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WOMEN’S CITIZENSHIP RIGHTS AND THE RIGHT TO RELIGIOUS FREEDOM

Abstract

Liberal regimes are faced with a dilemma between respecting the right to religious liberty and securing women’s equality rights. Exempting religious institutions from nondiscrimination laws dealing with gender may limit women’s rights. This article concerns this field of discussion. Empirically, it focuses on a specific provision found in the Danish Gender Equality Act that exempts faith communities, including the Lutheran Danish folk church. The article examines legislative decision-makings and touches on legal aspects of the dilemma in light of human rights regimes. Drawing on theories of justice, the article discusses conflicting normative positions in debates on religious accommodation and explores the ways that religious and equality concerns are balanced against each other. Concerning the Danish folk church, I suggest repealing the exemption provision while still protecting the minority within the Church.

Key words: religious liberty, gender equality law, The Danish folk church

Introduction

Globally, faith communities struggle for political influence within liberal regimes committed to human rights. Consider the following examples. (i) To make an impact on the framing of civil laws concerned with gender (abortion, contraception, and divorce) and sexuality (partnership and biotechnology), the Roman Catholic Church interacts with institutions of the European Union and the United Nations (Børresen 2007). The Vatican State refuses to ratify the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) accepted in 1979. (ii) The Cairo Declaration on Human Rights in Islam endorsed by the member states of The Islamic Conference Organization in 1990 obviously challenges the universality of human rights. The rights that the declaration provides are subject to the Islamic shariah. By referring to this law (according to mainstream interpretations), the personal autonomy of women is annulled (Mayer 2007). (iii) In India, the constitution encompasses warranties of gender equality. Still, the existence of separate religious family laws, e.g. in the Hindu community, often leads to an enforcement of these laws at the expense of women’s admitted constitutional rights (Nussbaum 1999b). (iv) In the United States, conserva-
tive Christian groups have been successful in mobilizing moral issues concerned with sexual control and calling for a return to traditional family values (Beyer 1994). Wide support of such convictions may hamper women’s independence.

These examples suggest that the idea of gender equality and therefore the notion of women’s equal citizenship are unfamiliar to many religions. Usually, in political theory, the concept of citizenship refers to individual rights and responsibilities and to participation and belonging to a political community. In this article, I focus exclusively on rights and obligations. In terms of the intersections between religion and gender, Børresen (2007:11) observes that belief in male superiority and female inferiority are inherent in the historical traditions of all the world religions. Often such ideas translate into gender specific rights and responsibilities. As a result, religion collides with women’s equal citizenship rights in contexts, where it provides legal norms that institutionalize women’s subordination. This is the case when religious laws compete with and override secular laws. Still, women’s equal citizenship rights are also at risk within secular legal systems, for example, in Denmark and Norway. In these nations, religious communities are exempted from the reach of gender equality laws in order to safeguard the right to religious freedom guaranteed in the constitution. Such immunities allow faith communities to treat women and men differently when appointing preachers if it is based on religious tenets. In both cases, the liberal regime faces a dilemma between respect for religious liberty and respect for the equality rights of women.

Exemptions from gender equality laws may hinder the protection of women’s equality rights. The article engages in this field of discussion. In terms of Nordic research, especially Norwegian scholars have recently addressed this issue (Hellum 2006; Hellum and Strand 2008; Skjeie 2004, 2007; Solhøy 2008). Apart from the studies of Christoffersen (2001) and Ketscher (2000), research on the topic is still sparse in Denmark. Internationally, there is an abundance of literature within the fields of law and political studies dealing with the dilemma (Cohen et al.1999; Eisenberg and Spinner-Halev 2005; Phillips 2005).

My empirical starting point is the specific exemption provision found in an executive order issued by the Danish Minister of Ecclesiastical Affairs. It came into force in 1978 when the Danish Gender Equality Act was passed and has remained unchanged until now. The fact that the right to religious liberty is repeatedly privileged raises the question of whether a fair balance between the two sets of rights is achieved. Therefore, I suggest that the legitimacy of the exemption provision should be reconsidered. From the perspective of justice, the principal approach adopted here, an a-priori commitment to either religious autonomy or gender equality is an invalid way of tackling the problem. Rather, justice requires weighing the two sets of rights against each other.

The article is divided into four main parts. Section 1 briefly outlines the Danish state/religion regime, concentrating on the Danish folk church (Den danske folkekirke), hereby called the national church or sometimes, the Church. Section 2 examines legislative decision-making. It focuses on how legislators settle conflicts over rights. The third part touches on legal aspects of the dilemma in the context of human rights regimes. Since my main argument is normative, this investigation will not be as thorough as the part concerned with political-theoretical issues. Drawing on theories of
The Danish state/religion regime

Lutheranism is the dominant religion in Denmark. Currently about 82% of Danes are members of the Lutheran national church. Around 4% belong to independent, ‘free’ Christian faith communities (e.g. the Pentecostal Church); and, about 4–5% have other faiths (Catholic, Jewish, Islamic and so on) (Kühle 2006).

The Danish Constitution establishes the relationship between the state and faith communities. The right to free exercise of religion is stated in Art. 67, which protects the worship of God, and the practical arrangements needed for this practice (Gammeltoft-Hansen 1999:499). Both the individual and the corporate aspect of this right are safeguarded. Yet, this liberty is not absolute: in practicing religion nothing must be taught or done, that is contrary to morals or public order. Presumably, only breaches of the criminal law would justify interferences (Christoffersen 2001:47). The national church is privileged over against other faith communities. The Evangelical-Lutheran church is The National Church of Denmark, and it is supported by the state (Art.4). Such support includes subsidies. When establishing the Constitution in 1849, the ‘architects’ presupposed that the internal affairs of the national church would be managed by an independent synod (Art. 66). Still, such a council has never been set up. Therefore, the national church is entirely governed by the state through public law (Gammeltoft-Hansen 1999).

Due to the state-church intertwinement, legal scholars disagree about the extent to which the Church enjoys autonomy in terms of its internal affairs - compared with the wide scope of freedom admitted to dissenter faith communities. Espersen (1999:61–71) argues that there is no clear distinction between the internal and the external affairs of the Church; more importantly, there is no legal foundation for establishing one. Gammeltoft-Hansen (1999:456) observes that the state-church relationship permits the extensive interventions of governmental bodies into the internal affairs of the Church (e.g. rituals), and that such interventions have taken place several times. Relevant to the case in point is the parliamentary decision in 1947 to admit women to the clergy despite extensive protests from the Church (Pedersen 1998). On the other hand, Gammeltoft-Hansen (1999:456) argues that legislators, as a rule, are careful of intervening in the internal affairs of the Church. Such caution suggests that a modus vivendi exists. This agreement seems to be based on a principle of non-interference, implying that the
state often abstains from intervening in church affairs. Alternatively, before passing
new laws, the state consults with the Church (Christoffersen 2006). Concerning the
appointment of clergy, the individual parochial church council has an exclusive right
to choose the candidate of its preference. The Minister of Ecclesiastical Affairs holds
authority concerning appointment. Clergy are government employees, and part of their
salaries and pensions are publicly financed (Espersen 1999:111).

Because of the very special nature and position of the national church, we should
reasonably expect that legislators showed due consideration for both the principle of
equal treatment and the right of religious bodies to a certain autonomy.

Legislative disputes over exempting religious communities from
the Danish Gender Equality Act

To incorporate the Employment Gender Equality Directive that is part of EU legisla-
tion, the Danish government introduced the Gender Equality Act in 1978. The act con-
cerns equal treatment with regard to access to employment, training, and working con-
ditions. It aims at eliminating all labor market discrimination, both direct (by reference
to gender) and indirect (by reference to pregnancy, marital or family status). Discrim-
ination amounts to differences in treatment that do not serve a legitimate aim, i.e. that
are not based on objective criteria. Unequal treatment, on the other hand, is permissible
if it can be justified objectively, and if it is proportional in a given case.3

The committee preparing the bill noted that prohibiting religious communities from
attaching importance to gender, when appointing preachers, might be regarded as con-
flicting with the constitutionally guaranteed right to religious freedom, if the appoint-
ment practice is considered part of their religion. In such cases, taking advantage of the
exemption clause in the Directive would be recommendable (The Ministry of Labor,
Recommendation of the Committee of Gender Equality 1977).4 The government sug-
gested that specific religious communities could appoint exclusively male clergy. The
planned exemption included only dissenter religious groups and not the national
church. During parliamentary debates, however, objections were raised. The Church
should be exempted too to respect theologically rooted reluctance to female clergy
(Official report of parliamentary proceedings 1977 – 78, 1. reading: column 5305).5

Accordingly, The Minister of Ecclesiastical Affairs would issue a departmental order
allowing all religious communities autonomy when appointing preachers (Official
report of parliamentary proceedings 1977–78, Annex B. (37); column 577). Presuma-
ibly, expanding the exemption provision to encompass the national church was a result
of pressure coming from conservative church groups, though this claim merits further
investigation. Ever since the Parliament permitted female clergy, they have opposed
this arrangement (Bækgaard et al. 2007). During subsequent readings, no substantial
deliberations on the relationship between the two sets of rights took place (Official
Gender Equality (1978:84) objected to a general exemption though. It recommended
granting religious communities exemptions at the request of individual applications in
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Each specific case. This device would enable testing each case according to the criterion of objectivity.

Some thirty years later, the established settlement was challenged. There were two points in dispute in Parliament. The first point concerned whether the provision permitted discrimination to take place among the clergy. The response of the Government was ambiguous. Unequal treatment found among parochial church councils was legitimate when it was based on religious convictions. Yet, the provision did not permit male clergy to treat their female colleagues in a discriminatory way. Notwithstanding, to safeguard the liberty of conscience of every clergyman, male clergy are allowed extensive autonomy with regard to co-operating with female fellows (Official report of parliamentary proceedings 2007–08, the Political-economical Committee, General part, question 39).

The second point related to the legitimacy of exempting the national church from the Gender Equality Law. The Social Liberal Party (Det Radikale Venstre) introduced a bill that, if it was passed, would abolish the exemption provision with regard to the Church. The aim of the proposal was to prohibit religiously rooted unequal treatment. The principal strategies of justification of the Party were the following two: (i) to ensure the legitimacy of the Church, its norms needed to be brought into line with the norm of gender equality prevailing in the wider society. (ii) Because the national church is part of public administration, because it is subsidized by the state, and because clergy are government employees, the state has an obvious interest in church affairs, including the concern for women’s equality rights (Official report of parliamentary proceedings 2007–08, Explanatory Memorandum, Bill 49). The Government, rejecting the very premises of the bill, emphasized the following issues: (i) the right of parochial church councils to autonomy in relation to employment could not be disregarded without violating the Constitution. Holding the view that the office as clergyman was a male privilege was legitimate when based on theological tenets. The minority defending this view had a due right to be protected. (ii) Introducing the norm of gender equality against the will of the Church would seriously jeopardize the modus vivendi that underpinned the state/Church relationship (Official report of parliamentary proceedings 2007–08 Bill 49, 1. reading 28 February 2008).

Presently, solid evidence of unequal treatment, whether legitimate or illegitimate, in the national church is lacking. The latest study was conducted in 1990 by Boolest (1990), demonstrating that opposition to female clergy, including both religiously and culturally rooted resistance, among members of parochial church councils and male fellows was not a minor problem. The situation has changed since then. The percentage of female clergy has doubled (from around 24% (1990) to around 50% (2008). The bishops have approved of the principle of gender equality, though the importance of this gesture is hard to assess (The Assembly of Bishops, statement on the 4 of January 2008). Informed by research into the relations between gender and work organizations (Höök et al. 2004), one might expect a general impact of the norm of gender equality on the culture of the Church. Still, the gender culture of the Church, based in part on theological norms and the growth rate of the above-mentioned minority within the
Church, might counterbalance this influence, at least to some extent. In all probability, opposition to female clergy will continue to decline. Until now, the parties in power have granted the right to religious liberty a greater weight than women’s equality rights.

Legal aspects of the dilemma

From a human rights perspective, the Danish ‘solution’ seems far from obvious. First, the right to nondiscrimination found in international human rights conventions may limit religious freedom, including the corporate aspect of this right. Second, human rights discourses suggest a balancing between these conflicting rights. Human rights are indivisible and inalienable, premised on a principle of unity that implies that the interpretation of one right must not hinder the respect for other basic liberties. Guidelines for such a balancing are provided by recommendations by international human rights councils and official interpretations of human rights conventions by courts (Christoffersen 2001; Hellum 2006; Hellum and Strand 2008; Ketscher 2000).

Three supranational conventions, besides EU legislation are of major importance here. The UN Covenant on Civil and Political Rights (CCPR) guarantees a general right to gender equality and nondiscrimination in Art. 26. Freedom of religion that is protected by Art. 18 may be subject to certain limitations, inter alia, those that serve the purpose of protecting the fundamental freedoms and rights of others and are necessary for attaining this purpose (Art. 18(3)). ‘Necessity’ implies that the restriction must be proportional in severity to the purpose being sought. The interests protected by Art. 26 may permit such restrictions (See Nowak 2005). In a general recommendation, referring to the issue of gender equality, The Human Rights Committee states that the freedoms, protected by Art. 18, may not be relied upon to justify infringements on the equal rights of women (HRC General Comment no. 28, 2000). The UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) aims at challenging the various forces that have created and sustained gender discrimination in all fields of social life (Art. 1). Special recognition is given to the impact of culture and tradition on restricting women’s enjoyment of their basic rights. States parties are obliged to modify «all practices which are based on the idea of the inferiority or superiority of either of the sexes» (Art. 2f and 5b); and «to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise» (Art. 2e). Faith communities fall within the ambit of these clauses. Art. 9 of the ECHR (The European Convention on Human Rights) guarantees freedom of religion, and in several cases, the Court has explicitly recognized the corporate aspect of this right (Christoffersen 2006). To ensure the rights and freedoms of others, the state may limit the manifestations of religion if it is ‘necessary in a democratic society’ (Art.9(2). Hence, the criterion for evaluating whether state interference is necessary is a common, democratic standard, besides the principle of proportionality. Prohibition of discrimination on grounds of gender is set forth in Art. 14. Since the end of the 1990s, there has been a strengthening of nondiscrimination legislation in the EU that is mirrored in
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Danish laws. The Amsterdam Treaty explicitly introduces the principle of gender equality as one of the pillars of the Community (Art. 2 and 3). Art. 13 states that the Council may take action to combat any form of gender discrimination. Directive 76/207 (later implemented into Dir. 2006/54) set forth the principle of equal treatment of men and women at the labor market. Both directives are incorporated into the Danish Gender Equality Act, at first in 1978 (see previous section in this article) and later in 2006 when the Law was revised. According to the exemption clause (elaborated in the 2006 directive), difference of treatment which is based on gender is legitimate, when gender constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The Danish exemption provision appears to be disproportional to the purposes and principles of human rights regimes and EU law. Two key arguments support this claim: (a) because both rights are basic rights in democratic societies, a balance to be struck between them is required. (b) To ensure ‘the freedoms and rights of others’ it may be necessary to restrict the right to religious freedom. Protecting women’s freedoms and equality rights, including religious women’s rights, may justify such limitations according to the criterion of ‘necessity in a democratic society’. If one of the principal purposes of law is to protect ultimate values – in liberal regimes the value of the equal worth of human beings – one may argue that safeguarding women’s equal rights serves this purpose. The strengthening of prohibition of gender discrimination given expression, in particular by CCPR and CEDAW, reflects a pressing social need to safeguard women’s equal dignity precisely because discrimination against women continues to exist (see Nowak 2005).

Legally, to create a balance between the two sets of rights, religious bodies should meet the criteria of objectivity, necessity, and proportionality and show explicitly that their religious manifestations would be violated if women’s equality rights were considered (Christoffersen 2001; Hellum and Strand 2008).

Normative controversies over religious exemption rights

The contrast between liberals and communitarians marks the debates on religious accommodation in political theory. Liberals, represented by Martha Nussbaum and Susan Okin, insist that the individual is morally prior to the community. In contrast, communitarians subscribe to moral collectivism; the group is the normative point of departure. Charles Taylor, a communitarian, sides with liberals by stressing the individual as the bearer of rights; he also defends one collective right, the right of a group to cultural or religious survival. Concurrently there is also a difference between the liberal positions held by Nussbaum respectively Okin. Okin endorses autonomy as a general value; people should be able to assess the worth of inherited convictions in all areas of life. The liberal state should take actions to ensure that individuals actually have the capacity to exercise personal autonomy in religious settings. Nussbaum, by contrast, distinguishes between political and nonpolitical context when discussing ways to protect individual autonomy. In political settings, all citizens are required to
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regard on another as equals in dignity and rights. As private individuals, people should
be free to see their identities as linked with religious convictions and should be
respected if they choose to live non-autonomous lives due to their beliefs. The second
major difference between the two scholars is related to their different views on religion.
Okin tends to see religion as offering very little to the promotion of women’s auto-
nomy. Nussbaum, on the other hand, stresses the ambiguous representation of women’s
agency within most religious traditions. Some interpretations of traditions may help to
empower women. The fourth position I discuss, that of Cass Sunstein, approaches the
conflict between the two sets of rights from a specific legal perspective that focuses on
the relationship between liberal law and religious institutions. The positions offered by
these four scholars are sufficiently divergent to make a juxtaposition revealing.
Because of their dissimilarities, they make quite different contributions to the debate
on religious exemption rights.

Communitarian multiculturalism

Charles Taylor (1995) advocates a version of multiculturalism resting on communitar-
ian tenets, which places care of communities (cultural, religious and so on) at its heart.9
Communitarians view people as embedded in the traditions or life forms of their group,
meaning that their identities and values are profoundly shaped by their affiliations.
People inherit a way of life defining the good for them (Parekh 2000:136; Taylor

Because religion or culture permeates our lives, it cannot be abstracted away and
confined to the private sphere. While sharing the liberal principles of equality and jus-
tice, this bulk of thought opposes the core liberal idea of state neutrality. This notion
means that the state should abstract away all differences when framing policies and
laws. Because the state cannot and, in practice, does not remain ‘difference-blind’, but
rather enforces the values and practices of the dominant, majority group, it inevitably
discriminates against minorities (Taylor 1995:248–250). To allow for diversity, Taylor
suggests that governments, besides according all citizens equal rights – what he calls
‘a politics of universalism’ – should pursue ‘a politics of difference’. The latter recog-
nizes the distinctiveness of groups and accommodates their differences (1995:233).
In terms of religious, minority groups, their religious holidays, dress codes, practices
concerning the appointment of preachers and so on should be accommodated (1995:247).
The notion of cultural survival is crucial to his defense of group rights. He argues that
a group may take measures seeking to ensure the survival of its culture or religion, if
these measures do not conflict with fundamental, individual rights. To decide on such
matters Taylor believes that a reasonable balance between safeguarding individual
rights and group rights can be achieved through deliberations. Still, one may read in his
account a strong commitment to guaranteeing cultural survival that trumps the prin-
ciple of equality (see Barry 2001:66). In the case in point here, this guarantee would
imply that the right of religious communities to retain autonomy in terms of their inter-
nal affairs should override considerations to individual equality rights. Since the
purpose of the politics of difference is to safeguard the integrity of minorities, it is logical that his guarantee only pertains to minority religions. To claim that the survival of the Danish, national church that is a state-supported, dominant majority-church would seriously be jeopardized by the introduction of a ban on gender discrimination is not convincing.

Among believers and theologians there are conflicting interpretations of the central tenets of Evangelical-Lutheran Christianity, especially as to whether the notion of gender equality contrasts with or is in line with the dogma of the religion (Nissen 2003:137–164). Following Taylor’s recommendation, a deliberative route to settle such conflicts should be taken. In terms of the appointment of clergy, all who are affected by religious norms should come together to rule themselves (Taylor 1995:192). Most likely, the outcome would be an endorsement of the principle of gender equality. This principle would not collide with the values and practices that the vast majority, including the clergy, the bishops and most members of the Church, identify as core constituents of their religion.

Political liberalism

Martha Nussbaum’s position combines three strands of political theory. It is humanist committed to the equal worth of human beings. It is liberal as it holds that human beings need a range of fundamental rights to carry out their life-plans. Her liberalism, usually coined political liberalism, also leaves people to decide in non-political context whether to value personal autonomy. Finally, it is feminist; the principle of equal concern and respect encompasses women and gender relations in the family.

From a liberal point of view, religious conviction is understood as an essential component of self-identity and interference with it is perceived as an intrusion on individual self-rule. Therefore, religious liberty is granted broad latitude (Nussbaum 1999b:110). Nussbaum also draws on two other arguments to substantiate the importance she places on protecting religious freedom. The first is an empirical-historical argument. It holds that since religion throughout history has been used to justify persecution it should be specially safeguarded. This claim is undoubtedly true, but it is entirely an empirical question to determine if the individual religion is oppressed today. Moreover, we need to distinguish between majority and minority religions when applying this argument to the current situation in Denmark. The Muslim minority that is increasingly discriminated against on grounds of religion need to have its freedom of belief properly respected; yet this is not the case for the majority, who are members of the national church. The second argument stresses ‘the nonoptional character of the demands that religious convictions make on believers’ (1999a:111). This assertion may be correct in the abstract. In practice, Danish Lutherans adopt different attitudes, active and reflective, not merely submissive, to their religious traditions, and interpret religious commands in relation to their own historical and politico-normative context (Nissen 2003:227–237). Therefore, the argument is too fragile to justify why the state should accord special protection to religious freedom, though there may be other reasons for doing so.
Regarding the tension between the right of faith communities to certain autonomy in terms of their internal affairs and women’s equality rights, Nussbaum does not present a clear solution (1999a:113–114, 1999b:111). Issues pertaining to ‘the core of worship’ such as rituals and the choice of clergy may legitimately be exempted from gender equality laws, she claims. Still, religious bodies should be required to conform to laws that guarantee the equal liberty and opportunity of all adult citizens in basic areas like the opportunity to seek employment outside the home. Three factors are crucial when defining the scope of freedom that religious communities should be allowed: the nature of the state’s interest in protecting a basic right (weak versus compelling interest); the character of the burden placed on religious groups in case the government interest conflicts with religion (substantial versus small burden); and, exit opportunities, which, in principle, are available to all adults in secular, liberal states.10 She argues that the state may only interfere with the exercise of religion if it can demonstrate that its interference ‘is in furtherance of a compelling interest’ (Nussbaum 1999a:111). Given her generally strong defense of the inviolability of the internal practices of religious bodies, it seems unlikely that she would consider a ban on gender discrimination as a compelling government interest. Even if Nussbaum, in some cases, would support state interference to protect women’s equality rights, she prefers to rely on internal reforms rather than external interventions (1999a:106–107). Moreover, granted the exit opportunity, i.e. that believers can withdraw from the national church if disagreeing with its hiring practices, the conflict between the two sets of rights is somewhat settled. If we presume that the vast majority of clergy - whom we might expect to be in opposition to the hiring practices of the Church - actually left the Church, the ‘exit solution’ would assume alarming proportions. The Church would be short of around 70 to 90% of its staff, a fact that would seriously jeopardize its continuing functioning. Moreover, if the great majority of church members preferred exiting for the same reason, the Church would be confronted with a legitimacy crisis of incalculable consequences. Apart from these problems engendered by the ‘exit solution’, it does little to help women who might be treated unjustly within the community, as noted by Reitman (2005) and Skjeie (2007).

Basically, Nussbaum’s recommendation means that the state should wait for the Church to decide on implementing the principle of gender equality. Still, due to the state-church intertwinement in Denmark, it is difficult to speak of the Church itself without referring to the state, i.e. the Minister of Ecclesiastical Affairs.

Comprehensive liberalism

The principle of gender equality is central to Susan Okin’s feminist, liberal theory. This standard should be applied to all social contexts, whether private or public, to ensure women’s fundamental rights and equality (Okin 1989). Therefore, it is crucial that all citizens are informed of their basic rights, including the right to revise their ends. Freedom of conscience allows for criticisms of religious convictions. The liberal state should also take actions to ensure that citizens actually have the personal capacity to
exercise their rights. Through schooling, people should learn the cognitive skills that are needed to evaluate different life forms, and should be exposed to different value horizons.

Okin argues that religious accommodations in liberal states, providing groups with special rights, are incompatible with the autonomy of the individual if these measures violate women’s equality rights. Often proponents of group rights have ignored issues of gender discrimination that are integral to most religious communities (Okin 1999a:12–22). While her criticisms revolve mainly around minority religious (and cultural) groups, her general arguments can be transferred to majority religious groups as well. Because of the liberal state’s commitment to the equal rights of individuals, it should prevent violations of women’s equality rights within any religious community (Okin 1999b:128, 2005:86). The state should pay no less attention to the failings of majority religions than it pays to the imperfections of minority religious groups. In general, Okin recommends that governments before allowing religious accommodation must ensure sufficient representation of the less powerful members of religious communities in negotiations (2005:74). Such a device is needed to avoid that those in power within a group, who often are not representative of all or even most of its members, speak on behalf of it. One may read in her account an adherence to a principle that recently has been called the ‘all-affected principle’ in theories of democratic justice. This principle suggests that all whose life chances and life expectancy are significantly affected by a given practice or policy should be entitled to participate on an equal footing in democratic decision-making (Fraser 2005). Okin also proposes that state subsidies to religious communities that have not recently suffered, or still suffer, from oppression should be abolished if they treat men and women differently in important matters, such as hiring decisions.

From Okin’s reasoning, exempting the national church from the Gender Equality Act cannot be justified, since it hampers women’s equality rights. State subsidies should be removed and female clergy should have a direct say in formulating the hiring rules of the Church.

A legal lens
Approaching the conflict between the two sets of rights, Cass Sunstein (1999:86) develops his argument by examining what he calls an asymmetry thesis. According to this thesis, it is uncontroversial to apply ordinary civil and criminal law to religious bodies, but problematic to apply laws banning gender discrimination. It is illegal to commit crimes such as murder, even if these acts are guided by religious precepts. When it comes to prohibiting religious institutions from discriminating against women, there is usually a reticence with implementing such devices into these bodies. The obvious question is whether the asymmetry thesis is sustainable.

Like Nussbaum, he engages in two crucial arguments: the strength of the state’s interest and the nature of the burden placed on religious institutions in case the state interferes. According to Sunstein, the current governmental practice of exempting reli-
gious institutions from laws prohibiting against gender discrimination rests on conventional intuitions that consider differential treatment as an insignificant form of violation. In contrast, it is assumed that acts prohibited by criminal and civil law always cause very serious harms. This is not the case. Rather, the ordinary law forbids torts that are often relatively modest, such as minor assaults without physical contact. Even in such cases, the state is not forbidden to apply the tort law (Sunstein 1999:90). These intuitions help to explain why the state often takes a weak (as opposed to strong) interest in protecting women against discrimination. On his view, it remains unjustifiable why such an interest is, in principle, so modest as to be weaker than the interests that lie beneath the ordinary criminal and civil law. In terms of the burden argument, it seems equally difficult to defend the asymmetry thesis. Several aspects of ordinary criminal and civil law go towards the ‘epicenter’ of religious manifestations. Witness, for example, laws forbidding animal sacrifice or the ritual use of drugs. Still, the state does not consider exempting religious bodies from these laws. Because the thesis proves unsustainable, Sunstein concludes that no general barriers to applying laws forbidding gender discrimination to religious institutions exist.

In case of conflict between interests and burdens, a liberal state should balance them in each specific case. The position of the individual religion, including its survival, and the extent to which gender equality laws would interfere with the core of worship should all be considered. Only if gender equality laws would strike the core of worship and would jeopardize the continuing functioning of the relevant religion, exemptions would be warranted (Sunstein 1999:91–92). Applying Sunstein’s reasoning to the case in point, it would be unconvincing to claim that the survival of the national, state-supported, majority church would be threatened if the Gender Equality Act covered its hiring practices. Still, one may argue that because the appointment of clergy lies within the core of worship, an exemption should be taken into account.

From the perspective of democratic justice, it is insufficient to leave it to the state or the courts to decide whether and to which extent laws prohibiting against gender discrimination strike the very heart of religious practice, as Sunstein suggests. Rather, both the clergy and members of the Church need to have a direct say.

Concluding discussion

The tension between respecting the autonomy of religious communities and respecting women’s equality rights raises thorny questions for contemporary political thought: how should a liberal society deal with illiberal groups without undermining its own foundational principles? Should we await internal reforms or are interferences necessary in democratic societies? What are religious actors permitted to do in the name of religious freedom, and what responsibilities do they have to other citizens? These are indeed difficult matters. Here I want to comment briefly on the last issue in light of the Danish case.

It is a puzzle that the Danish state is willing to accommodate the claims of faith communities without simultaneously making demands. Theories of justice emphasize
the interdependence between rights and obligations: we can only see ourselves as right-bearers once we have understood our obligations to others, i.e. respecting their rights. When it comes to the issue of equal treatment, religious citizens who oppose female clergy seem to neglect their responsibilities. While they themselves feed on key liberal principles, they do little to reproduce them. The obvious question is how a liberal regime is to sustain the institutional preconditions for a societal culture inclined to accommodate the demands of religious communities, while still giving universal rights to those citizens refusing to identify with that culture (Borchgrevink 2007:52).

It is beyond the scope of this article to provide a satisfactory answer to this question. Still, part of the solution in terms of institutional arrangements is to develop ways of combining the corporate right to religious freedom and women’s equality rights. In particular, four of the suggestions made by theorists of justice may promote this aim. The liberal state should: (i) weigh the concerns for the two sets of rights up against each other in case they conflict, and in doing so take into account the current position of the individual religion. (ii) Make decisions on whether to exempt the individual religion from gender equality laws by demanding that the community shows unanimously that its religious manifestations would be violated if women’s equality rights were conside-red. (iii) Ensure that all affected by accommodation policies have an equal say in decision-making. (iv) Removing privileges to religious communities if they wish to continue favoring male clergy in hiring decisions.

In terms of the national church, I propose in line with other commentators, among these Christoffersen and Holm (2008), to abolish the exemption provision while simultaneously protecting the religious freedom of the ‘minority within’ who is opposed to female clergy. Such a divided solution allows for differentiating between different kinds of congregations within the Church, ‘ordinary’ and ‘self-chosen’ congregations; and, concurrently, to maintain the unity of the Church across internal divisions – an issue of paramount importance to most believers. ‘Ordinary’ and ‘self-chosen’ congregations enjoy different privileges. The Law on ‘Self-chosen’ Congregations grants members of the Church wishing to form their own congregation and favoring a particular person as their clergy the right to have their congregation recognized as part of the Church. The solution I suggest entails that the Gender Equality Act would be brought to bear on the ‘ordinary’ congregations. ‘Self-chosen’ congregations would be exempted from its reach. Enjoying this ‘privilege’ would also imply that they had to be economically self-supporting. In short, my proposal employs Nussbaum’s ‘exit-solu-tion’ but I turn it upside down: adversaries of female clergy have to form their own congregations. The Law on ‘Self-chosen’ Congregations meets in advance one aspect of Okin’s solution since these bodies are not subsidized by the state. To ensure the legitimacy of my proposal in accord with the democratic routes suggested by Okin and Taylor, the state needs to include the clergy and members of the Church in the decision-making process to settle this matter. Moreover, my suggestion is adjusted to the parameter of the Danish state/religion regime. This system allows for religious diversity and protects the religious liberty of disserter or minority faith communities, including the ‘free’ Christian churches mentioned previously in this article and the self-chosen congregations. Wishing extended liberty of action and diverging from the ‘main-
stream’ of the national church, in some cases because of adopting a more orthodox position than the Church, such faith communities are able to flourish independently (see Espersen 1999).

Obviously, the mere existence of laws prohibiting against gender discrimination does not provide gender equality in actuality. Yet, protecting women’s equality rights may have a potentially transformative effect on the social standing of female clergy. It serves a useful purpose as part of a broader struggle for substantive justice for women in society. Above all, laws play an important symbolic role signaling what the society considers worthy of protection. Introducing gender equality into the national church would be a powerful sign that indicates the active support of the inviolability of women’s human dignity.

Notes

1 Cf. Art. 1 in Executive Order no. 350/1978 on deviation from The Gender Equality Act in terms of employment etc. concerning the appointment of clergy.
2 Broadly speaking, the aim of theories of justice is to explicate and justify a set of principles that can be used to structure political institutions and inform the framing of policies. Examples of such principles include the achievement of equality, the protection of community, or some combinations of these goals.
3 The criterion of objectivity is common to national and international nondiscrimination law. So is the principle of proportionality, i.e. difference in treatment should be proportional to the purpose being sought.
4 The clause states that if gender is crucial for the performance of specific functions an exemption may be required.
5 Debates in the Parliament taking place before 1996/97 originate in Official report of parliamentary proceedings (’Folketingstidende’). Reports of sessions held after 1997 are available at the internet (http://folketing.dk)
6 Though it suffered from low reliability and validity, an enquiry carried out by the newspaper Politiken (2007) among female clergy in the national church did indicate that discrimination was still a problem.
7 See note 3 for the specific criteria of discrimination.
8 See note 3 for the specific criteria of discrimination.
9 Multiculturalism is not a precise term. It can be used both in a descriptive and in a normative sense. The former refers to a society where a plurality of cultural groups coexists with all their conflicts. When Taylor invokes the term, it is used as a normative ideal of a pluralist society in which the various groups and cultures do not need to become assimilated to the norms of the dominant culture, but where each group can uphold its special identity.
10 Children often need extra protective measures to have their liberties and opportunities ensured.
11 Law on Self-chosen Congregations, Law no. 204, issued 24 May 1972.
12 According to the Law, it would also require bishops willing to supervise clergymen who are opposed to female clergy. This might be difficult, because the bishops would be obliged to support the general norm of gender equality endorsed by the state. Still, I consider it a practical-legal problem to be solved.
References


Christel Stormhøj: Women’s citizenship rights and the right to religious freedom


