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Religious Freedom to Curtail Freedom

Supporting Documents

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"The real question in these cases is . . . who decides what constitutes 'marriage'"? – Chief Justice Roberts, dissenting in Obergefell (2015)

"Like many cases in this Court, this case boils down to one fundamental question: Who decides?" – Justice Kavanaugh, dissenting in Bostock (2019)

I. US CONSTITUTION BALANCES FREE EXERCISE AND LGBTQ RIGHTS

The US Constitution (1789) protects:

- Freedom from establishment of any state religion;
- Free exercise of religion;
- Free speech;
- Liberty (sometimes defined as rights deeply rooted in historical tradition and/or implicit in the concept of "ordered liberty"); and
- Equal protection of the laws.

In a series of decisions, now-retired Supreme Court Justice Anthony Kennedy confirmed that liberty and equal protection apply in the area of LGBTQ identity, over dissents.

A. The Relevance Of Legislative "Animus" To Defining Constitutional Rights

In Romer v. Evans (1996), Justice Kennedy struck down a state constitutional provision permitting discrimination against gays, lesbians and bisexuals under the equal protection clause because it was "born of animosity" and lacked any rational relation to a legitimate governmental purpose.[1] "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

In US v. Windsor (2013), Justice Kennedy ruled that the Defense of Marriage Act, defining marriage as a heterosexual union for federal law purposes, violated the rights to liberty and equal protection because it was motivated by "a bare congressional desire to harm a politically unpopular group" and thus by "improper animus or purpose."

In Masterpiece Cakeshop v. Colorado (2017), Justice Kennedy found that the state failed to act in a "neutral and respectful" manner when evaluating a wedding cake baker's claim that his religious beliefs justified his discriminating against a same sex couple.

Finally, faced with the COVID-19 pandemic, a 5-4 Court refused to issue injunctive relief in Calvary Chapel Daytona Valley v. Sisolak (2020). The governor of Nevada limited church gatherings to 50 people, while casinos, gyms, and bowling alleys could exceed that numerical limit. Justice Gorsuch dissenting, asked why the constitution favors Caesars Palace (gambling) over Calvary Chapel (religion).

[1] Sexual orientation receives the lowest level of scrutiny ("rational basis") under the equal protection clause. However, the Bostock ruling equating sexual orientation with sex under statute may give rise to intermediate scrutiny.

B. The Relevance Of Past Discrimination To Defining Constitutional Rights

In Lawrence v. Texas (2003), the Court (by Justice Kennedy) overturned the recent (1986) case Bowers v. Hardwick and struck down a criminal law against consensual homosexual sodomy as a violation of the liberty right. Both the majority and dissent considered the relevance of past bias to interpreting the scope of a constitutional right. Justice Kennedy considered bias both in Judeo-Christian history across the centuries and also at the time Bowers (1986) was decided. He held that the Constitution is not frozen in time but allows for "emerging awareness" of liberty. "'[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Dissenting Justice Scalia, a so-called "originalist," ironically argued that modern biases are relevant because they were formed in "reliance" on the 1986 Bowers decision and constitutional interpretation should not disrupt "the current social order."

In US v. Windsor (2013), the Court (by Justice Kennedy) struck down the *federal* Defense of Marriage Act limiting marriage to heterosexuals for *federal* law, under the equal protection clause. Although same-sex marriage is new, old attitudes had interfered with the "dynamics of state government in the federal system" by which innovation leads to "consensus." Dissenting Justice Alito would have denied equal protection because same sex marriage did not exist in 1789.

In Obergefell v. Hodges (2015), the Court (by Justice Kennedy) held that liberty and equal protection protect same-sex marriage from *state* laws barring them. Justice Kennedy again rejected historical or traditional concepts as a basis for determining liberty. Evolving common law recognizes "underlying principles" regarding what fundamental rights are.

> History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. . . . The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition

> that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Limiting liberty to "historical practices" is self-perpetuating discrimination: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." Equal protection is also dynamic: "[T]he Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."

Dissenting Chief Justice Roberts attempted to find a middle ground. On one hand, historical approaches are anti-democratic and arbitrary. On the other hand, if past discrimination warranted future discrimination then "every restriction on liberty [would] supply its own constitutional justification." His proposed middle ground? Savvy politics: rights should not be expanded "suddenly and dramatically."

By contrast, originalist dissenting Justice Scalia limited his analysis to attitudes in existence when the Constitution first became applicable to the states (1868): "That resolves these cases." And dissenting Justice Thomas cast his eyes back to the reign of King Henry VIII, during which legal commentators defined "liberty" as merely freedom from physical restraint: "As used in the Due Process Clauses, 'liberty' most likely refers to 'the power of locomotion, of changing situation . . . without imprisonment or restraint, unless by due course of law. That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure."

This past term, the Court (by Chief Justice Roberts) determined in Espinoza v. Montana (2020) that free exercise requires that a state tax credit be allowed to be used at private religious schools, once again wrestling with the relevance of history and tradition and seeking a middle ground. On one hand, "founding-era" attitudes are indeed relevant and later attitudes are relevant only if consistent with "founding-era" attitudes: post-1789 practices and attitudes "may reinforce an early practice but cannot create one" so that a change in attitudes "cannot by itself establish an early American tradition" (emphasis supplied). On the other hand, the Court must reject historical practices that are "checkered," "born of bigotry" or have a "shameful pedigree" and thus "hardly evince a tradition that should inform our understanding of the Free Exercise Clause."

C. The Relevance Of Politics To Defining Constitutional Rights

Chief Justice Roberts' dissent in Obergefell v. Hodges (2015), as set forth above, argued that, regardless of the merits, rights should not be expanded "suddenly and dramatically." Roberts is viewed as a guardian of the Court's institutional legitimacy and hence a form of politician. In dissent, he pointed out that perfect balancing of competing rights (*e.g.*, liberty and free exercise) simply will not work as a practical/political matter. What happens, he asks, when a religious college that provides married-student housing only to heterosexual couples is ordered to provide housing to same-sex couples? In a perhaps self-fulfilling prophesy, Justice Roberts predicts "[t]here is little doubt that these and similar questions will soon be before this Court."

In Espinoza v. Montana (2020), dissenting Justice Breyer also acknowledged the Court's political imperative. All but dismissing history ("it is next to impossible to attribute to the Founders any uniform understanding"), he warned against over deference to religious exercise as forcing the Court into the politically unpalatable role of examining whether and how laws separately impact scores of religions

practiced in the United States. There may be "small but important details of a particular benefit program" that affect different religions differently. Any presumption of unconstitutionality burdens courts with "untangling disputes between religious organizations and state governments, instead of giving deference to state legislators' choices to avoid such issues altogether."

Finally, in Our Lady of Guadalupe Schools (2020), the Court deferred to a religious school's definition of what is a "minister" – and hence exempted from anti-discrimination laws those employees. Again eyeing the political ramifications of the constitutional analysis, dissenting Justice Sotomayor warned that abandoning judicial review of what a religious organization determines is a "minister" will become politically unworkable: "the Court's apparent deference here threatens to make nearly anyone whom the schools might hire 'ministers' unprotected from discrimination in the hiring process. . . . It risks allowing employers to decide for themselves whether discrimination is actionable. . . . [It] risks upending antidiscrimination protections for many employees of religious entities."

D. The Future Of Balancing Constitutional Rights

The Court has accepted Fulton v. Philadelphia, which expressly asks the Court to overrule prior caselaw establishing that neutral and generally applicable laws are constitutional even if they burden free exercise. In Employment Division v. Smith (1990), the Supreme Court had adopted this rule of presumptive constitutionality to avoid opening the floodgates to constitutional-based religious exemptions from civic obligations. The argument is now made in Fulton that courts are up to the task of managing the open floodgates and "engaging in case-by-case considerations of religious exemptions . . . without creating 'anarchy' or anything like it."

The Court has not yet decided whether or not to hear Washington v. Arlene's Flowers (cert. pending), another wedding vendor case where discrimination by a flower arranger is sought to be protected by the free speech and free exercise clauses. There, the religious objector argues that the state has "uniquely disadvantaged religious creative professionals who work in the wedding industry, believe that marriage is between one man and one woman, and are unable to attend and participate in wedding ceremonies contradicting that belief."

Yet another wedding case, Brush and Nib Studios, LC v. Phoenix, has not yet moved for leave to appeal to the Supreme Court. This case marks a potential shift in religious exemption jurisprudence and suggests a role the newly-minted Trump judiciary might take. Here an art studio seeks to discriminate against same sex weddings (refusing to create invitations). The state court balanced the competing constitutional rights and determined that the government's interest in securing equal access to goods and services for all citizens was "not sufficiently overriding."

II. RELIGIOUS FREEDOM STATUTES FAVOR FREE EXERCISE EVEN AT THE EXPENSE OF OTHER RIGHTS

As the US Constitution (at least for now) still requires balancing religious and non-religious rights, religious objectors have sought to skirt the balancing act without directly contesting non-religious rights by enacting sub-constitutional (statutory) law favoring religious exercise.

The federal Religious Freedom Restoration Act (1993) ("RFRA") was enacted in response to Employment Div. v. Smith (1990) which (as set forth above) established the presumptive constitutionality of neutral and generally applicable laws regardless of the level of the government's interest as against challenges

by religious groups. The rule was designed to avoid opening the floodgates to religious objectors to civic obligations and overly-enmeshing the Court in adjudicating religious issues. The RFRA opens those floodgates by invalidating laws that "substantially burden[]" free exercise of sincere religious beliefs, regardless of how unreasonable, unless there is (a) a compelling government interest (preventing the "gravest abuses endangering paramount interests") achieved in (b) the "least restrictive manner possible" (no other way possible).

While the Supreme Court has invalidated RFRA's application to the states in City of Boerne v. Flores (1997), states have been busy enacting religious exemption laws of their own that enable self-professed religious objectors to skirt anti-discrimination laws – not only clergy and religious organizations but also in some cases private citizens *and even government officials*.

- First Amendment Defense Acts ("FADAs") bar government from action against any person or organization because of religious beliefs or moral convictions on (1) the status of marriage, (2) sexual relations, and (3) gender identity. Some FADAs prevent the government from punishing government employees who speak about or act on their religious beliefs about sex or marriage. Also, some FADAs prohibit actions by administrative or judicial bodies under applicable antidiscrimination or other laws which may infringe on a religious objectors' beliefs. Thus, FADAs may potentially allow violations of contractional obligations by religious objectors – as well as out-right violations of state civil and criminal law.
- "Wedding services bills" exempt individuals and organizations from providing event space or services for, or otherwise participating in, LGBT weddings.
- "Government worker exemption bills," if passed would "allow government employees and officials . . . to refuse to provide marriage licenses or solemnize weddings if doing so would violate their religious beliefs." Others would eliminate state involvement in the issuance of marriage licenses or make marriages accessible only by clergy or a notarized "affidavit of common-law marriage."
- Last, "context-specific exemption bills" apply targeted exemptions in narrow circumstances such as foster care or adoption agencies and denial of health care or mental health counseling.

A. Religious Freedom Favored By Statute Even When Third Parties Are Harmed

In Burrell v. Hobby Lobby (2014), the Court (Justice Alito) held that a government mandate that employers who offer health insurance provide women with contraception at no cost unduly burdened free exercise of for-profit closely-held corporations because it was not the "least restricted means possible." The RFRA requires accommodations to free exercise far beyond what is constitutionally required, even for corporations (or at least closely held ones) which can have sincere religious beliefs. In dicta, however, Justice Alito stated the RFRA does not nullify basic anti-discrimination statutes – such as ones barring race discrimination, because there the compelling government interest is precisely tailored (i.e., least restrictive).

Dissenting Justice Ginsberg warned that third party rights are ignored under the RFRA – here women seeking free contraception. Are third party interests not to be disregarded in various cases such as –

- Restaurant owner refuses service to black patrons based on religious opposition to racial integration (Newman v. Piggie Park Ent.)
- Health club owners have religious objection to hiring unmarried people living with members of the opposite sex, women working without their father's consent, married women working without their husbands' consent," and gays. (State by McClure v. Sports & Health Club, Inc.)

- For-profit photography studio refuses service for lesbian couple's commitment ceremony based on the religious beliefs of the company's owners. (Elane Photography, LLC v. Willock)
- Employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)

Instead, dissent (Ginsberg) argued that, as the "substantial burden" prong is objective, courts must look beyond the sincerity of the belief to analyze whether it is substantially burdened. This brings the courts into the untenable role of adjudicating religious issues, which is not deferential at all. "Indeed, approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.'"

In Little Sisters Of The Poor Saints v. Pennsylvania (2020), picking up where Hobby Lobby left off, the Court (Justice Thomas) affirmed the Trump administration's rule that exempts a broad category of religious and non-religious organizations (including publicly-traded corporations) with sincere religious *or moral* objections from offering contraception to women through employer-sponsored health insurance plans. As a result, 75,000 and 125,000 women lose free contraception.

B. Religious Freedom Favored By Statute Even When Classes Protected By Anti-Discrimination Statutes Are Harmed

In Bostock v. Clayton County (2020), the Court (Justice Gorsuch) ruled that gay or transgender employees are protected by statute (the Civil Rights Act of 1964, also known as "Title VII") barring discrimination on the basis of "sex." However, Justice Gorsuch speculated that RFRA may override anti-discrimination statutes because it "operates as a kind of super statute, displacing the normal operation of other federal laws" and hence "might supersede Title VII's commands in appropriate cases." See §2000bb–3. ["Nothing in this chapter shall be construed to authorize any government to burden any religious belief."]" Dissenting Justices Alito and Thomas agreed that anti-discrimination statutes "threaten freedom of religion, freedom of speech, and personal privacy and safety."

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Religious Freedom or Freedom to Discriminate?
Same-Sex Marriage legislation and
Religious Freedom legislation: An Australian Perspective

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On 7 December 2017, Australia became 26th jurisdiction around the world to approve same-sex marriage. The path of legislative reform in Australia commenced in 2004 and there were no fewer than 22 unsuccessful attempts in Australia's Federal Parliament to legislate for marriage equality.

The path to reform was highly politicised, divisive and rancorous and the passing of the legislation has not seen the end of debate. This is, perhaps, not surprising as only one of the 5 separate Prime Ministers over the 10 years leading up to the 2017 legislation was in favour of same-sex marriage reform

The final passage of the legislation took an extremely unusual route to finally pass both houses of the Australian Parliament. The conservative Prime Minister in 2016 proposed a "plebiscite", which did not get support of a hostile Senate. Ultimately the government decided to hold a non-binding "voluntary postal survey" to gauge support of the same-sex marriage proposal – perhaps expecting it to fail.

The survey asked: *"Should the law be changed to allow same-sex couples to marry?"*

Of the eligible Australians who expressed a view, the majority indicated that the law should be changed to allow same-sex couples to marry, with 7,817,247 (61.6%) responding Yes and 4,873,987 (38.4%) responding No.

Nearly 8 out of 10 of 16 million eligible Australians (79.5%) expressed their view. All states and territories recorded a majority Yes response. Only 17 of

150 Federal electorates recorded a majority No response. The voluntary postal vote cost AU$100 million.

During the debate on the Opponents to the marriage equality legislation argued that same-sex marriage legislation infringed their religious freedom and, by implication, their right to discriminate against others on the basis of their religious beliefs.

In 2019, the government, under pressure from its conservative right faction, introduced the Religious Discrimination Bill, 2019 (Cth), together with connected other legislative measures. While events of 2020 have somewhat distracted government resources and public discussion to other issues, no doubt, at some stage, the legislation will again be a focus of debate.

Some preliminary matters

It needs to be noted that Australia is one of the few Western democracies that does not have a codified or written "Bill of Rights". The Australian Constitution largely deals with creation of the Commonwealth of Australia as a constitutional monarchy under the Queen of England as Australia's Head of State, the structure of the Commonwealth Parliament: and the allocation of powers between the various State governments and the Commonwealth and the role of the Parliament and executive. It is not a document that purports to set out a comprehensive list of rights of citizens.

This "limited" Constitution has meant that there is not a significant history of Application to the Australian High Court (or equivalent of the US Supreme Court) to define or set out powers as a result of fundamental rights. The High Court has traditionally taken a "black letter law" approach in interpreting existing legislation rather than an interventionist role.

That is not to say that Australia does not have significant human rights and anti-discrimination legislation, both at a federal level and at a state level. The Commonwealth includes the following laws that operate at a national level:

- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Australian Human Rights Commission Act 1986

- Disability Discrimination Act 1992
- Age Discrimination Act 2004
- Fair Work Act 2009

The 6 Australian States and 2 Territories each have Anti-Discrimination or Equal Opportunity Acts. Both Commonwealth and State laws apply and generally overlap to prohibit the same types of discrimination although they often apply in different ways with different mechanisms for relief.

It should also be noted that all the relevant Commonwealth and State statutes already include protection from discrimination on the basis of religion or religious belief. Indeed, all the statutes also include protection from discrimination on the basis sexual orientation.

The Religious Freedom Bills

In August 2019 the Attorney-General's Department release a package of three draft bills described collectively as the 'Religious Freedom Bills'[1]. On 10 December 2019, the Attorney-General's Department published a second exposure draft of the Religious Freedom Bills.

Background to the Bills

The Religious Freedom Bills have their origin in the same-sex marriage debate. In response to concerns from some stakeholders in that debate, the government commissioned a review of religious freedom in Australia.

That report found that religious freedom was not 'in imminent peril' but the protection of faith required 'constant vigilance'.[2] The review recommended, amongst other things, a religious discrimination act.[3]

The issue of religious freedom was again the focus of public discourse in early 2019 when Rugby Australia sacked prominent player Israel Folau in relation to posts that he made on social media declaring that "Those that are living in Sin will end up in Hell unless you repent." The post was accompanied by an image

[1] Religious Discrimination Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth).
[2] Religious Freedom Review: Report of the Expert Panel (18 May 2018) 8 < https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf>.
[3] Ibid, Recommendation 15.

of a list of 'sinners' including homosexuals, adulterers, and athiests and text quoting three biblical passages.[4]

The first draft of the Religious Freedom Bills was released in August 2019, with the second draft exposure Bills released in December 2019. Over 7000 submissions were received in response to the second draft of the Bill.[5] Submissions on the second draft closed on 31 January 2020. The Bill is yet to be formally introduced to Parliament.

Broadly speaking, the model proposed by the Religious Freedom Bills is based upon other federal discrimination laws including the Sex Discrimination Act 1984, the Age Discrimination Act and the Disability Discrimination Act.

The Bill will make it unlawful to discriminate on the basis of a religious belief of activity in specified areas of public life. The Bill protects against discrimination, both direct and indirect, on the grounds of 'religious belief or activity'.[6] It will be unlawful to discriminate in relation to key areas such as work, education, access to premises, provision of goods and services, accommodation, facilities and clubs. The bill does not create a 'positive right' to freedom of religion.

It is worth noting that 'religion' is not defined in the Bills. 'Religion' is likely to be given its ordinary meaning in its context, noting previous judicial constructions of the term.[7] This includes both established and new religions, regardless of the size of their following. 'Religious belief or activity' is defined as:

(a) holding a religious belief; or

(b) engaging in lawful religious activity; or

(c) not holding a religious belief; or

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[4] izzyfolau, (Instagram, 10 April 2019) https://www.instagram.com/p/BwEWt2uHcLI/?utm_source=ig_web_copy_link

[5] 'Submissions received for the Religious Freedom Bills – second exposure drafts consultation' *Australian Government Attorney-General's Department* < *https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-freedom-bills-second-exposure-drafts-consultation*>

[6] Religious Discrimination Bill 2019 (Cth) cl 5.

[7] In *Church of the New Faith v Commissioner of Payroll Tax (Vic) 1983 154 CLR 120* it was proposed that 'the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…'

(d) not engaging in, or refusing to engage in, lawful religious activity.[8]

It is noted that an activity is not unlawful merely because a local by-law prohibits the activity. For example, if a local council prohibits preaching on public property, this section would regard such activity as lawful religious activity.

The Bill also establishes the new role of Religious Freedom Commissioner at the Australian Human Rights Commission[9] to enhance engagement, understanding and dialogue in relation to the protection of freedom of religion. Complaints under the Bills can be made to the Australian Human Rights Commission in the first instance.

Critique

Most stakeholders providing submissions in response to the Bills seem to favor the introduction of legislation to support the prohibition of religious discrimination. While there are some protections in the legislation of states and territories, they are inconsistent and, in some instances, non-existent. It is broadly agreed that the introduction of religious discrimination legislation would bring that issue into alignment with other human rights protected by federal legislation.

Some features found in the Religious Freedom Bills that are not present in other anti-discrimination legislation have been welcomed by stakeholders. For example, the definition of employment in the Bill includes unpaid work and volunteers.[10] This is significant given the number of unpaid workers in religious organisations.

However, there has been widespread criticism that the Religious Freedoms Bills go too far and prioritise the protection of freedom of religious expression over other well recognised (and legislatively protected) human rights. By way of superficial example, it is proposed that the new Commissioner be given the

[8] Religious Discrimination Bill (Cth) cl 5(2).
[9] Ibid Part 6.
[10] Religious Discrimination Bill (Cth) cl 5 'employment'.

title of 'Freedom of Religion Commissioner'. This is not consistent with other commissioners including the Age Discrimination Commissioner, Disability Discrimination Commissioner, Race Discrimination Commissioner. It has been argued a more appropriate title would be 'Religious Discrimination Commissioner'.[11]

In relation to the operation of the Bills themselves, the following appear to be the most widely held criticisms:

- Clause 42 appears to be the most contentious provision. It states that a Statement of Belief (the definition is attached below) does not in and of itself constitute discrimination for the purpose of anti-discrimination law unless the statement is malicious, is likely to harass, threaten, seriously intimidate or vilify another person or group of persons or could reasonably lead to a serious offence. The statement itself need not be about religion, it may include any subject that is covered by a religious teaching. By way of example:
    - A Christian may say that unrepentant sinners will go to hell.
    - A doctor may tell a transgender patient that gender is binary as God made man and woman in his image[12]

  One consequence of this section is that beliefs that stem from, or can be tenuously tied to a religious teaching, will have greater protection than those stemming from intellectual or political beliefs, such as support for gay marriage.

- Clause 8 which covers indirect discrimination on the grounds of religious belief or activity contains a number of notable exceptions. For example, it provides that unless it is unlawful to refuse treatment, health practitioners are permitted to conscientiously object to providing a health service and this cannot be overridden by any professional rules.[13] For example:
    - A Catholic nurse may refuse to participate in abortion procedures[14] or hormone treatment for gender transition;[15]

[11] Law Council of Australia, 'Submission to Attorney General's Department: Religious Freedom Bills' (3 October 2019) 58.
[12] Explanatory Memorandum, Religious Discrimination Bill (Cth) Second Exposure Draft, 66.
[13] Religious Discrimination Bill (Cth) cl 8(6), 8(7).
[14] Explanatory Memorandum, n12, 22.

It is noted that this does not allow practitioners to discriminate against individuals based on other characteristics. For example, a doctor cannot conscientiously object to providing contraception to single women, he must refuse contraception to all individuals who seek that from him.

- Clause 9 has the potential to extend the scope of the Bill beyond natural persons. This clause was introduced in the second draft to replace a definition of 'person' that included a body corporate including religious body or institution. The natural language of the section appears to limit the scope to natural persons such as spouses, however the Explanatory Notes suggest this clause includes associations including personal, business, employment and other relationship with an individual.[16] It provides the example that a corporation would by protected against discrimination in relation to their association with their CEO, a natural person. It remains to be seen whether there will be further refinement of this section in subsequent drafts.

- Importantly, the bill provides that certain religious bodies do not engage in unlawful discrimination when acting in accordance with their faith. The term religious body includes a church or a mosque, an educational institution; a registered public benevolent institution, and any other body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than those that engage solely or primarily in commercial activities.)

It is argued that when considered as a whole the overall effect of the Bills is to reverse the onus of discrimination. In that protecting statements of belief, the Bill does not merely protect a person from being discriminated against, it allows a person to actively discriminate on the basis of their religious beliefs.

It is not enshrining a right to be treated as the same as others, but a right to mistreat others through both acts and omissions.

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[15] National LGBTI Health Alliance, 'Religious Discrimination Bill: Second Exposure Draft: National LGBTI Health Alliance submission' (31 January 2020) 7.
[16] Explanatory Memorandum, n12, 26.

Following the release of the second draft Bills, the President of the Uniting Church in Australia stated "In our previous submissions the Uniting Church has called for changes to ensure the legislation will not override other human rights or existing protections from discrimination. On our initial reading of the second draft of these Bills, we remain concerned that religious rights to discriminate will effectively be privileged over other rights. We do not want to discriminate against people, nor do we want to subject already vulnerable people such as LGBTIQ Australians to further pain in this conversation."[17]

It is submitted that the Australian legislation tries to elevate or protect a particular type of discrimination as legitimate at the expense of other anti-discrimination measures. The measures are probably unnecessary as religious freedom is already protected in Australian law. As an attempt to mollify a particular part of the community, the legislation probably makes no sector of the community happy. It will be interesting to see how or if the legislation moves forward.

[17] Deidre Palmer, 'Peace and Goodwill Required' (News Release, 12 December 2019) < https://assembly.uca.org.au/news/item/3108-peace-and-good-will-required>.

statement of belief: a statement is a statement of belief if:

(a) the statement:

(i) is of a religious belief held by a person (the first person); and

(ii) is made, in good faith, by written or spoken words by the first person; and

(iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or

(b) the statement:

(i) is of a belief held by a person who does not hold a religious belief; and

(ii) is made, in good faith, by written or spoken words by the person; and

(iii) is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.

9 Discrimination extends to persons associated with individuals who hold or engage in a religious belief or activity

This Act applies to a person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.

Example: It is unlawful, under section 14, for an employer to discriminate against an employee on the ground of a religious belief or activity of the employee's spouse.

PREMISE 1 – the LGBT+ rights in Poland*

There is only very vague equalitarian protection against non-discrimination on the grounds of sexual orientation under the Polish statutory law. The key legal act is the Article 32 of the *Constitution* prohibiting discrimination on any ground, yet it does not specifically refer to sexual orientation.

> ***Polish Constitution* (1997), Article 32**
> 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
> 2. No one shall be discriminated

> ***Polish Labour Code* (1977, as amended), Article 11^3 (*cf.* Article 18^{3a})**
> Any discrimination in employment, direct or indirect, in particular in respect of gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or an indefinite period of time or full or part time, are prohibited.

The only act expressively prohibiting and penalising discrimination on the grounds of sexual orientation is the *Polish Labour Code*. There is an active duty of the employer to counter-act all types of discrimination (Article 97 section 2b of the *Code*).

The criminal law – unlike that of many European countries – does not outlaw homophobic acts *per se*. Sexual orientation is not singled out by the *Criminal Code* as a possible reason for punishable hate-speech, the only grounds being expressively mentioned: nationality, race or creed (or the lack thereof).

> ***Polish Criminal Code* (1997), Article 212**
> § 1. Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.
> § 2. If the perpetrator commits the act specified in § 1 through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. (...)

Some limited protection may be sought under the Article 212 of the *Criminal Code* penalising defamation. Thus, a personal criminal action is available to a person who felt defamed by a statement of the offender, yet difficult to carry out. Personal interest of the prosecuting party needs to be proven: it is usually quite challenging with generic statements referring to a whole group. An objective test of 'offensiveness' is applied. So far there has been one successful conviction in case of associating homosexuality with paedophilia.

One may also seek remedies under civil law protection of personal rights (as above, difficult since personal interest of the plaintiff needs to be proven). There have been some cases initiated, none has been finished. Most defendants have been sued for using derogatory language referring to LGBT+ as a group. One case concerns the 'LGBT+-FREE ZONE' stickers appended to a weekly magazine.

Furthermore, there is no equalitarian legislation. Consequently, no same sex-partnership recognition exists (thus no spousal rights, benefits, or duties in any form), no protection of parental rights of same sex-parents, no tax privileges, or administrative protection at large). The legal status of same-sex relationships is largely determined by a few self-standing, sometimes contradictory, court judgements, which offer only a very limited protection under criminal, civil, and administrative law.

Even if the Polish legal system, just like the vast majority of the European legal orders, is that of codified law, and thus does not know the rule of court precedent as known in the common law jurisdictions, the court-decisions have got authoritative and persuasive function, especially if taken by the higher courts (the Supreme Court and the Chief Administrative Court).

That said, one needs to bear in mind that, since 2016 the government has introduced multiple amendments in legislative acts on the judiciary in Poland, ostensibly violating the standards of judicial independence. Despite judgments of the Court of Justice of the European Union and national courts, branding the changes as incompatible with Polish and European Law, they hold a potential chilling effect. The chairman of the ruling party, *Law and Justice*, Dr Kaczyński, MP, referred to the courts as acting 'under an influence of this [LGBT+] ideology and that one should do something about it.'

By virtue of the international agreements the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union has instead binding and direct application. Yet, in many LGBT+ related cases the national courts have largely ignored it. They courts have never agreed either to refer a pending LGBT+-related case for a preliminary ruling to the CJEU (the chief argument is that of the apparent non-application of the European Law).

* Translation of the *Constitution* is taken from the Polish Parliament site (www.sejm.gov.pl); the Codes translations are taken from public domain.

PREMISE 2 – **Protection of Religion in Poland**

The fundamental protection of freedom of conscience is rooted again in the *Constitution.*

> ***Polish Constitution* (1997), Article *25***
> 1. Churches and other religious organizations shall have equal rights.
> 2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
> 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
>
> ***Polish Constitution* (1997), Article 53**
> 4. Freedom of conscience and religion shall be ensured to everyone. (…)

The criminal law offers strong protection of religious beliefs:

> ***Polish Criminal Code* (1997)**
> **Article 194**. Whoever restricts another person from exercising the rights vested in the latter, for the reason of this person affiliation to a certain faith or their religious indifference shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.
> **Article 195**. § 1. Whoever maliciously interferes with a the public performance of a religious ceremony of a church or another religious association with regulated legal status shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years (…).
> **Article 196**. Whoever offends the religious feelings of other persons by outraging in public an object of religious worship or a place dedicated to the public celebration of religious rites, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

According to the *Resolution* of the Supreme Court of 2012 (I KZP 12/12) the crime may be committed both with direct and possible intent. That means that the subjective attitude of the culprit does not really count in adjudicating of his or her criminal liability. In 2017 there were 8, and in 2018 12 successful convictions of under Article 196.

* * *

The possible areas of CONFLICT

Until recently the argument of protection of religious beliefs had been mostly used to curb down any attempts to pass equalitarian legislation. That had been mostly done by the politically extremely influential catholic church in Poland under the heading of protection of marriage, traditional ('Christian') gender roles, and the traditional parenthood. In particular, in the last two years the Church has been overly vocal censuring the so-called 'gender/LGBT-ideology'. The present populistic right-wing alliance government (in power now for the second mandate) sees the church as their natural ally, and often uses the same kind of argumentation in the political debate arguing against the LGBT+ emancipation. There is a strong support of such policy on the part of influential ultra-conservative organisations. One of them, the Institute of Legal Culture 'Ordo Iuris' carries out potent lobbying, and regularly gets involved in court proceedings either representing the claimants, who invoke religious arguments, or as *amicus curiae*. Another, Foundation 'Life and Family' has just started a popular bill initiative aiming at limitation of the right to assembly. It would be illegal, i. *al.*, to propagate same-sex unions, the notion of gender, and sexual orientations other than heterosexuality, but also to use any kind of religious symbols and associations in this context. Some of the bishops, and common clergy call for collection of signatures supporting the bill.

These policy-statements have found its way to a number of tangible situations.

1. Recently, The Ministry of Justice and its Justice Fund (originally designed to aid crime victims) have sponsored a 3-year programme 'Prevention of crimes related to violation of freedom of conscience committed under the LGBT ideology'. The programme proposes conferences and 'educational' seminars as well as publications of supplements to a right-wing, ultraconservative weekly *Do Rzeczy*. The same institutions have just provided extra funds to the communities that have adopted 'LGBT-free zones' resolutions. One may thus presume that the criminal law punishing offence to religion would be actively used to stop LGBT+ activism.
2. Politically controlled State Prosecution initiate criminal proceedings whenever there is even a faint hint of a possible offence to religion. Sometimes these steps are taken after private denunciation, but mostly upon prosecutors' own initiative. Often their actions could be interpreted as legal harassment. Some notable cases may be mentioned by the of examples:

A. Charges against an activist who has fashioned posters with the icon of Our Lady of Częstochowa adorned with a rainbow halo. The prosecutor's office ordered detention of the suspect, later deemed as unnecessary by the court (2019).
B. Charges against Szymon Niemiec, bishop of the United Ecumenic Catholic Church. Niemiec celebrated a Mass during the 2019 Warsaw Pride, which was branded as 'parody of religion'.
C. Charges against Queer activists Margot, Łania, and Poetka, for, among others, having decorated the statute of Christ in Warsaw with rainbow flag (summer 2020).

None of these cases have been yet finally decided by the courts.

3. 'The Printers-Case'. Back in 2015 a printer from Łódź declined an order to print an LGBT+-related roll-up. He claimed that carrying out this task would be contrary to his religious convictions. The unsatisfied clients petitioned the Prosecutor's Office to charge him with a misdemeanour consisting in discriminatory denial of services (in virtue of a provision of *the Code of Misdemeanours*). In 2018 the Penal Chamber of the Supreme Court finally approved the judgement of the lower courts finding the printer guilty of offence (which was the only legal consequence of the act, no fine was imposed). The Minister of Justice immediately challenged the constitutionality of the respective article 138 of *the Code of Misdemeanors* at the Constitutional Tribunal, claiming that this article infringed the freedom of conscience and religious belief. The Tribunal, in a legally doubtful composition of the adjudicating bench, pronounced unconstitutionality of the regulation, thus opening way to a new trial. In December 2019 the Court of Appeal in Łódź reopened the case, and immediately dismissed it, clearing thus the suspect.
4. 'The IKEA Case'. In 2019 one of the IKEA employees commented the company equality campaign, stating at the internal portal that 'accepting and promotion of homosexuality, and of other deviations is spreading of a corruption'. He justified his opinion citing the Bible (*Mt* 18:6, and *Lev.* 20:13). The management pointed out that his declarations were discriminatory and asked to remove them. Upon the employee's decline, he was given a notice. In 2020 the HR manager of the company was criminally charged with limitation of religious beliefs under the Article 194 of the *Criminal Code*.

> ***Polish Constitution* (1997), Article 73**
> The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone against in political, social or economic life for any reason whatsoever.

One could also expect a possible clash between the protection of religion and the freedom of artistic expression (enshrined in *Article 73* of the *Constitution*), where LGBT+-themed art pieces would use religious symbolic. One example could be provided by the recent Daniel Rycharski's exhibition *Fears* at the Warsaw Museum of Modern Art. In his work, Rycharski, a queer artist, takes inspiration from his trans-sectoral minoritarian status: homosexual, religious, Jewish, and provincial. He uses strong religious symbolism to address the LGBT+ exclusion by the established church. There have been media attacks on the content of this exhibition, claiming it be offensive to the religion as such. Even if no actual legal proceeding has been initiated, one could imagine its happening, with a very uncertain outcome. A good parallel could be offered by a lengthy trial of Dorota Nieznalska. This artist was charged in 2001 of offence to religion caused by her work 'Passion' consisting of a photographic image of a penis attached to a cross, accompanied by a video representing a face of a man exercising at a gym. Nieznalska was finally acquitted only in 2010; her trial and intermediate convictions caused a kind of artistic ostracism towards her; several galleries did not want to present her works.

Even if there is a well-established jurisdiction of the European Court of Human Rights protecting artistic freedom in such a context (see *e.g. Alekhina v. Russia* (2018), 38004/12 in which the Court underlined that more and more controversial means should be accepted in a particular political context), one could fear that, given the lengthiness of the procedures, the possible charges would have chilling effect on artistic expression in the cases in which art-creation would involve statements on religion in connection to LGBT+ issues.

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