Insular Religious Communities and the Rights of Internal Minorities: A Dilemma for Liberalism

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I. INTRODUCTION

It is a defining feature of a healthy democracy that its society is composed of diverse groups able to practise their culture and religion freely. However, while democracy boasts equal rights for all, some groups that it protects may themselves be 'undemocratic' or 'illiberal'. These groups may deny their own minorities the rights that citizens outside these groups possess. The purpose of this article is to examine how 'illiberal' religious communities can exist within liberal democracies. While it is arguable that there are few 'liberal' religions, for the purposes of this article the term "illiberal" will refer to 'insular' religious communities in particular.

Part II of this article will detail the justifications for these communities to function free from state interference. Part III will look at how these communities can impinge on the rights of their own minorities. Part IV will explore the policy arguments for and against state interference. Part V will examine how the State, in particular the courts, have traditionally responded to claims brought by or against these groups, and to what extent the courts could and are prepared to intervene to protect the rights of minorities. Finally, in Part VI, concluding statements will be made as to whether the conflict between the rights of minorities and the rights of these communities could be resolved to better protect the rights of minorities within these communities. The situation of women will be used as an example of a minority in these communities.[1]

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[1] While women are not a minority group in terms of size they are aligned with minorities because of their similar lack of power and position in the communities.

II. ILLIBERAL COMMUNITIES

'Liberalism', broadly defined, is the political theory that is concerned with giving people individual rights and freedoms. At the basis of this theory is the idea that individuals should be protected from tyranny and have an equal opportunity to assert their rights as long as they do not harm others. By definition, 'liberalism' generally refers to rights of individual autonomy and political participation. As shall become apparent in this article, liberalism is often in direct conflict with the tenets of illiberal religious communities.

'Illiberal' communities are, broadly speaking, those which deny their members the rights that a liberal democracy neutrally grants its individual citizens. They are considered 'insular' in that they "withdraw as fully as possible from the wider society [or the State] and make the cultivation of in-group purity their primary concern".[2]

This article focuses on the communities that are descended from the Anabaptists of sixteenth century Europe, in particular the Old Order Amish of the United States and the Hutterite Colonies of Canada. It is useful to briefly set out some of the doctrines and practices of these insular communities. While there have been schisms amongst these groups, they share certain doctrines and practices. This article concentrates on these common doctrines and practices.

"The Amish live in patriarchal communities that [mandate] ... unthinking obedience to the community's rules."[3] In contrast, the liberal State encourages its citizens to be self-reflective, and promotes the political ideal of equality. The Amish's central belief is that of *Gelassenheit*, which involves self-surrender and complete submission to God's will. It is for this reason that the Amish do not promote intellectual achievement or tolerate individuality. "Amish behavior is regulated by the *Ordnung*, which is an unwritten code of conduct" that evolves almost haphazardly as "new challenges posed by modernity must be met and settled".[4] To the Amish, the rejection of modern technology is crucial to set their community apart from the rest of society. These rules must be

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2 Wilson, *The Social Dimensions of Sectarianism: Sects and New Religious Movements in Contemporary Society* (1990) 28.

3 Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (1994) 88.

4 Ibid 89-90.

strictly observed or the transgressor is punished by being banned from communion and shunned in social relations.[5]

The Amish community does not promote individual rights and equality. A woman is not equal to her husband and cannot hold leadership positions.[6] Politically, the Amish take no interest in many issues that are relevant to wider society, as they do not see themselves as part of that society. Amish rarely vote, are exempted from paying certain taxes, never run for public office, barely use any public service and are uninterested in preparing their member for exercising political rights.

The Hutterites share many of the beliefs and practices of the Amish, including the rejection of the values of the State. Like the Amish, they do not believe in the concept of private property. All property and labour is for the benefit of the community. The Hutterite Church allows only adult, baptised males to be members. It "has enormous power over the spiritual, physical, economic and social lives of its members and their families"[7] who must devote themselves to the community and strictly observe its rules.

McLean[8] suggests that "[o]n one point of view, the Hutterite Church operates as a mini-state"[9] as it functions by its own system of law. The Hutterites adopt only the legal instruments of the State that are necessary to conduct transactions with the 'outside' society. Despite this, "the Church regards its jurisdiction as the primary one and the intervention of ... [state] law as the wrongful coercion of a foreign power (if negative) or wrongful delegation of the Church's responsibility (if benevolent ...)".[10] For these communities, their church is their state and religion permeates every aspect of their lives.

III. JUSTIFICATIONS FOR NON-INTERFERENCE BY THE STATE

As discussed, the Amish and Hutterite communities strive to distance themselves completely from society and reject the State. Therefore, there

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5 Ibid 90.

6 The limited role given to women is taken from the teachings of the Apostle Paul: "Let the women learn in silence with all subjection."

7 McLean, "Intermediate Associations and the State" in Taggart (ed), *The Province of Administrative Law* (1997) 167.

8 Senior Lecturer in Law at the University of Auckland.

9 McLean, supra note 7, 167.

10 Ibid.

is a question as to what extent the State can tolerate these communities, especially when they limit rights of their own members that the State promotes and protects for all its citizens. Can the State regulate their behaviour by imposing liberalism? There are three main justifications for non-interference by the State. First, there is the argument founded on freedom of religion. Second, there is the controversial argument based on 'group rights', which sees these communities as having rights distinct from individual rights. Finally, it has been argued that these communities consist of merely 'partial citizens' and the State should be interested only in the part of these communities that participate in civic affairs. It is also possible that a claim of freedom of association could justify the autonomy of these communities. This will be examined in Part V.2, which discusses the courts' approach to these communities.

1. Freedom of Religion

The subject of freedom of religion is broad and often controversial. As such, the intent of this section is merely to outline briefly how it plays a central role in justifying the autonomy of these communities. The right to freedom of religion has been universally recognised as an important fundamental constitutional right.[11] Therefore, an argument for autonomy by a religious community can be an assertion of freedom of religion.

The United States offers extensive history and valuable case law in this area. By contrast, the case law in other jurisdictions such as New Zealand and Canada is relatively undeveloped. Consequently, this article will focus on the United States approach to religious freedom. By tracing the history of the United States, it is possible to see how such importance came to be placed on this right. Religious groups from Europe migrated predominately to escape persecution in their own countries.[12] This deep distrust of government, and a desire to secure religious freedom, manifested itself in the First Amendment of the United States Constitution, whereby "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof."

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[11] The International Covenant on Civil and Political Rights, Art 18; see also the New Zealand Bill of Rights Act 1990, ss 13 and 15; the Canadian Charter of Rights and Freedoms, s 2(a); the Bill of Rights of the United States of America, Art 1 (the First Amendment to the Constitution of the United States).

[12] Thompson, "Religious practices and beliefs: A case for their accommodation in the Human Rights Act 1993" [1996] NZLJ 106, 106-107.

It is in the context of the struggle to preserve religious freedom, and prevent interference and persecution, that we should view these insular communities. This history also explains why the courts have, at times, jealously guarded religious freedom. Today, however, it could be said that the principal rationale for guarantees of religious freedom is not based on the significance of religion itself, but more that:[13]

> [I]ndividual autonomy demands the freedom to choose amongst religious beliefs without coercion [from the State]; that religious diversity is to be valued; and that religious minorities ought not to be alienated by a 'tyranny of the majority'.

While different jurisdictions are a function of their history and have approached freedom of religion with varying levels of commitment, the common theme is that religious activities are not to be interfered with and it is only into the secular area that the court may enter. The United States courts' approach to freedom of religion claims by these communities, in particular the Amish, has varied. The Amish have conflicted with the State over the issues of military service, compulsory education,[14] health care,[15] Social Security,[16] stabling horses in towns, sanitation facilities, manure pollution, and slow moving vehicle codes,[17] to name but a few.[18] While the State has at times made allowances for the Amish's religious beliefs,[19] the traditional approach was that the Amish had to comply with secular state laws or face prosecution. The conflict was particularly prevalent in the area of compulsory high school attendance where Amish parents, who refused to send their children to school past eighth grade, were charged and often convicted.[20] This issue was finally settled in 1972

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13 Rishworth, "Coming Conflicts over Freedom of Religion", in Huscroft and Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 231.

14 *Byler v State* 26 Ohio App 329, 157 NE 421 (1927); *Commonwealth v Beiler* 168 Pa Super 462, 79 A 2d 134 (1951); *State v Garber* 389 US 51 (1967); *Wisconsin v Yoder* 32 L Ed 2d 15 (1972).

15 *Commonwealth v Sykes* No 11 EQ 1989 (CP Mercer County, Pa, Dec 21 1949).

16 *Borntrager v Commissioner* 58 TCM (CCH) 1242 (1990); *United States v Lee* 445 US 252 (1982).

17 *State v Hershberger (Hershberger II)* 462 NW 2d 393 (Minn 1990); *People v Swartzentruber* 170 Mich App 682, 429 NW 2d 225 (1988).

18 For further discussion on Amish conflict with the state, see Kraybill, "Negotiating with Caesar" in Kraybill (ed), *The Amish and the State* (1993) 3.

19 For example, the Amish, along with other religious groups such as the Mennonites, Brethren and the Quakers, negotiated with the State to perform alternative service during World War Two; see Keim, "Military Service and Conscription" in Kraybill (ed), ibid 43.

20 See, for example, *State v Hershberger* 77 Ohio L Abs 487, 150 NE 2d 671.

in *Wisconsin v Yoder*,[21] in which the United States Supreme Court clarified its approach to the Amish claim of freedom of religion. This decision appears to indicate a move by the courts towards placing more emphasis upon this right.

(a) Wisconsin v Yoder

The facts of *Wisconsin v Yoder* were not new to the State or the Amish. The case concerned two Amish parents who were arrested and convicted of violating Wisconsin's compulsory school attendance laws. The parents refused to send their children to high school because they saw its values and programmes as undermining, and being in conflict with, the fundamental mode of life mandated by the Amish religion. The lower court judge "acknowledged that their religious liberty had been violated but [he held] there was a superior state interest in forcing the children to attend school".[22] The Supreme Court reversed this decision on appeal. It applied the principle that persons ought to be exempt from laws that impose a substantial burden on their religious beliefs except where the State could show there is an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause".[23] A State's interest in universal education was not absolute and was held to be subject to a balancing process when it impinged on fundamental rights. Accordingly, the Amish were granted a free exercise exemption. Burger CJ justified his decision by directly appealing to freedom of religion. He saw that it was only interests of the highest order, of which education was not one, that could "overbalance legitimate claims to the free exercise of religion".[24]

While this historic judgment finally clarified the right of Amish parents to freedom of religion in educating their children, it is still not clear whether the United States courts' stance on freedom of religion in this context would be extended to breaches of individuals' rights. It is arguable that this decision did not adequately consider the rights of the children to receive education and the fact that without education their ability to leave the community, if they so desired, is limited.

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21 Supra note 14.
22 Cited in Meyers, "Education and Schooling" in Kraybill (ed), supra note 18, 101.
23 Supra note 14, 24 per Burger CJ.
24 Ibid 25 per Burger CJ.

(b) Employment Division v Smith

In 1990, a shift occurred in the Supreme Court's approach to free exercise exemptions. In *Employment Division v Smith* ("*Smith*"),[25] the Court ruled that if a law was of general application and neutral toward religion, then the State did not have to advance a compelling interest for its refusal to exempt religious practices. This judicial application of the First Amendment was met with extensive criticism.[26] As a result, the United States Congress passed the Religious Freedom Restoration Act 1993, which states that "governments should not substantially burden religious exercise without compelling justification".[27] Its purpose is expressly "to restore the compelling interest test as set forth in ... *Wisconsin v Yoder*".[28] It is clear from the consequences of the *Smith* decision that should the courts ever try to limit freedom of religion 'unnecessarily', the legislature will step in to protect the right.

2. Group Rights

The theory that groups may possess a set of rights distinct from individual rights has been largely developed by Kymlicka.[29] He views the relationship between the State and its members not simply as one with the individual at one end and the State at the other. Instead, the relationship includes certain group-specific rights that are distinct from individual rights. To him, group rights are not translatable into either individual or social rights, but exist as a category on their own.[30] Special group rights are justified on the basis that the State needs to protect minority groups. Without group rights these groups would not survive as distinct societies. Ensuring the survival of these groups is important because of the intrinsic value of cultural diversity and because societal cultures play a central role in the lives, identity and self-esteem of its members. It is only through specific legal or constitutional measures above and beyond the common

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25 494 US 872; 108 L Ed 2d 876 (1990).

26 For a discussion of these criticisms, see Bosselman, "Extinction and the Law: Protection of Religiously-Motivated Behavior" (1992) 68 Chi-Kent L Rev 15, 29-30.

27 Section 2(a)(3).

28 Section 2(b)(1).

29 Professor of Philosophy at Queen's University.

30 See, generally, Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) ("*Multicultural Citizenship*"); Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" in Kymlicka (ed), *The Rights of Minority Cultures* (1995) 179, 185 ("*Minority Cultures*").

rights of citizenship, in other words 'group rights', that cultural differences can be accommodated.[31]

In discussing group rights, Waldron[32] comments that modern human rights discourse appears to assume that "particular cultures, communities, and ethnic traditions have a right to exist and a right to be protected from decay, assimilation, and desuetude".[33] This argument is supported by Article 27 of the International Covenant on Civil and Political Rights.[34] A United Nations report has stated that this article is not simply a non-discrimination provision, but demands special measures to be put in place for minority cultures.[35]

The group rights theory can also be applied to justify the decision in *Wisconsin v Yoder*.[36] Here, the Amish feared that their community would be destroyed if the law requiring attendance was enforced against them. Evidence was put forward that exposing Amish children to 'worldly' influences at the crucial adolescent stage of development would result in psychological harm to the Amish children and ultimately result in the destruction of the Amish community.[37] It was claimed that it would also interpose a "serious barrier to the integration of the Amish child into the Amish religious community".[38]

However, the Court ultimately decided for the Amish on the basis of freedom of religion. Interestingly, this decision implies that non-religious ethnic communities do not have a comparable right. Either the Court would reject the idea of group rights altogether, or only afford them to religious communities. The rationale for the latter approach was not well argued.[39] However, the Court seemed to be strongly influenced by evidence that the additional two years of high school for Amish children would do little to serve the interests of their community. According to the

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31 Kymicka, *Multicultural Citizenship*, ibid 26.

32 Affiliated Professor of Law at Columbia University.

33 Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Kymlicka (ed), *Minority Cultures*, supra note 30, 97.

34 Which states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

35 Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 40-41, 98-99, U.N. Doc. E/CN.4/Sub. 2/384/Rev. 1 (1979) cited in Waldron, supra note 33, 115 n 24.

36 Supra note 14.

37 Ibid 23.

38 Ibid.

39 Ibid 25. Burger CJ merely states: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it based on purely secular considerations."

Court, they did not need to be prepared for life in modern society. Instead, they needed to be educated by their own community who could prepare them for life in a separated agrarian community.[40] While the Court cloaks this view in argument based on freedom of religion, it could just as easily (perhaps more easily) be a group rights argument.

Freedom of religion focuses on an individual's right, whereas in *Wisconsin v Yoder* the Court focuses more on the community. All discussion centres on the damage to the community if the children were forced to attend high school and the importance of Amish religious practice to their survival. Education is seen as being of no benefit to the children because it would not benefit them in their positions as members of a community. Their individual right to education is dismissed as irrelevant: unless there is physical or mental harm to the child the State should not intervene.[41] It is in this manner that it could be argued that the Amish community was exempted from compulsory school attendance laws based on their group rights, rather than on a cluster of individual rights to freedom of religion.

It is interesting to note the basic paradox here. The 'counter-assimilationist' groups, whose beliefs centre on rejection of the values of the majority of society (and by extension, the State), depend on the State granting them special rights and privileges to survive.

It is often the case that, by virtue of these special rights, groups are able to impose greater restrictions on the liberty of their members. Individual autonomy may have to give way to the rights of communities to self-preservation. To what extent this consequence can and should be tolerated will be looked at when the rights of minorities within these groups are discussed in Part IV.

3. Partial Citizenship

Spinner[42] advances an argument based on the concept of 'partial citizenship' as to how the State should view groups that purport to reject its authority. He states:[43]

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40 Ibid 29.
41 Ibid 33.
42 Associate Professor of Social Justice at the University of Nebraska.
43 Spinner, supra note 3, 97.

> [L]iberal virtues should be encouraged among those who have (or aspire to) full liberal citizenship but not among those who live in a liberal state but who are not, and do not want to be, full members.

Under this theory, the liberal state should facilitate liberal virtues only among full citizens, not among people who are citizens of other sovereign communities. It is along this line of reasoning that Spinner views the Amish:[44]

> [I]t is a mistake to think of the Amish as liberal citizens. Although most ethnic groups want full citizenship, the Amish opt out of mainstream society; they choose to forgo liberal citizenship. I suggest that we should think of the Amish as a community apart from the political community in the United States, a community that wants to stay apart. The Amish are *in* the United States, but not *of* the United States. They came here so they could live in their church community unharmed, not because they believed in some kind of liberal ideal, although they benefit from liberal values.

Spinner draws the conclusion that as the Amish do not embrace liberalism they should be viewed as partial citizens. As such, the State should intervene in their community only if they harm their members or mainstream society.[45] What constitutes harm is problematic in itself, but it is interesting to note that it was this approach to intervention that the Supreme Court took in *Wisconsin v Yoder*. In that case it was noted that the absence of physical or mental harm to the child, the State should allow the Amish to practise their religion freely.[46]

This theory is riddled with numerous practical difficulties that, if implemented, would undermine the legitimate authority of the State. However, as a theory it does help to explain why the Amish could be exempt from certain demands of liberal citizenship. The theory is based primarily on the classic distinction between public and private spheres. So, while the avoidance of harm to others is the main concern of the private sphere and given that State interference in the private sphere ought to be minimal, the avoidance of harm continues in the public sphere, but with the added principle of non-discrimination. The public sphere is interested in cultivating "the liberal virtues of self-reflectivity, equality and autonomy".[47] Therefore, as the Amish are not interested in these aspects of the public sphere, the State need not encourage these

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44 Ibid.
45 Ibid 98.
46 Supra note 14, 33.
47 Spinner, supra note 3, 98.

virtues in Amish society. Some theorists have gone further by arguing that as the State derives its just power from the consent of the governed, the State has no claim over the Amish who withhold their consent.[48]

While the concept of 'partial citizenship' explains the State's attitude towards the Amish, it provides little assistance to the plight of the minorities within these communities. Furthermore, it assumes that members of these communities always choose to remain there and are free to leave if they so desire. In reality, many members do not explicitly consent to the rules governing the community and lack the economic or social independence to leave. The State's non-interference only compounds this situation. This problem will be addressed below.

IV. MINORITIES WITHIN ILLIBERAL COMMUNITIES

As discussed, the non-intervention of the State in the functioning of illiberal communities may actually enable them to oppress their own minorities. This creates a situation of minorities within minorities. The focus of this article is the situation of these minorities, particularly women. While women are not a minority group in terms of size, they are aligned with minorities because of their similar lack of power and position in the communities.

Green[49] points out that some of the privileges that the State gives to minorities to ensure that they are not oppressed by the majority makes it *more* likely that these communities are able to deny rights to their own minorities.[50] If religious minorities are accorded special rights to self-determination, they may take refuge behind these rights when intent on violating the rights of their members.[51] The result is that members of these communities have far greater restrictions placed on their liberty than if they were not members or if the State did not use its power to protect the communities. Here lies the dilemma for the State. Can or should a liberal State tolerate communities that are illiberal? Should the State accord illiberal communities certain group-specific rights? What

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48 Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory" in Kymlicka (ed), *Minority Cultures*, supra note 30, 45.

49 Professor of Law at York University.

50 Green, "Internal Minorities and their Rights" in Kymlicka (ed), *Minority Cultures*, supra note 30, 257.

51 Ibid.

happens when the collective interests of a minority group clash with rights of its individual members? Part IV will examine the policy arguments for and against interference to protect internal minorities, and Part V will address how the courts have approached this issue.

1. The Case for Non-Interference

Any case for non-interference must start from the premise that diversity should be encouraged and that minorities have a right to self-determination. The argument then continues that placing value on these two principles unavoidably means that these communities should be left to govern themselves. If this self-government results in the oppression of internal minorities then this is simply an inescapable consequence, which is outweighed by the benefits of having a society made up of diverse groups.

It is often the case that, in order to maintain these distinct identities, minorities such as the Amish and Hutterite communities reject liberal values and organise their societies along traditional, non-liberal lines. If the State does not allow them certain protective rights, they may lose the ability to enforce religious orthodoxy or traditional gender roles and, in turn, their ability to maintain their distinct society. Thus, it is seen that some forms of group difference can be accommodated only if their members have certain group-specific rights. This view explains the approach taken in *Wisconsin v Yoder*. That decision allows the Amish community to exercise considerable power over its members by limiting the extent to which a child can learn about the outside world, and ultimately leave the community. This limitation is justified on the basis that it protects the community's freedom to live in accordance with its religious doctrines.[52]

It has also been argued that if the State intervened to uphold the rights of the internal minorities, this would have the effect of strengthening them against an already weak group.[53] To liberalise these minorities would be to change the group. Many religions rely on doctrines that are inconsistent with the rights of women and other minorities. For example, they might ascribe a limited gender-specific role to women because it is intrinsic to the practice or identity of the faith with the consequence that those who wish to challenge the role ascribed to

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52 Kymlicka, *Multicultural Citizenship*, supra note 30, 162.

53 Green, supra note 50, 263.

them should leave rather than potentially destroy the distinctiveness of the religion. John Stuart Mill echoed the notion that practices that violate rights should be tolerated if exit is possible when he discussed the Mormon practice of polygamy. While he saw it as violating women's rights because it upset a fair reciprocity of obligation, he nonetheless observed that it should be tolerated because:[54]

> [I]t must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution.

Kymlicka sees it as "fundamentally *intolerant* to force ... a community which poses no threat to anyone outside the group to reorganise its community according to 'our' liberal principles of individual liberty".[55] This view implies that all the members consent to the rules that govern the community and are free to leave if they choose. In this way, members have 'contractually' given up certain rights[56] and as such the State should not intervene. The Supreme Court of Canada took this approach most notably in *Hofer v Hofer* ("*Hofer*")[57] and to a limited degree in *Lakeside Colony of Hutterian Brethren v Hofer* ("*Lakeside Colony*").[58] While these decisions will be looked at in detail in Part V, it is important to note here that the Court in *Hofer* expressly supported the view that members freely contracted out of their individual freedom.[59] Further, it suggested that freedom of religion allows congregations to limit individual freedom if it accords with the congregation's religious doctrines and that without these limits the Hutterian existence would be threatened.[60]

Finally, it has also been argued that the courts should not intervene in religious matters on the basis that questions of religion are outside their jurisdiction. That is to say that only religious authorities can define religious law and how it will be applied to their communities. This argument is based both on the grounds of freedom of religion and the

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54 Mill, "On Liberty" in Warner (ed), *Utilitarianism: Including Mill's 'On Liberty" and 'Essay on Bentham' and selections from the writings of Jeremy Bentham and John Austin* (1962) 126, 224.

55 Kymlicka, *Multicultural Citizenship*, supra note 30, 154.

56 This point is particularly pertinent in these closed religious communities as they are not concerned with the exercise of individual rights, but with obedience, see Kymlicka, *Multicultural Citizenship*, supra note 30, 232.

57 [1971] 13 DLR 3d 1.

58 [1992] 3 SCR 165.

59 Supra note 57, 4 and 13-14

60 Ibid 4.

inability of the courts to fully understand matters of religious law.[61] It is possible to extend this latter rationale to claims of cultural relativism. Relativism, broadly defined, is the view that there is no universal sense of truth or value and, therefore, no universal human rights. As values and norms are culturally produced, they can only be defined within the context of that culture. Cultural relativism advocates respect for a culture as it is, with the State having no legitimacy to attempt to remodel a culture.[62] The claim is particularly relevant to religious communities that, in the name of their religion, deny women the right to express their views publicly, or deny them the opportunity to form and develop their views by refusing access to education or liberty. Arguments based on cultural relativism shield the community from any revision of this power structure.

2. The Case for Intervention

Arguments for State intervention see the prevention of oppression of internal minorities as far outweighing any claims the communities have to autonomy.

The starting point for arguments that support intervention is often that the internal minorities should have the same rights as the groups themselves. If they do not, then "a liberal regime is compatible with the existence and protection of minority groups that ... act towards internal minorities in ways that would be condemned if practised by the larger community against the minorities".[63] Arguments that strengthening internal minorities would weaken an already weak group are easily countered by the fact that the community is not weak vis-à-vis its own minority,[64] which is dependent on it economically and psychologically.

The dependence of the communities' members is further compounded by the fact that they do not freely and completely consent. The existence of an exit does not, contrary to Mill's argument, make leaving a reasonable option. The fact that members can leave, does not mean it is practicable, or that those who stay freely consent to the rules of

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61 Roberts, "The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause" (1991) 101 Yale LJ 211, 218 and 228.

62 Singer, "Relativism, Culture, Religion, and Identity" in Howland (ed), *Religious Fundamentalisms and the Human Rights of Women* (1999) 46.

63 Green, supra note 50, 263.

64 Ibid 268.

the community that controls their lives. As demonstrated in *Hofer*,[65] once members of the community leave they are not entitled to any property. Lack of economic independence, coupled with limited state-recognised education, means that it is extremely difficult for members to support themselves in the wider community. Bearing these factors in mind, it is not a valid argument to say that members readily consent when they decide to stay. Furthermore, it is implausible to consider that members who are born into the communities are given the opportunity to agree or disagree with the power the community will have over them. If we start from the basis that minorities in illiberal religious communities did not consent to having their rights limited then state intervention appears more justified.

As far as the rights of women in particular are concerned, the case for intervention becomes even more compelling. Cultural relativist arguments have been seen to be "bad for women"[66] because they deny women the protection of human rights in the name of difference. In the Amish and Hutterite communities, membership and voting rights are restricted to adult, baptised males. Therefore, it is these members who define the culture, and cultural relativism seeks only to uphold the value of these elites. Providing religious minorities with 'group rights', and in turn cultural relativism, is criticised because it is seen as the State endorsing groups that treat females as subordinate.[67] Cultural relativism means women cannot look to the State for protection, and are paralysed under the control of their religious communities. By sheltering behind 'group rights' communities are able to maintain the conservative status quo, which includes discrimination against women. Group rights, which assume cultures are immutable are, therefore, particularly damaging for women who can improve their status only by challenging traditional norms.[68]

Objections to State interference are not compelling enough to deny rights to the internal minorities. There is still a need for the State to reserve some power to protect these rights, otherwise women will be unable to defend themselves against their illiberal communities. The discussion up until now has been largely theoretical. Part V will examine

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65 Supra note 57.

66 See generally Okin, *Is Multiculturalism Bad for Women?* (1999).

67 Cohen, Howard and Nussbaum, "Introduction: Feminism, Multiculturalism, and Human Equality" in Okin, ibid 4.

68 Tamir, "Siding with the Underdogs" in Okin, ibid, 51.

how the courts have traditionally approached the dilemma of internal minorities.

V. THE COURTS' APPROACH TO THE OPPRESSION OF INTERNAL MINORITIES

There is a marked reluctance by the State to take action against matters that are viewed as religious. As a result, cases that reach the courts are usually brought either by individuals or by the communities. It is only in a small proportion of cases that actions are initiated by the State itself. The courts have generally been hostile to attempts by the State to interfere with the operation of religious communities. However, their approach to the actions of the communities against their own members has been slightly different.

Assessing the courts' attitude to the oppression of minorities, in particular women, in these communities is a difficult task. This difficulty is largely due to the lack of case law on the issue. Women rarely bring actions and, as they exist in the hidden 'private' sphere, their situation is not a point of focus in the 'public' sphere. It is precisely the oppression and powerlessness of women that prevents them from initiating an action, rather than the fact that there are no actionable injustices.

This Part will examine how the courts have addressed the claims of dissenters and will attempt to distil from this how the courts might respond to cases in which women are oppressed by religious communities. It will examine the approach the courts have taken to discrimination against women by religion in general to determine whether the jurisprudence would be extended to apply to the situation of women within illiberal religious communities.

1. The Civil or Property Rights View

The general rule governing internal disputes of religious associations has been that the courts should not become involved unless civil or property rights are implicated. This approach was clearly spelt out in *Ukrainian Greek Orthodox Church v Trustees of Ukrainian Greek Orthodox Cathedral*:[69]

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[69] [1939] 2 DLR 494, 514. The judge goes on to say that the courts will also interfere if natural justice has been violated. Natural justice will be discussed in Part V.3.

> The principle is well established in English and Canadian authority that a member expelled from a voluntary association may not have equitable relief by injunction unless he has been deprived of a right of property.

This case demonstrated a clear refusal to adjudicate on "questions of faith or doctrine"[70] and to interfere only if "civil rights are in question".[71] This approach was confirmed in *Hofer*.[72] Here, as a property issue was linked to matters of religious doctrine, the Court was required to accept jurisdiction. The excommunicated plaintiffs sought a winding-up order for the Hutterite Colony and equitable division of its assets. As community property is a fundamental religious tenet, property rights will always be tied to matters of doctrine in the Hutterite expulsion cases. While the courts will always be able to exercise jurisdiction, this does not mean that they will enforce property rights that are contrary to the doctrines of the community. As members of the Colonies of Hutterite Brethren must renounce all their rights of property, the Court saw it as implicit in the articles of association that if members "leave the Colony, voluntarily or by expulsion, they will not demand any of its assets".[73] The Court expressed considerable sympathy for the appellants, even going so far as to recommend legislative reform to "permit a dissenter and his family to leave a community such as this one in dignity".[74]

Accordingly, while the court may not approve of the outcome of upholding the rules of these religious communities, they will defer to its articles of association if they are seen as having been freely consented to. On this basis it is highly unlikely that the courts would intervene to address the unequal status of women. Women's rights and their standing in the community are always classified as matters of religious doctrine to be determined by the community.[75] Where an issue impacts solely on a person's status within a religious organisation, the courts refuse to interfere.[76] Accordingly, as women exist in the private sphere, their rights would not be seen as civil. It is in this manner that communities are able

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70 Ibid 515.

71 Ibid.

72 Supra note 57.

73 Ibid 4 per Cartwright CJ.

74 Ibid 14 per Hall J.

75 See, for example, *Scandrett v Dowling* (1992) 27 NSWLR 483 where the ordination of a women priest was viewed as being not justiciable in a civil court as it did not concern a matter of church property.

76 Ogilvie, "Ecclesiastical Law-Jurisdiction of Civil Courts-Governing Documents of Religious Organizations-Natural Justice: *Lakeside Colony of Hutterian Brethren v. Hofer*" (1993) 72 Can Bar Rev 238, 241.

to avoid the reach of the courts into their illiberal practices. Therefore, the civil or property right approach does little to uphold the rights of women. In fact, the courts have historically used the approach to deny rights to women. In *Tully v Farrell,*[77] the Court set aside the 'improper' election of a churchwarden because female lessees of pews had voted in the election. Here, the right to vote was regarded as a property right recognised by law that the articles of the church did not confer on women. Without the Court's interference, the women's votes would have been effectual, ultimately giving them the same voting rights as the men, because the church required the power of the State to invalidate the election.

It is interesting to note that the decision in *Hofer* actually proves to be even harsher on women. Unlike the men of the community, they have no training in agriculture or manual labour as their prescribed duties are those in the domestic sphere. Should they wish to leave the community, they do not have the skills to support themselves economically. The difficulty of economic survival is further compounded if they wish to take their children with them. The heightened difficulty for women of leaving the community raises questions of consent and whether the articles of association of these illiberal communities could be contrary to public policy.

2. Freedom of Association

Freedom of association is the primary basis on which the courts will refuse to interfere in the matters of religious communities. It is from this viewpoint that the relationship between the community and its members is seen as contractual. Unlike the ecclesiastical disputes of large, 'open' religions, judicial intervention in the Hutterite or Amish communities cannot be justified on the basis that they have "sufficient public character".[78] It is for this reason, as Ogilvie[79] observes, that "contract alone remains the implicit foundation for judicial intervention in ecclesiastical disputes".[80] She argues that "the 'civil right' which provides the allegedly necessary legal nexus for the intervention of civil courts is

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77 (1876) 23 Gr 49 (Ont Ch), cited in Ogilvie, ibid 246.

78 *Lindenberger v United Church of Canada* (1985) 10 OAC 191, 193 (Ont Div Ct) cited in Ogilvie, "Ecclesiastical Law-Jurisdiction of the Civil Courts-Status of Clergy: *McCaw v. United Church of Canada*" (1992) 71 Can Bar Rev 597.

79 Professor of Law at Carleton University.

80 Ogilvie, supra note 78, 607.

this contract".[81] This views sees all members of *voluntary* religious organisations as contractual parties, with the right to enforce the doctrines or procedures they consented to.[82] The corollary of this is that members can contractually relinquish certain rights.[83] It follows that when disputes arise the courts first look to the contract or rules of the religious group. The courts will then hold the 'parties' to the terms and will intervene only if these have been infringed, or do not comply with natural justice, in much the same way as the courts approach commercial contracts.[84] The difficulty with the Amish and Hutterite communities is that their rules and doctrines are not always express, and a party may not know the terms of membership until they have been breached.[85] While a party who does not read their contract before signing must bear the risk, in these communities the terms are not available to be read. Retrospectively creating terms flouts the principles of contract law. It would be interesting to see if the courts would nonetheless uphold the term or rule. It should be noted here that the courts have declined jurisdiction in the employment of clergy on the basis this is a spiritual, not a contractual matter. they are spiritual, not contractual, matters.[86] The freedom of association argument for the purposes of this paper concerns members, not clergy.

There are a number of objections to the 'contract approach'. Chafee[87] saw it as artificial because a member would not regard their relationship with the community as promissory.[88] He argued that the fact that a clause could be disregarded on the basis that it is contrary to natural justice or public policy means it is "judged by its effect upon the relation between the member and the association, rather than by the usual doctrines of the law of contracts, which do not brush aside a promise merely because of its harshness on one party".[89] Therefore, it is not the parties' consent that is the determining factor, but whether the courts see it as in the members'

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81 Ogilvie, supra note 76, 247.

82 Enlisting the courts to enforce these doctrines or procedures were examined in Part IV.2.

83 *Pinke v Bornhold* (1904) 8 OLR 575 (Ont HC) cited in Ogilvie, supra note 78, 603.

84 These grounds for intervention were discussed in Part IV.2.

85 The procedure for forming rules and doctrines in these communities was discussed in Part II where it was noted that they are remarkably undemocratic.

86 *McCaw v United Church of Canada* (1988) 51 DLR (4th) 86; *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323; *Mabon v The Conference of the Methodist Church of New Zealand* [1997] ERNZ 690.

87 Late Professor of Law at Harvard University.

88 Chafee, "The Internal Affairs of Associations Not For Profit" (1930) 43 Harv L Rev 993, 1002-1003.

89 Ibid 1005-1006.

or broader public interest to uphold the rules of the community or association.

It is clear from case law,[90] and Chafee's analysis, that the courts will consider the broader public interest before enforcing the articles of an association. The question then becomes whether the "claims on the state by individuals who are excluded from participation or who are themselves minorities in an association may sometimes be higher than the claims of an association to independence from the state".[91] Specifically, would the State intervene to ensure equality of participation for women?

Firstly, in order for decisions of a given body, in this case religious communities, to attract the courts' supervisory jurisdiction there has to be a State interest in the decision-making power in question. The courts will not regulate intimate or religious functions unless they contain a public law element.[92] What if the rights of women conflict with the articles of the association? Is the elimination of discrimination against women a sufficient state interest to justify intervention? Do doctrines that oppress women have a public law character?

In the cases of *Roberts v United States Jaycees* ("*Jaycees*")[93] and *The Board of Directors of Rotary International v Rotary Club,*[94] the United States Supreme Court held that the State's interest in eradicating sex discrimination justified compelling all organisations which only accepted men as members to accept women as regular members and did not abridge the First Amendment rights of association. The right of freedom of association was held not to be absolute. The Government may infringe on that right with "regulations, adopted to serve compelling state interests ... that cannot be achieved through means significantly less restrictive of associational freedoms".[95] In *Jaycees*, Brennan J justified state intervention by emphasising the harm that discriminatory membership policies have on women:[96]

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities.

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90 *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249; *Board of Directors of Rotary International v Rotary Club of Duarte* 481 US 537 (1987).

91 McLean, supra note 7, 169.

92 Supra note 90, 254-255.

93 468 US 609 (1984).

94 481 US 537 (1987).

95 Supra note 93, 623.

96 Ibid 625.

> It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life.

While it is clear that freedom of association can be trumped by the State's interest in eliminating discrimination against women, it is highly unlikely that the courts will adopt the same approach to cases involving discrimination against women in Amish or Hutterite communities. The first reason why the courts would not apply the State interest rationale to these communities is the communities' right to freedom of religion. As discussed above in Part III.1 while the right is not absolute, the courts are extremely reluctant to interfere in the practice of religion. To force these communities to accept women as members would be in direct conflict with their religious belief in the subordination of women. The association cases, as discussed, can be distinguished as they dealt with matters that were purely secular. The second reason is the distinction that is drawn between 'intimate' and 'expressive' associations. In *Jaycees*, the Court saw intimate associations as consisting of relationships distinguished by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship".[97] These associations receive "protection as a fundamental element of personal liberty".[98] Intimate associations must be compared with 'expressive' association, which is a right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends".[99] A right of intimate association cannot be asserted if the group is large and unselective,[100] but nor is it confined to familial relations.[101] Other highly personal associations, including some private clubs,[102] have found protection from state regulation by invoking intimate association rights. On this analysis, the Amish and Hutterite communities are the antithesis of expressive associations and serve no public purpose. The courts would not view it as being in the State's interest to regulate their conduct by insisting that women be permitted to become members, or are generally given equal rights to men.

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97 Ibid 620.
98 Ibid 618.
99 Ibid 622.
100 Ibid 621.
101 Supra note 94, 545.
102 See, for example, *Moore v East Cleveland* 431 US 494 (1977).

The final basis on which the freedom of association or contractual approach does little for the rights of women is that it assumes that women have consented to the rules that dictate their oppression. In *Hofer*,[103] Cartwright CJ implied that the members may freely contract out of their rights, and even saw it as necessary for the community that they do so:[104]

> It has been said that one of the liberties chiefly prized by a normal man is the liberty to bind himself. Unless the members are free to enter into contracts of the sort set out in the articles of association, it is difficult to see how the Hutterian Brethren could carry on the form of religious life which they believe to be the right one.

In reality, women, unlike the 'normal men' of Cartwright CJ's judgment, are born into these communities, have little or no say in the rules governing them, and have no practical means of leaving. Can it really be said that the members freely consent to the rules and doctrines of the community? The absence of consent is even more acute in the case of women, who do not partake in decision-making processes, are not permitted to be members and have no voting rights. With these factors in mind, any arguments that the courts could make about members freely contracting out of rights would not be well founded. Pigeon J's dissent in *Hofer*[105] addressed these issues:[106]

> The evidence shows that the rules and practices of this religious group make it as nearly impossible as can be for those who are born in it to do otherwise than embrace its teachings and remain forever within it .... [I]t is unusual for Hutterian children to be allowed to go beyond Grade 8 education. They have no right at any time in their life to leave the Colony where they are living unless they abandon literally everything .... Such a construction of the contractual relationship between the members of the Colony means that they really cannot exercise their freedom of religion.

Pigeon J's dissent clearly sees freedom of religion as an individual right which "includes the right for each individual to change his religion at will",[107] rather than a group right as asserted by the majority. Furthermore, Pigeon J states that while churches are free, like other voluntary associations, to establish whatever rules they like, freedom of

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103 Supra note 57.
104 Ibid 4.
105 Ibid.
106 Ibid 21-22.
107 Ibid 21.

religion is a fundamental freedom that churches cannot deny to their members.[108] In other words, it is a right that cannot be contracted out of. He saw the rules of the Hutterite church as limiting freedom of religion by preventing its members from abandoning it at will. He concludes that any provision that purports to deprive a member of freedom of religion would be unenforceable as contrary to public policy.[109] While Pigeon J's dissent is against the judicial trend, it shows an appreciation for the powerlessness of the members of these communities. It also suggests that in certain circumstances the courts, in Canada at least, may be willing to assert an individual's fundamental freedom over the group's rights.

Hall J, while not going so far as to declare the provisions unenforceable, conceded that "the unlimited power and control of the ministers of the church under the articles of association might be void as being contrary to public policy"[110] in certain circumstances. He does not expressly state what those circumstances would be, but does say they would involve "minors or others under disability as well as those who have not subscribed to the articles of association".[111] Whether he would be willing to include women in this group is not clear, but following his reasoning they should be included, as they would not have subscribed to the articles of association.

3. The 'Natural Justice' Approach

Aside from the public policy grounds, the courts see themselves as able to intervene if religious communities or associations do not follow their own rules or procedures "with regard to the principles of natural justice, and without *mala fides*".[112] This approach does not involve reviewing the merits of decisions, but merely procedural intervention. It is "based on an implied term in the 'contract' between organisation and member",[113] which imposes an obligation of natural justice on proceedings. The view is, at least according to some judges and

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108 Ibid.
109 Ibid 25.
110 Ibid 14.
111 Ibid.
112 Supra note 58, 175.
113 Mullan, "Administrative Law at the Margins" in Taggart *The Province of Administrative Law* (1997) 139.

commentators, that individual autonomy does not give parties liberty to contract out of the rules of natural justice.[114]

This approach was set out in *Lakeside Colony.*[115] Here, the Court discussed the application of the rules of natural justice to dispute resolution procedures within religious institutions where no provision is otherwise made for them. The Court accepted jurisdiction by interpreting the civil or property right view widely. It saw this view as authorising civil courts to engage in a broader review provided a civil or property right is involved or the matter is "of sufficient importance to deserve the intervention of the court and whether the remedy sought is susceptible of enforcement by the court".[116] The defendants argued that their attempted expulsion was invalid because they were denied natural justice in the Colony's disciplinary proceedings. The Supreme Court of Canada found that the defendants had not received adequate notice of their proposed expulsion and therefore were entitled to remain on the Colony subject to a new hearing.

In its decision, the majority of the Court[117] showed limited acknowledgment of the unwritten, standard procedures of the Hutterite community, preferring instead to uphold the principles of natural justice. It was only Gonthier J that raised the question of tradition and custom in proceedings.[118] He saw "the difficulty of understanding tradition and custom [as] ... reason to avoid assuming jurisdiction in the first place".[119] However, once jurisdiction was assumed, the Court abandoned its position of reluctant intervention and viewed the principles of natural justice as flexible enough to be invoked in a variety of circumstances. It used its discretion to apply the requirements of notice, opportunity to make representations, and an unbiased tribunal to the proceedings of the community.[120] Interestingly, as Mullan[121] observes, this approach deviates from the deference that has been shown to the procedural norms of non-secular bodies such as universities.[122] It is arguable, though, that "having voluntarily submitted themselves to the jurisdiction of the civil courts, the

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114 See, for example, *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 342 and *John v Rees* [1969] 2 All ER 274, 306-7.

115 Supra note 58, 175-176.

116 Ibid 175.

117 La Forest, L'Heureux-Dube, Sopinka, Gonthier, Iacobucci, Cory JJ (McLachlin J dissenting).

118 Supra note 58, 190.

119 Ibid 191.

120 Ibid 195.

121 Professor of Law at Queen's University.

122 Mullan, supra note 113, 149 citing *Paine v University of Toronto* (1981) 34 OR (2d) 770 (Ont CA) in support.

Hutterites were in fact signing on to the values of the common law".[123] In fact, the Colony even accepted that it must act in accordance with the principles of natural justice.[124] Ultimately, however, it was the Court that decided what these principles were, without regard to the processes of the community.

It is on this basis that McLachlin J dissented. In her view, the flexibility of natural justice means that the court "must be careful to ensure that it fully appreciates the institutional and factual matrix in which the decision arises".[125] The fundamental issue was whether the procedures followed were fair with regard to the circumstances of the decision under review. To McLachlin J, formal notice was not necessary to allow the defendants to present their defence because "the expulsion of the appellants was essentially a self-expulsion, freely chosen by them with full knowledge of the consequences".[126] She concluded, therefore, that as formal notice served no purpose, the failure to give notice was not a breach of the rules of natural justice.[127] While McLachlin J clearly attempts to take into account the circumstances of the case, her view of the community's processes is problematic. It is an oversimplification to refer to the defendants as expelling themselves. As Ogilvie commented, "the shunning essentially amounts to expulsion since the decision to shun leaves the person shunned with the sole option of accepting that with no further opportunity for discussion".[128] Once a member leaves the community, the only avenue to be accepted back into the community is repentance. The view that the dispute resolution procedures were 'fair', and grounds for not extending the reach of natural justice, is not well founded in the light of the reality of the expulsion procedure.

While the decision in *Lakeside Colony* shows a clear willingness on the part of the courts to intervene to ensure the fairness of the processes of the communities, it is not certain what approach the courts would take to the substantive unfairness of women's roles in these processes. It is interesting to note, as McLean does,[129] that the process of expulsion does not involve women, who are not allowed to be members of the community, to vote, or partake in decision-making. By the courts requiring the expulsion procedure to be undertaken again, they are

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123 Ibid 148.
124 Supra note 58, 175.
125 Ibid 226.
126 Ibid 228.
127 Ibid 230.
128 Ogilvie, supra note 76, 244.
129 McLean, supra note 7, 169.

"scarcely using judicial power to enhance democratic participation".[130] If the courts are prepared to adopt the standards of the common law without regard to the religious doctrines of the community, it seems hypocritical to then defer to religion when it comes to the participation of women in these procedures. This criticism would become even more acute if women were subjected to the community's expulsion proceeding, which consisted of a tribunal's decision-making process, from which women were explicitly excluded.

4. Self-Governance of Communities

There are some instances where the courts have refused jurisdiction over cases concerning the discriminatory practices of self-governing communities. In two notable decisions, *Mississippi Choctaw v Holyfield* ("*Mississippi*")[131] and *Santa Clara Pueblo v Martinez* ("*Santa Clara*"),[132] the United States Supreme Court deferred to the jurisdiction of the Native American tribes to decide matters relating to the rights of women. The former case concerned a mother who was denied the right to decide the future for her child. The latter case concerned the denial of tribal membership to the children of female tribe members who married outside the tribe and the extension of tribal membership to the children of male members who married outside the tribe. The decision in *Santa Clara* provided that habeas corpus was the only mechanism of judicial review provided by the Indian Civil Rights Act 1968. The Act gave tribes sovereignty to govern their own people and, although it was designed to protect individual rights from encroachment by the tribe, the decision left women with no remedy to enforce those rights, confined within a system that subordinates women. The gender-biased tribal membership codes result in the suffering of women financially and psychologically.[133] The Court in *Santa Clara* did state that if the tribal courts proved inadequate to apply and enforce civil rights, federal jurisdiction would be granted.[134] Jurisdiction was not granted, indicating that they viewed it as acceptable to subordinate women.[135]

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130 Ibid.

131 490 US 30 (1989).

132 436 US 49 (1978).

133 Christofferson, "Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act" (1991) 101 Yale LJ 169, 170.

134 Supra note 132, 56.

135 Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts" [1989] 56 U Chi L Rev 671, 755.

The Native American tribes' arguments take on the distinct tone of the group rights theory. These tribes argue that their self-government needs to be exempt from human rights legislation, not to restrict the liberty of women - although this is an inevitable consequence - but to defend the community against the larger society.[136] The Court in *Mississippi* echoed this view by stating that the concern was not solely about the interests of Native American children and their families, but about the impact on the tribes themselves.[137]

These cases could be distinguished from religious communities such as the Amish and Hutterite on the basis that Indian communities have distinct rights of self-government free from judicial review. This is derived from their status as indigenous people with a legitimate claim to sovereignty, not as a minority group. However, they do indicate an attitude which views discrimination against women as without serious implication for society as a whole; an attitude which the decisions requiring men-only associations to admit women have set about remedying.

5. Prevention of Discrimination Against Women: A Sufficient State Interest?

Numerous actions have been brought against religious institutions alleging discriminatory practices and seeking to invoke non-discrimination laws. These institutions have objected to such laws applying to them on the grounds that their practices are based on sincerely held religious beliefs, so that the prohibition of these practices would amount to an infringement of their freedom of religion. The courts have refused to allow the State to regulate employment relationships between a church and its clergy, even when they have been clearly discriminatory.[138] The rationale, as set out in *McClure v Salvation Army*,[139] is that the relationship is so central to the functioning of the church that no State interest could justify interfering with it. However, in a proportion of other cases, particularly involving religious employers, the courts have been more sympathetic to the rights of women and the

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136 Kymlicka, *Multicultural Citizenship*, supra note 30, 39.

137 Supra note 131, 49.

138 *Scandrett v Dowling* (1992) 27 NSWLR 483; *EEOC v Catholic University of America* 856 F Supp 1 (DDC 1994); see also New Zealand Human Rights Act 1993, s 28 which permits discrimination in employment on the grounds of sex if it is for the purpose of religion.

139 409 US 1050 (1972).

State interest in eliminating discrimination, than to claims of religious liberty.[140] In these cases, the courts have examined the impact of the State's action on the institution's exercise of its religious belief. Against this impact, the courts weigh two other factors. The first is whether a compelling State interest justifies the infringement of the institution's free exercise rights, and the second is whether achievement of the State's objectives is impeded by granting the institution exemption from anti-discrimination statutes.[141] If the court finds that the State interest outweighs the infringement upon free exercise rights, the statute will be upheld. However, where the discrimination concerns private religious schools, the courts appear more likely to uphold the religious liberty of the institution rather than the state interest.

The test was applied by the lower court in *Dayton Christian Schools v Ohio Civil Rights Commission* ("*Dayton*"),[142] which involved a religious school firing a pregnant teacher. Despite the school's discriminatory practices being founded in sincerely-held religious beliefs, the Court found that the commission's investigation of sex discrimination did not violate the school's First Amendment rights, as only a "minimal" burden was placed on it.[143] In any event, the Court also found that this burden was outweighed by the state interest in eliminating sex discrimination and in protecting the "freedom of personal choice in matters of marriage and family life."[144] Finally, the Court considered that the State's interest would be frustrated if the school was granted an exemption from the anti-discrimination laws. It expressed concern that "[e]xposure to an educational atmosphere wherein any form of unlawful discrimination is practised could have a substantial impact on the values these children eventually carry out into the world".[145] This decision was reversed on appeal.[146] The United States Court of Appeal concluded that allowing the Commission to exercise its jurisdiction over sex discrimination charges would result in excessive involvement of the State in church affairs. The Court based its decision on the fact that the school aimed to permeate every aspect of education with its religious principles

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140 See, for example, *Proceedings Commissioner v Boakes*, Complaints Review Tribunal, EOT 1/94, 13 April 1994. A Brethren employer dismissed his non-Brethren employee as he did not believe that married women should be in paid employment. The Commission held this dismissal to be unlawful.

141 *EEOC v Pacific Press Publishing Association* 676 F 2d 1272, 1279 (1982).

142 578 F Supp 1004 (1984).

143 Ibid 1034.

144 Ibid.

145 Ibid 1036.

146 766 F 2d 932 (1985).

and values, with the teacher playing an important role in this.[147] Therefore, requiring the school to allow a pregnant to teacher to work for it would unduly burden the plaintiff's right to free exercise of religion. While the Court conceded that the State's interest was substantial, it did not see the accommodation of the religious beliefs in this particular case as significantly interfering with that interest, as the State would still be able to regulate employment practices of non-religious institutions.[148]

Although the Court's decision in *Dayton* does little to help the plight of women in religious institutions, it does suggest alternative possibilities for state action. The "less burdensome alternatives"[149] proposed were the denial of tax exemption, as in *Bob Jones University v United States*,[150] or denial of public transportation. These options would limit State support of these discriminatory practices and "help the State accomplish its goal while reducing interference with the exercise of religion".[151] It is interesting to note that in the New Zealand case *Re Centrepoint Community Growth Trust*,[152] the New Zealand High Court held that the purpose of the community's trust did not have a religious objective on the grounds that it was based on the "self-gratification" of its leaders, not on the religious or spiritual benefit to its members.[153] Cartwright J found the community's sexual activities with young girls and its treatment of women who opposed this behaviour as compelling factors against allowing the community to utilise the 'religious objective' charitable trust category.[154] She also emphasised how the activities of the community were "principally for the benefit of the older men in the community".[155] While this decision would be of little assistance to the Amish and Hutterian women who belong to a recognised religion, it demonstrates one of the tools by which the courts can show its disapproval for the practices of a community, in particular its treatment of women.

An examination of the judicial reasoning in *Dayton* indicates that the courts would not find the State interest compelling enough to result in the application of anti-discrimination laws to communities such as the Amish or Hutterites. Furthermore, as religion permeates every aspect of their

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147 Ibid 949.
148 Ibid 955.
149 Supra note 146, 955.
150 461 US 574 (1983).
151 Supra note 146, 955.
152 [2000] 2 NZLR 325 (HC).
153 Ibid 335.
154 Ibid 334-335.
155 Ibid 335.

lives, any attempt at state regulation would inevitably result in a burden upon their religion. Also, it is extremely unlikely that a woman would even bring a claim. If she did it would probably be after being expelled or leaving, in which case she would not be seeking change within the community, but a property or custody right. If such a claim were brought, however, it appears that the courts would recognise that allowing the community an exemption would not frustrate the state's objective of eliminating discrimination because it would relate only to a small isolated group who have little contact with the general public. As the Court expressed in *Wisconsin v Yoder*, granting an exemption from the State's compulsory education law was necessary to avoid burdening the Amish's free exercise rights and sufficiently narrow that few other religious groups or sects would qualify.[156] So not only are women oppressed by their communities, but they would be denied state protection because of the nature of their communities. As they do not have any say in how the communities are run, their only choice, if they want change, is to leave; an option that is practically impossible.

VI. CONCLUSION

This article has examined the justifications for non-interference by the State in the functioning of illiberal religious communities such as the Amish and the Hutterian Brethren. It also presented the dilemma of protecting the rights of minorities, in particular women, and showed how the justifications for non-interference are often in conflict with these rights. While the courts have shown some sympathy for the plight of minorities within religious groups, they are extremely reluctant to question the autonomy of these communities or burden freedom of religion. The concluding question, therefore, is whether there can ever be a reconciliation of the rights of religious communities and the rights of women. It is clear from the communities' standpoint that the status and role of women in their societies is ordained. They co-operate with the State only to the extent that its laws do not conflict with their religious beliefs. Therefore, any attempts by the State to influence the communities' treatment of women would be a massive intrusion into freedom of religion and amount to coercion. These consequences would be repugnant to the concept of a liberal democracy.

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[156] Supra note 14, 37.

The challenge is to ensure that women's rights are upheld with minimal impact on freedom of religion. As shown in this article, the approaches that the courts have traditionally taken to interference in these communities are not satisfactory for protecting the rights of women. Often the courts have shown little appreciation for the reality of living in these communities and the psychological and economic power they have over individuals. Assuming that individuals have consented to the rules that govern them and are free to leave if they choose ignores the fact that people who live in these communities are usually born into them and do not have the financial independence or skills to leave.

This article makes several recommendations to ensure that the rights of women are better protected while minimising the burden placed on religious practice. First, the importance of the religious practice to the community's religious freedom should be assessed to see what impact state interference in this practice would have on the community's existence. Secondly, the degree to which the practice infringes the rights of women should be looked at to decide whether the seriousness of the situation justifies state interference. Finally, the extent to which state interference would be effective in upholding the rights of women should be examined. By weighing these three factors, the courts could best ensure that women's rights are maximised while interference in religion is minimised.

However, these recommendations, if undertaken, would still not completely remedy the situation for women. Ultimately, the balancing of rights involves a compromise that can never fully uphold the rights of women, nor leave religion free from interference. The complete protection of women's rights would require the individual rights of women to always trump the religious freedom of communities, a stance the courts would not be prepared to take and the communities would not be prepared to accept. An immediate solution would be for the State to make leaving these communities a viable option for women by assuring them property rights. However, the availability of this secular solution still does not solve the situation of the majority of women who do not bring claims and those who do not wish to leave their communities but would like their rights respected. It is clear, therefore, that any change that should occur within the community must come willingly from the community itself. Only then can the rights of women and religious freedom truly be reconciled.