THE 'RELIGIOUS QUESTIONS' DOCTRINE: ADDRESSING (SECULAR) JUDICIAL INCOMPETENCE

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The religious questions doctrine states that courts typically refuse to adjudicate on religious questions. The two common rationales are a lack of judicial competence to decide religious questions (the pragmatic rationale), and the danger that allowing a secular court to decide religious questions enables state endorsement of one religion over another (the principled rationale). However, the rise of litigation involving religious questions means a rigid adherence to the doctrine is no longer tenable. This article focuses on addressing the pragmatic rationale, which has some implications for addressing the principled rationale. While the use of expert evidence on the religious question can mitigate judicial incompetence, this can itself give rise to two further problems: meta-expertise and secular translation. These problems can be addressed through a framework with two aspects. The first is application of the golden rule, which entails an objective and fair assessment of the evidence by the court. The second is the development of an imaginative sympathy with the internal religious perspective. Addressing the pragmatic rationale in this way also points to resolution of the principled rationale, because objective and fair judicial consideration, including genuine engagement with the religious perspective, would diminish apparent state endorsement of particular religions.

I INTRODUCTION

The religious questions doctrine states that courts typically refuse to adjudicate on religious questions. That is, courts cannot resolve religious disputes which turn on questions of theology and doctrinal practice.[1] Though religious questions arise in the private law context, such as commercial agreements relating to the purchase of a religious product or securing of a religious performance, in this article I will focus on the public law context, and particularly human rights. Such cases usually

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1 See, eg, Jared A Goldstein, 'Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs' (2005) 54(2) *Catholic University Law Review* 497.

involve issues of religious freedom and entanglement between religion and the state, where judges are asked to identify the scope and meaning of religious doctrine, or interpret religious categories, terminology or practice. This intertwines matters of theology and religion with fundamental legal questions over government authority and personal freedoms. A failure to decide such questions, therefore, leaves aggrieved citizens without a remedy against potentially illegal actions taken by other individuals, organisations and governments. For this reason, Helfand argues, courts should adopt legal alternatives to the doctrine 'so as to avoid too freely renouncing their central duty of resolving disputes submitted on the courthouse doorstep'.[2] While acknowledging that the broader relationship between a state and religion will influence the justiciability and adjudication of religious disputes in particular states, this article does not engage in that debate and assumes a general liberal democratic framework where there is some constitutional relationship between religion and the state that does not amount to discriminatory preference.[3]

There are two common rationales for the religious questions doctrine. The first is a lack of judicial competence to decide religious questions, which I term the *pragmatic rationale*. The second is the danger that allowing a secular court to decide religious questions could be, or appear to be, state endorsement of one religious doctrine or practice over another. This invokes the religious freedom principles that one religion should not be given discriminatory preference over others (establishment), and that religious organisations should have institutional autonomy to determine their members, beliefs and practices (free exercise).[4] I term the rationale entailing these two principles the *principled rationale*. However, the rise of human rights litigation involving religious questions means a rigid adherence to the religious questions doctrine is no longer tenable. Accepting this premise, the article focuses on addressing concerns associated with the pragmatic rationale, which has some implications for addressing the principled rationale. In particular, the article argues that while the use of expert evidence on the religious question can mitigate judicial incompetence, this can itself give rise to two further problems. First, there is the problem of 'meta-expertise' — how is a court to determine which religious expert is the authoritative expert in the event of conflict between experts on religious questions? Second, there is the problem of 'secular translation' — how can a court interpret and apply religious doctrine using secular legal categories while remaining faithful to the doctrine? The article proposes that these problems can be addressed through a framework with two aspects. The first is application of the 'golden rule' (explained in Part IV). The second is the development of an imaginative sympathy with the internal religious perspective. Addressing the pragmatic rationale in this way also points to resolution of the principled rationale, because objective and fair judicial consideration of the

2 Michael A Helfand, 'When Judges Are Theologians: Adjudicating Religious Questions' in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar Publishing, 2018) 262, 264 ('When Judges Are Theologians').

3 Cf Francois Venter, 'The Justiciability and Adjudication of Religious Disputes' in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar Publishing, 2018) 286, 289–92.

4 See, eg, Rex Ahdar and Ian Leigh, 'Is Establishment Consistent with Religious Freedom?' (2004) 49(3) *McGill Law Journal* 635, 638–9, 649.

experts, including genuine engagement with the religious perspective, would diminish actual or apparent state endorsement of particular religious doctrine. The framework is illustrated in the Australian context by considering the contrasting approaches in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('*Cobaw*')[5] and *OV and OW v Members of the Board of the Wesley Mission Council* ('*Wesley Mission*').[6]

Part II of the article outlines the rationales for the religious questions doctrine, distinguishing and explaining the pragmatic and principled rationales. It then establishes that the rise of human rights litigation makes the religious questions doctrine untenable. Part III explores expert evidence as a potential solution to the pragmatic rationale. However, it notes this option produces two further problems: what to do when there is a dispute between experts (or over who constitutes an expert), and the tendency of courts to reify or translate religious arguments into secular terms, which in some situations renders those arguments impotent or less effective. Part IV proposes a more detailed framework for addressing the pragmatic rationale which takes these further problems into account; this framework involves application of the 'golden rule' (which entails objective and fair assessment of the evidence by the court), and an imaginative sympathy (which entails judges understanding the position and practices of a religious party from an internal point of view). Part V applies this new framework to two cases which involved religious questions, critiquing the decision of the *Cobaw* majority as failing to objectively consider the evidence from the perspective of a religious organisation, and upholding the decision in *Wesley Mission* and the dissent in *Cobaw* as better examples of how this framework would be effective in practice. Part VI concludes by briefly pointing to how this framework may assist in addressing the principled rationale, noting that the development of a framework which blunts both rationales is of particular importance in a context where the religious questions doctrine can no longer be strictly adhered to in practice.

II RATIONALES FOR THE RELIGIOUS QUESTIONS DOCTRINE

A *Pragmatic Rationale*

Helfand explores how judges decide legal disputes when the decision 'is predicated, to varying degrees, on a theological question upon which there is some debate'.[7] There is often a simple but unsatisfactory answer: they just don't. The decision by judges to refuse to adjudicate disputes involving religious questions is known as the 'religious questions doctrine', and this is justified either with reference to the esoteric nature of religious questions (such that judges are not

5 (2014) 50 VR 256 ('*Cobaw*').

6 (2010) 79 NSWLR 606 ('*Wesley Mission*').

7 Helfand, 'When Judges Are Theologians' (n 2) 262.

competent to decide such questions),[8] or with reference to the fact that secular courts 'are not arbiters of scriptural interpretation' (such that judges ought not to decide such questions as a matter of separating church and state).[9] For example, Lupu and Tuttle argue that the religious questions doctrine stems from an 'adjudicative disability' — courts simply have 'limited jurisprudential competence' to resolve such questions.[10] This is because religious questions are understood to rely on 'faith, mystical experiences, miracles, or other nonrational sources' as opposed to ordinary questions of fact which can be resolved by the logic of law through reason and science.[11] Goldstein explains the issue as courts being 'institutionally incompetent to resolve religious questions', which depends upon 'a conception of law and religion as epistemologically distinct spheres'.[12] For Goldstein, if this conception is correct, it follows that courts cannot resolve religious questions because they lack the analytical tools — and if courts cannot resolve religious questions, then they should not resolve religious questions.[13] I characterise this as the pragmatic rationale.

Among other issues, McCrudden also identifies the pragmatic rationale as an 'epistemological problem': how judges operating in a particular normative system (secular, liberal human rights) can comprehend a different normative system (eg a religion) 'sufficiently well to be able to adjudicate on the meaning of that religion' or associated doctrines and practices 'when conflicts arise that depend on an understanding of that normative system'.[14] Judges are not competent to resolve religious disputes because they cannot comprehend a different normative system. Foster frames the issue as whether religious questions are 'justiciable', or 'within the formal competence of a court to decide'.[15] This may involve courts needing to decide either whether particular behaviour or beliefs are religious, or a ruling on the content of the religion itself.[16] Foster concisely delineates two lines of reasoning for the pragmatic rationale. First, there are competency arguments which

8 Ibid 268–9.

9 Ibid 262–3, quoting *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 716 (Burger CJ) (1981).

10 Ira C Lupu and Robert W Tuttle, 'Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders' (2009) 7(1) *Georgetown Journal of Law and Public Policy* 119, 122–3.

11 Goldstein (n 1) 536. See also Mark Fowler, 'Identifying Faith-Based Entities for the Purposes of Antidiscrimination Law' in Paul T Babie, Neville G Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing, 2020) 207, 224–5.

12 Goldstein (n 1) 502.

13 Ibid.

14 Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press, 2018) x. For details: see at 87–100.

15 Neil Foster, 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47(1) *University of Western Australia Law Review* 175, 179.

16 Ibid 180.

note that '[j]udges are trained in the mainstream "secular" legal system'.[17] They lack the deep knowledge of internal religious disputes and the competence to resolve such disputes.[18] Second, religious questions are not justiciable (it is alleged) in the sense that religious doctrine is subjective and not amenable to evaluation by reason or rationality.[19]

Foster also takes the view that in limited circumstances where private rights are at stake, courts may be required to interpret certain religious or theological doctrines in order to resolve a dispute and not leave aggrieved parties without remedy.[20] Furthermore, though courts have regularly refused to resolve some disputes on the basis of the religious questions doctrine, historically they have also regularly resolved other disputes involving religious questions, particularly in the private law context.[21] Though this article focuses on public law and human rights, Foster's delineation is helpful for the purpose of considering the cogency of the pragmatic rationale more broadly. The principle that the courts have the responsibility to resolve disputes brought to them applies in the public context as well.

In some cases, courts need to decide between personal religious conviction and public safety, such as where a state bans face coverings (effectively targeting the burqa or niqab). Making this determination requires not only a consistent and cogent standard, but also a mechanism for weighing the strength of the religious conviction to inform application of the standard.[22] In other cases of an intra-religious nature, courts may need to apply the law to prevent infringement of fundamental rights in a context which requires them to consider theology and perhaps make determinations on religious grounds.[23] For example, where a member of a religious group is excluded from that group on the basis that they no longer adhere to the foundational beliefs or practices of that group, a court may uphold such an exclusion as a matter of institutional religious freedom while making factual determinations regarding the actual beliefs and practices of the group.[24] This inevitably raises the religious questions doctrine, and in particular the pragmatic rationale. As Venter observes, cases of this nature raise the issue of whether 'judges should, on the basis of their legal expertise and professional

17 Ibid 183.

18 Ibid.

19 Ibid 183–4.

20 Ibid 176–7.

21 Ibid 177. See, eg, the detailed discussion of Judaism and various civil proceedings: Keith Thompson, 'Is the Australian Judiciary Unnecessarily Interfering with Freedom of Religion? The Sydney Beth Din Case' (2020) 252(2) *St Mark's Review* 79.

22 Venter (n 3) 297–8. This is exemplified by the internal debate within Islam regarding whether face coverings are a requirement of the religion or a matter of individual conscience. Presumably, if the former, a court may attribute greater weight to the strength of the conviction: see, eg, Renae Barker, 'Rebutting the Ban the Burqa Rhetoric: A Critical Analysis of the Arguments for a Ban on the Islamic Face Veil in Australia' (2016) 37(1) *Adelaide Law Review* 191, 197–201.

23 Venter (n 3) 302.

24 Ibid 302–3, discussing *Taylor v Kurtstag* [2005] 1 SA 362, 374–7 [30]–[36] (Malan J) (Local Division).

abilities, be considered competent to adjudicate intra-religious disputes by interpreting *religious* law'.[25]

Another example is that when a court needs to determine whether certain religious exercise is 'substantially burdened', a court will need to assess what constitutes a substantial burden as opposed to an insubstantial one. Doing so entails making a theological determination about what counts as a substantial burden for a particular religion, religious practice, or religious person.[26] Religious liberty claims along these lines challenge the conventional approach of refusing to resolve religious questions, because the religious questions doctrine prevents a court from 'distinguishing between the theological substantiality of different claims' — undermining the ability of the court to quickly dismiss claims without substance.[27] Conversely, it also prevents the court from properly assessing claims with substance.[28]

Hence it is becoming apparent that a strict application of the religious questions doctrine is no longer possible. As Venter suggests, religious pluralism in diverse states implies states, communities and individuals 'will find themselves increasingly embroiled in religious disputes' of a public nature.[29] And this

> ubiquitous occurrence of religious disputes requires legal intervention, at least for the purposes of mitigating, if not preventing, multifarious undesirable consequences. The state continues to be the entity primarily responsible for making and maintaining the law and hence the resolution, where possible, of religious disputes. … No state … can escape dealing with disputes rooted in, or emanating from, religious beliefs.[30]

McCrudden articulates several ideological and institutional reasons for why human rights litigation renders the religious questions doctrine untenable.[31] We shall here focus on the ideological reasons:

> Three ideological developments are of particular importance. First, there have been significant developments in human rights doctrine that have resulted in religious practices coming more into conflict with human rights; second, there have been significant doctrinal developments within particular religions that have resulted in more fundamentalist approaches to doctrine being adopted; and, third, religious issues have increasingly become of renewed geopolitical significance, in some ways replacing, in other ways exacerbating, other ideological tensions. … the stage is set

25 Ibid 304 (emphasis in original).

26 Helfand, 'When Judges Are Theologians' (n 2) 269–70.

27 Ibid 272.

28 Ibid.

29 Venter (n 3) 289.

30 Ibid 286. See also Baroness Hale, 'Secular Judges and Christian Law' (2015) 17(2) *Ecclesiastical Law Journal* 170, 170–4.

31 See McCrudden (n 14) 20–59, where he expands upon these in detail.

> for increased tensions and conflicts, including conflicts between religions and human rights.[32]

McCrudden then provides a summary of illustrative cases.[33] For example, Fowler notes that the religious questions doctrine is enlivened in a public context through faith-based bodies asserting their interpretation of doctrine as the basis for employment selection criteria.[34] So while the pragmatic rationale is a substantial and relevant objection, a better approach would be to see if this rationale can be mitigated, rather than simply refusing to consider a case where a religious question arises.

B *Principled Rationale*

However, judicial competence is not the only reason for the existence of the religious questions doctrine. In the American context, Eisgruber and Sager have argued that the First Amendment prohibition against establishment prevents the state taking sides on religious issues, and if courts were to decide religious questions and prefer one interpretation over another, that would have the effect of favouring certain religions or religious interpretations over others.[35] I characterise this as the principled rationale. But 'establishment' reasons are not the only principled arguments that could be made in this area. More relevantly for the Australian context, Foster argues that a general version of the religious questions doctrine should be adhered to on the basis that 'religious beliefs ought not to be the subject of "secular" judicial rulings',[36] because this would undermine the dignity of the religious parties to internally decide and regulate their own doctrines.[37] If religious parties are not free to internally resolve religious disputes, the concern is that judicial resolution of such disputes could be interpreted as an endorsement of particular religious doctrines or practices over others.[38] Intervention in this way undermines the religious freedom of a religious body to determine for itself what its religious beliefs entail.[39]

Though Helfand acknowledges that the determination of a religious question does not necessarily entail endorsement or preference of one religion over another in a private law context, what is more relevant for this article is he does take the view that the principled rationale is at its strongest, and is more of a concern, when it

32 Ibid viii–ix.

33 See ibid 8–19.

34 Fowler (n 11) 219.

35 Christopher L Eisgruber and Lawrence G Sager, 'Does It Matter What Religion Is?' (2009) 84(2) *Notre Dame Law Review* 807, 812. In the Australian context, the 'establishment clause' of s 116 of the *Constitution* would not be relevant because that clause only prohibits 'Commonwealth laws' which establish religion, not the decisions of courts.

36 Foster (n 15) 176.

37 Ibid 177.

38 Ibid 185, quoting Helfand, 'When Judges Are Theologians' (n 2) 269.

39 Foster (n 15) 184–5.

comes to public law claims.[40] '[T]he endorsement justification of the religious question doctrine provides ample jurisprudential resources for courts to avoid theological inquiries when courts consider using theology to determine the scope of exemptions granted to religious claims'.[41] To return to the issue of substantial burden, when assessing substantial burden, complicity arguments entail diverse theological claims about the nature of sin and causation, 'because it requires courts to assess and compare various theological doctrines — and not simply for their meaning, but for their significance'.[42] And courts are typically predisposed to favour religious majorities whose doctrines and practices are better understood.[43]

Conversely, as Goldstein has argued:

> [P]ositive religious questions, such as those concerning the content of religious beliefs or the importance of a religious practice within the context of a religion, do not call on courts to employ anything other than ordinary tools of judicial fact-finding and can be resolved through resort to traditional evidence, such as reliance on expert witnesses, treatises, and factual testimony.[44]

So Goldstein contends the issue is not whether courts may resolve religious questions but which questions they should resolve. Courts should not resolve normative questions about religion in the sense of determining the goodness or truth of religious beliefs or the efficacy of religious practices. This would indeed entail favouring particular religious doctrines and practices over others. However, it is not endorsement of a religion to determine its content or the centrality of particular doctrines or practices within that religion. It is simply a matter of articulating facts about that religion.[45] 'In other words, on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.'[46] In the following Parts, this article will focus on addressing concerns regarding the pragmatic rationale by exploring ways judicial incompetence can be overcome. Furthermore, as this article will indicate, addressing the pragmatic rationale will provide some insight into how to address the valid concerns raised by Helfand that relate to the principled rationale, along the lines indicated by Goldstein.[47]

40 Helfand, 'When Judges Are Theologians' (n 2) 281–3.

41 Ibid 283.

42 Ibid. It is worth noting that Helfand has advanced alternatives to assessing substantiality which avoid the religious questions doctrine: Michael A Helfand, 'Identifying Substantial Burdens' [2016] (4) *University of Illinois Law Review* 1771; Michael A Helfand, 'How to Limit Accommodations: Wrong Answers and Rights Answers' (2017) 5(1) *Journal of Law, Religion and State* 1.

43 Helfand, 'When Judges Are Theologians' (n 2) 284.

44 Goldstein (n 1) 502–3.

45 Ibid 501.

46 Ibid.

47 See, eg, ibid 540–50.

III RELIGIOUS QUESTIONS AND (SECULAR) JUDICIAL INCOMPETENCE

A *Expert Evidence and Judicial Competence*

It is well-recognised that judges evaluate expert testimony in a proceeding, and decide between conflicting expert testimony. For example, the Hon Geoffrey Davies, formerly of the Queensland Court of Appeal, once noted that expert opinion evidence is problematic because it is assumed that judges know how to understand and apply expertise in advanced areas when they decide legal disputes, when in fact they may not.[48] Particularly in the technically difficult and rapidly advancing areas of science and technology, the ability of judges (who are generally experts only in law) to understand and evaluate expert evidence, and the implications for legal outcomes, is a considerable challenge. This is known as 'judicial competence'.[49] The need to rely on expert evidence and the spectre of judicial competence to decide matters of esoteric fact is not unique to science and technology. As Foster notes in the case of religious questions, though lack of competence will always be a lurking issue, 'courts can accept expert evidence' to determine the 'meaning of particular [religious] concepts' and practices.[50] However, with religious questions this can be particularly difficult due to the epistemological problem, in conjunction with varied and interrelated sources of authority (including the complexities of understanding holy text, dictates of religious leaders/councils, and individual conscience) leading to diverse views and interpretations of doctrine and practice.

As Hatzis observes, '[e]ven among members of traditional, mainstream religions there are significant disagreements' as to orthodox religious doctrine, on specific matters of doctrine, and what requirements the religion imposes on adherents.[51] These have been debated and tuned over decades and centuries of theological debate. It is difficult to imagine how a court would choose between the conflicting expert evidence of different but equally eminent theological scholars to decide whether a particular belief or practice is essential to the Christian faith, for example.[52] It is a 'mistake' to invite judges to 'pronounce upon the correctness of

48 GL Davies, 'Court Appointed Experts' (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 89, 92–3.

49 See, eg, Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press, 2008); Sheila Jasanoff and Dorothy Nelkin, 'Science, Technology, and the Limits of Judicial Competence' (1982) 22(3) *Jurimetrics* 266; Richard B Katskee, 'Science, Intersubjective Validity, and Judicial Legitimacy' (2008) 73(3) *Brooklyn Law Review* 857; Lucas Bergkamp, 'Adjudicating Scientific Disputes in Climate Science: The Limits of Judicial Competence and the Risks of Taking Sides' (2015) 23(3) *Environmental Liability* 80.

50 Foster (n 15) 215. See also Bobbi Murphy, 'Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*' (2016) 40(2) *Melbourne University Law Review* 594, 616–17.

51 Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74(2) *Modern Law Review* 287, 296.

52 Ibid.

competing scriptural interpretations and use that assessment as the determining factor in the test for religious discrimination'.[53]

Courts often do refer to expert evidence to enable it to decide which persons, beliefs or practices are authentic from the perspective of the religion. One purpose is so the decision-maker can decide which experts these contested issues involve, and how authoritative they are. However, as mentioned earlier, major problems with this approach are how to identify relevant sources, and then how to decide between them. For example, a religion may have a simple single source, or they may refer to a number of related sources which have a particular hierarchical structure (and, even more vexing, this structure may be disagreed upon internally as well as externally). Due to such potential complexity and multiplicity of sources, there may be different schools of interpretation among different theologians. Given disagreement among theologians (who are likely to be relied upon as expert witnesses), the court will then have to decide between theologians as to what the 'official' doctrine or practice of the religion is.[54] This raises both the pragmatic and principled rationales (pragmatic, because the court arguably does not have the competence to make this decision, and principled, because this would arguably entangle the court in preferencing a particular version of religion).

There is no easy answer to the problem of establishing expertise and deciding between experts, especially where there is conflict between experts. Trial judges in particular are required to adjudicate expertise, but such judgments cannot be 'arbitrary'; they must occur within a 'rational framework'.[55] Judges themselves do not possess such expertise. Cole proposes the idea of the 'meta-expert' as the 'ad hoc reference community'[56] constituted to measure whether the claims and expertise of the purported expert are generally accepted by that expert's relevant discipline community.[57] In other words, these are 'experts able to evaluate the expert knowledge claims of other experts'.[58] However, this raises the problem of an infinite regress — what if the meta-experts disagree as to their evaluations of expertise? Must there be experts to evaluate the expertise of the meta-experts?[59]

Other scholars have more confidence in the ability of experts to assist in providing judges with the competence to decide religious questions. As Garnett puts it:

53 Ibid 297.

54 McCrudden (n 14) 97–8.

55 Simon A Cole, 'Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in *Frye* Jurisdictions' (2008) 9(2) *Minnesota Journal of Law, Science and Technology* 453, 454.

56 Ibid 458.

57 Ibid 453–8 (emphasis omitted).

58 Ibid 499. See, eg, Harry Collins and Robert Evans, *Rethinking Expertise* (University of Chicago Press, 2007).

59 See Harry Collins and Martin Weinel, 'Transmuted Expertise: How Technical Non-Experts Can Assess Experts and Expertise' (2011) 25(3) *Argumentation* 401, 408.

> [T]he fact that judges charged with deciding legal questions are usually unfamiliar with religious texts, doctrines, and traditions would not seem to require, as a principled matter, a strong hands-off rule. Judges answer hard questions, untangle complicated problems, and educate themselves about new fields, all the time. They hear testimony; they listen to experts; they consider arguments. That we do not think government officials may or should 'declare religious truth' does not mean — or, at least, it need not always mean — that they cannot take judicial notice of the fact that, say, ham-and-cheese sandwiches are not Kosher. A court that believes it can decide which rules and practices are, and are not, essential to the game of golf probably does not lack the ability merely to confirm, or take judicial notice of the fact, that the Roman Catholic Church teaches that 'Jesus of Nazareth … is the eternal Son of God made man.' Many 'religious' questions are hard, but not all of them are hard.[60]

We have already seen this view is shared by Goldstein. Despite Helfand's reservations, he also argues that the US Supreme Court's early jurisprudence actually accepted and engaged in the resolution of religious questions. When they chose not to, their reasoning was less to do with the modern religious questions doctrine and more to do with deferring to the right of a religious institution to resolve disputes internally under the First Amendment. Recognising this sheds light on an earlier legal framework for resolving religious questions.[61] There is good reason to think that the pragmatic rationale is overstated. For example,

> courts already adjudicate claims that turn on deeply complex matters, including technology, science, economics, medicine, and finance. Courts overcome such complexities by using standard fact-finding techniques, most notably by having the parties present expert testimony and evidence speaking to the contested issue.[62]

Furthermore, even if particular religious doctrines can be categorised as mystical or non-rational as distinct from other justiciable (rational) categories of knowledge (a questionable designation),[63] the court will only need to analyse pertinent facts regarding beliefs and practices, not the truth of those beliefs and practices. Courts often engage in this process of rationally relying on objective facts to make determinations regarding subjective behaviours or states of mind according to law, such as where intention is a fact in issue in a murder trial. This is not intrinsically different to what would be required where a religious question is raised.[64]

60 Richard W Garnett, 'A Hands-Off Approach to Religious Doctrine: What Are We Talking About?' (2009) 84(2) *Notre Dame Law Review* 837, 857–8 (emphasis omitted) (citations omitted).

61 Helfand, 'When Judges Are Theologians' (n 2) 276–9. See also Michael A Helfand, 'Litigating Religion' (2013) 93(2) *Boston University Law Review* 493. Cf Foster (n 15) who, as we saw earlier, argues that religious institutional autonomy is part of the principled rationale. Since I focus on the pragmatic rationale in this article, here I leave that question to one side.

62 Helfand, 'When Judges Are Theologians' (n 2) 279–80 (citations omitted).

63 See, eg, Goldstein (n 1) 536–8 and references contained there; Garnett (n 60) 855–7 and references contained there.

64 See Goldstein (n 1) 533–40; Garnett (n 60) 857–8. See also Christopher C Lund, 'Rethinking the "Religious-Question" Doctrine' (2014) 41 (Special Issue) *Pepperdine Law Review* 1013.

It seems there is a genuine scholarly impasse here. Some scholars argue that expert evidence and normal fact-finding techniques can be used by courts to answer religious questions. Others form the view that religion is uniquely complex, requiring greater levels of meta-expertise. I will return to this issue after I propose my more detailed framework for addressing the pragmatic rationale, and argue that application of the 'golden rule' in the context of an imaginative sympathy largely resolves the problem of expertise by circumventing it. For now, I turn to a second problem raised by the use of evidence to resolve religious questions.

B *The Problem of Secular Translation*

McCrudden notes that when courts interpret religion, they will often 'convert the religious language in which the religious believer or the religious group presents their case into a form more consistent with the courts' understanding of what would constitute acceptable reasons', which he terms as 'translation'.[65] This effectively articulates relevant interests and tells the believer what they mean in language that is consistent with secular or 'public reason'.[66] It addresses the epistemological question (or the pragmatic rationale) for the court by reformulating religious arguments as 'rational' arguments that judges are competent to evaluate and make decisions about.[67]

A classic example of secular translation provided by Habermas is the biblical idea of humanity being created in the image of God. The secular translation is the human being has inviolable dignity.[68] However, secular translation has been extensively critiqued in the context of political engagement, and the principles undergirding that critique apply equally to the judicial context.[69] Requiring translation in the process of political debate 'undermines democracy … by restricting the kind and content of contributions available to religious citizens'.[70] Laborde has observed that there may be no good secular reasons for a particular proposal, but there may be good religious reasons. An example is fundamental issues of life and death such as abortion or euthanasia which invoke the 'sanctity of all human life' as an argument.[71] According to Laborde, 'the secular ideal of

65 McCrudden (n 14) 98.

66 Ibid. Cf John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005).

67 McCrudden (n 14) 99.

68 Jürgen Habermas, 'Pre-Political Foundations of the Democratic Constitutional State?' in Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization: On Reason and Religion*, ed Florian Schuller, tr Brian McNeil (Ignatius Press, 2006) 45.

69 See, eg, Alex Deagon, 'The Name of God in a Constitution: Meaning, Democracy, and Political Solidarity' (2019) 8(3) *Oxford Journal of Law and Religion* 473, 478–82 ('The Name of God in a Constitution'). Cf Silje A Langvatn, Mattias Kumm and Wojciech Sadurski (eds), *Public Reason and Courts* (Cambridge University Press, 2020).

70 Deagon, 'The Name of God in a Constitution' (n 69) 480.

71 Cécile Laborde, 'Justificatory Secularism' in Gavin D'Costa et al (eds), *Religion in a Liberal State* (Cambridge University Press, 2013) 164, 180.

human dignity is perhaps not robust enough' to be a pure secular justification for preserving life.[72]

As I have argued previously:

> Indeed, is it even fully reasonable to argue for a religious position without relying fully on the religious doctrine? … even if people do not agree with the underlying theological concepts, they can rationally accept and implement the practice … as beneficial for society. If we were to divorce the [argument] from its theological context — making it a secular argument rather than a religious one — the argument would lose force and specificity.[73]

Hence,

> not all religious beliefs can be easily or meaningfully framed as secular values without also importing the relevant content of that religious belief. It may well be very onerous to require the ordinary religious citizen to reframe their religious conviction as a secular argument.[74]

A requirement for translation in this context severely restricts 'the ability of religious citizens to participate in the democratic process on their own terms',[75] and so mandated translation actually undermines the democratic contribution of religious citizens and limits their ability to appeal to transcendent principles.[76]

Schulz also questions the prospect of translation. If the 'reason' of religion is different from secular 'reason' (as seems to be assumed for translation to be conceivable) 'then religious beliefs could scarcely succeed in being translated into [secular] philosophical concepts'.[77] He continues:

> Religious experiences and decisions cannot be translated and transformed into universal formulas that might be applicable to all. There is a private sphere and unjustifiable (incommunicable) dimension of faith, which resists being grasped in the form of deductive concepts or conclusions. Religion is something that is deeply private, but this does not make it a merely private, socially irrelevant thing. … [Human] dignity is violated the moment someone pretends to seize, define, and possess another conceptually. Obviously this is because we experience ourselves as a conceptually ungraspable mystery, as an ineffable — opaque — reality. In this sense, the translation of the biblical idea of humanity being created in the image of God in

72 Ibid.

73 Alex Deagon, 'Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse' (2018) 41(3) *Harvard Journal of Law and Public Policy* 901, 914 (citations omitted) ('Liberal Secularism').

74 Ibid 917–18 (citations omitted).

75 Ibid 918.

76 Ibid 917–18.

77 Michael Schulz, 'The Existential and Semantic Truth of Religion in Jürgen Habermas's Political Philosophy and the Possibility of a Philosophy of Religion' (2017) 31(3) *Journal of Speculative Philosophy* 457, 462–3.

> the secular speech of the inviolable dignity of humanity takes on a central dimension of the opaque.[78]

In other words, there is a fundamental incoherence at the heart of the translation idea. Translation implies a different kind of language, but if the language is fundamentally different, then adequate translation is difficult and unlikely. Faith and religion are unique individual experiences and communal contributions that cannot be rigidly characterised using secular categories. Any translation attempt will almost inevitably neglect aspects of the religious contribution. Milbank agrees, criticising the Habermasian argument that 'religious claims can be "translated" into public terms' or 'norms governing fair communicative discourse' on the basis that 'few religious people will accept the adequacy of such translation, since it leaves the rational aspect of specifically religious content redundant and suggests that faith makes no difference at all to the shape of genuine human action'.[79] Moreover, if this kind of translation occurs, it results in a loss of transcendent ethical content shared by religions and non-religions alike (such as 'solidarity').[80] Such an approach is likely to restrict the autonomy of religious bodies and therefore religious individuals, silencing them because their public expression does not match up with the 'publicly acceptable' liberal language of natural and social statistical science.[81]

Applying this critique specifically to the judiciary, Hunter-Henin, using similar language to McCrudden, identifies an 'epistemological concern' as motivating a view which accommodates religious claims generously: 'the inability of liberal laws and courts to truly understand religious normative systems'.[82] Courts cannot fully grasp or understand the complexity of religious doctrine and practice due to its special transcendence and relation between God and creation.[83] This inability is also 'tainted by suspicions of illegitimacy',[84] and the recognition that the liberal system has been largely shaped by Christian theology and culture, and hence any framing of minority religious concerns in liberal or secular language would distort those concerns:[85]

78 Ibid 463.

79 John Milbank, 'What Lacks Is Feeling: Mediating Reason and Religion Today' in Gavin D'Costa et al (eds), *Religion in a Liberal State* (Cambridge University Press, 2013) 187, 208–9.

80 Ibid 209.

81 See John Milbank, 'The Decline of Religious Freedom and the Return of Religious Influence', *ABC News* (online, 14 March 2017) <https://www.abc.net.au/religion/the-decline-of-religious-freedom-and-the-return-of-religious-inf/10095982> ('The Decline of Religious Freedom').

82 Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Hart Publishing, 2020) 11.

83 Ibid, citing Michael W McConnell, 'Why Protect Religious Freedom?' (2013) 123(3) *Yale Law Journal* 770.

84 Hunter-Henin (n 82) 12.

85 Ibid.

> Against those liberals who would dissolve, disaggregate and dilute religious freedom into underlying secular values of liberty and equality, I argue that such an approach would not solve but just divert the epistemological problems associated with the category of religion and unduly undermine the importance of the religious self-definition of religious citizens.[86]

If the courts insist on only evaluating religious claims in the terms of secular argument, the religion 'is then faced with the task of resisting an unacceptable translation, thereby risking losing the court's sympathy', or submitting to a duty to translate by articulating their religious beliefs using public reason, even if they do not necessarily agree with it.[87] This imposes a considerable burden on religions which cannot effectively express their beliefs using the accepted discourse. It can 'force religious [groups] onto a terrain with which they are neither comfortable nor particularly expert', and where '[t]he ability to articulate competing interpretations of a particular religious tradition in language that comes closest to "public reason" affects the likelihood of success or failure', this can create significant inequities and disadvantages for religious parties.[88]

Harrison also criticises this kind of 'monolingual adjudication' which is 'inattentive to the actual arguments of religious groups, or else potentially fails to comprehend the seriousness of what is at stake'.[89] Judges need to understand a religion on its own terms to adjudicate a dispute, and failure to understand the 'internal life, beliefs, or practices of [a] religious body' can lead to problematic decisions like in *Cobaw*, where the Christian Brethren operating a campsite were deemed not to have a 'doctrine' on marriage because the trust in question 'did not include marriage within its creedal statements'.[90] Judges often view religious claims through the filter of public reason, with some expressing scepticism as to the need to understand the religious claimant in their own terms — instead, what is demanded is a secular judgment based on reasons accessible to all persons. Hence, rather than considering 'the diversity of arguments presented by claimants', they are 'subsumed' into the same 'abstract language' of secular reasons.[91] This means the 'real nature of the community's argument may be lost'.[92] The very religion-based reasons why a tension is experienced by a religious claimant is eliminated at the outset, and '[t]here is something deeply unsatisfying or else anaemic in this framing'.[93] '[T]he secular vocabulary within which public discourse is constrained to operate today is insufficient to convey [the] full set of

86 Ibid 14.

87 McCrudden (n 14) 99.

88 Ibid. This also explains the increasing religious litigation in the human rights context, where religious parties will resort to more generally acceptable human rights principles: at 100.

89 Joel Harrison, 'Towards Re-Thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93(9) *Australian Law Journal* 734, 739.

90 Ibid, citing *Cobaw* (n 5) 306 [202], 324–5 [276]–[279] (Maxwell P).

91 Harrison (n 89) 740.

92 Ibid.

93 Ibid.

normative convictions and commitments.'[94] For this reason religious communities are wary of adjudication by secular courts, for their claims must be 'reformulated and constrained' — emphasising the disadvantage religious parties can face.[95]

Given this disadvantage in conjunction with the problem of expert evidence, and the increasing prevalence of religious litigation, there is a need to articulate a new framework for judicial competence which can address these problems. Such a framework would have the effect of undermining the pragmatic rationale for the religious questions doctrine, and would also point to a method for responding to the principled rationale.

IV A FRAMEWORK FOR CREATING JUDICIAL COMPETENCE

A *The Golden Rule*

As Venter identifies, '[t]he adjudication of religious disputes … is both unavoidable and challenging'.[96] Since judges are not theologians or religious scholars, the quality of adjudication of these matters

> will not just depend on the judges' *judicial* proficiency, but crucially also on their willingness to consciously admit (at least in their own thinking) the probable impact of their own religious convictions and worldview on their adjudicatory considerations — and then their ability to deal judiciously with their personal predisposition.[97]

For progress to be made, Venter therefore advocates for judges to reject the 'fashionable but deficient position of neutrality', and instead adopt a position of 'honest objectivity'.[98] Neutrality implies disinterest or disengagement, and that stance renders courts impotent to resolve the often emotive and passionate issues which arise in religious disputes. Furthermore, neutrality is often used as a veil for secularism, which 'usually manifests itself … as anti- or counter-religion. Ironically, secularism represents a dogmatic preference, if not prejudice, against organised religion.'[99] This is another manifestation of the problem of secular translation and as such this sort of neutrality is not conducive to a proper resolution of religious disputes. Venter instead characterises 'objectivity' as a 'moral perspective which is fair to all concerned, but is simultaneously as free as possible

94 Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010) 39.

95 Harrison (n 89) 740. To resolve this, Harrison suggests bypassing the courts as much as possible and having a richer debate through the democratic process with enacted changes better reflecting religious perspectives: at 742–6. While that is in principle a good option, it does not contribute to resolving the problem for this article, which is concerned with improving judicial competence. Even if more religiously inclusive legislation is passed, it will need to be interpreted by courts, so competence remains an important issue.

96 Venter (n 3) 307.

97 Ibid 304 (emphasis in original).

98 Ibid 307. See also at 305–7.

99 Ibid 306.

from the subjective religious or ontological preferences of the adjudicator'.[100] Objectivity involves the judge confronting and avoiding the exercise of their personal preferences in making determinations, while also acknowledging that all relevant parties have profound views and interpretations in matters of religion.[101]

More broadly, Venter claims an objective standard is also required:

> [A] universal standard, established over centuries in many cultures, philosophies and religions, does exist in the form of what some call 'the golden rule', or more concretely, the principle of reciprocity. This golden rule is expressed as the injunction to treat others as you want them to treat you, and reflects the same quality of intuitive rectitude as the general acknowledgment that compassion is good, and that dishonesty, theft and murder are wrong.[102]

For example, in a dispute between religions where a judge personally adhered more closely to one of the religions, a 'neutral' approach would not only be disingenuous, but also imply disinterest in the justice of the outcome. However, an objective approach allows the judge to acknowledge their personal views while also causing them to be sensitive to the fairness of the outcome, such that the judge could engage in their usual balanced application of the law with the golden rule in mind — specifically, that it would not be fair if a personal bias interfered with the proper application of the law to the dispute.[103] As Duxbury observes, the golden rule is best described 'as a principle of fairness', and 'requires fairness to others — treatment of others modeled on how one would have them treat oneself'.[104] Of course, this does not necessarily mean equivalent treatment, though any differential treatment would require justification.[105] By making judges more aware of their own prejudices (so they can explicitly guard against them), and sensitive to applying the law in a way which is fair and reciprocally acceptable to religious parties, the golden rule can assist with rendering judges competent to decide religious questions in public contexts.

B *Religious Perspectives and Imaginative Sympathy*

But this raises the question of what is fair and reciprocally acceptable to religious parties. As explored earlier, the typical secular translation approach can misrepresent the arguments of religious claimants and disadvantage them. So

100 Ibid.

101 Ibid. The notion of objectivity articulated here, and in jurisprudence more broadly, is open to the standard critique by various critical theorists that the ideal of objectivity is illusory. In this article I assume a typical 'liberal legal' notion of objectivity which is in principle achievable: see, eg, Kent Greenawalt, *Law and Objectivity* (Oxford University Press, 1992).

102 Venter (n 3) 306 (citations omitted). See, eg, Jeffrey Wattles, *The Golden Rule* (Oxford University Press, 1996).

103 See Venter (n 3) 306–7.

104 Neil Duxbury, 'Golden Rule Reasoning, Moral Judgment, and Law' (2009) 84(4) *Notre Dame Law Review* 1529, 1543.

105 Ibid.

McCrudden proposes an additional solution which involves 'imaginative sympathy with the religious internal point of view' to produce a genuine dialogue which is mutually beneficial.[106] In this context McCrudden helpfully distinguishes between the 'external' and 'internal' approaches to interpretation. Where the external approach focuses on objective observation relying on factual evidence, the internal approach engages 'seriously the belief systems of religious believers themselves, and the significance of those beliefs, from their own (internal) perspective. This involves an attempt to understand rather than simply to observe'.[107] A sophisticated approach requires both the external and internal perspectives.[108] Importantly, the internal or sympathetic approach does not require acceptance of the beliefs in question, merely the appreciation and understanding of the guiding standards as authoritative for that religion, religious body/organisation, or individual religious believer.[109]

An imaginative sympathy in this sense is not only consistent with Venter's approach, but almost seems to entail and enrich it. Objectivity within the framework of the golden rule requires that the judge consciously consider the dispute from the perspective of the parties, putting aside their own biases and really engaging with what the parties desire, and treating the parties as the judge would like to be treated:

> Claimants are entitled to expect judges will be willing and able to appreciate and understand the group, its ways and its practices, in terms of the group's own standards. This takes imagination and religious literacy, rather than … imposing an external view.[110]

Applying the golden rule and an imaginative sympathy also provides a solution to the problem of meta-expertise. Sympathy with the religious perspective allows the judge to put themselves in the place of the parties, so as to better understand their religious perspective such that they can properly resolve the dispute. This is consistent with a recommendation by Collins and Weinel for the use of 'social expertise' to assist with determining expertise, which is 'sustained social contact with the group that has the tacit knowledge'.[111]

Furthermore, in many situations this framework will actually allow the judge to accept the testimony of the religious party regarding their own beliefs and practices (with supporting evidence) as the starting point, rather than trying to evaluate the facts about the religion through 'expertise'. It reflects the golden rule specifically, for anyone who belongs to a particular group or ideology would object to the

106 McCrudden (n 14) xii. For details, see at 138–49.

107 Ibid 92–3.

108 Ibid 93.

109 Ibid.

110 Nicholas Aroney, Joel Harrison and Paul Babie, 'Religious Freedom under the Victorian Charter of Rights' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 120, 130.

111 Collins and Weinel (n 59) 402.

condescending treatment of having an 'outsider' dictate what their beliefs and practices are. It circumvents the debate surrounding the efficacy of expertise on religious questions by having the court accept the evidence of the party calling the expert witness that the witness is an expert, and then having the court accept the expert's testimony about the doctrines or practices of that particular religion. The judge ought to ultimately rely on the testimony of the religious party for the facts about the religion, not what the opposing party says about the religion from an external point of view. The judge then takes this as a basis for the decision they need to make in relation to the particular religious question.[112] This is not to say the 'external view' is irrelevant; courts will still need to be informed in regard to the basic empirical facts of a religion's relevant beliefs and practices.[113] But where there is a genuine dispute, the court should have recourse to the internal perspective of the religion as the determining factor. This approach is an improvement upon secular translation because it does not simply attempt to transform religious concepts and terms into a secular language — which, as discussed above, is very difficult and likely to misrepresent religious claims. Rather, an imaginative sympathy attempts to understand religious concepts and terms in their own framework, providing a more comprehensive perspective on the interests at stake.

The importance of imaginative sympathy or understanding religion is that it helps humans to develop a greater self-understanding about life and its goods.[114] 'An openness to different world-views is a condition for self-understanding.'[115] McCrudden contends that our aim should be to engage in a 'genuine dialogue' between law and religion.[116] And as Fowler observes:

> [I]t is the nature of any conversation occasioning mutual respect that the participants share the confidence that their respective self-conceptions are comprehended by the other. Artificial impositions of constructed belief risk undermining respect for the law precisely because they prevent the law from communicating the rationale for limitations in a manner that is comprehensible to the believer.[117]

An example is reference to human dignity from a religious perspective (as opposed to a purely secularised reference that deflates the religious context for this reference), which 'enables a degree of commensurability to be identified between the values' of religious and non-religious claimants.[118] Rather than simply

112 See, eg, Richard A Posner, *How Judges Think* (Harvard University Press, 2008).

113 This would address the potential danger of bias and self-interest in the self-reporting of a party about their own religious beliefs. Apart from the external view providing an indication of where the self-report is obviously and indisputably wrong (eg 'I am an atheist Christian'), an external view also provides scope for an empirical analysis of the party's usual beliefs, statements and practices to exclude fraud. So while we accept the word of the party concerned, we should also seek corroborating evidence where they may have motive to lie.

114 McCrudden (n 14) 139–40.

115 Ibid 140.

116 Ibid.

117 Fowler (n 11) 224.

118 McCrudden (n 14) 144.

excluding particular religious perspectives outright, 'respectful attention is given to the claims of both parties' in their own terms.[119] This can enable the rights and interests of both parties to be preserved to the maximum extent possible; properly considering the weight of a religious claim can lead, in many circumstances, to that claim being upheld without an adverse effect on the rights or freedoms of the other party.[120]

Similarly, Milbank poses a 'religious toleration' framework which recognises that religious devotion must be free, and our mutual imperfection means we may even be able to affirm the validity and complementary nature of any (in our view) error.[121] The 'judgment of affinity' on the part of different religious cultures 'permits a necessarily limited and yet much more substantively real allowance of the other religion's existence' and self-understanding.[122] Other examples of this kind of imaginative sympathy include recognising that religious faith necessarily 'informs external actions' and cannot be limited to the private sphere,[123] acknowledging that '[r]eligious freedom is a basic right' equal to other rights, and the very idea of it is to protect religious belief and practice 'from any prevailing orthodoxy that may oppose it' (rather than to compel subservience in the event of conflict),[124] and realising the weight of religious objections and trying to find reasonable accommodations.[125] More broadly, many religious groups would emphasise the following observation by Cole Durham:

> Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact, religion virtually always has a communal dimension, and religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.[126]

This approach for both religious individuals and religious groups is sympathetic to the religious internal point of view, trying as much as possible to fairly accommodate the religious perspective to achieve some kind of reasonable balance or consideration of difference.[127] It means the court can obtain competence by

119 Ibid.

120 See, eg, ibid 146–7.

121 Milbank, 'The Decline of Religious Freedom' (n 81).

122 Ibid.

123 Deagon, 'Liberal Secularism' (n 73) 929.

124 Roger Trigg, *Equality, Freedom, and Religion* (Oxford University Press, 2012) 38–9.

125 Ibid 9; Hans-Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom: To Be Fully Human* (Routledge, 2017) 98–9.

126 W Cole Durham Jr, 'The Right to Autonomy in Religious Affairs: A Comparative View' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, 2001) 683, 683.

127 See also Alex Deagon, 'Equal Voice Liberalism and Free Public Religion: Some Legal Implications' in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia: A New Terra Nullius?* (Shepherd Street Press, 2019) 292, 314–15, 320–2, 324–5.

simply relying on the evidence provided by the religious party as to the nature of the doctrine or practice in question, rather than becoming embroiled in messy disputes regarding expertise and external debate about the religion. Of course, this does not amount to the court simply accepting the religious party's judgment regarding the ultimate decision. That power still resides with the court, but the court can now focus on its determination of respective rights and interests with a competent understanding of the religious perspectives.

V APPLYING THE FRAMEWORK: *COBAW* AND *WESLEY MISSION*

This part aims to apply the framework proposed above to two specific case scenarios where religious questions were involved, arguing that the approach in *Wesley Mission* (New South Wales) ('NSW') and the dissent in *Cobaw* (Victoria) are examples of a judicial competence bolstered by the golden rule and imaginative sympathy. Conversely, the majority in *Cobaw* failed to properly engage with the claims of the religious party in a fair and reciprocally acceptable way. Aroney identifies that despite the 'subtly dissimilar' facts and law in these cases, the approaches to judicial interpretation were 'sharply contrasting'.[128] The Victorian legislation provided an anti-discrimination exception for the action of a body 'established for religious purposes' which 'conforms with' the doctrine of the religion or is necessary to avoid injury to the religious 'sensitivities' of adherents, while the NSW legislation provided a narrower anti-discrimination exemption for action done by a body 'established to propagate religion' which 'conforms to' the doctrine of the religion or is necessary to avoid injury to the religious 'susceptibilities' of adherents.[129]

In *Cobaw*, the Court imposed 'its views on religious doctrine onto a religious body for the purposes of enforcing a "public law" (discrimination) obligation'.[130] The complainant, who ran a project designed to provide support services to same-sex attracted people, tried to make a booking for a campsite generally available to community groups which was run by Christian Youth Camps ('CYC') (connected to the Christian Brethren). The booking was refused on the basis that it would constitute endorsement of behaviour inconsistent with the Christian Bible, and the complainant sued for sexual orientation discrimination. One of the issues was whether the view that sexual activity should only occur in the context of a heterosexual marriage constituted a core doctrine of the Christian Brethren. The Tribunal decided that it was not by simply relying on one (liberal) expert over another (conservative) expert on a 'spurious basis',[131] and consequently held for

128 Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) *Australian Law Journal* 708, 716.

129 Ibid, quoting *Equal Opportunity Act 1995* (Vic) s 75(2) and *Anti-Discrimination Act 1977* (NSW) s 56(d).

130 See Foster (n 15) 197.

131 Ibid 199.

the complainant.[132] However, applying the golden rule, it is 'not appropriate for the secular court to simply prefer one witness over another' on a religious question without cogent reasons based on relevant expertise and context.[133] A better approach is to accept the views of senior officials or scholars connected with the relevant religious body and who are recognised by that body as having authority to decide or resolve doctrinal disputes.[134] On appeal to the Victorian Court of Appeal, a majority upheld the Tribunal's decision on the basis that the Tribunal was correct to decide the view that homosexuality is contrary to God's will was not a 'core doctrine' of the Christian Brethren.[135] The leading judgment by Maxwell P referred to the fact that there is some variability in belief as to how literally the Bible should be applied with regard to particular passages.[136] It is problematic that a 'County Court Judge' had to 'decide what constitutes the core doctrines of Christianity',[137] and the 'narrow' approach adopted by the Tribunal and the Court of Appeal is 'not appropriate in dealing with a broad internationally recognised human right like "freedom of religion"'.[138]

This 'narrow' and 'restrictive' approach, which belies an imaginative sympathy with the internal religious view of CYC, was demonstrated in three specific and distinct ways.[139] First, the majority held that for the exemptions to be available, the purposes of the organisation must be 'directly and immediately religious'; that the camp operator was motivated by religion and ran a deeply spiritual camping environment consistent with his religious convictions was not sufficient to overturn the view that camping is essentially 'secular' and 'commercial'.[140] Second, in relation to the requirement that the action conform to the doctrines of the religion, Maxwell P held that the relevant doctrinal beliefs of the organisation concerned only the behaviour of believers in private and had no application for public or commercial contexts, even though the profits were returned to the site for religious and charitable purposes.[141] As Aroney observes, 'the content and implications of the religion were ultimately determined by the Court, even though its judgment differed markedly from the religious believers' own understanding of … their religion'.[142] Finally, in relation to the requirement that the act be necessary to avoid injury to the religious sensitivities of adherents, Maxwell P argued an

132 Ibid 198–200.

133 Ibid 210.

134 Ibid.

135 *Cobaw* (n 5). See ibid 200–1.

136 *Cobaw* (n 5) 325 [278]–[279].

137 Foster (n 15) 199.

138 Ibid 201.

139 Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (n 128) 717. See also Aroney, Harrison and Babie (n 110).

140 *Cobaw* (n 5) 315 [233], 317–18 [246] (Maxwell P).

141 Ibid 316 [237], 325–7 [280]–[290].

142 Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (n 128) 718, citing ibid 323–5 [274]–[279] (Maxwell P).

objective test must apply and it is not sufficient that the camp owner held a subjective view to the contrary.[143] Perversely, '[a]lthough those who were running the campsite considered that their religion required them to refuse the booking, the Court considered that they were not religiously obliged to do so'.[144]

Not only is it questionable whether the relevant judges were truly 'objective' in the sense of applying the golden rule (because the Tribunal in particular preferred a liberal expert over a conservative one without any solid reasons), they certainly did not adopt an imaginative sympathy with the religious perspective in accordance with the principle of reciprocity. This failure occurred in the sense that it is not unreasonable to expect a Christian group running an organisation according to Christian principles to not engage in or provide services which contradict those principles — just as it would not be unreasonable for another group with certain ethical commitments to refuse to engage with or provide services to persons or groups which contradict those commitments.[145] The majority also made findings about the doctrine and practice of CYC (as an extension of the Christian Brethren) which flatly contradicted CYC's own expressed views, even though those views were supported by relevant evidence and expertise. This also indicates a lack of imaginative sympathy.

However, Redlich JA of the Victorian Court of Appeal in *Cobaw* provides an excellent model of the proposed framework in dissent by assuming a position of objectivity as articulated by Venter and demonstrating imaginative sympathy with the religious organisation. He begins by acknowledging that the Tribunal 'was neither equipped nor required to evaluate [CYC's] moral calculus'; this should have been simply accepted by the Court.[146] He also notes there was a 'consistent uniform expression of belief by all of the members of the Christian Brethren who testified before the Tribunal, including those who occupied positions within CYC, which permitted the conclusion that their beliefs were those of CYC'.[147] Redlich JA identified that the content of a doctrine will to some extent be obscure to those who do not subscribe to that belief system, and often will not include specific direction on how it is to be applied in practice.[148] Thus Redlich JA acknowledges the consistent testimony of the religious party and does not impose an external appraisal. He fairly relies on the religious group as best placed to determine the content and requirements of their doctrine. For Redlich JA, this avoided either implicitly labelling a religious applicant as a hypocrite for making a false claim under the guise of religion, or finding that the religious party had an inferior

143 *Cobaw* (n 5) 328 [292].

144 Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (n 128) 718, citing ibid 328 [292] (Maxwell P).

145 See Alex Deagon, 'Religious Schools, Religious Vendors and Refusing Services after Ruddock: Diversity or Discrimination?' (2019) 93(9) *Australian Law Journal* 766, 772, 775.

146 *Cobaw* (n 5) 392 [526].

147 Ibid 379 [480].

148 Ibid 391 [521], [523].

understanding of their own deeply held beliefs — applying the golden rule by treating the religious party as any equivalent party would like to be treated.[149]

The dissenting judgment by Redlich JA demonstrates a deep, sympathetic engagement with the religious disposition and the particular religious principles at play. 'The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much part of their religion as the belief itself.'[150] Redlich JA continues:

> Religious faith is a matter of personal conscience and of consistency with the canons of conduct derived from the person's religious belief. … Once [CYC] became aware that the particular purpose for which the campsite was to be used was contrary to their religious beliefs or principles, they were compelled by those beliefs to refuse to allow their camp site to facilitate such a purpose.[151]

Redlich JA therefore provides a persuasive argument that if a purpose for using the campsite was inconsistent with the content of the Christian Brethren's doctrine (which it was, according to the evidence), then it 'would have been necessary for [CYC] to refuse the use of their facility for such purposes'.[152] This is a function of their amply demonstrated and deeply held belief regarding the function of their campsite business.[153]

On the issue of whether the function of the campsite business was strictly secular and commercial, Redlich JA referred to extensive academic literature demonstrating that religious belief and practice extends to a wide range of ostensibly 'profane' activities, rendering them intrinsically religious:

> [A]ll of life is inspired by … faith and belief. The most mundane of human behaviours can be 'spiritualized' and take on a religious connotation. … On this view there is no activity which is not generated by one's obedience (or disobedience) to God. Countless schools, hospitals, orphanages and shelters have been run by religious organizations as part of their religious mission. Running a café, gymnasium or bookshop could equally be part of one's religious calling.[154]

The 'vocation of the business person' can be regarded as a sacred calling in terms of the purpose and functioning of that business.[155] As Aroney insightfully provides:

149 Ibid 391–2 [523], quoting Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 164.

150 *Cobaw* (n 5) 403 [560].

151 Ibid 406 [570].

152 Ibid 406 [571].

153 Ibid 406 [570]–[571].

154 Ibid 403–4 [562], quoting Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 149) 155.

155 *Cobaw* (n 5) 404 [563], quoting Pontifical Council for Justice and Peace, *Vocation of the Business Leader: A Reflection* (2012) 5.

> [S]ome people who regard themselves as religious nonetheless tend to regard their religion as one aspect of their lives among many; others see their religion as definitive of their whole lives, so that even the most mundane activities are seen in religious terms. Such people frequently gather together, not only for narrowly 'religious' activities such as prayer or scriptural study, but also for what might be described as social and cultural activities, such participation in games and sports, or the provision of educational, medical or charitable services. For many such people, such activities are deeply religious.[156]

So Redlich JA concludes that the provision in question

> does not confine the right to manifest religious beliefs to those areas of activity intimately linked to private religious worship and practice. The legislature intended that it operate in the commercial sphere. … which permits a person's faith to influence them in their conduct in both private and secular and public life.[157]

The analysis by Redlich JA comprehensively and fairly acknowledges the religious perspective by exploring how the religious believer themselves perceive the doctrines and obligations in question, and the extent to which the believer perceives these obligations extending to public contexts. This perfectly exemplifies the framework of objectivity and imaginative sympathy, providing a powerful model for how a secular court can be competent to understand and evaluate religious questions by accepting the religious perspective on those questions, without becoming entangled in complex debates about expertise or simply following the religious perspective on the outcome of the broader case.

The *Wesley Mission* case also provides a better example than the majority in *Cobaw*.[158] In this case the complainants, who were a same-sex couple, had applied to the Wesley Mission ('the Mission') to become foster carers for children in need (who generally provided this service). The Mission refused the application on the basis that the couple were not eligible under the Mission's guidelines, which designated homosexual couples as unsuitable foster parents on religious grounds. The guidelines assumed the traditional Christian view of marriage as the best environment for raising children. The Tribunal held that discrimination had occurred and the Mission could not rely on the religious exemption because a preference for traditional marriage was not a doctrine of the Christian church. They relied on expert evidence to the effect that there was theological disagreement on the point (the Uniting Church leadership, under which Wesley Mission operated, took a more liberal approach, but the Wesley Mission is more conservative and was sometimes at odds with the broader leadership of the church).[159] On appeal, the Tribunal Appeal Panel held that the Tribunal had 'misdirected itself by

156 Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 161 n 46.

157 *Cobaw* (n 5) 400 [550], citing Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' (2011) 34(1) *University of New South Wales Law Journal* 281.

158 *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

159 Foster (n 15) 215–16, citing ibid.

requiring that a doctrine be uniformly accepted across the whole of "Christendom" before it could "count" for the purposes of [the exemption]'.[160] This decision was upheld by the NSW Court of Appeal.[161]

The matter returned to the Appeal Panel on the merits, where the Panel concluded that the word 'doctrine' in the religious exemption was broad enough to include not just formal doctrine as might be found in a creed, but also what is usually taught or advocated by a religious body, including religious and moral principles.[162] Evidence by a leading Reverend of the Wesleyan church connected with the Mission was sufficient to establish that enabling provision of foster care services by a homosexual couple 'would be contrary to a fundamental commitment of the organisation to Biblical values'.[163] This was enough to satisfy the exemption.[164] As Foster notes:

> Here, then, the decision-maker was prepared to accept evidence focussed on the specific religious commitments of the organisation involved … rather than coming to a broader (and inevitably controversial) decision about the relevant approach of the whole Christian tradition.[165]

Hence, the NSW Court of Appeal in *Wesley Mission* adopted a 'more generous' approach which 'required a focus on the religious doctrines of the particular body established to propagate the religion' (the doctrines of the Methodist Church derived from John Wesley) rather than 'the recognised beliefs of Christianity as a whole or the official doctrines of the Uniting Church as an entire denomination'.[166] A key distinguishing indicator of competence seems to be the weight afforded to the religious organisation's own understanding of its doctrines and practice, and whether the court will accept that or substitute its own interpretation.[167]

The approach of the Tribunal at first instance had the same problems as the decision-makers in *Cobaw*, but the approach of the Appeal Panel and NSW Court of Appeal is a more objective approach in accordance with the golden rule because it enables the organisation to provide their perspective in their own terms, does not arbitrarily prefer experts in a way that undermines the religious position of the organisation, and treats the organisation as any other organisation with religious, moral and ethical commitments which inform their behaviour would expect to be

160 Foster (n 15) 216. See *Members of the Board of the Wesley Mission Council v OV and OW [No 2]* [2009] NSWADTAP 57.

161 *Wesley Mission* (n 6).

162 Foster (n 15) 217, citing *OW & OV v Members of the Board of the Wesley Mission Council* (n 158) [32]–[33] (Patten DP, Member Hayes and Member Schneeweiss).

163 Foster (n 15) 217.

164 Ibid.

165 Ibid.

166 Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (n 128) 717, citing *Wesley Mission* (n 6) 617 [35] (Basten JA and Handley AJA).

167 Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (n 128) 719.

treated.[168] A framework for judicial competence which relies on the golden rule and imaginative sympathy therefore dictates that 'a generous approach is to be maintained in the exercise of recognising belief', which permits (for the specific example of religious institutions) 'the maximum scope to define their own doctrine and to effectuate that doctrine' by preferring employees who adhere to the character of the institution.[169] Assertions by the institution that it is religious, that its employees ought to be so religious, and that particular activities are 'religious' for the purposes of the institution should be accepted (subject to the basic requirements for evidence of sincerity and so forth).[170] A claim should not be defeated just because there are diverse views among those holding to the religion. Consistent with the approach in *Wesley Mission*, 'the enquiry is to be directed to the belief of the religious body', and this may be evidenced by experts, or more preferably, by the body itself.[171] 'The recognition of the actual self-conception at the stage of the identification of the belief avoids the accusation of courts having a tin ear with regard to religious belief, and, most importantly, permits meaningful exchange between the State and religious institutions.'[172] It provides confidence that judges can exhibit competence to adjudicate religious questions through applying the golden rule and imaginative sympathy, while simultaneously avoiding accusations of favouring particular religious views over others by simply accepting the respective views of religious parties as valid and applying the law on that basis.

VI CONCLUSION

The pragmatic and principled rationales are persuasive reasons for the religious questions doctrine. However, in an environment of increasing religious litigation and other litigation requiring the resolution of religious questions, the doctrine is no longer tenable. This does not itself render the rationales insubstantial, which means they ought to be addressed so religious questions can be properly and fairly resolved by courts. This article has proposed a framework to provide judges with the competence to resolve religious questions, addressing the pragmatic rationale. When judges objectively acknowledge their own interests and biases, it puts them in a better position to understand the interests at stake without allowing their own perspectives to unfairly dictate the outcome. An imaginative sympathy where the judge perceives the interests from the internal point of view of the religion also

168 Foster correctly observes that this could be dangerous because it may allow minority religious positions (eg a 'white supremacy' based on a misreading of the Bible) to be protected by such exemptions. However, this can be checked by a court being able to confirm that a purported 'religious' view is not a sham through testing the sincerity of the belief through evidence — and, in any case, religious freedom is not unlimited and cannot always be successfully invoked to justify what we might categorise as morally objectionable behaviour. That is a separate debate: Foster (n 15) 217–18.

169 Fowler (n 11) 226.

170 Ibid 226–7.

171 Ibid 227.

172 Ibid.

enables the judge to understand the interests at stake so they can apply the 'golden rule' by treating a religion as they would like to be treated (for example, accepting the religion's own articulation of its doctrines and practices as supported by evidence).

Imposing a 'neutral' perspective actually secularises and constrains the legal arguments, and in so doing, actually privileges a particular secular liberal (metaphysical/religious) view which ironically reinforces the principled rationale. Conversely, the proposed framework addresses the principled rationale not by privileging religion, but by actually understanding the religion from its own perspective to inform decision-making. Responding to the rationales for the religious questions doctrine makes limitation of the doctrine more theoretically possible, which is particularly important given an increasing volume of public litigation involving decisions on religious questions. The proposed framework provides a justification for courts to be appropriately engaged in resolving disputes which involve the intersection of law and religion, rather than courts abdicating their legal role and leaving parties without an acceptable outcome or remedy.