

# Are Organizations' Religious Exemptions Democratically Defensible?

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Many democratic societies are pluralistic: people from different cultural, ethnic, and religious backgrounds live together, with different plans and values, and they disagree strongly about the permissibility of particular practices. Yet coordination and cooperation require that all citizens are united under one set of laws. Sometimes, this tension between pluralism and unity produces a *lex exceptio*: there is a generally applicable law, but some are granted an exemption from that law because of religious conviction.

Thus, the United Kingdom's Highway Code requires that "On all journeys, the rider and pillion passenger on a motorcycle, scooter or moped MUST wear a protective helmet." Yet, "This does not apply to a follower of the Sikh religion while wearing a turban."<sup>1</sup> In other cases, the exemption is granted for religious reasons, but the exempt party is not an adherent of the religion: in the Australian state of Victoria, local councils have successfully applied for exemptions from antidiscrimination legislation so they can run women-only swimming classes targeted at Muslim women.<sup>2</sup> Here, the exempt parties are the councils, yet the exemption is justified with reference to the religion of individuals (swimming pool users).

In the 1990s, there was heated philosophical debate over such exemptions. Some viewed them as the proper response to individuals' autonomy or need for recognition.<sup>3</sup> Others argued that exemptions are unnecessary if we have robust



Collective agents— including organizations— can form irreducibly group-level religious convictions. To see this, consider that a “decision-making procedure” takes in reasons, beliefs, and preferences, and processes them to produce decisions. Organizations’ procedures include voting, committees, meetings, and so on, but their procedures are often informal and tacit, with the organization’s true beliefs and preferences revealed by the on-the-ground behavior of members (when acting within and because of their role), rather than by the “official party line.” Whether formal or informal, an organization’s procedure is “distinct” in that 1) the reasons it takes in tend to differ in kind from the reasons any of its members take in when deciding for themselves (consider: votes, proposals, and so on); and 2) its method for processing those reasons is different from the method of any one member when deciding for herself. For example, an organization might take the meeting contributions of members and process these using conversation-based consensus, thereby using a distinctive set of inputs and procedures to arrive at organizational beliefs. Members are unlikely to use these inputs, processed in this way, when settling the beliefs they hold themselves. If a procedure is “rationally operated,” it is operated with the aim of ensuring that current decisions follow with the aim of. If a proa.d87 ( ing)0.6 (cof)-20 ( methe )0.5 (belieese inputs, ) ]Tu

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claims to religious exemptions: our religion is constitutive and/or determining of our (sense of) identity; our (sense of) identity should be respected and protected; therefore, our religion should be respected and protected, which will sometimes require that we are exempt from generally applicable laws.

How might humans' autonomy-based or identity-based claims transfer to organizations? The idea is this: When Ashers Bakery endorses a message, this implies that (some of) its members endorse that message. But the option to endorse that message is crucial for members' autonomy or identity. So, for members' autonomy or identity to be respected, the bakery must be granted a claim to resist endorsing the message. The action transfers down (from organization to member); so the claim not to perform that action transfers up (from member to organization).

The problem is that the action does not transfer down. So there is no reason for the claim to transfer up. Ashers Bakery endorsing a message does not imply that any individual member endorses the message. Even if it is true that— to respect and protect individuals' autonomy or identity— individuals should be free not to endorse messages they disagree with, this individual freedom is not infringed upon when an organization of which they are a member endorses a message. The transferring-up strategy commits the fallacy of assuming that when a whole has some property, some constituent part of the whole also has that property. If a wall is eight feet tall, that does not imply that any brick constituting the wall is eight feet tall. Likewise, when a bakery endorses a message, this does not imply that any member endorses the message.

Nonetheless, sometimes some, most, or even all organization members will feel (or be interpreted as) tainted by the behaviors of their organization. A school's hiring a gay teacher does not imply that any member hires the gay teacher. But the school's hiring might cause individuals on the hiring committee to do things inconsistent with their autonomy or identity. If so, do members' claims transfer up to the organization, despite the action not transferring down?

No. Members claims might be real, in such cases. But members' claims do not generate a claim of the organization itself. To be clear: members' claims need to be balanced against the claim of the potential new hire, before an all-things-considered judgment is made. If the former claims outweigh the latter, then members are permitted not to be involved in the organization's action. If there is no other way for the organization to perform the action, then the organization is permitted not to perform the action. But this does not mean that the organization has a claim. Instead, it is akin to the Australian city councils being granted exemptions to run women-only swimming classes. There, it was not that Muslim women's rights were transferred up to the city council, such that we were respecting the council's claim and right to have its religious convictions respected. Instead, granting the council an exemption was a means of respecting the women's rights.

Similarly, sometimes an organization's action would have detrimental effects on members' autonomy or identity. The members may have a claim not to be involved in that action. But these are *individual* claims, not *organizational* claims. This is important for two reasons: 1) such member claims will likely change as the composition of the organization changes—present members' autonomy and identity do not say anything about future members' autonomy and identity, so the organization's exemption should not be projected into the future; and 2) if we view the organization's exemption as grounded in a claim *organizational* rather than *individual* ( ), then we may be misled into thinking the claim is unduly weighty (because organizations are large, powerful, and subsume many members). When we view the claim as held by the relevant member(s), it will be easier to give it proper weight balanced against the competing claims of other individuals (such as potential new staff of the school).

Additionally, there are practical upshots to viewing the claim as held by members rather than by the organization. If members make a claim based on being tainted by the organization's action, then the first response should be to find other members who do not mind such "taint." The first response should not be to grant the organization (as a whole) the permission not to perform the action. Furthermore, members' claims must be treated on a case-by-case basis: in an instance in which *some* members refuse to be involved in the organization's action, this might (pending consideration of competing claims) justify allowing the organization not to perform that action *in that instance*. But it would not justify a general and ongoing exemption from the organization performing actions of that type.

In sum, we must not confuse an organization's claims with its members' claims. The latter do not give rise to the former, even if the latter can justify organizational noncompliance with laws in some instances. To believe otherwise is to neglect the ontological distinctness of the organization and its members.

**A** second argument suggests organizations have their own claims to autonomy and/or identity-protection. Take a university with a religious character. The interests of the university are not merely a product of the interests of its members; its interests may run counter to their interests. So perhaps it has its own right to autonomy or identity-protection.

Take autonomy first. The idea is that one's religion provides one with options, and choosing from among those options is highly valuable: "the sort of freedom ... they [that is, people] most value, and can make most use of, is freedom ... within their own societal culture."<sup>17</sup> This argument is grounded in the liberal conception of the self: the self is a fundamentally free being. In philosopher John Rawls's words, "the self is prior to the ends which are affirmed by it," such that individuals "do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any



would enjoy scant support in pluralistic democracies. Instead, Smith has argued for granting organizations only those rights that are reasonable preconditions for them to offer accounts of their actions. If some rights are reasonable precondi-



There is a fourth and final strategy. It starts from the fact that organizations are set up for a particular purpose, to be pursued in a particular way. We saw this when discussing the second strategy. There, I noted that the autonomy-based defense of religious exemptions is inapplicable to organizations, because organizations lack the relevant autonomy. A university, for example, cannot consider giving up the goals of teaching and research. Those goals are fundamental to its decision-making. More generally, an organization cannot decide to perform an action if its decision-making procedures, and fundamental goals, render it unable to decide to perform that action.

Building on this, I suggest we conceive of religiously grounded exemptions as liberty-rights, rather than claim-rights: religiously grounded exemptions amount to the absence of a duty to perform some action (the action of abiding by the generally applicable law), rather than amounting to the absence of a claim-right (held by an entity other than the right-bearer) to respect the content of the right.<sup>28</sup> Most members of society have a duty to abide by the generally applicable law. Any entity that has an exemption lacks that duty. When exemptions are thus framed as absences of duties, it is easy to see how they might be justified. Simply, a duty to perform an action implies that the duty-bearing entity has the ability to perform that action: “ought” implies “can.” By contraposition, if an entity lacks the ability, then it lacks the duty. Thus, if an organization’s fundamental goals or decision-making procedures render it unable to abide by a generally applicable law, then it cannot have a duty to abide by that law. Thus, it must be granted a liberty-right (an absence of a duty) regarding that law: an exemption from the duty to abide by it.

The question is under what conditions an organization’s procedures and goals render it constitutionally unable to abide by a law. When assessing this, we should not simply take organizations at their word. After all, a school with a religious character might suddenly find itself able to abide by antidiscrimination laws if its funding becomes conditional on its doing so.<sup>29</sup> In this way, organizations might misunderstand their own constitutional inabilities.

This suggests a test for organizational abilities: would the organization abide by the general law if it were given an incentive for doing so? If yes, then we should reject any assertion that it is constitutionally incapable of abiding. This follows political theorist Zofia Stemplowska’s account of feasibility, according to which “motivational failure is an instance of mere unwillingness when there exists a conceivable incentive that would bring the agent’s motivational state in line with what is needed to perform the action in question.”<sup>30</sup> By contrast, if there is no incentive that could induce an organization to abide by the generally applicable law, then we should take seriously its claim to be unable to abide.

Morally speaking, it is important that the incentives are not threats.<sup>31</sup> To ensure this, the offered incentive must not infringe upon the organization’s rights

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the nonenforceability of such obligations does not derive from the organization's claim to have its religious convictions respected. And if members face moral-political pressure to fulfill such obligations, then the organization may well find itself able to abide by the law after all, thus dissolving its liberty-right not to abide.

This fourth strategy might appear overly permissive, insofar as its rationale extends beyond religious organizations. For example, can a white supremacist organization assert its inability to abide by antiracism laws because its constitution is racist? I make two points in response. First, I have sought to find a plausible justification for existing laws that provide religiously grounded exemptions to organizations. If that justification extends beyond religious organizations to other (more sinister) organizations, this does not show that the law should be changed to allow exemptions to the latter organizations. Second and more important, even if the fourth strategy does apply beyond religious organizations, some procedures and fundamental goals are beyond the democratic pale. Plausibly, religiously grounded exemptions apply only to those that are within the pale. The pale might be set in various ways, such as with reference to a harm principle or to basic liberal rights. But it will rule out certain organizations as impermissible, even before those organizations' exemptions can arise as a political question.

**W**here does this leave us? Consider again the Australian law: religious educational institutions may discriminate against potential staff members, contract workers, or students on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. This is not justified by an organization having a claim of its own that is transferred up from the claims of members (the first strategy). Nor should we view the exemption as protecting the autonomy or identity of the organization itself (the second strategy). Neither is the exemption necessary for the accountability of the organization (the third strategy). Perhaps members have claims not to be involved in the hiring or teaching of people, because of those people's sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. This essay has not sought to assess that idea. By looking directly to that possibility, we avoid giving members' claims more weight than they deserve, by imbuing them with the size, power, and longevity of the organizational entity. When members' claims are balanced against those of potential staff members, contract workers, or students, the latter may well win. But this is a matter of balancing members' claims: it is not a matter of a claim held by the organization itself.

That said, there may be some cases in which religiously grounded exemptions are justified with reference to the organization itself. These cases fall under the fourth strategy, in which an organization's procedures or foundational goals prevent it from being able to abide by the generally applicable law, thus preventing it from having a duty to so abide. To test whether this strategy can legitimately

be taken by Australia's religious educational institutions, I proposed an incentive test: would sticks and/or carrots suffice to induce compliance with nondiscrimination laws? Even when the answer is no, such that the fourth strategy can be taken, that strategy is unlikely to last: organizations will often have the long-term (if not short-term) ability to abide by the general law, and members will often have a moral duty to bring such an ability into existence if it does not yet exist. The result is that religious exemptions for organizations should be few and far between.

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