"RESPECTING THE DIGNITY OF RELIGIOUS ORGANISATIONS: WHEN IS IT APPROPRIATE FOR COURTS TO DECIDE RELIGIOUS DOCTRINE?"

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The notion of "dignity" is usually associated with individuals. But in the religious sphere, individuals often join together as part of organisations, whether "churches" or other groups. Court decisions in disputes involving religious parties may involve the court being invited to decide what is a "valid" or "correct" religious doctrine. But is it consistent with the dignity that ought to be afforded to religious persons and groups for secular courts to take on a role as "amateur theologians"? There are good public policy reasons to suggest not, based on the lack of expertise of judicial officers, and religious freedom considerations supporting the authority and dignity of religious actors to decide the meaning of their own doctrines. However, in some cases, courts are required to determine religious questions for the purposes of enforcing a private law right, such as under a charitable trust for the advancement of religion, or an employment contract. Refusing to decide these issues in such cases may leave deserving parties without a valid remedy. This article reviews the approach to this issue taken by courts in the United States, United Kingdom and Australia, in order to determine whether these different decisions can be reconciled. It recommends that courts usually continue to respect the dignity of religious organisations by declining to determine the content of religious doctrine, but should be willing to do so where the private rights of parties arise under a religious regime initially accepted by the parties concerned.

I INTRODUCTION

> What we as judges need to know and understand is what the individuals before us actually believe and whether that belief is freely and sincerely held. We are not concerned with whether it is doctrinally right or wrong… We are no longer concerned with whether it is a 'core belief' of the religion to which the individual belongs.[1]

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[1] The Hon Baroness Hale, "Secular Judges and Christian Law" (2015) 17 *Ecclesiastical Law Jnl* 170-181 at 179.

> [T]he parties accepted that it was no part of the Court's function to review the correctness of the theological opinion expressed by the Committee and they did not seek to tender any expert evidence on the topic. That approach is correct.[2]

> [T]he courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.[3]

It is not uncommon to find wide-ranging statements such as those above that "courts do not determine religious doctrine". But there are other cases, flagged by the comments of the UK Supreme Court in *Shergill v Khaira* quoted above, where the court finds itself bound to determine at least some religious issues. Are the courts simply being inconsistent? Or is there a rational and workable distinction between cases where religious beliefs ought not to be the subject of "secular" judicial rulings, and those where the courts have to offer their interpretations of doctrine? The aim of this paper is to demonstrate that the latter is true and to provide a clearer understanding of the difference between these two situations.

These issues matter for many reasons; some of those reasons relate to the fundamental idea of human dignity. A basic aspect of the protection of human dignity is respect for the fundamental religious beliefs that may underlie human actions. Freedom of religion is protected in crucial international agreements, and as a basic part of the presuppositions of Western societies. A key feature of religious freedom, however, is that it protects not only the rights of an individual in their own autonomy, but also the rights of groups of persons who joint together to live out their shared religious commitments. Art 18(1) of the *Interational Covenant on Civil and Political* Rights ("ICCPR"), for example, refers to the right:

[2] *Kumar v Satsang Hindu Maha Sabha of NSW Incorporated (No 2)* [2019] NSWSC 325 per Kunc J at [21] (thanks to my colleague Dr Renae Barker for alerting me to this reference.)
[3] *Shergill v Khaira* [2015] AC 359, [2014] UKSC 33 per Lords Neuberger, Sumption and Hodge at [45].

> either **individually or in community with others** and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. [4]

Part of the respect that should be offered to a religious group, then, is that it be left to order its life in accordance with its own understanding of the religious doctrines that shape its existence. Of course, there are some circumstances where the living out of those doctrines may need to be controlled in the interests of fundamental rights of members of the group or members of the public- where a religious group, for example, inflicts physical or sexual abuse on children or other vulnerable persons. There are well recognised limits to religious freedom.[5] But even in those cases, there are significant questions to be raised as to whether the State should be interpreting, or "re-interpreting" doctrine, or rather simply saying that "whatever your doctrine means, we cannot allow this behaviour". The latter response is more consistent with the dignity of the group, which is not undermined but actually affirmed when the group is held accountable for the lived consequences of its doctrines.

Western societies in general usually assume a separation between "church" and "state", and one aspect of that is that secular judges do not usually make definitive rulings on the content of religious doctrine. While there are good reasons in most cases to be wary of judicial involvement in determining the content of doctrine, a blanket policy of this sort may create problems where private parties have entered into arrangements with a shared understanding of religious beliefs.

In any event a blanket "hands off" policy[6] is not consistent with the actual history of how courts have made decisions in some areas. Judges have regularly asserted that they will not make rulings on theological doctrines; but historically courts have just as regularly been called on to determine, in property disputes involving religious trusts, what is an acceptable use of property in accordance with the trust. To decline to make a ruling there will often leave one party at the mercy of another who has behaved in bad faith.

[4] For detailed analysis of the religious freedom rights of groups, see J Rivers, *The Law of Organized Religions* (Oxford; OUP, 2010); Nicholas Aroney, "Freedom of Religion as an Associational Right" (2014) 33/1 *University of Queensland Law Journal* 153-186.

[5] See art 18(3) of the *International Covenant on Civil and Political Rights*, providing that impairment of the right to manifest religion is justified by "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

[6] For this terminology, see Kent Greenawalt, 'Hands Off! Civil Court Involvement in Conflicts over Religious Property' (1998) 98 *Columbia L Rev* 1843.

Some consideration has been given to these issues in the United States, where the First Amendment has led to a long history of consideration of the matters. A recent review by Helfand surveys the different approaches there, which have often been driven by an assumption based on a particular reading of the First Amendment to the US Constitution that "religious questions" are not able to be answered.[7] He notes, however, a number of cases where in the past courts have been prepared to review such questions where private rights are at stake, and offers suggestions as to a more nuanced test.

In the United Kingdom there has also been increased impetus for commentary on this question since the decision of the UK Supreme Court in *Khaira v Shergill*,[8] holding that questions of doctrine are not always "non-justiciable", as had been suggested in some previous recent decisions.

But there has been little detailed discussion on a principled basis concerning *how* judges in the UK decide when it is appropriate to determine these matters, and almost none in Australia. The issues are likely to arise more regularly in the future. For example, in *Christian Youth Camps v Cobaw*[9] the court had to determine whether views on appropriate sexual behaviour fell within the broad description of "doctrines" of the Christian Brethren church, and in the end the majority agreed with the holding of a lower Tribunal that these views were not "doctrines" of the church.[10] In dissent in that decision, Redlich JA commented:

> [526] … Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety (*Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 220 [36] (Nettle JA)). The Tribunal was neither equipped nor required to evaluate the applicants' moral calculus.

The aim of this paper is to consider the framework within which these differing approaches to the question whether courts should rule on religious doctrines, are being applied, to discuss whether they can be reconciled, and to

[7] Helfand, Michael A "When Judges are Theologians: Adjudicating Religious Questions" in Rex Ahdar ed, *Research Handbook on Law & Religion* (Edward Elgar Publishing, 2018); Pepperdine University Legal Studies Research Paper No. 2017/12.

[8] [2015] AC 359.

[9] (2014) 308 ALR 615, (2014) 50 VR 256.

[10] See para [276], where Maxwell P affirmed the holding of the Tribunal, accepting the views of an expert called on behalf of Cobaw that "the absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith demonstrates the Christian Brethren beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the religion.".

outline guidelines that are consistent with legal principle and past authority which a judicial officer might be expected to follow in dealing with the question.

There are good reasons to be cautious about courts making pronouncements on religious questions. But it is argued here that an exception to the bar on courts making religious findings should be recognised in circumstances where the private rights of the parties to a dispute are at stake, and the parties themselves have chosen to accept benefits on the basis that they will be bound by certain religious principles. While there should be a presumption that courts will usually have a "hands off" approach to religious doctrine, this presumption may be rebutted where there is a civil dispute involving private parties, who have agreed to subject themselves to a specific religious regime. In those circumstances, the court has an obligation to resolve the dispute between the parties, even if that resolution may incidentally involve a consideration of religious doctrine. Apart from these circumstances, however, the freedom of an organisation or person to determine the meaning of their own religious commitments should be respected.

This approach is one which respects the dignity, autonomy and religious freedom of religious persons and organisations where the community seeks to impose external obligations, but allows the courts to intervene where private parties have decided to subject themselves to a particular religious regime.

II THE NATURE OF THE PROBLEM

The question is- when it is appropriate for a court to make an authoritative ruling on the content of a religious doctrine?

This might in some cases be framed as an issue as to whether certain matters are "justiciable"- ie within the formal competence of a court to decide. (For example, one area which has traditionally been held to not be "justiciable" is a ruling on the actions of a foreign government.) Or, more straightforwardly, it might be expressed simply as an issue as to whether it is "appropriate" for a court to make such a decision.

A *Related but different issues*

It is important to distinguish this issue from a similar but different one, which is whether a particular belief or doctrine system is classified as "religious" (the "*truly religious*" issue). We should also distinguish this issue from the question whether a particular belief is "central" or "foundational" for a particular religion (the *centrality* issue); and also from the question whether a person sincerely or genuinely believes the relevant doctrine (the *sincerity* issue).

The courts have developed a number of doctrines over the years to deal with the "truly religious" issue[11] and are well able to exclude a "sham" (a purported religion made up for ulterior purposes) from being given protection as "religious". Courts all over the world, for example, have had no problem concluding that the so-called "Church of the Flying Spaghetti Monster" is a parody invented for argument, rather than being a true religion (see, for example, *Cavanaugh v Bartelt*)[12]. In the UK, the Charity Commission has ruled that the "Jedi Order" (based on beliefs from the fictional Star Wars universe) is not a genuine religion.[13]

B *The Content of Doctrine issue*

But here we are dealing with the question, given that this is a genuine "religion", is it appropriate for a court to provide a ruling on the content of the religion (the *content of doctrine* issue)?

Some examples of situations where this question may arise are as follows.

One of the situations where this might arise is where a **statute may provide an exemption** from obligations which would otherwise apply, where a religious group is behaving in accordance with its religious beliefs. Here it may be suggested that the court will need to determine whether those beliefs do *in fact* justify the way that the group is behaving.

Another area which presents the question is where a court has to rule on some action which is taken in relation to real property which is governed by a **trust for religious purposes**. The law has long recognised the category of "charitable trust", and one valid type of such trust is a trust "for the advancement of religion".[14] An issue may then arise where property or funds derived from the sale of a property are to be used for certain purposes, as to whether those purposes are consistent with the religious purposes for which the trust was established. To make a decision here the court may be presented with the question of the interpretation of religious doctrine.

[11] The decisions most commonly referred to in the common law world for a definition of "religion" are those of the High Court of Australia in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ("the *Scientology case*") [1983] HCA 40; (1983) 154 CLR 120, and more recently the decision of the UK Supreme Court in *Hodkin & Anor, R (on the application of) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77.

[12] 12 April 2016; USDC for Nebraska, 4:14-CV-3183.

[13] See a note of the decision at https://www.farrer.co.uk/news-and-insights/charity-commission-decision-the-temple-of-the-jedi-order/ (8 March 2018). See also T Cheung, "Jediism: Religion at Law?" (2019) 8 *Oxford Journal of Law and Religion* 350-377 for discussion of the issues.

[14] For a general review of the area, see Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia" (2011) 35 *Melbourne University Law Review* 1071.

Another example may be taken from the literature on **religious freedom** in the United States. The Federal *Religious Freedom Restoration Act*,[15] introduced after a decision of the US Supreme Court limiting the scope of the First Amendment free exercise protections,[16] requires that free exercise of religion be protected such that government may not "substantially burden religious exercise," unless those burdens satisfy strict scrutiny. But what is a "substantial burden"? On one view, in determining how "substantial" a burden on religion is, the courts will need to interpret religious doctrine.[17]

Helfand notes that this issue has been discussed in the context of US Supreme Court decisions relating to the "contraception mandate" under the *Affordable Care Act*, where some religious bodies argued that being required to fund the provision of contraception (and in particular abortifacient drugs) made them "complicit" in these actions contrary to their deeply held religious beliefs. The extent to which involvement in a chain of events leading to a specific outcome, makes a person complicit under religious doctrines, can be said to be a matter of interpreting religious doctrine.[18]

III POSSIBLE FRAMEWORK TO DISTINGUISH APPROPRIATE FROM INAPPROPRIATE CASES

Given the range of different approaches noted, then, can we formulate a principle to explain and justify circumstances when it is appropriate for courts to make theological judgements, and when it is not?

A *Private vs Public*

One formulation of the line between appropriate and inappropriate religious adjudication is Helfand's "private" v "public" suggestion. In his article, he suggests that an appropriate distinction can be drawn between cases where "private rights" are in issue- contractual claims, for example; and those where "public rights" are concerned. In particular, while a court imposing obligations onto parties, in accordance with its understanding of a theological doctrine, would seem to raise the problems of "excessive entanglement" with religion, and

[15] Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.
[16] *Employment Division v Smith*, 494 U.S. 872 (1990).
[17] See Michael A Helfand, 'Identifying Substantial Burdens' 2016 *U Ill L Rev* 1771; and 'How to Limit Accommodations: Wrong Answers and Rights Answers' (2016) 4 *Journal of Law, Religion and State* 1.
[18] See Helfand (2017) "Adjudicating" above n 7 at pp 13-15 for detailed comment.

a "preferencing" of some theological options might raise "establishment" issues, he argues that in the sphere of private law arrangements a "contextual" approach may avoid such concerns. Such an approach would involve considering, not the "objective" meaning of religious propositions, but the meaning that the specific parties involved would give to them.

In particular Helfand refers to cases involving "co-religionists", people from the same theological tradition who enter into contractual arrangements. In many of these cases it seems that a court would endorse an injustice by refusing to provide a remedy should promises not be fulfilled; and if the court is prepared to accept evidence of the shared understanding of the parties about particular terms, it may avoid many of the problems of undue "entanglement" or "establishment".

> A commitment to contextualism encourages courts to consider the parties' shared norms and expectations when interpreting and enforcing various religious agreements. Thus, in contrast to a purely formalistic approach to contract interpretation—one that prioritizes text and outward manifestations—contextualism asks courts to use context to assess the shared intentions of the parties. The very nature of co-religionist commerce suggests that careful evaluation of context will frequently lead courts to different conclusions… contextual inquiry may provide a basis to interpret seemingly religious terminology, thus allowing enforcement without encroaching on Establishment Clause prohibitions. In this way, contextualism can further ensure the enforceability of co- religionist commerce by avoiding Establishment Clause pitfalls, using the norms and understandings shared by co-religionists to fill in gaps and interpret terms in co-religionist commercial agreements.[19]

The example that Helfand gives is helpful. Where parties enter into a contract for the supply of "kosher" food, it would not usually be difficult to identify the specific religious tradition in which they were contracting, and holding them to a bargain would involve the court reading their contract in context of their shared understanding.

B *"Hand Off unless…"*

Another possible formulation, with a stronger emphasis on protection of the religious freedom of religious groups, might be as follows: that the court should decline to decide a theological question *except* where it is a private law issue and

[19] Above, n 7, at 17.

the parties have chosen to subject themselves to a specific religious regime (a "hands off unless" approach.)

Note the difference between cases where the court will intervene in the affairs of a voluntary association if the issues are "usual" common law questions (fraud, defamation on "secular" grounds); and situations where the court may be called on to decide a theological question (in property cases involving a trust.) If a mix of religious and non-religious issues is present, the court may decline to decide some, but decide others.

IV UNDERLYING POLICY REASONS

Before examining the course of judicial authority in more detail, it seems to be a good idea to discuss the theoretical framework within which these decisions are made. What sort of reasons are put forward for a court to determine, or not to determine, these matters?

A *Reasons why a secular court ought not to be determining theological questions*

What reasons, then, are put forward to justify a blanket "hands off" policy under which a court would refuse to determine theological questions?

One set of reasons may be called "**competency**" arguments. Judges are trained in the mainstream "secular" legal system. With rare exceptions, few will have a deep knowledge of the internal debates within religious traditions, or the competence to resolve those debates.[20]

Another reason that has sometimes been put forward is all religious doctrine is "**subjective**", and hence unable to be discussed in a rational way.

For example, Neave JA in *CYC v Cobaw* at [417] cited the decision of the United Kingdom Court of Appeal in *Khaira v Shergill*[21] that because religious beliefs are 'subjective inward matters' they are incapable of proof and not justiciable as a legal question.[22] This echoes comments about the "irrationality" of religious beliefs made by Laws LJ.[23] Holzer has drawn attention to a strain of

[20] See, eg, Ira C Lupu and Robert W Tuttle, 'Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders' (2007) 7 *Georgetown J Law & Pub Policy* 119, 138.

[21] [2012] EWCA Civ 983.

[22] As noted below, that 2012 decision was later over-turned by the UK Supreme Court on precisely this point, the Supreme Court holding that it was not true that religious questions were "not justiciable".

[23] See the comments of Laws LJ in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 at [23]-[24]: "in the eye of everyone save the believer **religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence**. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice

judicial reasoning in First Amendment decisions in the US which treats all religious reasons as "irrational, divisive, and dangerous".[24]

Other, more persuasive, reasons for a blanket "hands off" approach by courts may be characterised as reasonable "**religious freedom**" arguments. The view may be put that recognising the dignity and freedom of believers to adopt religious views and to live them out, implies that they, and the religious groups they are a part of, should be given the autonomy and dignity to resolve issues of what the doctrines of their faith are and how they inter-relate.

As well as comments from Western countries, similar arguments have been put forward in India, where the Supreme Court has sometimes declined to recognise religious doctrines on the ground that they were not "essential" to a particular religious tradition.[25] Criticising this approach of Indian courts to protecting only the "essential" doctrines of a religion,[26] Mustafa and Sohi note:

> The essentiality test impinges on this autonomy [ie freedom of religion] because the judiciary assumes the power to decide what the essential or non-essential parts of religious practices are.[27]

An example from the common law world of a public decision-maker deferring to the internal interpretation of doctrine by a religious group can be found in the decision of the New Zealand Human Rights Review Tribunal in *The Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland*.[28]

Even after New Zealand had passed legislation allowing same-sex marriage, the *Human Rights Act* 1993 (NZ) s 39 exempted "qualifying bodies" from being liable for breaching discrimination law where those bodies were determining admission to a religious organisation. In those cases, the relevant bodies were allowed to apply "the doctrines or rules or established customs of that religion". The Tribunal made it clear that it would not itself take on the task of determining the content of the relevant doctrine. They commented:

he accepts its claims. [24] The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is **irrational, as preferring the subjective over the objective."** (emphasis added).

[24] S Holzer, "Religious Reasoning and Due Process of the Law: Why Religious Citizens Have the Burden to Prove the Innocence of Their Reasoning in the Public Square" (2015) 57/3 *Journal of Church and State* 419–449, at 449.

[25] See Faizan Mustafa and Jagteshwar Singh Sohi, "Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy", (2017) *BYU L. Rev.* 915; available at: https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/9 .

[26] See above, n 25, cases referred to from p 931.

[27] Above, n 25, at 937.

[28] [2013] NZHRRT 36 (17 October 2013).

> [10] … Nor is it the function of this Tribunal to second guess the Anglican Church as to what its doctrines and teachings should be or how those doctrines and teachings should be interpreted. This is a common law principle of long standing. See for example *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705 at 708, *Mabon v Conference of the Methodist Church of New Zealand* [1998] NZCA 244; [1998] 3 NZLR 513 (CA)and *Marshall v National Spiritual Assembly of the Bahá'is of New Zealand Inc* [2003] 2 NZLR 205 at [31]-[34].

In *Mabon* at 523 it was said:

> Clearly, and reflecting the separation of church and state, Courts must be reluctant to determine what are at heart ecclesiastical disputes where matters of faith or doctrine are at issue.

Another reason that has been offered in the past for a court not to decide these issues, is the fear that deciding the issues may privilege one religion over another. Helfand refers to these "**establishment**" arguments in the US: "judicial resolution of such questions will be interpreted as endorsement of one religious view over another—a form of, so to speak, prohibited denominational preference".[29] But this does not seem a very strong argument- the decision of a court to decide a theological question does not of itself entrench or privilege the religious body whose doctrine is being interpreted.

Yet to some extent it seems that the desire to avoid "entanglement" with religious issues, referred to in the US First Amendment jurisprudence, may be connected to "establishment" fears.[30]

Finally, we may note that on occasions the concept of "**lack of justiciability**" has been put forward; either as a separate criterion, or by way of summing up other concerns. See, for example, the recent Canadian Supreme Court decision of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26:

> [36]…This Court has considered the relevance of religion to the question of **justiciability**. In *Bruker* v. *Marcovitz*, 2007 SCC 54 (CanLII), [2007] 3 S.C.R. 607, at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, **courts should not decide matters of religious dogma**. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551, at para. 50, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably **entangle** the court in the affairs of religion." The

[29] Above, n 7, at 11.
[30] Ibid.

> courts have neither **legitimacy nor institutional capacity** to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, at para. 33 (CanLII); *Amselem*, at paras. 49-51…
>
> [39] … In the end, **religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute**.

In this interesting passage, we see reflection of a number of the reasons noted above: the discussion on "entanglement", on "legitimacy", on "institutional capacity" (a reference to what we have called "competence"), and a general reliance on the value of "autonomy".

B *Situations in which a secular court has to consider theological questions*

Despite the above, however, cases arise where the courts have apparently no choice but to make a decision on the interpretation of a religious doctrine: where property is held on a religious trust, or where the parties have entered into a contract agreeing to be bound by a religious framework. If a court declines to rule in these cases, then one party may get a "windfall" decision in their favour, based on the *status quo* at the time of the dispute arising, and the other party will not have their case properly heard.

To a large extent these cases depend on the prior consent of the parties to have any disputes resolved within a particular framework. This consent may arise explicitly, under the terms of a contract; or implicitly, under the general principle of property law that a party cannot accept the benefit of property ownership without at the same time agreeing to shoulder the "burden" of any obligations attaching to the property.[31] While this principle is most directly applied in cases dealing with easements or restrictive covenants, it can be seen to be in operation where someone assumes control or ownership of property to which has been attached "charitable trust" obligations by a previous owner. By becoming owner of such property, the new owner also assumes the obligations attaching to the property under the pre-existing trust.[32]

[31] *Halsall v Brizell* [1957] Ch 169.

[32] A similar principle was applied in the NSW Supreme Court decision of *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856, where the court ruled that members of a management board, when they accepted office on the board, impliedly accepted personal responsibility to meet obligations entered into by the board as previously constituted. At [325]: "Acceptance alone of appointment to a standing committee designated and regulated by comprehensive ordinances plainly intended, amongst others, to ensure continuity and the proper discharge of obligations, is sufficient

Of course, by the time a matter reaches the courts, one of the parties will usually no longer prefer that the asserted religious constraints be enforced. But in general terms, courts have seen it as their duty to apply the legal constraints which have been previously accepted, and in doing so will sometimes need to offer a view on religious doctrine.

An example of a case of this sort is the NSW decision of *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)*,[33] which is an example of a contractual dispute. There the contract between a rabbi and the synagogue he served (which was an incorporated body) stipulated that the rabbi could only be dismissed if this were done after an order of the Beth Din (a Jewish religious tribunal) applying Jewish law, and this was upheld by the court as a valid clause of the contract.

Brereton J commented at [29]:

> The parties to a contract governed by Australian law can incorporate into the contract, as terms of the contract, provisions of another system of law, including Jewish law.[34]

There was no uncertainty about the content of the relevant law:

> [32]…There is no evidence of any … controversy concerning the content of that subset of Jewish law…. As in *Halpern,* there is no difficulty in relying on orthodox Jewish law as part of the contractual framework, and its content, at least for relevant purposes, is not controversial, unclear or uncertain

outward expression of agreement to be bound by contractual obligations undertaken by that standing committee, and which are still on foot".

[33] [2017] NSWSC 823 (22 June 2017).

[34] *Engel v Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402 at 409 [36] per Doyle CJ (with whom Bleby and Vanstone JJ agreed); cf *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] 1 WLR 1784.

In *Mohamed v Mohamed*[35] a question arose as to whether a "pre-nuptial" agreement between Muslim parties, requiring payment of an amount under Islamic law should the "husband" terminate the relationship, was enforceable. It was held that it was enforceable as a contract. The judge considered cases from other common law jurisdictions where a "dowry" of this sort had been enforced. However, he noted that enforcing the payment did not require interpreting the provisions of Sharia law, it simply involved treating the agreement as a contract under Australian law, so there was no sense in which the court needed to decline jurisdiction. See [62]

> No expert evidence relating to Sharia Law was relied upon either in the Local Court or in this Court. As discussed above, her Honour did not apply Sharia Law, nor was she required to do so to properly interpret the agreement.

V US CASES

Helfand discusses a number of US cases where courts have, and have not, ruled on religious doctrines.[36] His comments may be summarised in the following table.

[35] [2012] NSWSC 852 (31 July 2012).
[36] See "Adjudicating", above n 7.

Summary of US decisions discussed by Helfand

Court should decline to decide theological issue	**Basis for declining**	**Court agrees to decide theological issue**	**Type of issue**
Wallace. v ConAgra Foods, Inc., 19HA-CV-12-3237 (Minn First Judicial District, 6 Oct 2014)	Court cannot decide a "purely religious question" (meaning of "kosher" food)- **First Amendment** analysis	*Bouldin v Alexander*, 82 US (15 Wall) 131 (1872)	Whether terms of a **property trust** were complied with- "the majority of a congregational church is considered to represent the church only if [it] adhere[s] to the organization and the doctrines"
Cases noted in Lupu & Tuttle[37]	"claims would require courts to answer questions that the state is **not competent** to address"	*Gonzalez v Roman Catholic Archbishop*, 280 US 1 (1929)	Again, property trust conditions: "Canon Law in force at the time of the presentation governs"
Cases noted in Eisgruber & Sager[38]	"[i]f government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby **favor** some religious persons, sects, and groups over others"		
Watson v Jones, 80 US 679 (1871)	"**freedom for religious organizations**," which entailed "an independence from secular control or manipulation" in adjudicating "matters of church government as well as those of faith and doctrine."		

Note: the cases and comments by academics are illustrative and may not all currently be authoritative due to their subsequent treatment by appellate courts.

[37] Ira C Lupu and Robert W Tuttle, 'Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders' (2007) 7 *Georgetown J Law & Pub Policy* 119.
[38] Christopher L Eisgruber and Lawrence G Sager, 'Does It Matter What Religion Is*?* (2009) 84 *Notre Dame L Rev* 807.

A number of the examples offered by Helfand come from cases where the US courts have had to deal with the aftermath of a "split" within a church, or a group of churches. Important issues are then raised as to how property being occupied by a "dissenting" group should be dealt with, if the formal title deeds are held by (or held on trust for) an opposing party. These are precisely the sort of cases where UK and Australian courts have been willing, where necessary, to examine religious doctrines.

VI UK CASES

A similar pattern of decisions, to that identified in the US courts, may be seen in the United Kingdom. In some cases, courts have declined to decide theological questions. In other cases, it has been necessary for them to enter on the task.

A *Cases in the UK where courts have refused to decide theological questions*

The best way to analyse the recent UK cases on this topic may be to see the jurisprudence as undergoing a fundamental shift after the decision of the Court of Appeal in *Khaira v Shergill* [2012] EWCA Civ 983.

This was a dispute within the Sikh faith over the holding of two Sikh places of worship (Gurdwaras). Trust deeds over the property required that they be held by the legitimate "successor" to the original holder, called the First Holy Saint; one side claimed that Mr Sant Baba Jeet Singh Ji Maharaj was the legitimate successor, the other claimed that he was not.

The Court of Appeal ruled that the issue could not be decided without the court making a judgment based on "religious" issues as to how the claimed successor had been appointed and struck out the claim as in its view not "justiciable".

Mummery LJ said:

> [77] The trusteeship question raised in these proceedings turns on who is "the successor" of the original founder of the temple trusts. The resolution of that issue depends on the religious beliefs and practices of Sikhs in general and the Nirmal Kutia Sikh institution in particular. The issue is **not justiciable by the English courts**. This does not depend solely on the construction of the trust deeds governed by English law: it is necessary to ascertain and apply objective criteria before a court is in a position to decide whether a person who claims to be "the successor" within the meaning of the deeds is what he claims to be. The conflict in this particular case is not one of objective evidence. The rival groups have differing beliefs and inward allegiances on the issue who is the successor. The English Courts

> are not equipped to adjudicate on the issue of succession by reference to religious beliefs and practices, either with (or as would be the case here) without, expert evidence. If this case were allowed to go to trial the judge would be placed in an invidious position not unlike that of jesting Pilate, who said "What is truth?" and would not stay for an answer.

The decision was, with respect, very unsatisfactory, and indeed it is interesting that the Court itself refers to previous decisions where the courts of England did exactly what they refused to do here, deciding "doctrinal" points which had property implications. A classic example was *General Assembly of Free Church of Scotland v Lord Overtoun*[39], where the question was whether trusts set up for the support of the Free Church before the setting up of a later denomination could be used for the benefit of the later church.

B *Cases in the UK where courts have decided theology*

But the decision of the UK Supreme Court on appeal from *Khaira v Shergill* has proven to be a significant turning point in the willingness of UK courts, in a carefully circumscribed class of appropriate cases, to consider religious doctrines. In *Shergill v Khaira*[40] the unanimous decision of the Court[41] dealt with some issues of trust law which the Court of Appeal should have ruled on, but then turned to the question of the "justiciability" of the religious issues from para [37].

The view of Mummery LJ in the Court of Appeal that there were no "judicial or manageable standards" which could be used was rejected, as being based on decisions to do with behaviour of foreign countries. Non-justiciable issues were said to fall into only two categories: matters beyond the constitutional competence of the courts to do with some transactions of foreign states or the proceedings of Parliament[42] (none of these relevant here); or matters which could be said not to be based on private legal rights or obligations (such as for example domestic agreements not intended to be binding); but in these cases they sometimes would be resolved by the courts "if their resolution is necessary in order to decide some other issue which is in itself justiciable".[43]

But the court "cannot shirk its duty to determine a matter of civil right" if such must be resolved.[44] There is a long history of courts being perfectly prepared

[39] [1904] AC 515.
[40] [2014] UKSC 33.
[41] Lords Neuberger, Sumption & Hodge wrote the main judgment, Lords Mance and Clarke agreeing.
[42] See above, n 41 , at [42].
[43] See above, n 41 , at [43].
[44] Ibid, at [56].

to examine the details of religious doctrine if it is necessary to do so either to enforce a contract or to ensure that a trust is observed.[45] Where a religious body is a voluntary association there may still be contractual or other obligations which need to be adjudicated upon- for example, if a party loses a remunerated office.[46]

Where a trust has been set up for the purposes of a religious body, the courts have often been prepared to examine the doctrines of the current body to see if it is consistent with the purposes for which the trust was established:

> [50] In a series of cases in which, as a result of a schism, parties disputed who had the beneficial interest in property which was held in trust for a religious community, the rule was established that the civil courts would ascertain the foundational and essential tenets of a faith in order to identify who was entitled to the property.

Cases such as *Overtoun*[47] (mentioned above) were clear authority for this; there was even a more recent Scottish decision in *Smith v Morrison*[48] where these principles were applied. Other cases involving disputes within the Muslim and Hindu communities were also cited.[49]

The Court held that a case where the court had refused to consider religious doctrine, when needed to deal with a defamation action, was wrongly decided- see *Blake v Associated Newspapers Ltd*,[50] about which the Court commented that:

> [57]…We do not think that the court was correct to refuse to adjudicate on that issue on the ground that it was non-justiciable. The claim was a civil claim in tort and the court will enter into questions of disputed doctrine if it is necessary to do so in reference to civil interests. See also *Forbes v Eden* (1867) LR 1 Sc & Div 568 HL, Lord Cranworth (at pp 581-582), Lord Colonsay (at p 588).

Hence the matter in *Khaira* was sent back from the Supreme Court to the trial judge, who would, if the parties could not agree, have to resolve the issue of what the "fundamental tenets" of the religious group were, and whether or not

[45] Ibid, at [45].
[46] Ibid, at [46]. We will see below that Australian courts have also been willing in some cases to consider doctrinal issues where a minister is dismissed from stipendiary work.
[47] Above, n 39.
[48] 2011 SLT 1213 (noted in *Khaira* at [52]).
[49] See [54]-[55].
[50] [2003] EWHC 1960.

the current "Third Holy Saint" had been validly appointed in accordance with those tenets.

In the aftermath of the appeal, the trial of the substantive issues took place, and in *Shergill v Khaira*[51] the judge held that the "Third Holy Saint" had been validly appointed as a successor to the previous office holders and was to be regarded as in control of the properties.[52]

Following the decision of the Supreme Court in *Khaira*, cases in the UK where the courts deal with internal disputes within religious groups continue to be resolved under these principles. See for example *Trustees of the Celestial Church of Christ, Edward Street Parish (a charity) v Lawson*[53] at [20]:

> The matter is governed by the joint judgment of Lord Neuberger PSC, Lord Sumption and Lord Hodge JJSC in *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359 at [47]-[48]:
>
> "The governing bodies of a religious voluntary association obtain their powers over its members by contract. They must act within the powers conferred by the association's contractual constitution. If a governing body of a religious community were to act ultra vires, for example by seeking a union with another religious body which its constitution did not allow, a member of the community could invoke the jurisdiction of the courts to restrain an unlawful union …
>
> Similarly, members of a religious association who are dismissed or otherwise subjected to disciplinary procedure may invoke the jurisdiction of the civil courts if the association acts ultra vires or breaches in a fundamental way the rules of fair procedure. **The jurisdiction of the courts is not excluded because the cause of the disciplinary procedure is a dispute about theology or ecclesiology**. **The civil court does not resolve the religious dispute**. Nor does it decide the merits of disciplinary action if that action is within the contractual powers of the relevant organ of the association …" (emphasis added)

This is a helpful summary of the circumstances in which a court will intervene in an internal dispute within a church or other religious organisation. On the one hand, the court will not decline jurisdiction simply because a matter of theology or church government has given rise to a dispute. On the other hand, they will not themselves purport to resolve that dispute over theology where that is not necessary, but instead will usually concern themselves with the question

[51] [2017] EWHC 883 (Ch) (3 March 2017).
[52] A later decision in *Khaira v Shergill* [2017] EWCA Civ 1687 (27 October 2017) involved a dispute over costs, which by then had become fairly substantial.
[53] [2017] EWHC 97 (Ch).

whether the decision-making processes agreed upon between the parties have been properly carried out.[54]

A recent decision in a religious defamation case was *Otuo v Watch Tower Bible and Tract Society of Britain*,[55] where the judge allowed a claim to proceed based on the statement made at a Jehovah's Witnesses religious meeting that the complainant was "not a Jehovah's Witness". He ruled that while the court would not be able to adjudicate on the truth of religious beliefs, it would be able to deal with many other issues. In this case it was held that allegations of financial fraud were conveyed by the excommunication, as all members of the congregation present knew that this was what had led to investigations of the congregation member's conduct. These allegations, in so far as they implied dishonest behaviour with money, were "justiciable". Presumably it would have been different if the statement made relied heavily on interpretation of a theological context.[56]

At the ultimate trial of the matter, however, in *Otuo v Watch Tower Bible and Tract Society of Britain*,[57] the announcement of "disfellowshipping" was held not to cause any harm to the plaintiff's reputation, as all those present already knew of the allegations.

VII AUSTRALIAN AUTHORITY

As with the other common law jurisdictions considered above, there have been some decisions in Australia refusing to decide theological issues, and others where the courts have been willing to do so.

A *Australian cases declining to decide religious issues*

In considering the Australian courts' attitude to this issue, we may start with comments from Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v*

[54] As noted below, in Australia there has been some debate about what civil rights will have to be in issue in an internal, religiously connected, dispute, before a court assumes the jurisdiction to resolve the dispute.

[55] [2019] EWHC 344 (QB) (21 February 2019).

[56] In the final trial of the matter, [2019] EWHC 1349 (QB) (07 June 2019), Judge Spearman noted that there was a possibly wider sense of "Scriptural fraud" spoken of in some JW documents (relating to the holding of "false doctrine"), and implied that if this had been the issue the court may have declined to hear the matter. But in the context it was allegations of financial fraud that had been at issue, and the court was well place to decide on issues around that type of fraud- see eg [17]: "Although there may be circumstances in which references to "Scriptural fraud" would fall outside the concept of "fraud" as used in the criminal law…, those circumstances do not arise on the facts of these particular Claims."

[57] [2019] EWHC 1349 (QB) (07 June 2019).

Commonwealth,[58] where he referred to the need for the courts to protect religions of all sorts, noting that:

> What is religion to one is superstition to another.

The implication here seems to be that courts should not usually be ruling on the content of doctrines.

A few years after this decision, the High Court of Australia was asked to decide another case involving religion. In *Wylde v Attorney-General for NSW* (usually known as the "*Red Book case*")[59], the Bishop of Bathurst had started using an alternative "order of service" for Holy Communion, and his decision to do so was challenged by some members of the church in the diocese. It was alleged that the trusts on which the property of the church was held obliged those who celebrated services in those churches only to follow the 1662 Book of Common Prayer, and that the additions to those services made in the Bishop of Bathurst's preferred book (the "Red Book") were unlawful.

Unfortunately, there were only four members of the Court hearing the case (five was the more usual number).[60] As it turned out the Court was split in two. Latham CJ and Williams J accepted the view that had been taken by the NSW Supreme Court (Roper CJ in Eq), that there was indeed a departure from the law of the Church of England, that the property trusts required adherence to those doctrines, and hence that the Bishop could be ordered to not use three specific parts of the Red Book which were shown to be unorthodox.

The other two members of the Court, however, Dixon J and Rich J, disagreed. Their view was that the property trusts could not be used to enforce doctrinal matters. Rich J set the tone for his comments with his opening sentences:

> The subject of this unhappy controversy is only fit for a domestic forum and not for a civil court. Unfortunately it is not an example of "charity" in the New Testament sense or of the command to love one another.[61]

[58] (1943) 67 CLR 116 at 123.
[59] (1948) 78 CLR 224.
[60] The only full academic analysis of the decision seems to be D Galbraith, *Just Enough Religion To Make Us Hate: An Historico-Legal Study Of The Red Book Case* (unpublished PhD thesis, University of NSW, 1998). He notes at p 242, n 1 that "Starke J had been the intended fifth member of the bench for the appeal, but he had fallen ill a few days before the appeal was due to begin." Of the other two members of the court, McTiernan J had been ill for some time, and Webb J was overseas in Japan as part of post-war work.
[61] (1948) 78 CLR 224, at 273.

These two members of the Court in effect held that the purposes of the property trusts did not extend to governing the form of liturgy used in the churches. The result of this even division of opinion in the Court was that, in accordance with the procedure set out in the *Judiciary Act* 1903 (Cth) s 23(2)(b), the decision of the lower court being appealed from (itself being a superior court of record) was affirmed. While the decision of Latham CJ and Williams J was hence only that of a "statutory majority", subsequent cases in Australia have indicated that this majority decision represents the formal *ratio* of the case.[62]

An example of a court clearly declining to decide theological issues can be seen in the later decision of *Scandrett v Dowling*.[63] In that case the NSW Court of Appeal declined to intervene when it was claimed that the Bishop of Canberra and Goulburn was about to ordain a number of women as priests.

The claim was made that only the General Synod of the Anglican Church had authority to allow this to happen, and that the General Synod had not yet approved the change of practice. Priestley JA and Hope AJA, the majority, held that the provisions of the relevant legislation, the *Anglican Church in Australia Constitution Act* 1961 (NSW), meant that the courts could only be involved in issuing orders in relation to Anglican practice and theology when there was an issue of property rights at stake. Otherwise the Constitution of the Anglican Church was simply a "consensual compact" the terms of which would not usually be enforced by the secular courts. Hence where, as here, property issues were not directly involved the courts would not intervene.

Priestley JA commented:

> The consensual compact is thus based on religious, spiritual and mystical ideas, not on common law contract. It has the same *effect* as a common law contract when matters of church property become involved with the other matters dealt with by the consensual compact. I do not think the claims made in this case get out of the area of the consensual compact which does not have the legally binding effect here relied on (at 513).

Mahoney JA also held that the court should not intervene, although his reasons were slightly different. In particular, his Honour took the view that there may be circumstances where a secular court *would* need to resolve issues of doctrinal difference:

[62] See, for example, Young CJ in Eq in *Metropolitan Petar v Mitreski* [2009] NSWSC 106 (4 March 2009) at [490].
[63] (1992) 27 NSWLR 483.

> If it be alleged and proved in a case within the jurisdiction of a civil court that there has been a breach of trust, the civil court may not refuse to decide such a question or to give relief even if the determination of the proceedings involves the forming of a conclusion upon religious matters… (at 499)

Still, in these proceedings his Honour took the view that no property issues were at stake, no trust involved, and the rules in question were not intended to be enforceable. *Wylde* was different, because there were clearly property issues at stake in that case.

B *Australian cases deciding theological questions*

The *Red Book case*, noted above, provides one example of courts of Australia deciding theological issues. In particular, the decision of Roper CJ in Eq and the decision of the "statutory majority" in the High Court, Latham CJ and Williams J, was to the effect that the use of certain rituals in the Red Book was contrary to the official theology of the Church of England as spelled out in the Book of Common Prayer. It is hard to imagine a more clearly "theological" question, yet these judges held that, in giving effect to trust arrangements over property, it was their duty to consider these matters and to come to a decision.

In *Metropolitan Petar v Mitreski*[64] Barrett J discussed the fact that religious doctrines may need to be interpreted for the purposes of charitable trusts, at [26]:

> The circumstance that property is held upon a charitable trust for religious purposes will, of course, introduce elements of justiciability into certain matters affecting such trust property. Use of the property in a way that does not accord with the relevant religious purposes may, for example, be restrained by injunction: eg, *Wylde v Attorney General for New South Wales* [1948] HCA 39; (1948) 78 CLR 224.

The above two cases illustrate the principle that, in a private law context or where trusts are involved, rulings on theological issues may be necessary in order to give effect to the intentions of those who set up the trusts. Those who agree to hold property on trust, impliedly agree to abide by the terms of the trust.

But the next case is an example of a court imposing its views on religious doctrine onto a religious body for the purposes of enforcing a "public law" (discrimination) obligation, in a completely different context.

[64] [2003] NSWSC 1007 (5 November 2003).

Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe[65] involved a complaint of discrimination on the basis of sexuality. The complainant, Cobaw, ran a project called WayOut, designed to provide support and suicide prevention services to "same sex attracted young people". The co-ordinator of the project approached Christian Youth Camps Ltd ("CYC") (a camping organisation connected with the Christian Brethren denomination) to inquire about making a booking at a Phillip Island campsite that was generally made available to community groups. Mr Rowe, to whom she spoke, informed her that the organisation would not be happy about making a booking for a group that encouraged a homosexual "lifestyle", as he later put it.

There had been a refusal to proceed with a booking; the reason for the refusal was connected with the CYC's view of the philosophy of support for homosexuality as a valid expression of human sexuality; their opposition to this view was a result of what was seen by the CYC to be required by the Scriptures.

Despite these things, the Tribunal at first instance (constituted by Judge Hampel of the Victorian County Court), ruled against the CYC, ordered that they had unlawfully discriminated and that they should pay a fine of $5000.

The primary liability was under ss 42(1)(a) and (c), and s 49, of the *Equal Opportunity Act* 1995 (Vic) ("*EO Act* 1995"). These provisions prohibited discrimination on certain grounds (among which were same sex sexual orientation, and personal association with persons of same sex sexual orientation), in the areas of "services", in "other detriments", and in accommodation.[66]

The *EO Act* 1995 contained two exemptions based on religion. Section 75(2), which applied to religious groups, provided:

> (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
>
> (a) conforms with the doctrines of the religion; or
>
> (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

Section 77, which applied to "persons" generally, not only groups, provided:

[65] [2010] VCAT 1613 (8 Oct 2010).

[66] The previous legislation has now been replaced by the *Equal Opportunity Act* 2010 (Vic), which contains provisions to similar effect, most of which came into operation on 1 August 2011.

> Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

One of the issues that came up in the litigation was whether the view that sexual activity should only be between a man and a woman who were married to each other, was something that was a part of Christian "doctrine". When Judge Hampel came to decide what the content of the relevant "doctrines" were, she ended up effectively holding that all that could be considered in this area were pronouncements of "ecclesiastical authorities" similar to the Nicene Creed.[67]

The spectacle of a County Court Judge in Victoria having to decide what constitutes the core doctrines of Christianity should surely give some pause as to whether this is the way the legislation is meant to work.

What her Honour did, of course, was to accept the evidence of one scholar over the evidence of another. The Reverend Dr Rufus Black, clearly a representative of the "liberal" wing of Christendom, was accepted when he ruled out of the category of "doctrine", beliefs about sexuality. The Rev Canon Dr Peter Adam, a highly regarded evangelical scholar, gave evidence that beliefs about sexuality were a core part of Christian doctrine. His views were rejected on what was arguably a quite spurious basis.[68]

In the end Judge Hampel ruled as follows: that "beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the [Christian Brethren] religion".[69] This ruling was made in spite of the fact that the legislation does not use the word "fundamental". A Judge of a secular court had decided to come to a theological judgment.

Her Honour then also went on to hold that even if a view that homosexuality was sinful could be regarded as a "doctrine" of the Christian Brethren, refusing to give the support of the CYC camping site to a group formed to promote the view that homosexuality was a normal and ordinary part of human identity, could not possibly be something that "conformed" to the doctrine.

[67] A major statement of Christian theology formulated in 325 AD by a church council and since accepted almost universally within Christianity as orthodox belief.

[68] For more detailed comment on the case, and some of the others mentioned here, see my conference paper "Freedom of Religion in Practice: Exemptions under Anti-Discrimination Laws on the Basis of Religion" presented at the conference *Law And Religion: Legal Regulation Of Religious Groups, Organisations And Communities*- Melbourne Law School, University Of Melbourne, 15- 16 July 2011; available at: http://works.bepress.com/neil_foster/46 ; at pp 26-27.

[69] At [305].

For Judge Hampel the "narrow" interpretation given to the religious freedom protections under the legislation meant that this fairly general word must mean that the action was "required" or "obligatory" or "dictated" by the doctrine.[70] The fact that no general enquiry was made of campers about their sexual activities was said to mean that the refusal of a booking in these cases was not "required" by doctrine.

On appeal in *Christian Youth Camps Limited v Cobaw Community Health Services Limited*[71] the Victorian Court of Appeal agreed with Hampel J and "narrowed" the scope of what could be accepted as "religious doctrine" to exclude views on human sexuality. At [276] Maxwell P, who gave the leading judgment for the majority, quoted this passage from the judgment of Hampel J:

> I am satisfied that Mr Rowe believes that homosexuality, or homosexual activity is prohibited by the scriptures, and so is against God's will. I am satisfied that his belief is based on the manner in which he interprets or applies the doctrine of plenary inspiration. I am satisfied Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep's evidence is representative of the range of beliefs held by members of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality. However, I am **not satisfied those beliefs constitute a doctrine of the religion** of the Christian Brethren, as I have defined that term. (emphasis added)

Maxwell P went on to say:

> [277] The appeal submission for the applicants was that her Honour erred in viewing particular teachings and beliefs as **applications of doctrine, rather than as doctrine** in themselves. This conclusion was said not to be open on the evidence. In my opinion, this submission must be rejected. On the evidence before her Honour, **the distinction was inescapable**.
>
> 278 Mr Keep said that the doctrines listed in the Trust Deed were 'the fundamental beliefs and doctrines of Christian Brethren'. They were 'the core doctrines'. Plenary inspiration was the only one of those doctrines which was said to have any bearing on the present issue. According to each of the experts called by CYC, it was by virtue of that doctrine, as it applied to the relevant passages from the Bible, that members of the Christian Brethren believed that homosexuality was contrary to God's will.
>
> 279 As noted earlier, the applicability of that doctrine to individual passages in the Bible was shown by the evidence to be quite variable, and to have changed over

[70] At [317].
[71] (2014) 50 VR 256, [2014] VSCA 75.

> time. Mr Keep acknowledged, moreover, that there was even some diversity between Christian Brethren congregations as to which parts of the Bible were to be applied literally. These were properly to be regarded as applications of doctrine, as her Honour found. (emphasis added)

It is arguable this is the narrow sort of view that is not appropriate in dealing with a broad internationally recognised human right like "freedom of religion".[72] Even commentators fully supportive of the court's finding here have queried whether it is appropriate for the court to make such a ruling.[73]

C *Considering theological questions in internal disputes*

A particular area where issues around courts deciding theological questions can become controversial, is where such questions are presented by internal disciplinary proceedings, or other disputes between members of the same religious group.

Suppose a minister of religion has been the subject of disciplinary proceedings by their superiors. The question may arise as to whether a court should intervene in such proceedings if there is alleged to be some irregularity (such as denial of natural justice). But another issue which may be presented is whether a secular court should make a ruling on an issue of doctrine, if that has been involved in the decision to discipline.

Sturt v the Right Reverend Dr Brian Farran Bishop of Newcastle[74] raises some of these issues. Two members of the clergy, Father Sturt and Father Lawrence, were accused by a member of the public of having been involved in sexual activity with him when he was a minor, and in particular of being involved in an "incident" at a motel in connection with a clergy conference.

[72] For more detailed views on the appeal decision see Neil J. Foster, 2014, "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 ; and also some press comment at Katherine Towers, "New anti-discrimination laws 'erode religious freedom'" *The Australian* 9 May, 2014: 35-36 at: http://works.bepress.com/neil_foster/81 . An application for special leave to appeal was refused- see comment on the special leave hearing in "High Court of Australia declines leave to appeal CYC v Cobaw" (2014) at: http://works.bepress.com/neil_foster/89/ .

[73] See B Murphy "Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*" (2016) 40 *Melbourne University Law Review* 594 at 616: "There is an inherent difficulty in requiring a secular court to determine what constitutes religious doctrine."

[74] [2012] NSWSC 400.

A disciplinary panel was set up under internal church rules which met and concluded that the allegations were true and warranted the two priests being disciplined and "deposed from Holy Orders". The priests sought an injunction to prevent the Bishop from proceeding with the penalty.

The trial judge, Sackar J, noted:

> [45] It should be acknowledged at the outset that the **church is a voluntary association**, that in and of itself has significant consequences in terms of the plaintiffs' ability to articulate their rights.
>
> [46] It should also be acknowledged that courts have routinely not interfered in the internal workings of voluntary associations especially religious organisations: *Attorney-General (NSW) v Grant* [1976] HCA 38; (1976) 135 CLR 587 at 613 per Murphy J.
>
> [47] With a voluntary association there is therefore a need to identify with some precision whether some civil or proprietary right has been infringed which as a matter of law requires enforcement before intervening in such an organisation's affairs.

His Honour concluded that the priests had not been shown to be "employees" of the church. However, this did not mean that the court had no jurisdiction to consider the process by which they had been disciplined. Following *Wylde*[75] and *Scandrett*[76] it was held that the Constitution of the Anglican church on its own did not create legal rights- (that is, in relation to internal doctrinal issues).[77]

However, in a number of decisions involving religious officers being removed from office under disciplinary procedures, the courts have been willing to hold that a failure to follow appropriate procedures may be justiciable.[78] Hence his Honour ruled that the question of whether appropriate procedures had been followed was one that he was prepared to consider:

> [142] There is little doubt in my mind that the [Professional Standards] Ordinance is drafted in language that manifests an intention to affect legal rights and obligations. Given the nature of the conduct which is sought to be examined and what is potentially at stake it seems to me that it cannot be gainsaid that that is the intention of the PS Ordinance. It has been put by the Primate, and I agree, that the

[75] Above n 61.
[76] Above n 63.
[77] Above, n 74 at [102].
[78] See eg *MacQueen v Frackelton* (1909) 8 CLR 673, *Baker v Gough* [1963] NSWR 1345.

> plaintiffs each have an **accrued right to hold and to hold themselves out as entitled to hold, Holy Orders in the Anglican Church of Australia** which right is clearly at risk as a result of steps undertaken or purportedly taken under the PS Ordinance. There is also equally little doubt that a **priest enjoys certain rights, privileges or advantages attached to the office (so described).** These would include the actuality or prospect of receiving emoluments of the office of a priest. One example which was given was to solemnise a marriage under and for the purposes of the *Marriage Act 1961* (Cth). Of course in doing so the priest is entitled to make a charge for the delivery of services. There is also the prospect envisaged by s 77(d) that if deposed from Holy Orders the person may not be able to hold an office which would otherwise be held by a lay person without the prior consent of the bishop. Examples of this would be a church warden or a member of a parish council.
>
> [143] Treating the PS Ordinance in this way is, it seems to me, entirely consistent with the decisions of *Macqueen v Frackelton*, *Baker v Gough* and *Raguz v Sullivan*.
>
> [144] On matters of discipline and if the PS Ordinance is invoked in the Diocese of Newcastle, **I consider its language should properly be construed as giving those threatened or whose careers are placed in jeopardy contractual rights to ensure the integrity of the process**.. {emphasis added}

Hence on this basis it seems arguable that someone who is being disciplined by a religious body and in danger of losing "entitlements" may be able to complain about standard "administrative law" concerns such as lack of natural justice or proper procedures being followed.

Interestingly his Honour also accepted the argument that, "reputation" being to some extent also a valuable right, a claim could have been made on the basis that a person's reputation would have been badly impaired by the result of a finding of an internal tribunal-.[79] This comment, as we will see, now has to be qualified.

In *Sturt*, having gone on to examine the course of the procedures, his Honour concluded that natural justice had been observed, that the priests had been given an opportunity to respond to the allegations made, and that there was no ground to interfere with the final decision

However, a later decision of the NSW Court of Appeal casts some doubt on the views of Sackar J here that a member of a voluntary association who is sanctioned under the association rules may challenge that action on the grounds of "reputation" alone (in the absence of a contract or property right).

[79] Above, n 74, at [163].

By way of background, in South Australia, in *Harrington v Coote,*[80] Kourakis CJ (with the agreement of the rest of the Court) held that one ground for holding that the question of the validity of disciplinary action against an Anglican clergyman was justiciable, was the "stipend" which the position involved.[81] He also held that the right of an ordained priest to occupy a parish residence (such as rectory) was sufficiently a "property" right to allow judicial action.[82] However, Kourakis CJ rejected the view that a threat to a person's **reputation** alone would ground justiciability,[83] doubting Sackar J's finding on the issue in *Sturt.*

The more recent decision of the NSW Court of Appeal relating to dismissal of a professional horse trainer, *Agricultural Societies Council of NSW v Christie*[84] holds that the mere **receipt of income** will not give jurisdiction to a court to interfere in the internal arrangements of a "voluntary association". Nor would an impact on **"reputation"** alone give such jurisdiction.[85] The refusal to regard "receipt of income" as a ground seems contrary to the dicta in *Harrington*, noted above. The refusal to accept "reputation" alone as actionable damage for these purposes is clearly contrary to comments to the contrary in *Sturt.*

In his later trial decision in *Live Group Pty Ltd v Rabbi Ulman*,[86] Sackar J was forced, in light of the appeal decision in *Christie*, to retreat from his previous comments in *Sturt,* and acknowledged that neither "reputation" nor "livelihood" could, without more, be used as a basis of jurisdiction in considering the affairs of a voluntary organisation (there, the Beth Din):

> [79] As the law stands, a Court may only grant a private law remedy in relation to a challenged decision of a private body when enforcing or protecting an underlying contractual or other entitlement recognised at law or in equity; *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331 (***Christie***) at [35] per Meagher JA. Where there is no "contractual or other entitlement," the Court has no jurisdiction to intervene in the affairs of a private body.

[80] (2013) 119 SASR 152, [2013] SASCFC 154.
[81] Ibid, at [23].
[82] Ibid, at [16], [21].
[83] Ibid, at [19].
[84] [2016] NSWCA 331.
[85] Ibid, at [35].
[86] [2017] NSWSC 1759.

> [80] The Court of Appeal in *Christie* rejected the proposition a mere affectation of reputation is sufficient to invoke the Court's jurisdiction to intervene in the decision of a private body.

The question of whether a court should undertake interpretation of religious doctrine, along with other issues about interference in internal religious disputes, were discussed on appeal in these proceedings in *Ulman v Live Group Pty Ltd*.[87] As the case is an important one in this area, it warrants some detailed comment.

The case arose out of a commercial dispute between two members of the Jewish community. Two companies were involved, Live Group Pty Ltd, whose main director was Mr Barukh, and SalesPort LLC, a US-registered company whose main director was Mr Kuzecki. Both Mr Barukh and Mr Kuzecki are observant Orthodox Jews. The contract between the two companies contained a dispute resolution clause:

> "**Conflict resolution** In a case of dispute that can not be resolved by the parties or via a 3rd party which is acceptable to both sides we here by agree that the matter shall be brought to the Chief Dayan of Sydney AUS. Rabbi Gutnick who will hear both claims in person or video conference or by phone and his decision will be final and acceptable on both sides …"

Rabbi Gutnick is the presiding member of the Beth Din in Sydney, a tribunal set up under Jewish law to resolve disputes within the Jewish community. The other members of the Beth Din involved in decisions made in these proceedings were Rabbi Ulman, Rabbi Schlanger and Rabbi Chriqui.

When a dispute arose between the two companies, Mr Kuzecki approached Rabbi Gutnick, who agreed to convene the Beth Din to deal with the dispute in accordance with the "conflict resolution" clause. But Mr Barukh refused to accept that the Beth Din had jurisdiction over the matter. (The proceedings filed in the Beth Din made a claim for some $5 million in damages, so clearly there was a lot at stake financially.) His lawyers advised that he would not attend at the Din Torah (the hearing before the Beth Din), and invited Mr Kuzecki to make a claim in the civil courts if he alleged that he was owed money.

Rabbi Schlanger then responded that members of the Jewish faith were required to appear when summoned before the Beth Din:

[87] [2018] NSWCA 338.

> "1. All members of the Jewish Faith are obliged to have their disputes heard in accordance with Jewish Law at a Beth Din. They are not permitted to seek adjudication at a civil court without the express permission of a Beth Din when the other side has refused to abide by a Beth Din summons. In accordance with Jewish Law they are not permitted to refuse such summons" (at [28])

A later letter of 28 December 2016 said:

> Unless by 5pm January 26 2017 the Beth Din hears from you on behalf of your client that he has recanted and that he acquiesces to the Beth Din process in accordance with Jewish Law, (which is indeed compatible with secular law), the following halachic sanctions will apply and the Synagogue/s where he prays will be informed accordingly.
>
> 1. He will not be counted to a minyan.
> 2. He will not be able to receive an aliyah to the Torah.
> 3. He will not be offered any honour in the Synagogue
>
> There are further sanctions that will be applied should your client maintain his recalcitrance (at [31])

A further letter of 31 Jan 2017 stated:

> "3. … A Jew is obliged by Jewish Law, in the first instance, to resolve his or her disputes via a Beth Din and **not through the civil jurisdiction.** The Beth Din has a duty, when asked to do so, to summons parties to attend a Din Torah. It is a duty that it can not refuse. As with any court the defendant has the option to file a motion to dismiss an action and if the Beth Din is satisfied after giving the plaintiff the opportunity to respond, the action can be dismissed. However a member of the Jewish Faith does not have the religious option to dismiss the Beth Din." (emphasis added) (at [34])

Mr Barukh then commenced an action in the Supreme Court seeking an injunction to prevent the Beth Din imposing religious sanctions, and also seeking an order that, by seeking to prevent him having his matter heard before the Supreme Court rather than in the Beth Din, the rabbis were in contempt of the Supreme Court. There were also allegations that even if the Beth Din had authority to hear the matter, its members had showed bias against Mr Barukh, and hence he could not receive a fair hearing.

The trial judge, Sackar J, held that the members of the Beth Din were liable to be punished for contempt. The majority of the Court of Appeal (Bathurst CJ and Beazley P) upheld the decision of contempt, although they held that the

amount of the fines imposed at first instance were excessive and reduced those amounts.

The majority noted that the allegation of contempt of court was not made in relation to specific proceedings which were on foot- in fact there had been no civil claim lodged yet in relation to the dispute between the two companies. But it was a form of contempt where the behaviour of the Beth Din was alleged to have "a real and definite tendency to interfere with the administration of justice generally", by threatening sanctions to be applied if a person resorted to a civil court.[88]

As the majority said: "there will be an interference with the course of justice where improper pressure is placed upon a litigant".[89] But the key question here was, what would constitute "improper" pressure? At one end of the spectrum, threatening to commit an unlawful battery on someone by beating them up if they went to court, would clearly be improper. At the other end, simply politely warning someone that if they commenced proceedings, those proceedings may be long and expensive, would obviously not.

It should be noted that there was a dispute as to whether the religious sanctions were threatened simply on account of the failure to attend the Beth Din proceedings, or whether the threat also related to the possible resort to the civil courts. The majority concluded that the various statements made had the implied meaning that the Beth Din had *exclusive* jurisdiction, and that this meant that sanctions would be applied for resort to the courts. They concluded that there had been: "an unambiguous threat that sanctions would be imposed if Mr Barukh persisted in asserting that the alleged commercial dispute be resolved in a civil court".[90]

Such a threat, the majority concluded, was relevantly "improper" pressure and amounted to contempt of court. They held that the "conflict resolution clause" in the contract, while it amounted to a binding arbitration agreement if it were invoked, only committed the parties to have their dispute resolved by Rabbi Gutnick personally, not the Beth Din, and in particular did not amount to an agreement to apply Jewish law to the dispute.[91] (This seems to have been important, because there was evidence that in a dispute between corporate entities, Jewish law would look beyond the "corporate veil" and hold individual

[88] Above, n 87; see para [58] quoting the trial Judge.
[89] Ibid, at [72].
[90] Ibid, at [159].
[91] Ibid, see [161].

company officials liable- and there would have been a danger that Mr Barukh may have found himself personally liable for his company's obligations.)[92]

Other reasons offered by the majority for concluding that the pressure applied was "improper" included that the religious sanctions would not have remained private, but would have been made known to Mr Barukh's local synagogue:

> Had sanctions been imposed on Mr Barukh, this would have become publicly known. Worship in a synagogue, as it is in any religious or faith-based institution, is public and may be considered to be a public act. The threatened sanctions were a **serious imposition on Mr Barukh's practice of his faith**. (emphasis added)[93]

While the majority's concern for Mr Barukh's religious obligations is welcome, it can be argued, with respect, that there seems to be little concern at this point for the religious obligations of the wider Jewish community of which he is a part. This issue is brought out in the dissenting judgement by McColl JA.

Her Honour dissented on the question as to whether there had been shown to be "improper" pressure put on Mr Barukh such as to satisfy the requirements for a finding of contempt of court (which is a criminal offence and needs to be proven beyond reasonable doubt.)[94]

Her Honour disagreed with the majority on the implications of the correspondence between the parties. She held that the Beth Din had asserted that Jewish persons ought not to disregard a summons to appear, but held that in the end they did not go so far as to threaten sanctions based on Mr Barukh resorting to a civil court.[95]

However, it seems that even if her Honour had concluded that there was a threat to impose religious sanctions in relation to court attendance, she would not have been inclined to find that this was improper pressure for contempt purposes. There is an important passage in the judgment which affirms the significance of religious freedom. While lengthy, it is worth quoting in full:

[92] Ibid, see para [166].
[93] Ibid, at [162].
[94] Ibid, at [241].
[95] See the conclusion on this issue at ibid, para [276].

[244] These issues fall for determination in the context, as the primary judge recognised, of "the judicially recognised right of unimpeded access to the courts" afforded to all citizens.[96]

[245] However, they also fall for determination in circumstances where "the law recognizes a complete freedom of conscience in matters of religion"[97] and it is acknowledged that "[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society."[98] Accordingly, there is "an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint."[99] However, "[t]he freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them".[100]

[246] As the primary judge recognised, "religious freedoms are vital and important in a democracy" but "must be balanced against every citizen's right to approach a court or to insist upon a secular court resolving any alleged commercial dispute between citizens, or for that matter between a citizen and foreign national".[101] As will be apparent from the juxtaposition of the propositions in the preceding paragraph, the balancing exercise to which his Honour referred may often be a delicate one.

[247] As Gibbs J said in *Grant*,"[n]o one is compelled to adhere to, or to abjure, any particular religious opinions. Any member of a church is perfectly free to leave that church and join another which professes different beliefs and has a different mode of government".[102]

[248] Furthermore, it should be recognised as Murphy J explained in *Grant* that, "[j]udicial determination of religious doctrine and practice is as much state interference in religious affairs as legislative and administrative measures are".[103] That does not mean that churches (using that expression broadly) are immune from judicial scrutiny, but, generally "only marginal inquiry into church government is permissible".[104] In particular, as recognised in a body of United States jurisprudence, "the decisions of the governing body of the church should be

[96] *Live Group Pty Ltd and Anor v Rabbi Ulman and Ors* [2017] NSWSC 1759 at [88].
[97] *Attorney-General for the State of New South Wales (on the Relation of MacLeod) v Grant* (1976) 135 CLR 587 at 600; [1976] HCA 38 (Grant) per Gibbs J (as his Honour then was).
[98] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 130; [1983] HCA 40 per Mason ACJ and Brennan J.
[99] Ibid.
[100] Ibid at 135 – 136.
[101] *Live Group Pty Ltd & Anor v Rabbi Ulman and Ors* [2017] NSWSC 1759 at [269].
[102] At 600.
[103] Ibid at 612 per Murphy J.
[104] Ibid at 613.

> accepted on issues of practice and procedure of ecclesiastical government, as well as issues of doctrine" and "controversial questions of doctrine (or departure from doctrine) or practice or procedure in ecclesiastical government … however forceful … arguments [on these issues] appear to be … are outside the judicial sphere.[105] As Kirby P recognised in *Uniting Church in Australia Property Trust (NSW) v Vincent*, judges' "competence to determine disputed issues of religious belief is highly doubtful."[106]

Against the background of these principles, it must be asked whether the majority decision involves too great an interference in the communal life of the Jewish community, which it could be argued should be left to determine its own issues in accordance with its own religious beliefs and authorities.

For example, as McColl JA points out, there was an issue in the evidence presented as to whether the Beth Din could, or could not, deal under Jewish law with a commercial dispute between companies by penalising company officers. Evidence given by Mr Barukh was to the effect that it could not.[107] But Mr Barukh was not an expert in Jewish law, and Rabbi Gutnick, who clearly was, gave contrary evidence that the Beth Din could deal with company officers directly and was not bound by the "corporate shield".[108]

Arguably, for reasons discussed above, it was not appropriate for the secular court to simply prefer one witness over another on this religious question. McColl JA noted that the US jurisprudence she had previously referred to would point to accepting the views of senior officials recognised by a religious body as having authority to resolve religious issues. But in the end, whether the views of the Beth Din were an accurate reflection of Jewish law or not, was not a matter that should have led to a finding of improper pressure.[109] As her Honour later said: "this court should not intrude upon the rabbinical view of the Halacha."[110]

As she pointed out, the sanctions that were threatened by the Beth Din were directed to encouraging Mr Barukh to comply with Jewish law, in a situation where both he and Mr Kuzecki were observant Orthodox Jewish believers. It was a sanction similar to what might have been called in a Christian context

[105] Ibid at 613, 614; the primary judge acknowledged in *Sturt v Bishop of Newcastle* [2012] NSWSC 400 at [46] "that courts have routinely not interfered in the internal workings of voluntary associations especially religious organisations".
[106] (Unreported, Court of Appeal (NSW), Kirby P, Clarke JA and Sheller JA, 19 August 1994) at 10.
[107] Ibid, at para [267].
[108] Ibid, see paras [268]-[269].
[109] See the discussion ibid at paras [271]-[276].
[110] Ibid, at [283].

"excommunication": "a form of religious censure common to many religious communities".[111] This was also in a context where the contract giving rise to the dispute had a "conflict clause" which, on McColl JA's view, seemed to amount to an agreement to accept the authority of the Beth Din.[112] Rabbi Gutnick in that clause was referred to explicitly as "Chief Dayan of Sydney", a job description of someone in a Beth Din, and he was known to both parties to have carried out that role for many years.

In the circumstances, her Honour held that there had been no relevant "improper" pressure applied by the Beth Din directed to preventing recourse to the civil courts, and hence no contempt had been committed.[113]

On the question as to whether the decision of the Beth Din could have been reviewed if it had been found to have authority to adjudicate, the majority of the Court of Appeal said that if the Beth Din had jurisdiction here, they would have been willing to entertain a claim about natural justice-.[114] They seem to have accepted the arguments that this was not the sort of case where the court would automatically decline jurisdiction, as the Beth Din if involved would have asked Mr Barukh to have signed a formal arbitration agreement which would have had either contractual (or statutory) force.

McColl JA, however, declined to comment on this point- her Honour thought that since the matter had not even reached the Beth Din, the question of whether the court would supervise its process was "hypothetical" and should not have been the subject of any order-.[115]

To sum up, the decision of the majority here means that correspondence from a Jewish tribunal which simply threatened religious sanctions if the party did not adhere to Jewish law, was seen to amount to contempt of court. With respect, there seems no clear explanation of why these purely religious sanctions were an "improper" form of pressure. The dissent of McColl JA arguably more correctly acknowledges the importance of the religious freedom of all the parties involved, and notes that in general it is better for the courts not to intervene in internal religious disputes of this sort.[116]

[111] Ibid, at [252].
[112] Ibid, at [263].
[113] Ibid, at [277], [278].
[114] Ibid, at [218].
[115] Ibid, at [285]-[288].
[116] For some more links to US decisions declining to intervene in disputes in Jewish communities, see my blog post (from which the above has also been drawn) https://lawandreligionaustralia.blog/2018/12/30/religious-sanctions-and-contempt-of-court/ (30 Dec 2018). There is also an interesting article here written by the plaintiff explaining his side of the case: 'I

An application for special leave to appeal the decision to the High Court, however, was denied.[117]

DEF v Trappett[118] is an another significant decision dealing with the "justiciability" of religious laws. The plaintiff was a Roman Catholic priest who was under investigation under internal church processes for sexual abuse of a parishioner. He claimed that he had been denied due process under the "Towards Healing" process, and he also claimed that elements of Roman Catholic Canon Law ought to be applied to his case.

The trial judge, Harrison AsJ, was asked to strike out these claims on the basis that they involved the court making determinations as to religious laws; but refused to do so, noting that there were clear prior examples of courts being prepared to look into the workings of voluntary religious organisations where decisions were being made that would affect a person's livelihood.

It was noted that "the courts will not interfere in the interpretation and operation of matters entirely of a spiritual nature".[119] However, orders may be made where church property is involved, and "Prescribed rights under internal legislation during disciplinary proceedings have been found to be legally binding and enforceable by the ordinary courts".[120]

Here DEF fell within the exceptional cases where a court would intervene:

> [84] DEF has been directed to stand aside from all priestly ministries until further notice. His career has been placed in jeopardy. He has an accrued right, as in *Sturt* (but in the context of the Catholic Church) to hold and to hold himself out as entitled to hold, Holy Orders. Also, DEF enjoys certain rights, privileges or advantages attached to his office (so described). These include a stipend paid at the fortnightly rate of $675, a fully maintained motor vehicle, a fortnightly allowance of $835 for household expenses and private health insurance all administered by the Archdiocese of Brisbane (Aff. McAuley 11/2/15, p 69).
>
> [85] Like the PS Ordinance in *Sturt*, I consider the language of the Towards Healing protocols should properly be construed as giving those threatened or whose careers are placed in jeopardy contractual rights to ensure the integrity of the process: at [144]. The process of investigation of allegations under the Towards Healing protocols, and in turn the public ventilation of such allegations, are

had no choice but to take rabbis to court' *Australian Jewish News* (10 Jan, 2019) https://www.jewishnews.net.au/i-had-no-choice-but-to-take-rabbis-to-court/85092 .

[117] On 17 May 2019.

[118] [2015] NSWSC 1840 (7 December 2015).

[119] Quoting *Scandrett v Dowling* (1992) 27 NSWLR 483- see ibid, [70].

[120] Ibid, at [74].

> arguably "contractually governed by the promised procedure with its promised safeguards": *Sturt* at [145].

Interestingly, Harrison AsJ also accepted that it was possible that the broader provisions of Canon Law relating to discipline of priests might be relevant, and also refused to strike out claims based on that body of law. In an important quote, we read:

> [97] Counsel for DEF also drew this Court's attention to the decision in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 where Gaudron, McHugh, Hayne and Callinan JJ in a joint judgment (Kirby J agreeing) held that although the proposition that the relationship between minister and church is pre-eminently or even entirely spiritual is couched in apparently absolute terms, it has been recognized that there are aspects of that relationship which may give rise to legally enforceable rights and duties: at [38].
>
> [98] In *Ermogenous*, at [73]-[76] Kirby J (providing additional reasons) said:
>
> "[73] ...Courts will seek to avoid entanglements in what are substantially issues of religious doctrine where there is no applicable legal norm or specific judicial competence. But **courts will reject the notion that religious organisations, as such, are somehow above secular law and exempt from its rules**. Like all others in a secular society, religious and associated bodies in Australia may be held accountable for the contracts which they voluntarily enter... Proceedings brought by the parties to such contracts who seek to enforce them do not, as such, lack justiciability. Nor can a blanket answer be given that, in such arrangements, ministers of religion and organisations providing for their sustenance do not intend to enter legally enforceable arrangements simply because of the 'spiritual calling' of the minister of religion concerned. **Spiritual functions do not negate legal relationships**
> [74] There is therefore no presumption that contracts between religious or associated bodies and ministers of religion, of their nature, are not intended to be legally enforceable. At least where the contracts concern proprietary and economic entitlements, of the kind which in this case Archbishop Ermogenous sought to enforce (and certainly where they are **not intertwined with questions of religious doctrine that a court would not feel competent to resolve according to legal norms**) there is no inhibition either of a legal or discretionary character that would prevent enforcement of such claims when they are otherwise proved to give rise to legal rights and duties.

However, when the matter later finally came to trial in *DEF v Trappett*,[121] a different view of the consequences of the "Towards Healing" process was taken by the trial judge, Beech-Jones J, who ruled:

> [5] As explained below, the type of step that might be taken by the Archbishop in reliance on the Assessors' Report was the removal of those "faculties" enjoyed by a priest in a diocese that are "freely granted" by the diocesan Bishop, such as the authorisation to perform certain functions and services for a particular parish or within a diocese (see [110]). It was not demonstrated that any of the financial emoluments enjoyed by the plaintiff are at risk, nor was it suggested that the Archbishop could take action to remove the plaintiff from the priesthood, that apparently being a matter exclusively for Church (or "canon") law.
>
> [6] For the reasons that follow I find that this Court does not have jurisdiction to deal with the plaintiff's claims.

In particular, the fact that there would be an impact on the priest's "reputation" alone was not sufficient to give the court jurisdiction to intervene in the processes of the church (consistently with the views expressed in *Christie*, noted above).

In an applicaton for leave to appeal, *DEF v Trappett* [2017] NSWCA 163, leave was declined, on the basis that the priest DEF had not exhausted all avenues of review within the church processes. No substantive comment was made on the jurisdictional issues, but the Court of Appeal (Beazley ACJ; Simpson JA and Sackville AJA) said this:

> [56] It was also relevant to the Court's determination that there is a serious question as to whether this is a matter in respect of which the Court has or would exercise jurisdiction. The recent decision of the Court in *Agricultural Societies Council of New South Wales v Christie* may stand in the way of the applicant's entitlement to or likelihood of the grant of relief. Given the recency of that determination, the Court ought not to embark upon a serious and difficult contested appeal until the applicant has exhausted other avenues of relief available to him.

[121] [2016] NSWSC 1698 (2 December 2016).

Keith Mason, in his comment on these issues,[122] notes that another possible ground for intervention may be found, if a "statutory" right of some sort were given to the cleric. He refers to the decision in *Baker v Gough*.[123]

VIII DISTINGUISHING THE CIRCUMSTANCES

It was suggested above that the approach which best protects the freedom of religious groups to determine the doctrines of their own religion, while protecting the legitimate expectations of private parties who have entered into arrangements on the basis of a particular understanding of doctrine, is what was called the "hands off unless" approach. This will involve courts not imposing their own interpretations of doctrine on parties from an "external" point of view, but being prepared to examine doctrine where necessary to enforce private law obligations that parties have voluntarily accepted.

Is this distinction workable and useful? Does the approach deal with the possible issues raised above?

On the one hand, it will provide an avenue for parties to have legitimate private law questions resolved. The "lack of competence" issue will still remain to some extent, but courts can accept expert evidence as the meaning of particular concepts. Courts should be willing to examine the subjective understanding of the parties concerned, as they have to do in other cases, and not "shy away" from issues simply because religion is involved.

But the courts will be reluctant to enforce their own understanding of doctrine where this would be imposed on a religious group by a public law rule.

The approach of the NSW courts in *OW & OV v Members of the Board of the Wesley Mission Council*[124] may provide an example. The basis of the claim here was that OW and OV, a same-sex couple, had applied to become foster carers for children in need, to the Wesley Mission, who provided such services. The Mission advised them that they were not eligible to be such under the Mission's guidelines, which on religious grounds did not regard homosexual

[122] See the Hon Keith Mason, "Clergy Status in the Age of the Royal Commission" (2018, Robin Sharwood Lecture in Church Law) https://www.trinity.unimelb.edu.au/getattachment/about/news-media/news/Trinity-host-Robin-Sharwood-Lecture-series/CLERGY-STATUS-IN-THE-AGE-OF-THE-ROYAL-COMMISSION.pdf.aspx?lang=en-AU .

[123] [1963] NSWR 1345. In that case it was held that the *School Chapels and Chaplains Ordinance 1954* (NSW), cl 10(a), conferred personal rights on a chaplain whom a school council has purported to dismiss without giving him a proper opportunity to show cause.

[124] [2010] NSWADT 293 (10 Dec 2010).

couples as suitable foster parents. The Mission relied on the traditional Christian view of marriage as the best environment for the raising of children.

In turning down the application, the Mission relied on s 56 of the *Anti-Discrimination Act* 1977 (NSW) ("ADA"):

> 56 Religious bodies
>
> Nothing in this Act affects: …
>
> (c) the appointment of any … person in any capacity by a body established to propagate religion, or
>
> (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The provision was relevant because the ADA provides that it is unlawful to discriminate against a person on the basis of their homosexuality, and it was conceded correctly by the Mission that unless s 56 applied, that they had done just that.

At first instance the Administrative Decisions Tribunal found both that there had been discrimination, but ruled that s 56 did not apply.[125] A key part of their reasoning that was that a preference for "traditional marriage" (ie "monogamous heterosexual partnership") was not a "doctrine" of the Christian church as a whole.

This was partly established by the leading of evidence from ministers from within the Uniting Church that there was disagreement among theologians on the point. (The Uniting Church is the "umbrella" body within which the Wesley Mission operates. However, the Wesley Mission represents what might be fairly called the "evangelical" or Biblically conservative wing of the church and is not uncommonly at odds with the broader leadership of the church.)

This decision was then set-aside on appeal to the Administrative Decisions Tribunal Appeal Panel, which held that the original Tribunal had misdirected itself by requiring that a doctrine be uniformly accepted across the whole of "Christendom" before it could "count" for the purposes of s 56.[126]

[125] See *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115.
[126] See *Members of the Board of the Wesley Mission Council v OV & OW (No 2)* [2009] NSWADTAP 57 (1 October 2009).

This decision itself was appealed to the NSW Court of Appeal, which in effect affirmed the Appeal Panel's ruling.[127]

The matter then came back to the Appeal Panel in the 2010 proceedings. The Appeal Panel reviewed the evidence that had previously been presented to the Tribunal by representatives of the Wesley Mission and concluded that the word "doctrine" was broad enough to encompass, not just "formal doctrinal pronouncements" such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included "moral" as well as "religious" principles.[128] The evidence of Rev Garner, who spoke of the doctrinal issues, was accepted as showing that the provision of foster care services by a homosexual couple would be contrary to a fundamental commitment of the organisation to Biblical values. Hence the defence under s 56(d) was established.

Here, then, the decision-maker was prepared to accept evidence focussed on the specific religious commitments of the organisation involved, the Wesley Mission, rather than coming to a broader (and inevitably controversial) decision about the relevant approach of the whole Christian tradition.

The "hands off unless" aspect of the suggested approach will, then, preserve to the maximum extent possible the religious freedom of persons and organisations to determine their own religious commitments in most cases, especially where the imposition of the power of the State is invoked without the consent of the parties involved.

There remains a danger, of course, that this approach would allow a particularly objectionable religious group to claim to hold a view which was only shared by a minority of their religion- eg an "Aryan" or "apartheid" group claiming that black people are lesser beings on their idiosyncratic view of the Bible.

One check on this may be that the courts should decline to accept a religious view that is a "sham" (similar to the way that courts will reject as a "religion" something that is a made-up religion with ulterior motives.) The sincerity of a belief may be tested through a range of the usual sort of evidence that is used in cases of this sort- such as whether there is any evidence of other parties that the observed behaviour of a person evidences such a belief.

The other thing to note is that even accepting that a particular view is "genuinely religious" does not automatically mean that religious freedom will be

[127] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155.
[128] *OV & OW* above n 124, at [32]-[33].

accepted as a justification for their behaviour. It is important note that this question (as to the extent to which courts should expound religious doctrine) is *not* one where all the problems of religious freedom are resolved. There has to be a separate discussion about the "limits" of religious freedom- so we will want to clearly not exempt acts of physical violence or child abuse, even if such actions are sanctioned by religious teaching. Whether we allow religious freedom to justify expression of views opposing homosexuality is a broader issue that still continues to be debated to some extent in the wider community.[129]

IX CONCLUSION

This paper has considered the extent to which courts should be involved in making decisions about the content of religious doctrines. We have seen that, while it has often been said that courts will not involve themselves in resolving these questions, there are important exceptions to this general principle, and we have been attempting to determine whether there are broad reasons which guide when courts will, and will not, determine these matters.

There are good reasons to be cautious about courts making pronouncements on religious questions. While these questions are not always as "irrational" as has sometimes been suggested,[130] it is certainly true that most secular judges are not really competent to make detailed findings about the content and interpretation of theological truths. This "competence" argument is all the stronger when we consider the strong principles favouring religious freedom, an aspect of which has always been seen as the dignity and right of religious bodies, and religious persons, to determine for themselves which views they hold on these matters.

However, it has been argued here that an exception to the bar on courts making religious findings should be recognised in circumstances where the private rights of the parties to a dispute are at stake, and the parties themselves have chosen to accept benefits on the basis that they will be bound by certain religious principles. So, it seems appropriate for a person who agrees to do work for a religious organisation and to be bound by the religious doctrines of the organisation, to be kept to their word, and for the organisation to hold that

[129] In Australia recently, these debates have been sparked off by the decision of Rugby Australia to dismiss high-profile player Israel Folau on account of a "meme" shared on social media suggesting that a range of sinners were destined to hell unless they repented, including homosexuals. For comment see blog posts at https://lawandreligionaustralia.blog/2019/04/14/reflections-on-the-israel-folau-affair/ (April 14, 2019) and https://lawandreligionaustralia.blog/2019/06/02/further-reflections-on-the-israel-folau-affair/ (June 2, 2019).

[130] See above, n 23

person to their promises. Where a dispute arises, it may be necessary for a court, in resolving a private dispute, to make findings about the preferable meaning of certain doctrines. In many cases this will be made easier because the parties themselves will have a common agreement on the meaning of the doctrines, which can be shown from their prior dealings.

To take another example, where a person or organisation assumes control of real property which is known to be subject to a charitable religious trust, a court cannot ignore its responsibility to see that the trust is carried out, by declining to decide religious questions. *The Red Book case*[131] and *Khaira v Shergill*[132] illustrate this fact.

This paper has tried to show that broad assertions that courts should "never" consider religious issues are not justified, in Australia or the UK, just as Helfand has shown that they are not justified in the United States. It does make the case, however, for a slightly more nuanced test to be adopted than that put forward by Helfand, of simply asking whether the question is one of "private" or "public" rights. Instead, it is suggested that there should be a presumption that courts will usually have a "hands off" approach to religious doctrine, but that this presumption may be rebutted where there is a **civil dispute** involving **private parties**, who have **chosen to subject themselves** to a specific religious regime. In those circumstances, the court has an obligation to resolve the dispute between the parties, even if that resolution may incidentally involve a consideration of religious doctrine.

It is hoped that the test put forward here will be of assistance to decision-makers and those advising parties in disputes involving religious persons or bodies, preserving to the maximum extent possible their religious freedom, but allowing decisions to be made which respect the choice of parties to contract or hold property under religious principles. As noted above, of course, this paper's scope does not extend to a resolution of all the complexities of determining the limits of acceptable religious freedom. Even if the freedom of an organisation or person to determine their religious commitment is respected, there are some broad areas where the community has to determine that religious rights cannot over-ride other fundamental rights. But hopefully these suggestions will make the issues around determination of the content of religious doctrine clearer.

[131] See n 59.
[132] See n 3.