

Gender identity and the protection of ontological difference through the autonomy of religious associations

Janko Vorster and Shaun de Freitas¹

Abstract

This article critically examines the intersection of gender identity, religious associational autonomy, and the evolving legal landscape in liberal democracies. Focusing on the clash between transgender rights and the religious beliefs held by these associations, it navigates the deep-rooted beliefs and assumptions underlying the transgender phenomenon. The article advocates for the protection of the autonomy of religious groups by considering international law, the principle of subsidiarity, the limits of law, and the inherent values that permeate these groups. Emphasizing the communal nature of religious associations, a holistic and integrated perspective is argued for. Ultimately, this article advocates a nuanced approach that respects diverse beliefs on gender identity against the background of communities of faith.

Keywords

Associational freedoms, autonomy of religious associations, church and state, freedom of religion, religion and diversity, religious associations, transgender identity.

1. Introduction

In many liberal democracies, legislative and judicial endeavours regarding transgender identity (or transgenderism)² have undergone substantial development, especially during the past decade. For example, there has been a significant development of legal issues related to transgender individuals through judicial ac-

¹ Janko Vorster is a strategy and investment consultant at Singular Advisory, Winterberg Group, and holds a Master of Laws from the University of the Free State. Email: vorster.janko@icloud.com. Shaun de Freitas is Professor of Law, University of the Free State and Adjunct Professor, School of Law, University of Notre Dame Australia, Sydney. Email: defreitas@ufs.ac.za. This article uses British English. Article submitted: 18 February 2024; accepted 19 July 2024.

² For the purposes of this article, the term 'transgender' refers to "someone who identifies as the sex opposite of that of their birth – that is, their natal sex. Someone who identifies as nonbinary is not, within this definition, transgender. They are best described as gender diverse" (Parkinson 2023:13).

tivism in Europe. In this regard, the European Court of Human Rights (ECtHR) has played a seminal role (Van der Vleuten 2020:282-283; Holzer 2022:8-9; Van den Brink & Dunne 2018:40-41). The establishment of gender identity recognition norms has led to a host of legislative developments throughout Europe; as of May 2022, 39 states in the region had implemented measures to provide legal recognition for transgender persons (TGEU n.d.). These developments were not limited to Europe; the ECtHR's rationale for legal gender recognition was adopted by the United Nations Human Rights Council and the UN High Commissioner for Human Rights (UNHRC 2008). A further indication of the contemporary relevance of matters related to gender identity is the exponential growth of interest in transgender persons that has occurred within the medical profession in the last two decades (Sweileh 2018:18-19). Accompanying these developments has been an increase in the number of people identifying as transgender, with Kenneth Zucker noting that recent studies on transgender health tend to define "transgender" much more loosely than in the past (Zucker 2017).

According to Patrick Parkinson, "Issues about gender identity have become lightning rods for furious disagreement in Western culture" (2023:10). On the other hand, discrimination based on religious convictions regarding gender identity has received limited scholarly attention (Parkinson 2023:12).³ In this regard, the issue of the rights of transgender individuals as weighed against the rights of religious associations requires further investigation. What should the law say in cases of a clash between the rights claimed by the transgender person and the doctrines held by a religious association? As Helen Joyce has pointed out, this new transgender movement demands not only that people should be allowed to self-identify as transgender or nonbinary (or any other descriptor), but that others be compelled to accept these people's beliefs about themselves (Parkinson 2023:33).⁴ The debate is actually about requiring others to identify and treat the subject as a member of the sex they claim to be (Parkinson 2023:33).

This article argues for the protection of the autonomy of religious associations against undue state interference in the guise of well-meaning anti-discrimination rhetoric. Religious associations need such protection when challenged, for example, by transgender individuals seeking membership or employment, where such individuals are unwilling or unable to abide by a given association's

3 Parkinson explains that an attribute of the new transgender movement "is a demand that people should be regarded as the sex with which they identify, irrespective of whether they have commenced a journey toward medically assisted transition, or ever intend to do so, and irrespective also of whether they have diagnosed gender dysphoria" (2023:24).

4 See Parkinson (2023:25-30) for an elaboration of the main tenets of this movement, which include gender as personal discovery, rejection of the gender binary in favour of a more fluid understanding, medical gatekeeping, affirming gender identity, and a belief that conversion therapy should be criminalized.

essential beliefs on gender and sex. The first main part of the article presents background information regarding the transgender phenomenon, emphasizing transgenderism as grounded in a specific ontology. This in turn places transgenderism on a plane that competes with other differing ontological paradigms on matters pertaining to conduct and the body; some of these differing paradigms are embodied in the essential doctrinal tenets of religious associations. Building on this discussion, the second part of the article outlines compelling justifications for safeguarding religious associational autonomy, drawing on international law, the principle of subsidiarity, the limits of law and the permeated ethos approach.

2. (Trans)gender identity and belief

The content of the recent sociological concept of “gender” (for example, whether it is mutable, malleable or even binary), is ontological in essence and thus can vary across different ontological and normative contexts. The transgender phenomenon of the 21st century is therefore inextricably connected to questions of ontological morality, although these are often disguised as matters of settled objective fact. For example (as further discussed below), some presume an established consensus that the concepts of sex and gender ought to be compartmentalized and separated, and that these categories are mutable and subject to varying degrees of personal choice. Yet these statements do not belong to the realm of objective fact; they are theoretical, moral, ontological and normative claims that have come to be perceived as objective facts. To demonstrate this point, one needs simply to look to the emergence of these ideas in the 1950s and their subsequent development in modern culture.

The man widely recognized as the first to distinguish between sex as biological reality and gender as social construct in the modern mode was New Zealand psychologist John Money (Williams 2020; Klein 2012:19; Stoller 1968), who in his work with intersex children (children with indeterminate genitalia – to be distinguished from children with gender dysphoria)⁵ theorized that socialization into a “gender role” and not biological sex was the main determining factor in the establishment of adult “gender identity” (Williams 2020:4; Hodson 2019). Money applied his theories in an experimental fashion to the raising of intersex babies, with varying levels of success (Williams 2020:4; Gaetano 2017:11-15). The results of his experiments were quite controversial – some failed experiments resulted in

5 According to Parkinson (2023:13), gender dysphoria refers to an incongruence between natal sex and gender identity that is deeply distressing. Parkinson (2023:19) refers to “the profoundly troubling disconnect between outward manifestation of genitalia and inward reality” that results in gender dysphoria, saying that such a condition “requires (or at least justifies) hormonal and surgical treatments that have the effect of bringing a person’s external appearance and genitalia more into concordance with their subjective gender identity.”

patient suicides – but this did not deter him or later feminist scholars from continuing to employ this theoretical gender-sex distinction (Gaetano 2017; Marchiano 2019). As Joanna Williams puts it, “Money’s experiments help locate the emergence of a transgender identity within the medical profession” (Williams 2020:4). Williams goes on to quote Nathan Hodson, who described how the emergence of the distinction between sex and gender was enabled by new medical techniques:

It became possible to conceptualise ‘gender identity’ as dislocated from biological sex when new medical technologies for the first time made it possible for doctors to change the bodies of those born with indeterminate genitals and to assign them to a sex ... the availability of the treatment appears to have essentially created the demand. (Hodson 2019:108)

The emergence of the distinction between sex and gender was enabled by new medical capabilities. However, the advent of this distinction would eventually, largely through second- and third-wave feminist writings from the 1970s onwards, take on a life of its own, eventually creating the orthodoxy experienced today (Klein 2012:12; Williams 2020:5). The theoretical distinction between sex and gender that originated in the clinical treatment of intersex conditions has thus opened the floodgates for what commentators would come to call “gender ideology” (Dialogue of the Holy Father 2016).

The early distinction between sex and gender first employed by Money in the 1950s was popularized in the 1970s by leading second-wave feminists (Klein 2012:12; Williams 2020:5). These feminists in turn used the distinction between sex as a biological reality and gender (or, in this case, specifically “gendered role”) as a social construct to critique the imposition of what they assumed were man-made and socially enforced gendered expectations on females (Williams 2020:6).⁶ It is important to reiterate that “‘gender role’ as invented and imposed construct” was then – and still is now – not an objective observation but a critical-theoretical presumption intended for use in criticising sex stereotypes.

Then came third-wave feminism and post-structural feminism (drawing from the ideas of the post-structuralists), which advocated the abandonment of certainty relating not only to gender but also to biological sex (Klein 2012:12; Williams 2020:5-6). Building on the post-structuralist foundations laid out by the likes of Jacques Derrida and Michel Foucault, post-structural feminists such as Helene Cixous and, most prominently, Judith Butler developed the body of ideas that constitute the basis of contemporary “gender ideology” (Derrida 2001, 2016;

⁶ See, for instance, the most influential book by second-wave feminist Germaine Greer (2019).

Foucault 2005, 2013, 2019; Cixous 1975; Butler 2002, 2011).⁷ Butler's works *Gender Trouble: Feminism and the Subversion of Identity* (1990) and *Bodies That Matter: On the Discursive Limits of Sex* (1996) are widely recognized as the foundations of contemporary theories on the deconstruction of sex and gender (Klein 2012:13). Butler's theory of "gender performativity" attempts to do away with the objective status of biological sex as opposed to socially constructed gender by arguing that biological sex itself is socially constructed, and that sex is thus not a separate nor more foundational concept than gender (Butler 2002:17). Butler's theory is of such a nature that many legal scholars dealing with proximal issues either agree with or prefer not to engage with the theory's arguments.⁸

This historical review demonstrates how the distinction between biological sex and social gender, developed in the 1950s for the treatment of intersex conditions, came to popular attention in the 1970s through the critical works of second-wave feminists. Finally, from the 1980s onwards, third-wave feminists argued against this distinction, but in the opposite direction. Before Money, sex and gender were both presumed to relate to a biological reality; after Butler, both sex and gender were said to be socially constructed. Parkinson (2023:30) comments:

Neither the belief that gender identity is different from natal sex nor the belief that gender is fluid can be validated or falsified by science. The first is essentially a belief about subjective understanding versus objective reality, and about the nature of human sexual identity. The essence of who I am is who I consider myself to be rather than how, in a physical sense, I am made. The idea that gender is fluid is also a belief. It begins from the premise that gender is something different from biological sex. Previous generations would have regarded the two words as interchangeable when describing the binary nature of humankind.

7 Post-structuralism emerged in the late 1960s as a challenge to structuralist paradigms in philosophy, linguistics and other fields that were prevalent at the time (for example, Saussure's structural linguistics). Leading theorists included Jacques Derrida and Michel Foucault, among others. Derrida is considered a founder of post-structuralist thought. In works including *Of Grammatology* (1967/2016) and *Writing and Difference* (1967/2001), Derrida developed concepts such as deconstruction, *différance*, and the instability of meaning to undermine structuralism's notions of binary oppositions and static structures. Foucault problematized structuralist ideas through exploring discourse, power and the socially constructed nature of knowledge. In *The Archaeology of Knowledge* (1969/2013) and *Discipline and Punish* (1975/2005), he examined how historical systems of thought are intimately tied to power dynamics and subjectivities. Post-structuralists emphasized the unstable, fragmented nature of language and meaning over structuralism's stable signs and signifiers. They focused on how knowledge and "truth" are tied to their sociohistorical contexts rather than reflective of fixed structures (Derrida 2001; Foucault 2005). This argument challenged essentialist and universal claims while accounting for power and ideology. Post-structuralism thus revolutionized philosophy and theory, paving the way for later developments like post-structural feminism, queer theory, and postmodern/post-identity theories around embodiment, performance, and social construction of identity, gender and sexuality (Cixous 1975; Butler 2002, 2011).

8 See Visser and Picarra (2012) and Sloth Nielsen (2020), all of whom agree with Butler's theories as a starting point.

Therefore, claims related to the mutability of sex or gender (the claims underlying the transgender phenomenon), such as “Gender and sex are completely unrelated,” “Biological sex is irrelevant,” or “Gender can be fluid and is a choice,” are not statements of objective, indisputable fact but ontological claims about the nature and meaning of sex or gender.

Transgender ideology stems in part from a dualistic anthropological view that separates the immaterial mind/spirit from the physical body, which is seen as inert matter. This mind-body dualism results in an understanding where one’s internally felt sense of gender identity is prioritized over one’s biological sex classification as male or female (Congregation for Catholic Education 2019:11). This prioritization of gender identity, as an attribute of the mind, above physical or biological sex classification reflects a liberal, individualistic ontology. Within liberal democracies, a philosophy that prioritizes individual rights and autonomy is dominant. According to this viewpoint, the rights of religious or other groups are considered derivative of the rights of constituent individuals. As such, individual rights and autonomy – including one’s right to determine their own gender identity – may be misunderstood to take precedence over group rights and autonomy, such as those of a religious association. In other words, the mind-body philosophical separation underlying transgender ideology correlates with a politically and legally dominant, overly individualistic liberal framework that elevates individual rights, gender identity exploration and self-determination above religious rights, the content of which cannot be fully appreciated in only individualistic terms (Aroney & Parkinson 2019:14-15).⁹

Since the domain of religious associations includes the formation and preservation of distinct religious, ontological moralities, and since the pluralistic liberal state must by definition include different moral communities (implying an inclusion of different ontologically derived moral views on sex and gender), it follows that the negation of religious associations’ opposition to the new transgender movement is manifestly illiberal and anti-pluralistic. The characterization of the new transgender movement as a belief system confirms that the non-religious also ascribe to beliefs that they wish to advance on important moral matters. The predominant climate within liberal democracies exhibits a recurring tendency toward concealing faith-based foundations of non-religious views on moral issues

9 See also Aroney and Parkinson (2019:27), who add, “As a consequence, liberal social ontologies run the risk of imposing a secularising model of the relationship between the individual, the group and the state that is not neutral among religions and cultures.” In this regard, the authors refer to Jocelyn Maclure and Charles Taylor, who “distinguish between a pluralist secularism that endeavours to strike a proper balance between moral equality and freedom of conscience and what might be called a monist secularism which seeks to emancipate individuals from religion and foster civic integration through enforced secular liberalism.”

and toward understanding reason (and science) as separate from (and superior to) that which is religious. In contrast, recognizing the transgender movement as a belief system places religious beliefs on equal footing with non-religious beliefs where claims for protection are concerned. Consequently, this latter observation strengthens the case for the protection of religious beliefs, in that liberal democracies should inherently stand for equal treatment of all beliefs, which should be consistent with their concern to embrace diversity.

Exemptions awarded to the religious regarding views or convictions on the nature of sex and gender should therefore not be rejected in favour of skewed and partisan views that such exemptions belong to the ‘exception to the rule’ type of thinking, or that the civil authorities have already gone the extra mile to accommodate such views, as if religion is some type of departure from the normal.¹⁰ Rather, such religiously grounded views should be viewed as equal in stature to other, non-religiously grounded opposing views and therefore eligible for inclusion in civil discourse.¹¹ This then implies that the civil authorities should not force religious associations to support the phenomenon of transgenderism or gender identity, a phenomenon that is inextricably linked to what the transgender person believes to be moral conduct but which clashes with the moral convictions held by many religious associations.

Building on this discussion, the next section provides further arguments in support of the protection of the autonomy of religious associations regarding beliefs or convictions related to the meaning of sex and gender (and related be-

10 Aroney and Parkinson (2019:24) similarly argue that anti-discrimination laws that deal with issues of faith by means of exceptions assume that legislatures have given religious associations “a right to discriminate,” in the sense that discrimination carries an altogether negative connotation and is therefore unlawful. Nevertheless, Aroney and Parkinson comment that “as the UN Human Rights Committee has pointed out in relation to Articles 2 and 26 of the ICCPR, ‘not every *differentiation* of treatment will constitute *discrimination*, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’” (2019:24). Since no association can exist without the capacity to define its terms of association, it is necessary to accept that a religious association is for members who adhere to and abide by the precepts of the relevant religion, which may include tenets related to conduct regarding matters of sexual morality (Aroney and Parkinson 2019:25). This understanding excludes the need for a legislative right to discriminate on specified grounds. Rather, Aroney and Parkinson assert, the religious association has “a positive right to appoint leaders, employ staff or admit members who adhere to the beliefs and principles of the organisation, with autonomy for those voluntary associations to set the conditions for membership of the community, or employment in the religious organisation, as the case may be” (2019:25).

11 Although it is not the focus of this article, we do not wish to imply that the religious believer who opposes views in support of gender identity (or the new transgender movement) has no access to scientifically based arguments in support of his or her stance. For example, medical science shows that sexual dimorphism (that is, the sexual difference between men and women) can be established within the fields of genetics, endocrinology and neurology. Genetics, for example, confirms that male cells (which contain XY chromosomes) differ, from the very moment of conception, from female cells (with their XX chromosomes) (Vatican, Congregation for Catholic Education 2019:13). This observation does not exclude recognition that a very small proportion of babies are born with ambiguous genitalia or have hormonal or chromosomal attributes that differ from the norms of what it means to be male or female (Parkinson 2023:31-32). However, says Parkinson (2023:32), these variations do not comprise a third sex.

liefs such as whether the mind, and therefore the individual's choice, should be viewed as separate from the body).

3. International law, subsidiarity and the limits of law

There is widespread recognition of the right to freedom of belief in international law.¹² Also, the importance of religious associational life in manifesting religious freedom has been duly recognized in the decisions of the European Court of Human Rights (ECtHR).¹³ Therefore, we must be cognizant of international human rights law that supports the protection of associational freedoms. Aroney and Parkinson (2019:19-20) argue that to achieve consistency between legislative anti-discrimination policies and the full range of human rights that should be recognized and protected, such policies should equally recognize and respect the communal aspects of the international human rights standards and their associated jurisprudence.¹⁴ Therefore, international law affords protection to the autonomy of religious associations, and this protection is aligned with the principle of subsidiarity, which is foundational to understanding the autonomy of religious associations in plural societies.

Subsidiarity relates to the view that communities should not deprive smaller communities (or individuals) of the opportunity to exercise their own functions (Benson 2022:434). For John Finnis (2016:134), the principle of subsidiarity means that “it is unjust for a higher authority [for example, the civil authorities or civil law] to usurp the self-governing authority that lower authorities [for example, the family or religious associations], acting in the service of their own members, rightly have over those members.” Finnis also relates this principle to “the requirement of justice.”¹⁵

¹² This is already obvious from the wording of those provisions of the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1966) (ICCPR) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (DEID) that guarantee freedom of belief, “either individually or in community with others and in public or private.” This associational aspect can also be gleaned from complementary provisions which guarantee freedom of association, such as Article 20 of the UDHR and Articles 22 and 27 of the ICCPR. The DEID itself expands on the communal aspects of freedom of belief so as to explicitly include, *inter alia*, the freedoms to faith-related assembly, faith-based teaching and the appointment of community leaders; see DEID Article 6.

¹³ Of special relevance is the often-cited case *Hasan and Chaush v Bulgaria*, para. 62. Also see *Fernandez Martinez v Spain*, paras. 127-128.

¹⁴ Aroney and Parkinson (2019:6) cite Michael Helfand's reference to “the new multiculturalism” which counters individualistic liberalism and which finds support in the associational aspects of international human rights law. Also, support by the courts, in a number of liberal democracies, for the protection of the autonomy of religious associations reflects a convincing degree of common practice (see for example, Ahdar and Leigh 2013:375-89, 425-26). Iain Benson's doctoral thesis, “An associational framework for the reconciliation of competing rights claims involving the freedom of religion” (2013), presents valuable insights on the protection of the autonomy of religious associations.

¹⁵ The authors also regard as insightful, regarding subsidiarity, Finnis' reference (citing from his celebrated work *Natural Rights and Natural Law*) to Pope Pius XI's view of subsidiarity in his encyclical letter *Quadragesimo Anno* (1931). “Just as it is wrong to withdraw from the individual and commit to a group what private initiative and effort can accomplish, so too it is a wrong ... for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower associations. This is a fixed, unchanged and most weighty principle of moral philosophy. ... Of its very nature the true aim of all social activity should be to help [*subsidium afferre*] members of a social body, and never to destroy or absorb them” (Finnis 2016:134).

Subsidiarity, explains Iain Benson (2022:434), “arises from the need for good governance” and constitutes beginning from the bottom and moving upwards instead of *vice versa*. Subsidiarity should not be viewed as a “block” but rather as “a check on command and control hierarchies” (Benson 2022:434, 436). Benson (2022:439) adds:

The ideas of civil society, associations, and what we might term ‘local governance’ are important related background notions in any discussion of subsidiarity. Each category may be understood as forms either of homogeneity or of diversity. If we conceive of human beings as parts of a whole merely, without associational or mediating aspects, then we will miss the importance of diversity. On the other hand, if we view human beings as merely individuals, then the question of what binds them together becomes pressing. Both civil society and local governance raise questions of how human beings relate and whether life is viewed as organic or as technological, quantitative, and mechanistic. Civil society and devolved local governance emerge out of conceptions of society that give preference to the organic and diverse rather than the mechanistic and homogenous.¹⁶

The principle of subsidiarity is deeply linked to the understanding that law inherently contains subjective moral elements. Despite claims often found in legislation and case law that law can remain neutral regarding foundational ontology, such neutrality is, in reality, irreconcilable with law’s nature. Without negating the relevance and importance of law for the ordering of society, law should caution against unnecessary or arbitrary enforcement of its inherent predispositions when dealing with the freedoms exercised by members of a religious association. Such inherent predispositions could, for example, result in claims (to varying degrees) of an overly rigid distinction between church and state, that ‘the secular’ is neutral regarding belief, that there is a distinction between reason or science and religion, that there is a distinction between equality and religion, or that the public good excludes religious concerns. Moreover, law should caution against the current climate of viewing law as an end in itself and, in the process, warding off any higher (or other) sense of normative importance (Berman 1979:354).

The underlying problem is that where there may be substantive differences in views on what morality requires related to forms of conduct such as gender

¹⁶ Benson further states, “The commons, properly understood, is that realm of existence in which different moral traditions and languages of meaning, not always understood or accepted by those outside the group, can coexist rather than be unnecessarily interfered with by laws and ‘systems’ that tend toward coercion” (Benson 2022:453; also see 440-441). In addition to this, a reading of the following substantive works in support of the protection of freedom of religion (including the freedom of religious associations) are strongly suggested: Horwitz (2011); Inazu (2016); and Deagon (2023).

identity and sexual orientation, the views held by the civil authorities may reign supreme (Calo 2011:517; Berman 1983:557). Views held by the governing authorities regarding certain matters of moral worth should not be enforced across all of society. In this regard, religious associations frequently hold moral convictions in contrast with the views held by the governing authorities, and these convictions require protection. The advancement of diversity and, in turn, democracy calls for the inclusion of various views regarding certain matters of moral worth, as long as gross human rights violations or substantive violations of the public order (or public morals) are not committed in the process.

4. The permeated ethos approach

Two prominent theoretical approaches have been used to define the parameters for protecting the autonomy of religious associations: the doctrinal core approach and the permeated ethos or organic approach. According to the doctrinal core approach, a religious association may be segmented into religious and non-religious individuals, or into members and non-members, all of whom constitute the religious association and contribute to its functioning. In this regard, a religious association is viewed primarily as an employer with a largely religious purpose; it consists partly of a religious community and partly of non-religious (or not necessarily religious) administrators, maintenance workers, and so on who perform work for the organization. The doctrinal core test, as initially developed in Canadian human rights jurisprudence in the 1970s (Benson 2013:146-148), was borne out of a necessity to distinguish between employment roles in a faith-based school by looking at the functions performed by a teacher (aside from teaching, a teacher was initially understood to also function as a role model for students, and thus a lifestyle requirement was not unfounded) as opposed to a secretary (a secretary was understood only to perform clerical work and answer inquiries). The problem with seeking such distinctions in non-educational contexts is obvious: the distinctions made in the initial tests are based on the assumption that the institution in question has faith-based education as its main mission. Where employment is unrelated to teaching doctrine, the test's assumptions do not hold; the mission of a faith-based care home, for example, is not faith-based education but care founded on a Christian morality (Esau 2009:403-404).

As both Benson and Esau note, the purpose of a faith-based care home, unlike that of a faith-based school, is not to teach. Therefore, one cannot distinguish by subject taught or duty to act as a role model; instead, one must ask whether a caretaker who rejects the faith-based care institution's doctrine can reasonably be expected to be able to provide full, faith-guided care to those in their charge (Benson 2013:148). Is it not unreasonable to assume that

recipients of care in a Christian care home may receive a lesser standard of care if their caretakers are unwilling or unable to be part of the community of believers whose principles the care home purports to uphold? A care home with a mission to provide care in accordance with the Roman Catholic faith should not be expected to employ non-Roman Catholic caretakers who may affirm ideas about sex and gender that are contrary to Catholic doctrine, as this would be seen as leading someone into sin; in such an institution's eyes, such affirmation would not constitute proper care. This analysis points to a clear blind spot in the doctrinal core test. As Benson (2013:148) points out, "This has diminished the respect for religious associations as a whole, subjecting non-educational projects to a test suitable only in an educational setting." Even in an educational setting, the administrative staff, even though they are not directly responsible for teaching, should not be viewed as separate from the encompassing religious ethos of the institution where they serve, such as a private Christian or Muslim school. This insight suggests an alternative to the doctrinal core approach, which is referred to as the organic or permeated ethos approach.

The organic approach views the doctrinal core approach as not affording sufficient respect to the nature and purpose of religious associations, the goods they provide (to their members and to society at large), or the important role they play in facilitating a truly diverse society by constituting varied conceptions of the good life (see Benson 2013:155; De Freitas 2012:267-268; Esau 2000, 2009). The permeated ethos approach, Benson explains, focuses on the nature of the association (or the workplace). In this regard, one must examine whether the association is permeated by religious practice; if so, then, according to Benson, it is unnecessary to examine specific job duties (Benson 2013:145). The permeated ethos approach contends that although a religious association may be an employer, it is first and foremost a community of religious believers, and that employment of even a janitor or secretary arises out of the need to enrich and sustain such a community of believers, together with the spiritual leader(s) and other congregants (Benson 2013:149). The organic approach assumes that the primary end of a religious association is to constitute a community of believers who, regardless of their station and through their shared beliefs and communal interactions, enliven in one another a sense of deep meaning that informs their identity and is integral to their experience of human dignity (Esau 2000:734).

As an illustration, let us consider the implications for a transgender secretary (we can call her Ms B, formerly Mr A) who is employed by a church? Those interacting with Ms B, whether members of the church (or outsiders), would be required (according to Ms B) to address her according to her preferred gender identity, be-

cause doing otherwise would offend her human dignity.¹⁷ However, this would present difficulties. Must members admit something that is contrary to their beliefs when addressing this person? According to the permeated ethos approach, these members should not admit something that is contrary to their beliefs, as reflected in the central tenets of the religious association to which they belong.

As another example, consider a transgender janitor (call her Ms D, formerly Mr C), who would reasonably be expected to clean bathrooms. Would the courts expect a Catholic church or faith-based school to allow Ms D to work within the bathroom of her professed gender, even though the religious association in question and its members – who likely will be among those using the bathroom – do not recognize her new gender identity? Again, it would not require ill intent from either party for a religious association in such a position to understand itself as needing either to terminate Ms D's services or have her behave in a way contrary to her gender identity (i.e. require her to present as male). In all these scenarios, the doctrinal core approach does not seem to provide the necessary framework to address the burden placed on the affected religious associations.

5. Conclusion

This article has addressed potential challenges faced by a liberal democracy in preserving meaningful and substantive diversity regarding transgender identity and religious associations against the background of ontological difference. It is imperative for any society that considers itself democratic to allow for the protection of various ontological convictions regarding sex and gender and to therefore prohibit the enforcement of the convictions of some against others who strongly oppose such convictions. Instead, we have advocated a respectful approach to the communal nature and ontology-preserving purpose of religious associations in the context of convictions related to transgender identity.

Allowing religious associations to abide by their views on gender identity should not be confused with allowing adverse treatment because of gender identity – for example, bullying, ridicule, or mistreatment. In the words of Patrick Parkinson (2023:36), “Clearly, disagreement about whether gender is fluid, whether sex is merely assigned at birth or observed from the genitalia, or arguments about language such as whether sex and gender should be so sharply differentiated, cannot justify adverse treatment of people who identify as transgender, gender diverse, or nonbinary.” Nevertheless, it is another thing entirely to impose ontological views related to specific forms of conduct on people who differ in their ontological views

¹⁷ It is assumed that Ms B was appointed prior to full realization and affirmation of her gender identity, with no misrepresentation occurring when the contract was concluded. The same applies to Ms D in the subsequent example.

regarding the morality or immorality of such conduct. Denying protection to religious associations regarding clashes that may occur between such associations and the transgender movement would be contrary to the prescriptions of international law and the expectations set by liberal democracies in support of pluralism, which in turn are inextricably related to the principle of subsidiarity and the limits of law.

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