupational requirements set by employers whose ethos is based on religion or belief.[182] However, the scope of judicial review in such cases depends on the conception of freedom of association that the CJEU and the ECtHR employ in their case-law. Recall that under a *jurisdictional* conception state authority is limited by a broad right of Churches to autonomy.[183] So, under a jurisdictional conception of freedom of association, judicial review is *broad* in scope, albeit *shallow* in reach. It is *broad* in scope both because it is triggered in a wide range of employment disputes and because the autonomy rights of belief organisations potentially have to be balanced against a wide range of individual human rights. But it is *shallow* in reach because whenever the courts have to determine whether an occupational requirement is genuine, legitimate and justified, judicial review is mostly limited to a review of plausibility. When a Church, for instance, based on its perception of its own ethos, distinguishes between doctrinal and non-doctrinal posts and sets a heightened duty of loyalty to its religious doctrine as an occupational requirement only for the former, the courts should not review whether that distinction is justified. They can only determine whether the occupational requirement in question is plausible on the basis of that distinction.

However, there is increasing evidence in European human rights law that the reach of judicial review is not as shallow as what a mere review of plausibility entails. A requirement for comprehensive judicial review can be traced in the CJEU's assertion in *Egenberger* that national courts have to provide 'effective' judicial review when a religious organisation claims that an occupational requirement is genuine, legitimate and justified.[184] But it also emerges clearly in case-law under the ECHR. More specifically, the ECtHR has repeatedly stressed that the autonomy rights of religious organisations are not absolute and cannot be exercised in ways that violate the rights of their employees to fair trial, freedom of expression, freedom of religion, respect for private and family life, and antidiscrimination.[185] For example, in *Lombardi Vallauri*, the ECtHR found a violation of the rights to fair trial and freedom of expression in a case involving the sudden termination of a professor's employment contract.[186] The employer, a Catholic university, provided no reasons for their decision to dismiss him and gave him no chance to defend himself.[187] In similar terms to the jurisdictional approach taken by the US Supreme Court,[188] the Italian courts held that they lacked jurisdiction to intervene in employment decisions made by religious institutions because those decisions were informed by reasons of religious orthodoxy that were central to their autonomy.[189] But in contrast to the jurisdictional approach favoured by the Italian courts, the ECtHR opted for comprehensive

[182] See eg *Obst*, n 172 above, at [45]; *Schüth*, n 171 above, at [59]; *Travaš*, n 176 above, at [110].
[183] Cohen (2015), n 147 above; T. Berg, K. Colby, C. Esbeck and R. Garnett, 'Religious Freedom, Church-State Separation, and the Ministerial Exception' (2011) 106 *Northwestern University Law Review Colloquy* 175, 176.
[184] *Egenberger*, n 151 above, at [55]. See also Opinion of Advocate General Tanche in, *Egenberger* at [88]-[100].
[185] See eg *Fernandez Martinez*, n 175 above, at [132]; *Travaš*, n 133 above, at [102].
[186] *Lombardi Vallauri v Italy*, Application no. 39128/05, 20 October 2009.
[187] *ibid* at [11]-[12].
[188] See eg *Serbian Orthodox Diocese v Milivojevich* 426 US 696 (1976). For a detailed discussion see C. Evans and A. Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1(1) *Oxford Journal of Law and Religion* 81.
[189] *Lombardi Vallauri*, n 186 above, at [27] and [32]-[33]. The Italian courts followed a similarly jurisdictional approach in *Pellegrini v Italy*, Application no. 30882/96, 20 July 2001 at [40]-[46].

judicial review. Although the majority in *Lombardi Vallauri* accepted that it was for religious organisations to determine their orthodoxy, it was held that secular courts always had to ensure respect for procedural fairness.[190] The interest of religious institutions to autonomy does not trump the rights of employees to basic procedural safeguards, such as their entitlement to be given reasons for termination.[191]

It could be argued that *Lombardi Vallauri* does not suggest any sort of comprehensive judicial review; that it was a particularly egregious case where the ECtHR intervened only to uphold a minimum level of procedural fairness. But even though that reading of the case might be convincing in isolation, it does not fit the rest of the ECtHR's case-law in this area. A better interpretation is that *Lombardi Vallauri* shows that the proportionality of an occupational requirement involves much more than minimal balancing between the autonomy rights of belief organisations, on the one hand, and the interests of workers in keeping their posts, on the other.[192] In fact, the proportionality of any interference with the rights of employees depends on both procedural and substantive limitations to the autonomy of organisations whose ethos is based on religion or belief. This interpretation, which invites comprehensive judicial review, fits well with subsequent cases under the ECHR. In *Schüth*, *Obst* and *Siebenhaar*, the ECtHR stressed that cases involving dismissals due to a breach of a genuine occupational requirement require careful examination, not only of the interest of the employees in keeping their posts, but also of their rights to respect for private life and freedom of religion, which have to be balanced against the interests of the religious employer.[193] In addition, the proportionality of a dismissal also depends on how hard it can be for the dismissed employee to find a job outside the Church. To that end, the ECtHR requires that the national courts take into account whether the employer tried to find another suitable post for the dismissed employee;[194] and whether, given the nature of the job, the age of the employee, their skills, the time they have spent on the post before being dismissed, and the general employment context, finding another post is a realistic possibility.[195] In *Schüth*, for instance, the ECtHR held that the fact that the applicant, a parish organist, had very limited employment options outside the Church was of 'particular importance' to the proportionality test.[196] In *Travaš*, the ECtHR was satisfied that the proportionality test of the national courts took into account that the dismissed employee, a teacher of religious education, had a degree in theology, which gave him 'the possibility to teach courses in ethics and culture';[197] as well as that the employer tried, albeit unsuccessfully, to find him another suitable post.[198] What was also deemed important was that the dismissed teacher could access unemployment benefits whilst seeking a new job.[199]

None of those considerations would be relevant to the proportionality test of the ECtHR under a *jurisdictional* conception of the associational rights of belief organisations. The

[190] *Lombardi Vallauri*, n 189 above, at [52].
[191] *ibid* at [71].
[192] See I. Cismas, *Religious Actors and International Law* (Oxford: OUP, 2014) 133-150.
[193] *Schüth*, n 171 above, at [67]; *Obst*, n 172 above, at [89]; *Siebenhaar*, n 174 above, at [40].
[194] *Travaš*, n 176 above, at [15]-[17]. The same consideration played some role in the arguably different case (as it does not involve a religious organisation as the employer) of *Eweida v United Kingdom*, n 2 above, at [93].
[195] See *Obst*, n 172 above, at [48]; *Travaš*, n 176 above, at [105], *Siebenhaar*, n 174 above, at [44].
[196] *Schüth*, n 171 above, at [73].
[197] *Travaš*, n 176 above, at [112].
[198] *ibid*
[199] *ibid* at [103].

jurisprudence of the ECtHR shows that balancing between religious freedom and religious anti-discrimination is much more comprehensive than merely reviewing the plausibility of an occupational requirement having regard to the ethos of a religious organisation.[200] In fact, effective judicial review requires that the courts take into account both procedural (e.g. giving reasons for someone's dismissal[201]) and substantive (e.g. the rights of the employees to privacy, religious freedom and freedom of expression;[202] their employment prospects[203]) limitations to the right to freedom of association that belief organisations enjoy under human rights law.

The discussion so far shows that the CJEU and the ECtHR resolve tensions between religious freedom and religious antidiscrimination through an interpretive approach that engages with their shared purpose, which is to secure fair background conditions for everyone's ethical independence. When a conception of the associational rights of religious organisations, such as the *jurisdictional* conception, poses an enhanced level of risk for the rights of employees to freedom of religion, privacy and antidiscrimination, the CJEU and the ECtHR correctly insist that that must be taken into account when considering whether that specific conception of freedom of association should be maintained. A *jurisdictional* conception, which only allows for shallow judicial review, could undermine a fair framework for the compossible pursuit of different (and often conflicting) religious and ethical commitments. This is an example of how through testing different conceptions of freedom of association the courts develop their own account of ethical independence and outline, as a result, the scope of religious freedom and religious antidiscrimination.

The same happens with certain conceptions of freedom of choice, such as the *forfeiture* conception, which rest on an overly narrow understanding of procedural fairness. Recall that, as the second substantive section of this article discussed, according to a *forfeiture* conception of the value of choice what has elevated moral force is that a particular outcome results from the conscious choice of an individual.[204] A *forfeiture* account places most of its emphasis on the legitimising force of voluntary action. For example, if a religious organisation made clear that certain employees have to be loyal to its doctrine, those employees would be responsible for any disadvantage they incur because of breaching their duty of loyalty. The circumstances under which that duty exists recede into the background. However, cases from the CJEU and the ECtHR clearly show that the two courts give independent significance to those conditions. In fact, the CJEU and the ECtHR consider the conditions in which an occupational requirement exists separately from any choices made by the employees in question. Apart from, and often way before, looking at whether an employee breached an occupational requirement, the CJEU and the ECtHR will consider whether there is a direct link between an occupational requirement and a specific employment post or activity in the light of the ethos of the organisation in question; whether any disadvantage to individual employees was necessary to avoid a real and substantial risk to the autonomy of the organisation; and whether, in cases of dismissal, the possibility to find another job is realistic in the circumstances. A *forfeiture* account of the value of free choice neither fits nor justifies this precedent. So, overall, in cases involving tensions

[200] Opinion of Advocate General Tanchev, *Egenberger*, n 151 above, at [68]-[74].
[201] *Lombardi Vallauri*, n 186 above.
[202] *Siebenhaar*, n 174 above; *Fernandez Martinez*, n 175 above.
[203] *Schüth*, n 171 above; *Travaš*, n 176 above.
[204] Scanlon (2000), n 44 above, 251-259.

between religious freedom and religious antidiscrimination the CJEU and the ECtHR do place *some* emphasis on the interest of belief organisations to their autonomy. But they place most of their emphasis on securing fair access to important opportunities that enable people to pursue their religious commitments. This is why important opportunities, such as employment, can be restricted only when specific procedural and substantive safeguards are satisfied.

In all those cases, the idea that religious freedom and religious antidiscrimination share their main normative foundation provides an attractive explanation of the relationship between the right of belief organisations to autonomy – which, recall, is captured by their right to freedom of religion read in the light of freedom of association – and antidiscrimination. The moral right to ethical independence flushes out tensions between religious freedom and religious antidiscrimination because it explains why it is important to 'carve out' some space for belief organisations in discrimination law. People join religious or philosophical groups to develop and pursue conceptions of the good that are central to their identities; and the stability and credibility of those groups depends on their freedom to organise their internal affairs. But the very reasons supporting some space for the autonomy rights of belief organisations in discrimination law also define the outer limits of this carved-out space.[205] Religious or philosophical organisations can expect neither jurisdictional immunity nor expansive exemptions from discrimination law. None of those is compatible with the very conceptions of liberty and equality that support the rights of belief organisations to their own autonomy through limiting the acceptable range of collective decision-making.

CONCLUSION

This article took as its starting point the theoretical and doctrinal confusion over the relationship between religious freedom and religious antidiscrimination, which are currently seen as either synonymous or as distinct and in competition. In contrast to those polar opposite positions, this article argued that religious freedom and religious antidiscrimination share their main normative ground on the moral right to ethical independence. The two legal rights are not synonymous though as they place their emphasis on different parts of the moral right. Religious freedom places its emphasis vertically on individual identity, whereas religious anti-discrimination places its emphasis horizontally on securing fair background circumstances for the compossible pursuit of different ethical and religious commitments. The article maintained that tracking the shared normative ground and the distinct emphasis of religious freedom and religious antidiscrimination sets the basis for a systematic analysis of their relationship; their distinct contributions to legal practice; and the considerations that the courts have to take into account whenever tensions arise between the two legal rights.

The main argument of this article does not categorically resolve questions about the scope or type of exemptions for religion or belief that can be supported by ethical independence. There are complex debates as to whether, for instance, particular occupational requirements are consistent with human rights and antidiscrimination law. Nevertheless, an interpretation of

[205] Traces of this principle can be found in the suggestion of the ECtHR that the Convention protects only those convictions and associations that are consistent with human dignity. See eg *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 A.C. 246 at [23]; *Campbell and Cosans v United Kingdom*, Application nos. 7511/76 and 7743/76, 25 February 1982 at [36].

religious freedom and religious antidiscrimination as a nexus of legal rights based on ethical independence outlines the framework within which such debates can arise. This framework, which locates ethical independence within a general theory of liberty, is useful for a wide range of cases – even those that do not involve human rights or antidiscrimination law. Debates on the accommodation of religion or belief often require difficult boundary judgements, which invite an interpretation of individual liberty in the light of other principles, including fairness and equality, in order to find the answers in hard cases. Crucially, this article claims that ethical independence is central to all such interpretive arguments.

Even so, the main arguments of this article should not be taken to suggest that religious freedom and religious antidiscrimination do not protect other values, apart from ethical independence, which are not necessarily shared between them. Historically, an important justification for religious freedom was maintaining civil peace,[206] which would be inadequate to explain the aim and function of religious antidiscrimination.[207] As the third substantive section of this article discussed, the main purpose of religious antidiscrimination is to secure a fair framework for ethical independence; for instance, through securing fair access to employment without disadvantage on grounds of religion or belief. But religious anti-discrimination may also pursue other distributive aims that are not necessarily related to ethical independence. Although those different aims may be normatively linked, their discussion falls beyond the scope of this article. It is important though that even if we accept that a plurality of values underlie religious freedom and religious antidiscrimination, that would still be entirely consistent with the claim that ethical independence furnishes their main and shared normative foundation.

By the same token, ethical independence yields a cluster of different legal rights that cannot be exhausted by rights directly related to religion or belief. Freedom of association, freedom of expression and respect for private life, along with 'rights of exit' from cultural and belief groups,[208] are also necessary to create and maintain the space required by ethical independence. Humility, respect, imagination and resourcefulness are tremendously important in their own ways as well. And although this article did not discuss non-legal responses to debates on the accommodation of religious and ethical commitments,[209] this should not be taken to suggest that responses reaching beyond human rights and antidiscrimination law are less valuable or less effective. Religious freedom and religious antidiscrimination specify the moral right to ethical independence only imperfectly. They clarify the duties arising from the moral right and form a powerful nexus that contributes to its realisation. They are only one, albeit central, part of the story.

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[206] H. Bielefeldt, 'Misperceptions of freedom of religion or belief' (2013) 35 HRQ 33; A. Sajó and R. Uitz, 'Freedom of religion', in A. Sajó (ed) *Oxford Handbook in Comparative Constitutional Law* (Oxford: OUP, 2012) 910-927; M. W. McConnell, 'The origins and historical understanding of the free exercise of religion' (1990) 103 *Harvard Law Review* 1409.

[207] A justification based on civil peace could not explain the concern of antidiscrimination with equal moral status or with preventing particular forms of harm. See eg Lippert-Rasmussen, n 125 above, 129-185.

[208] L. Green, 'Rights of exit' (1998) 4 *Legal Theory* 165.

[209] On 'value-added' negotiation see M. Minow, 'Should Religious Groups Be Exempt from Civil Rights Laws?' (2007) 48(4) *Boston College Law Review* 781.