

TOWARDS A RESPONSIVE LAW PARADIGM FOR FAITH WORK

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This article explores the private law and employment status of faith workers. Although faith workers generally lack statutory employment rights enjoyed by the majority of Australian workers, judicial and bureaucratic responses to this lacuna leave much to be desired. The article sets out a theoretical framework for understanding the character and historical dimensions of faith workers' employment situation.

Drawing on the work of Philip Selznick, it calls for a 'responsive law' approach to remedy the problem. It also surveys recent developments in the United Kingdom which could provide guidance for Australian policy and legal initiatives.

I INTRODUCTION

The broad aim of this article is to more fully understand a seemingly intractable problem that has troubled jurists concerned with the distinct demarcation of power between church and State: the private law and employment status of faith workers. Judges and regulators continue to encounter the often institutionalised lack of access for many faith workers to statutory employment rights enjoyed by most Australian workers. However, bureaucratic and judicial responses to the problem remain tenuous and inconsistent. This article will, firstly, suggest an appropriate theoretical framework within which to comprehend the nature and historical development of this issue. Secondly, it will propose a 'responsive law' approach to exploring suitable regulatory and judicial solutions.¹ It will also highlight recent developments in the UK as a paradigm for the Australian context.

It is necessary at the outset to clarify basic terms and concepts. Access to statutory rights in employment is understood to mean qualification for a range of employee entitlements that are mandated by statute and commonly predicated on proof of

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These aims and proposals are seen as consistent with the broad thrust of the contemporary policy imperatives of 'social inclusion'. See the *Social Inclusion Principles for Australia* and the *Compendium of Social Inclusion Indicators* issued by the Commonwealth Government's Australian Social Inclusion Board.

employee status.² Faith workers are understood to be ‘the professional or ordained personnel [that] religious institutions commission to propagate religious faith and belief to adherents of religions’.³ The term ‘faith workers’ in this article is generally coterminous with the more common expressions ‘clergy’, ‘ministers of religion’ and ‘clerics’.⁴ The ‘responsive law’ framework refers to the approach advanced generally by the work of Philip Selznick,⁵ with particular reference to the developmental model of law in society outlined in his 1978 study *Law and Society in Transition: Toward Responsive Law*.⁶

In what way is faith work relevant to the broad theme of ‘Law, Religion and Social Inclusion’? The legal and employment status of faith workers has been a recurring topic in legal literature, with most of the analysis to date focusing on the question of whether they are employees, generally a precondition of the statutory entitlements referred to above. For a very long time the answer to that threshold question in common law jurisdictions has consistently been that they are not, and that their work is somehow different because it deals with spiritual matters. It has long been considered that their obligations are grounded in conscience rather than contract and that their ordination should not be equated with the formation of a contract, whether one of employment or otherwise, notwithstanding their receipt of remuneration or other benefits for the discharge of their obligations.⁷ But in recent

² See the National Employment Standards released by the Commonwealth in June 2008 (maximum weekly hours; requests for flexible working arrangements; parental leave and related entitlements; annual leave; personal/carer’s leave and compassionate leave; community service leave; long service leave; public holidays; notice of termination and redundancy pay; written statement of workplace rights).

³ Simon Fisher, ‘Clergy confidentiality and privileges’ in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (2005). This corresponds to the liberal and inclusive interpretation of ‘clergy’ adopted by the Federal Court of Australia in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 195 (Pincus J).

⁴ By using the terms ‘faith work’ and ‘faith workers’, the aim is to focus on the issue of legal status as an incident of the work that is performed, rather than on any particular position that is held, or title that may be enjoyed, within religious organisations. They are also culture-neutral and inclusive.

⁵ Philip Selznick (1919 -), BSS, City College of New York (1938), MA, Columbia University (1943), PhD, Columbia University (1947), Dr Jur hc, (Utrecht) (1951), Professor of Law and Sociology Emeritus, at the University of California, Berkeley. Among his most important publications are *Tennessee Valley Authority and the Grass Roots: A Study in the Sociology of Formal Organization* (1949); *Leadership in Administration* (1957); *Law, Society and Industrial Justice* (1969); *Law and Society in Transition: Toward Responsive Law* (1978); and *The Moral Commonwealth* (2002). See Robert Kagan, Martin Krygier, Kenneth Winston (eds) *Legality and Community: On the Intellectual Legacy of Philip Selznick* (2002).

⁶ Philip Selznick (with Philippe Nonet), *Law and Society in Transition: Toward Responsive Law* (1978).

⁷ See cases such as *In re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563; *Re Employment of Ministers of the United Methodist Church* (1912) 107 LT 143; *Scottish Insurance Commissioners v Paul* [1914] SC 16; *Rogers v Booth* [1937] 2 All ER 751; *President of the Methodist Conference v Parfitt* [1984] QB 368; *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309.

decades a number of courts in Britain, Australia and elsewhere have granted relief to faith workers in actions brought on the basis of breach of contract or infringement of statutory employment rights.⁸ This has led to the supposition in some cases that the relationship between a faith worker and a religious organisation may be seen as contractual if the factual matrix is supportive. In response to these developments, there have been calls to declare faith workers employees and even to regulate their status, conditions of work and benefits of service in ways identical or comparable to all workers, regardless of industry, trade or profession.⁹ In Britain, a recent government initiative signalled a move to that end, in the context of legislation for the benefit of ‘atypical’ workers.¹⁰ The British developments are likely to provide a backdrop for future Australian governments, raising the potential for an arguably inappropriate ‘command and control’ regulatory approach to this important issue. Many religious organisations would argue that such an approach risks damaging the fabric of the work conducted by faith workers and the fundamental nature of their relationship with their church. It risks degrading the crucial aspects of faith, belief and attachment upon which their religions depend to dogma, and could invite secular courts to pronounce on the value of such beliefs. It also has important implications for churches facing vicarious liability claims for the negligence or allegedly criminal conduct of their ordained personnel.

On the other hand, many faith workers point to the frequent and serious denials of justice and equity that have arisen when they are left with no entitlements upon dismissal or retirement, or when they are left to the mercy of irrational superiors or intransigent committees and assemblies.¹¹ There are real dangers for faith workers who risk losing their status and livelihood because of doctrinal differences with their superiors on matters such as ordination of categories of people or adoption of certain liturgical forms of worship. Current community standards, and principles of social inclusion, could be expected to support the notion of guaranteeing faith workers certain basic rights, which most workers in comparable polities enjoy, in

⁸ See cases such as *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95; *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32; *The New Testament Church of God v Stewart* [2005] UKHL 73; *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28.

⁹ See Amicus the Union, *Amicus Briefing: The Campaign for Employment Rights for Faith Workers* (Jan 2007) <<http://www.amicustheunion.org/default.aspx?page=6177>> at 21 Jan 2008.

¹⁰ See *Discussion Document on Employment Status in Relation to Statutory Employment Rights*, URN 02/1058, Department of Trade and Industry (UK) July 2002.

¹¹ See cases such as *Parker v Orr* (1966) 1 ITR 488; *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705; *Birmingham Mosque Trust Ltd v Alavi* [1992] ICR 435; *Coker v Diocese of Southwark et Ors* [1998] ICR 140; *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513; *Knowles v Anglican Property Trust, Diocese of Bathurst* [1999] NSWIRComm 157; *R v Bishop of Stafford, ex parte Owen* (2000) 6 *Ecclesiastical Law Journal* 83.

recognition of their service, existential requirements and personal proprietary interests. The argument in this article is that this dichotomous approach to the issue, one that juxtaposes the polar opposites of employee and non-employee, is inappropriate and ill-suited to arriving at a workable solution that respects both the individual rights and interests of faith workers and the institutional autonomy and freedom of the religious organisations within which they work. A responsive law paradigm may provide the pathway to a solution.

II CONTEXTUAL BACKGROUND

It is important initially to outline three fundamental historical factors that underpin an understanding of the issue at hand. The first is that the position of faith workers in common law jurisdictions was understood historically to be contingent upon their holding a special status before the law known as *ecclesiastical office*. This concept was rooted in canon law and reflected an orthodox natural law view of obligations and rights.¹² The legal effect of this status was that ordained personnel enjoyed a qualified immunity from prosecution,¹³ a recognised clergy-parishioner privilege,¹⁴ a legal right to occupation of residential premises owned by the church,¹⁵ income from a variety of sources during their term of office and other indices of autonomy from the affairs of ordinary lay citizens. The semi-autonomous status of the church as a juridical entity, reflective of its position as ‘one of the great estates of the realm’,¹⁶ was manifested in a variety of ways in law and equity, including early forms of corporate personality for the holding of property,¹⁷ the entrenchment of the charitable trust and the special status of gifts for the support of clergy.¹⁸

¹² By assuming the duties and obligations attaching to their office, clerics were clearly defined in contradistinction to other persons subject to law enforced by the Crown. From earliest times, the status of clerics was not capable of any other interpretation, nor were they understood to assume rights that were additional or external to those derived from the church itself. Their work was seen not as employment, but as service performed on the basis of spiritual and other qualifications and pursuant to a ‘calling’ in order to fulfill the functions of an office or position within the hierarchy of the church.

¹³ For the ‘benefit of clergy’ privilege see R H Helmholz, *The Oxford History of the Laws of England: Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (2004).

¹⁴ For a history of this privilege, enshrined in statutes across some jurisdictions to this day, see Jacob M Yellin, ‘The History and Current Status of the Clergy-Penitent Privilege’ (1983) 23 *Santa Clara Law Review*; Anthony Cardinal Bevilacqua, ‘Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests’ (1995-96) 29 *Loyola of Los Angeles Law Review* 1733.

¹⁵ For this right, and *advowson*, or the right to nominate a cleric to a livelihood in a ‘benefice’, see Helmholz, above n 13.

¹⁶ Justice B H McPherson, ‘The Church as Consensual Compact, Trust and Corporation’ (2000) 74 *Australian Law Journal* 159, 160. ‘Estates of the realm’ was the term used for the broad division of society into groups such as the clergy, nobility and common people which, in pre-revolutionary France and England, formed the basis of the early legislatures.

¹⁷ For treatments of ‘corporations sole’ see Frederic Maitland, ‘The Corporation Sole’ (1900) 16 *Law Quarterly Review* 335.

¹⁸ See G E Dal Pont, ‘Charity law and religion’ in Radan, Meyerson and Croucher, above n 3.

The second relevant factor is that for centuries the civil courts evinced a reluctance to intervene in the internal affairs of the church. This reflected the continuous assertion of ecclesiastical autonomy and separateness mentioned above, as well as the intermittent historical struggles for political power between the State and the church. These struggles were ostensibly resolved with the *Act of Supremacy*,¹⁹ which marked the inception of the process of bestowing establishment status on the Church of England as the official church of the English people. Establishment secured the church its autonomy, although inevitably at the expense of its political power. This historical compromise also heralded the gradual diminution of the separate jurisdiction of ecclesiastical courts and entrenched the formal subservience of church laws to those of the State. Canon law effectively became part of statute law, with the tabling and endorsement of the church's legislation in Parliament. In return, the monarchy pledged allegiance to the English church in perpetuity. Church laws were subject to parliamentary veto and could not offend the royal prerogative or the laws of the realm.²⁰ In practice, what emerged was reluctance on the part of royal courts to adjudicate on internal church matters, including disputes involving clerics and their personal status within the church hierarchy.²¹ This reluctance carried over to non-established religious entities as well. By the mid-19th century it was clear that common law courts would intervene to provide remedies only to those clergy who could establish proprietary loss as a result of the breach of church rules by their superiors or church assemblies.

The third salient fact is the rediscovery by courts of the *consensual compact*, a concept based on the civil law version of the Roman *pactum* or covenant between two or more people. This was how courts rationalised the legal status of the non-established churches,²² thereby accounting for the preparedness of judges to entertain the argument that the private law status of clerics could be grounded in contract. Following upon the constitutional and military battles of the seventeenth century, statutes such as the *Toleration Act* of 1688²³ brought the dissenting religious organisations into a State of tacit acceptance. The corollary of toleration was that these non-conformist churches were regarded simply as voluntary groups operating outside the official body politic of which the Church of England formed an established part. Unlike clerics of the established church, the clergy in these

¹⁹ 26 Hen VIII (1534) c 1. With this Act, the English monarchy extinguished the authority of the Pope over the Church of England and proclaimed the monarch as its Supreme Governor. Subsequent legislation dissolved the monastic orders, vested powers of dispensation and jurisdiction over matrimonial causes in the Archbishop of Canterbury, placed clergy within State jurisdiction and secured legal sanctions against diversity of theological opinion.

²⁰ Mark Hill, 'Church Autonomy in the United Kingdom' (Paper presented to the Second European/American Conference on Religious Freedom, *Church Autonomy and Religious Liberty*, University of Trier, Germany, 27-30 May 1999) 4.

²¹ Ibid 5.

²² In a historical English context, these were the Catholic Church with its hierarchical apex in Rome and the great variety of dissenting, independent and separatist Protestant groups that rejected both the papacy and the established English church. But they included also the Church of England itself in places such as Scotland where establishment status was enjoyed by the Presbyterian Church.

²³ 1 Will & Mar (1689) c 18.

groups had no equitable interests in church property, rights of tenure or licences from their bishops. The property that these groups held was vested in trustees and was to be used for the purposes expressed in the trust deeds, which invariably referred to the primary documents and acts that contained the religion's binding beliefs. The trust deeds commonly contained 'detailed provisions regulating rights and powers of trustees, ministers, church officers and the congregation, and their relationship to the national church organisation, if any'.²⁴ These 'rules' of the church came to be regarded virtually as contractual terms subject to judicial construction.²⁵

Against this background it is not surprising that by the early 20th century faith workers were prepared to argue breach of contract where they had been disciplined or dismissed by their congregations or ecclesiastical superiors. However, it is also not surprising that church bodies relied on the institutional pull of ecclesiastical office to refute a contractual basis for spiritual work. This was very evident in early litigation which tested the extension of certain statutory rights to persons who could establish an employment relationship. The judgments in these cases²⁶ were effectively premised on a presumption that spiritual work could not be understood in contractual terms. However, the history of the faith worker cases in the superior courts demonstrates that by the close of the 20th century courts were prepared to locate a contractual arrangement if the factual matrix indicated a mutual intention that the arrangement was legally enforceable.

III ORDER, LEGITIMATION AND COMPETENCE

Thirty years have passed since the publication of Philip Selznick's remarkable exposition of law in society.²⁷ Can his developmental model shed light on the common law's struggle with this issue and offer a path towards a solution? Selznick's model is grounded in the tradition of sociological jurisprudence, which assigns primacy to law's relationship with society and social change. That tradition shares some of the key orientations of the realist school, notably the interest in social phenomena, which inform social policy inductively through empirical evidence. It also sees law not as a closed logical or conceptual order, but rather as rooted in reality and 'in action'. In Selznick's hands, this approach also inherits a pragmatism that measures the law's effectiveness by way of its problem-solving outcomes, and acknowledges that it can play an important, albeit limited, instrumentalist role in correcting social ills and injustices. However, Selznick is also concerned with the *realisation of values*, and parts with the realists over their

²⁴ McPherson, above n 16, 162.

²⁵ In the early modern Scottish case of *Dunbar v Skinner* (1849) 11 D 945, the Court of Sessions referred to the Episcopal Church (the principal non-established Anglican congregation in Scotland) in terms of a 'voluntary union pactionally constituted' and a 'voluntary agreement'. The dispute and its resolution were couched in terms of 'breach of agreement' and 'agreement'.

²⁶ See above n 7.

²⁷ Selznick, above n 6.

seemingly skeptical belief that the law is ultimately whatever legislatures mandate and judges wish to believe. Because for him law is ‘morally significant’,²⁸ it must be concerned with normative questions and *envaluation*, bringing him to the brink of a modern conception of natural law. For him, a revitalised natural law can still be of use in its search for universally valid principles rooted in human nature. This necessarily downplays relativist positions, yet respects the diversity and *variability* of social and cultural phenomena. Selznick offers a way out of the fact-value dilemma with his faith in a social science approach to law. In other words, humans need to constantly study and re-evaluate themselves and their institutions, extracting clues from the data about values that may be universal and timeless. These will then inform the normative dimension of the laws they create and their social ordering. ‘Logically and empirically disjunctive’ categorisations or absolutist positions are unhelpful, since law is neither the Weberian ‘coercive power’²⁹ in all contexts, nor is it invariably the Thomist ‘reason for the common good’.³⁰ Human nature and action should be seen as continuums or dimensions ‘along which variation occurs.’³¹ This leads him to a developmental model for law in society, one that sees law as moving through stages, or displaying characteristics, that are variously *repressive*, *autonomous* or *responsive*. Their primary goals are, respectively, *order*, *legitimation* and *competence*. Each carries the dialectical seeds and potentials of the other. Any given social order may display elements of each or all at any given time, and a steady chronological movement may be more easily discernible in some societies than others.

What seems to characterise law in a repressive polity is the overwhelming concern for *order*. This realisation may underscore the historical conflict between church and State, with each competing for jurisdictional power and demarcation of influence. It may shed light on the concern of the church in medieval times to separate and protect its personnel from civil and temporal authority. The use of coercion by the State, and even at times the church, played a part in overcoming what Selznick has called the ‘poverty of power’.³² Monarchs were concerned also to shore up their legitimacy and to destroy opposition, thereby establishing their claim to ‘sovereign immunity’ and even divine right. In such a world, those who lived and worked for the church were clearly separated from the rest of society by virtue of their special positions and offices within its sanctified and mystical hierarchies. The continuing struggle for power between State and church institutionalised a kind of sharing of power, the temporal and the spiritual. This in turn required continual compromises and delineations. In the temporal sphere at least, state organs displayed a culture of arbitrariness in executive power. Limiting the arbitrary power

²⁸ Martin Krygier, ‘Selznick’s Subjects’ in Robert A Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (2002) 3, 8.

²⁹ A reference to sociologist Max Weber’s conception of law and the State as monopoly on coercive power.

³⁰ A reference to St Thomas Aquinas’ naturalist conception of law.

³¹ Selznick, above n 6, 9.

³² *Ibid* 33.

of the sovereign through the state apparatus became the function of the courts. The courts that flourished in early England did so as a result both of the State's concern to delineate its jurisdictional power from that of the church courts, and its need to legitimise its power with the populace and the state functionaries who exercised that power on behalf of the monarch. The courts in turn grew from the patronage they received and the specialist personnel who filled their corridors. As the authority of the courts grew, so did the leverage of the lawyers. They represented a new class of professionals who gained entry to the elite social ranks through their expertise. Their role is crucial to understanding the nature of autonomous law.

What characterises law in the autonomous stage is the primary urge for *legitimation*, a concern of both the State and legal institutions. The often violent separation of the English State from the papal church received the support of key stakeholders, principal among them being the legal profession and the institutions in which they worked. The courts and the profession defended their autonomy politically by fighting to limit sovereign power, as was seen in the role played by Coke and the common lawyers in the parliaments leading up to the civil war of the seventeenth century. The restraint on power benefited both the State and the courts. It allowed the monarchy, especially in the crucial century leading up to 1688, to have its legitimacy 'certified' by consenting to the restraints put on it by the courts and the legislature. It allowed the legal institutions to attain legitimacy through their image of separateness, exclusiveness and competence. The importance of the 'artificial reason'³³ of the common law and the specialised competence of the lawyers were crucial in this regard. An emphasis on words, concepts and rules helped the legal profession establish its legitimacy by appealing to a sense of abstract and objective justice. An emphasis on rhetoric, system and method facilitated the development and refinement of much legal doctrine, culminating in the doctrinally fecund 19th century.

This kind of legal reasoning underpinned much of the commercial progress of the industrialising society in which the common law operated. In Selznick's terms, what eventuated was indeed a process by which the exercise of power shifted from its *source*, the monarchy, to its *sustained use* by state organs exercising limited authority defined by the legislature, courts and legal profession.³⁴ They were specialised entities with 'qualified supremacy and defined spheres of competence'³⁵ whose legitimacy was sustained by restraining arbitrary power and maintaining the 'rule of law'. An 'historic bargain' was struck when the courts in particular gave up any claim to political power, in exchange for the institutionalisation of their autonomy. The special reasoning, language and dispassionate objectivity of the courts helped secure their autonomous status, and the deference to rules allowed them to develop important legal doctrine. However, this deference to rules, and the

³³ See Sir Edward Coke's celebrated explanation to James I in *Fuller's Case* (1607) 5 James 1: '[The] Fortunes of his [the king's] Subjects are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law, which requires long study and experience ...'.

³⁴ Selznick, above n 6, 56.

³⁵ *Ibid* 53.

emphasis on precedent and authority, often hindered courts from solving disputes *in context*. Selznick sees in this an emergence of legalism in bureaucratic States, and the inability of courts and legal institutions to respond adequately to social change.

Finally, what characterises responsive law is the quest for *competence*. This implies that the major legal institutions would acquire the capacity to respond flexibly to the realities of context, without endangering their integrity. A responsive law approach is unlikely to be appropriate for many types of disputes before the courts, and it represents to some extent a ‘high risk’ strategy that carries the potential for loss of systemic authority. By encouraging openness, there is the danger of dissipating clear lines of authority and handing decision-making power to zealous bureaucrats and policy ideologues, thereby rekindling the medieval spectre of a fusion of law and politics. But such an approach could lend itself to alternative forms of dispute resolution, where normative factors of public interest are more likely to be pertinent to outcomes. For Selznick, the starting point is to *generalise law’s objectives*,³⁶ which means to replace reliance on rules with the values implicit in them. To be specific, for example, it would mean avoiding rules that ascribe employee status to faith workers for all purposes, or that impose crude regulatory obligations on religious organisations without due regard to the integrity of their beliefs. But it would also mean requiring those organisations to meet a standard, objective or *purpose* that is commensurate with the employee entitlements that communities may expect. *Purpose* in this context has not only a critical, but also an affirmative, aspect. This equates to the pragmatist concern that law be tied to results and consequences. What consequences would be tolerable in the responsive model? They are those that aspire to *civility*, which for Selznick means an inbuilt respect for the *variability* of interests and identities. Applying such an approach would for our purposes mean that a regulatory provision deeming faith workers to be employees would be unlikely to approximate the civility that responsive law would require for ordained personnel within Roman Catholic or Orthodox ecclesiastical hierarchies. It could arguably, however, be more appropriate for decentralised Muslim or Jewish communities in contemporary Australian cities. To recognise such distinctions requires a competent legal order, one in which Selznick envisages law to be more attuned to, and informed by, the citizens and groups it affects. This would entail the use of self-regulation, codes of conduct and other forms of post-bureaucratic dialogue with policy makers. Because the ‘paradigmatic function’ of responsive law is regulation, it remains to be seen by what means the law would be able to accommodate the potential claims of faith workers without unduly interfering with the autonomy of religious organisations.

In what ways, then, could regulators and courts be more adequately responsive to the complex realities of faith work within the great diversity of its institutions? On the premise that conventional ‘command and control’ regulatory mechanisms, traditionally prescriptive and prohibitive, are generally inadequate for subtle tasks

³⁶ Ibid 78.

of the kind that responsive law promises, this article will consider some of the characteristics of responsive regulation, which

...bear many of the marks of ... Selznick's (1978) 'responsive law' concept – flexibility, a purposive focus on competence, participatory citizenship [and] negotiation ...³⁷

It will then reflect on current British experience as a possible model for how Australian regulators may approach the problem. Finally, it will contend that Selznick's view of the judicial function in a responsive order would facilitate the aim of balancing equity for faith workers with respect for the diversity of religious organisations in a modern and pluralist society. It is argued finally that strains on the legal system to achieve these ends would be alleviated by the pursuit of *competence* and *purpose* by churches and religious groups themselves.

IV RESPONSIVE REGULATION

There can be no easy solution to the continuing problem of the legal status of faith work. A responsive law approach would require a combination of strategies, involving legislatures, regulatory bodies, courts and religious organisations. It is worth noting at the outset that much of the concern for regulators and commentators has been on the debate, mostly pertinent to traders in free markets, between regulatory models that favour a high degree of state intervention and those that recommend various degrees of deregulation. It may seem that organised religion would not fall within this ambit, but many modern religious groups are in fact 'constitutional corporations'³⁸ that engage in trading activities, even if limited. Further, legal regulation of religions is not something new,³⁹ and there is a discernible international debate on the extent to which States in developing societies should seek to regulate religious activity.⁴⁰

Responsive regulation represents an alternative means of official administrative or executive operations in the 'new regulatory state,' which has been described as:

³⁷ Ian Ayres and John Braithwaite, 'The Politics of an Idea' in Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 5.

³⁸ Defined in s 4 of the *Workplace Relations Act 1996* (Cth) as a 'corporation to which paragraph 51(xx) of the Constitution applies'. The term refers to any corporation that engages in 'significant' or 'substantial' trading or financial activities. Some incorporated bodies that have charitable or educational purposes may be considered constitutional corporations on that basis.

³⁹ See, eg, Pauline Ridge, *Legal Regulation of Religious Giving* (College of Law research paper, Australian National University, 2007).

⁴⁰ See, eg, Desmond Cahill, *Managing and Regulating Religion in a Global Context* (research paper, Royal Melbourne Institute of Technology, 2005).

... a position in which governments are increasingly relying on non-governmental institutions (market and civil society) to accomplish policy objectives and to deliver previously state-delivered services.⁴¹

This includes the participation of key stakeholders who are affected by the regulatory outcomes. Responsive regulation assumes a more creative ‘interplay between private and public regulation’,⁴² and, in the conviction that ‘the best strategy is shown to depend on context, regulatory culture, and history’,⁴³ it envisages different forms of regulation for different structures, variegated government responses for different actor motives and objectives, different regulatory designs for different groups and industries, delegation of government regulation to key firms, actors and interest groups, and a range of varied enforcement measures that combine punishment with persuasion.⁴⁴ A recent example of how regulators may seek a measured intervention in religion has been witnessed in the UK. Although the initial aim was to accede to European law and legislate for a command and control solution, ongoing discussion with religious bodies appears to have laid the groundwork for an approach comparable to a responsive law solution.

The grounds for potential state intervention in this area began with the announcement by the British Government in 2002 of an Employment Status Review and the release of a Discussion Document⁴⁵ by the Department of Trade and Industry (DTI) addressing the possible extension of statutory employment rights to working people, described as ‘atypical’, who were seen as ‘excluded’ because of their legal status. They were principally the self-employed, labour hire or ‘agency’ workers, some casual workers, home workers, ‘economically dependent workers’ and office holders. It was the concern of the British Government that such groups were unprotected since statutory employment rights, such as receipt of a minimum wage and paid leave entitlements, did not extend to them by law. This had the potential of hindering the State’s labour market objectives of high participation, high productivity and flexible workplaces. The Government sought to remedy this through the use of s 23 of the *Employment Relations Act 1999* (UK), which gave it the power to confer upon individuals the rights⁴⁶ that were guaranteed by a variety of employment statutes,⁴⁷ as distinct from rights granted under various

⁴¹ Richard Johnstone and Richard Mitchell, ‘Regulating Work’ in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite, *Regulating Law* (2004) 101, 117.

⁴² Ayres and Braithwaite, above n 37, 4.

⁴³ Ibid 5.

⁴⁴ Ibid 4.

⁴⁵ Department of Trade and Industry, *Discussion Document on Employment Status in Relation to Statutory Employment Rights*, URN 02/1058 (2002).

⁴⁶ These were the right to time off for certain purposes; the right to maternity, paternity, adoption and parental leave; the right to an itemised pay statement; the right to a written, detailed statement of terms and conditions of work; and the right to apply to an Employment Tribunal in case of breach of any of the above and for redress against unfair dismissal.

⁴⁷ *Trade Union and Labour Relations (Consolidation) Act 1992*; *Employment Rights Act 1996*; *Employment Relations Act 1999*; *Employment Act 2002* and any instrument made under

discrimination statutes. Section 23 effectively allowed, inter alia, the deeming of individuals as 'parties to workers' contracts or contracts of employment' and the declaration of persons as the employers of individuals.

The aim of the Discussion Document was to raise issues and invite public submissions about the adequacy or otherwise of the coverage of existing rights. It mooted the options for extending coverage and the possible arguments for and against statutory intervention. In relation to office holders, the Discussion Document pointed out they were not employees at common law but were taxed as employees and were liable for national insurance contributions.⁴⁸ However, it was possible for an office holder to be regarded simultaneously as an employee. Faith workers or 'clergy' were specifically addressed in the document as a group for consideration, being usually considered as holders of ecclesiastical office. However, the evolution of judicial tests to ascertain their true status on a case-by-case basis had at times resulted in clergy being declared the employees of hospitals, prisons and the like. The customary view of the clergy's position, in which they owed 'allegiance to God rather than a terrestrial authority,' meant 'in effect that ministers of religion [were] unable to seek redress through the legal system in the event of any dispute over their treatment by the church authorities'.⁴⁹ The DTI document gave notice to interested parties, including religious organisations, that the State was prepared to give effect to its European obligations by regulating the entitlements of those working people whose employment status was legally uncertain, unless 'non-legislative approaches could be used to address problems that might arise from any lack of clarity in employment status'.⁵⁰ The DTI held a series of round-table meetings with a variety of religious groups to facilitate responses to the document.

By March 2006, there were over 400 responses to the DTI paper from private and public sector employers, small businesses, trade unions, voluntary organisations and other interest groups. Interestingly, '343 responses were specifically about the position of office holders, primarily the clergy'.⁵¹ The large number of responses from churches, faith-based organisations and individual faith workers included submissions from those who considered the special spiritual bond between clergy and congregation could be threatened by government intervention, as well as those who argued that internal church mechanisms were inadequate and that there existed a need for a 'statutory right of recourse to an external body such as an employment tribunal'.⁵² The political process launched by the Employment Status Review, and the variety of responses from religious entities, commensurate invariably with their

section 2(2) of the *European Communities Act 1972*. Granting statutory discrimination rights was seen as a potentially destructive intrusion into the freedom of religion.

⁴⁸ Department of Trade and Industry, above n 45, 24.

⁴⁹ Ibid 25.

⁵⁰ Ibid 3.

⁵¹ Department of Labour and Industry, *Employment Status Review – Summary of Responses*, URN 06/1050 (2006), para 3.

⁵² Ibid para 18.

traditions, structures and historical interpretations of faith work, reveal an insightful perspective on responsive regulation. Three responses have been chosen in order to illustrate that a regulatory approach, to be successful, would need to accommodate a vast spectrum of profoundly held views: from those groups that reject any identification with the concept of a contract of service or the need for state regulation, like the Roman Catholics; to those who would be prepared to countenance some compromises to achieve common purpose without accepting that the status of their faith workers is grounded in contracts of employment, such as the Anglicans; and finally to those who would accept the prospect of regulation by the State, with or without internal adjustments, such as the Muslims.

The response of the Catholic Church in England and Wales⁵³ was indicative of the stand against government regulation. It was premised on the conviction that intervention would ‘fundamentally undermine’ the relationship between priest and bishop and between a cleric and the people entrusted to his pastoral care. Because a priest’s ordination is not a right but a ‘gift from God’, expressed as participation in a life-long ministry in spiritual union with the bishop and in service to the parish, priesthood had never been considered a career in the Catholic Church. It followed then that ‘the language of employee, employer and service provider is completely alien to the Catholic understanding of ordained ministry’.⁵⁴

Canon law requires a priest before ordination to sign a declaration attesting to his free exercise of will and acceptance of the rights and duties flowing from holy orders, followed by the taking of an oath of canonical obedience to the diocesan bishop. The primary relationship is between priest and bishop, with Catholic priests rarely stepping outside the confines of their diocese or religious order. In consideration for this act of obedience and spiritual communion, the principle of *incardination* ensures the priest’s welfare, with the bishop or religious superior retaining the ‘life-long commitment to care for [the priest] spiritually and materially, even if the cleric is removed from pastoral ministry or incapacitated for office in any way’.⁵⁵

As a consequence, certain rights and obligations are canonically mandated in the Catholic Church. Rights that could be equated to civil employment rights include the following: to vindicate and defend one’s rights before an ecclesiastical forum; to be judged at trial in accordance with canon law; to work in appropriate pastoral offices; to receive sufficient remuneration and welfare provision; and the right to an annual holiday. Duties include the obligation to undertake any functions entrusted to the priest by the bishop; to refrain from public office involving the exercise of civil power; to refrain from business and trade and active participation in political parties; and to reside in one’s own diocese.

⁵³ *Joint Response by the Catholic Bishops’ Conference of England and Wales, the Standing Committee of the National Conference of Priests and the Conference of Religious*, December 2002.

⁵⁴ *Ibid* [2.2].

⁵⁵ *Ibid* [2.5].

The government's concern for a priest's possible loss of office is also unwarranted, according to the Catholic submission. Unlike Church of England advertisements and interviews, a parish priest is appointed solely by the bishop 'for an indefinite period of time' with 'stability of office'. Removal and transfer by the bishop are only possible after 'established canonical process' or upon resignation. The process of removal and transfer are spelled out in the submission, with emphasis on the right to be heard, consultation, notice and fair hearing even though the bishop's decision is binding. If a priest is removed or transferred, 'the canon law requires that provision must always be made so that the priest does not lack those things necessary for his decent support'.⁵⁶ In any event, 'the benefit available to the priest goes beyond what an Employment Tribunal may award any unfair dismissal claim in other contexts'.⁵⁷ This is because a priest can never lose the 'indelible mark ... made on his soul' through ordainment, even though he may lose his 'clerical state as a juridical status' because of misconduct or some other grave offence. The conclusion is that the church provides conditions and security of tenure that the State cannot match, and to extend employment rights through regulation would 'attack the very basis of Catholic ministry'. Priests and deacons work because they are called to do so by way of the 'grace of ordination' and '...not because they have entered into a quasi-contractual agreement to provide a service to a defined group of clients or consumers'.⁵⁸

Notwithstanding its general position, the Catholic Church continued its discussions with the bureaucracy and agreed to set up internal reforms to their methods of appealing against administrative decisions and the 'bishop's edict', and to investigate the options of an administrative court or binding arbitration.

The stance of the Church of England seemed to reveal its concern, as the established state church, to accommodate the government's search for a solution to account for its European obligations. It should be mentioned that dialogue within the church had been going on for some time about the need for institutional reform. This was mostly prompted by numbers of younger clergy who were disaffected by their lack of access to tenure of the 'freehold' in church residences, which were traditionally in the possession of stipendiary parish incumbents. Disaffection had also been registered about security of position in the face of fixed term appointments, transfers and terminations at the hands of bishops. A large industrial organisation, Amicus, had set up a clergy working group to lobby for the extension of statutory employment rights for faith workers. It responded positively to the Discussion Document and continued its campaign for dismissal, redundancy and other rights:

In situations that would normally be considered as unfair dismissal there is currently no recourse ... no job, no home, no financial compensation, often

⁵⁶ Ibid [3.12].

⁵⁷ Ibid [3.8].

⁵⁸ Ibid [5.1].

no career opportunities ... A priest-in-charge, for example, feels vulnerable with regards to redundancy [upon] the amalgamation of parishes ... [and] is told that they are now surplus to requirement, yet is unable to claim redundancy payments. ... We do not believe that a vocational calling to the ministry is in conflict with holding an employment contract.⁵⁹

The Archbishop's Council of the Church established a review group to report on clergy terms of service, one of the primary tasks of which was to consider the theological implications of acceding to secular law on these matters. For the Anglicans, compromise with state laws was doctrinally acceptable. The group's first report⁶⁰ reported as follows:

We argued [in an interim report] that it was all but impossible to sustain the idea that accountability to God or the concept of vocation can only be applied to the clergy. The New Testament rarely uses the language of vocation in respect of ministry; rather the focus is on gift, and on all people (whether ordained or not) being gifted and called to use their gifts in the service of the Kingdom of God. There seemed no reason for concluding that accountability to God precluded accountability to anyone else. This approach supported the second of our provisional conclusions, that the clergy should be given the section 23 rights as a matter of law.

The report proposed a new form of tenure, to be known as *common tenure*, for those vulnerable clergy without freehold who could be summarily dismissed by their bishops. This received a generally positive reception, but a second report by the group⁶¹ recommended that common tenure be extended to all new appointments, including the beneficed and senior episcopacy. Common tenure heralded the prospect of changing several centuries of tradition, and effectively meant the end of the benefice. Legal ownership of clergy housing, church and churchyard would be transferred from the incumbent to the Diocesan Board of Finance. Importantly, it was to include the common statutory employment rights enjoyed by employees, including annual leave, parental leave and redundancy entitlements, to be enacted by way of Clergy Terms of Service Regulations. It was envisaged they would entrench access to employment tribunals, open-ended appointments to retirement age and a controversial new 'capability procedure' as a performance benchmark that would entail training, warnings and termination for clergy who under-performed. A Consultation Document that accompanied the group's second report summarised the church's desire, despite some opposition, to accommodate the government's policies without compromising on ecclesiastical office:

⁵⁹ Amicus the Union, *Meeting of Clergy Working Group 19 May 2004* (2004) [2-3] <www.amicustheunion.org>.

⁶⁰ *Review of Clergy Terms of Service* (GS1527) (2004).

⁶¹ *Review of Clergy Terms of Service: Part Two* (GS 1564) (2005).

Relationships between employees and their employer are based on certain assumptions about control, directing work on a daily basis and setting targets. The relationships that clergy have with their congregations and bishops are not like that, and rightly allow clergy a degree of distinctive autonomy. The [first] Report accordingly concluded that clergy should not become employees but should retain their legal status as office holders; they should also be given a range of employment rights and have their responsibilities clarified through legislation.⁶²

Many of the proposals were seen as controversial and even potentially disruptive of faith work. Considerable dialogue and debate eventuated within the church. The following view reflects the position of many sceptical faith workers who were opposed to reform:

If a priest is to have section 23 rights, he is entitled to a statement setting out in detail his terms and conditions of employment. What are his terms of work and to whom is he responsible? To whom should he direct a grievance? What are his hours of work? It is going to cost [the church] a great deal of time and money in advising people how to draft these statements. It will be difficult because we will be trying to mix concepts from modern employment law, with its emphasis on rights, with the priestly concept of sacrifice and service.⁶³

Nevertheless, the Church of England decided to proceed with introduction of statutory employment rights while at the same time opposing unilateral regulatory interference in the concept of ecclesiastical office. It was engaged in considerable dialogue with state authorities, which ultimately decided to respond to the diverse needs of the religious groups with a compromise measure for the establishment of common standards.

An Islamic response⁶⁴ to the DTI document was 'very much in favour of the extension of employment status',⁶⁵ principally as a way of bringing order and support to the work of Imams as the frontline spiritual workers in the community. Because there is in Islam 'no central, hierarchical religious authority',⁶⁶ regulation of its 'inherent diversity' was seen as a positive move, as long as it was not perceived by the Islamic communities as state intervention in community affairs.

⁶² *A Consultation Document to Facilitate Discussion of GS 1564* (2005) Church of England <<http://www.cofe.anglican.org/lifeevents/ministry/workofmindiv/dracsc/1564.doc>> at November 2006.

⁶³ Paul Benfield, 'Common Tenure: Introducing the Review of Clergy Terms of Service: Part Two' (2005) 119 *New Directions* <<http://trushare.com/0119Apr05/TR119COVE.htm>> at 15 Nov 2006. Benfield is the Vicar of St Nicholas, Fleetwood.

⁶⁴ *Response by the Forum Against Islamophobia and Racism, the Muslim College and the Al-Khoei Foundation to the Government 'Discussion Document on Employment Status in Relation to Statutory Employment Rights'*, December 2002.

⁶⁵ *Ibid* [8].

⁶⁶ *Ibid* [4].

The submission acknowledged that Imams 'are employed in the service of the community' and that their salaries are funded either directly by the communities themselves or by Muslim States abroad. But they often received less than the minimum wage and endured undefined hours, duties and working conditions. There was no protection against dismissals, which were 'often ad hoc and capricious, frequently being driven by grassroots politics' with no transparency or accountability.⁶⁷ Because this state of affairs undermined their position and autonomy, extending employment status would have a 'symbolic as well as practical value' for Imams.

Further, the specific needs of young Muslims required Imams not only to provide religious instruction and 'sustain the continuity of their homeland cultures',⁶⁸ but also to give advice and guidance to disaffected and alienated youth. This ranged from those who were embracing radical responses to those who were turning to Western culture and 'adopting its norms and patterns of behaviour.' Imams had a role to play also with women, including marriage ceremonies, partner introductions and the upholding of 'the status and rights Islam gives to women where cultural practices dictate otherwise.'⁶⁹ In those few communities where women played a role in leading prayers, even though they lacked the status of Imams, an extension of employment rights to them was seen as beneficial.

Imams working in hospital environments often faced enormous demands, irregular hours, unclear duties and job descriptions, language difficulties and a lack of training in counselling and administrative skills. Much of this work was done on a voluntary basis. On the other hand, those working with prisoners had seen considerable improvements, principally because the prisons service had recognised their role and created for them 'enforceable employment rights through contractual agreements' in the public sector. Regulation was seen as the means by which Imams working in the community could achieve employment parity with public sector workers. It did not represent a threat to spiritual authority presumably because that authority did not emanate from, or rely on, statute or civil law principles.

The diversity of responses from the various denominations indicates that attitudes to regulatory intervention for the assertion of employment status are inevitably linked to issues of dogma, hierarchical structure and governance. The importance of structure has been judicially noted in at least two Australian decisions⁷⁰ that have relied on a late 19th century American judicial classification of church

⁶⁷ Ibid [7].

⁶⁸ Ibid [5].

⁶⁹ Ibid.

⁷⁰ *Attorney General ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 37 NSWLR 293, 314-315 (Young J); *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 669 (Young CJ).

organisations as hierarchical, presbyterian or congregational.⁷¹ A significant number of other matters would need to be taken into account as well, leading to the immediate conclusion that a single regulatory approach would be doomed to a short, albeit highly eventful, life span. The British experience illustrates that encouraging the parties to approximate regulatory purpose, within parameters that are set by the actors themselves, is more likely than ‘command and control’ to bear fruit where the State wishes to regulate profoundly held beliefs and avoid interfering with religious freedom and church autonomy. The British project is currently at a compromise stage, which has largely been responsive to the needs of the community. The DTI’s Clergy Working Group, comprising representatives of faith groups, trade unions and government personnel, produced in 2007 a Model Statement of Good Practice,⁷² representing minimum standards expected of faith groups. The standards relate to terms and conditions of work; resolution of disputes; development and personnel support; and information and counselling. Religious organisations were encouraged to survey their members and consider to what extent they could introduce mechanisms to implement some of the specific procedures outlined in the statement. A further government-sponsored consultation process was scheduled to convene upon the expiration of two years.

V RESPONSIVE ADJUDICATION

Although regulation may be paradigmatic of responsive law, it is nevertheless a goal that requires sustained cooperation between the various arms of government and the community, requiring considerable political will. But it is not limited to the regulatory sphere:

[Selznick’s] vision of responsive law provides few guidelines concerning how competing values, such as equality and liberty and efficiency, should be prioritized; or whom legal officials should be most responsive to; or how, in politically pluralistic, contentious societies, conflicts among legal officials and elected politicians about which legal ‘responses’ are most desirable might be resolved.⁷³

The role of the judiciary therefore remains fundamental, since claims will continue to arise and be adjudicated in the courts regardless of the implementation of any regulatory processes, although they may be mitigated and fewer in number. A circumspect judicial use of intention to create legal relations provides a pragmatic

⁷¹ *Watson v Jones* 80 US 679 (1871) (Miller J): *Hierarchical* churches are those in which church governance is in the hands of superior clergy, such as bishops, even though some powers may rest with lower clergy and laity; *presbyterian* churches are those that exhibit a hierarchy of local, regional and national committees, with local decisions valid insofar as they are not overruled by a higher level in the hierarchy; *congregational* churches are those in which local congregations are responsible for the rules.

⁷² Department for Business, Enterprise and Regulatory Reform (formerly DTI), *Model Statement of Good Practice*, URN 07/818 (2007) <<http://www.berr.gov.uk/files/file38521.doc>> at 22 Aug 2007.

⁷³ Robert A Kagan, ‘On “Responsive Law”’ in Kagan, Krygier and Winston, above n 5, 85, 89.

mechanism for the adjudication of disputes between faith workers and their churches where contract is a prerequisite to the validation of statutory rights. It allows courts to assess the total relationship between the parties in light of institutional context, policy and community standards of reasonableness, rather than rely simply on instances of fact that may approximate offer, acceptance and consideration. In the major cases in which faith workers have asserted a contractual relationship with their church organisations in order to ground a statutory claim, superior courts have invariably resorted to the element of contractual intention to either deny⁷⁴ or recognise⁷⁵ contract. Applying intention principles in accordance with the modern objective approach adopted by the High Court of Australia,⁷⁶ freed of prescriptive presumptions, dovetails neatly with a competent, responsive approach to the broader social and institutional context in which many disputes germinate. Courts will continue to play a pivotal role, and their potential to find the 'right' response to problems thrown up by disputes of this kind should be influenced by two factors: the inherent nature of the common law and the qualified potential of the judge as administrator.

Selznick's developmental model of law in society presumes a conception of the common law that is shaped by his naturalist inclinations. The 'rule of law' is emblematic of the autonomous phase, but that phase also fell victim to the curse of legalism, an undue reliance on precedent and frequent formalistic sophistry that separated the problem from its context. It favoured procedural fairness over substantive justice. But this is not necessarily the true nature of common law, since reasoning from precedent should not be seen as blind adherence to earlier decisions. The common law theorists stressed that judges did not make law by fabricating rules for society. Blackstone wrote that:

...[T]hese 'judicial decisions' were emphatically not the common law itself, but rather 'the principal and most authoritative evidence' of that law ... '[T]he law' and the '*opinion of the judge*' were not 'one and the same thing,' and it was certainly possible for an occasion to arise when 'the judge may *mistake the law*'.⁷⁷

⁷⁴ See *Rogers v Booth* [1937] 2 All ER 751; *President of the Methodist Conference v Parfitt* [1984] QB 368; *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705; *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309; *Coker v Diocese of Southwark et Ors* [1998] ICR 140; *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513; *Knowles v Anglican Property Trust, Diocese of Bathurst* [1999] NSWIRComm 157.

⁷⁵ See *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95; *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28; *The New Testament Church of God v Stewart* [2005] UKHL 73; *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32.

⁷⁶ See *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95.

⁷⁷ David Lieberman, 'Philip Selznick and the Common-Law Tradition' in Kagan, Krygier and Winston, above n 5, 119, 123.

It should be kept in mind that in its quintessential state, common law is ‘a species of *custom*’.⁷⁸ Historically, the common lawyers emphasised ‘immemorial custom’, lore and tradition in the sense of aspects of the common culture that acquired the force of law through long and accepted usage. The common law theorists understood these as *general customs*, applicable universally or throughout a kingdom; *particular customs*, applicable in certain regions; and *particular laws*, which were observed only in certain courts and jurisdictions.⁷⁹ In other words, the nature of common law is not a blindly legalistic reasoning by precedent, but a qualified deference to authority insofar as it reflects the values, practices and beliefs that the community is prepared to uphold. Lieberman insightfully points out that Selznick envisages, in his book *The Moral Commonwealth*,⁸⁰ the precedential focus of the common law as recognising the ‘moral worth of tradition’:

In conceiving of the law as ‘an expression of community, a product of shared history and common life,’ the common-law tradition is echoed in responsive law’s commitment to the insights of modern legal pluralism, which similarly ‘posits the moral worth of institutions close to the people ... based on shared experience, reflecting shared sentiments, sustained by practical needs.’⁸¹

So the common law historically looked to popular custom, as validated by experience in society, to give guidance to the judges for ascertaining the substance of the law. In addition, pedigree of this kind was not enough, since customs had to conform also to *reason*. In this sense, not the ‘artificial’ sense used by lawyers in their rhetorical work, customs were not to be *unreasonable*. Of course, what any given society in any given time will consider to be unreasonable will be fashioned according to the collective memory and wisdom of that society as informed by experience, and in the light of present needs. This is not a simple task, but it is one that may properly fall to a competent and responsive judiciary that is conscious of the relationship between judicial precedents and community values over time:

[T]he efficacy and the normative authority of the law is held to flourish when law ‘springs from the character and condition of the people and when it is administered with due regard for the integrity of practices and the autonomy of groups’.⁸²

Judges can, and should, be responsive in their adjudication of disputes between faith workers and their faith groups by recognising the variability and diversity of the communities that come before them in the court room. Faith groups bring with them customs and traditions that are embedded in profound belief and entrenched practice. Judges should recognise this insofar as it is reasonable to do so in light of

⁷⁸ Ibid.

⁷⁹ Ibid 123-4.

⁸⁰ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (2002).

⁸¹ Lieberman, above n 77, 125-6.

⁸² Selznick, above n 80, 469-470.

what contemporary purposes require. This responsiveness has much in common with the regulatory ethos described above. Contractual intention, as an established element in common law contract theory, has an important role to play in that regard.

What, then, is the role of the judiciary? How can judges, in responsive law theory, maintain this innate common law responsiveness without undermining their authority and raising the spectre of arbitrariness and politicisation of the law? After all, the main aim is 'the progressive reduction of arbitrariness in positive law and its administration'.⁸³ Since the primary task of responsive law is to generalise objectives and identify purpose, courts need to be conscious of the quest for competence in the pursuit of purpose. Here lies the pragmatic concern to solve problems in context. The judiciary have over the centuries adopted a variety of guises by which to manifest their functions, which Feeley and Rubin recognise in Selznick's models of judicial decision-making.⁸⁴ *Purpose* is to be achieved objectively – not subjectively, capriciously or politically – by ascribing to judges an appropriate role. In the past, judges were often seen to be discoverers of the law, meaning in early days that they pronounced universal principles accessible to all humans, or later that they adopted a scientific, formalist view through case books and treatises. In the classical 'rule of law' paradigm of the autonomous law stage, judges were seen as interpreters of the law, acknowledging law's political origins, but limiting the judicial role to an application of its internal logic to the problem in the court room. The realists and, later, the critical legal studies movement, saw them as political actors who reacted against formalism and made public policy. Others saw judges principally as moral educators, whose job it is to extract the message from the statute and seek ways of achieving a just result, perhaps by favouring plea bargains, settlements and alternative processes at the expense of adversary trial and the letter of the law. But because responsive law envisages law's inherent instrumentalism or capacity to achieve social ends through the realisation of values, the most propitious model of the judge is perhaps as implementer of public policy or administrator:

Judicial decision making under responsive law is distinguished by its willingness to undertake a 'diagnostic inquiry' that looks beyond formal accountability and procedure. By placing purpose and competence rather than procedure and predictability at the core of the analysis, and by taking institutions and not individuals as the central units of analysis in modern law ... [judges have] the same range of tasks as are assigned to other administrators, including the adjudication of disputes, the interpretation of statutes, and the formulation of public policy.⁸⁵

⁸³ Selznick, above n 6, 108.

⁸⁴ Malcolm Feeley and Edward Rubin, 'Responsive Law and the Judicial Process: Implications for the Judicial Function' in Kagan, Krygier and Winston, above n 5, 249.

⁸⁵ Ibid 262.

In giving prominence to the administrative role of the judiciary, judges would not forsake their role to the bureaucracy, and would allow discretion and creativity. By interpreting the law in a purposive way, judges would be bound to achieve the regulatory purpose implicit in any statute or piece of regulatory standard. Feeley and Rubin envisage a responsive judiciary to be implementers of public policy with their authority grounded in laws and texts 'as a grant of jurisdiction, not as a source of substantive standards.'⁸⁶ Judicial policy-making departs from conventional judicial interpretation in that it does not invoke the text of the law, examine its words and structure, look at the intent of the drafters and find its inherent purpose. It instead invokes the legal text, establishes judicial control of the subject matter, and relies on non-authoritative sources as well as judicial judgment to arrive at a decision. Doctrine does not dictate, but it plays a role. What this would mean in a practical sense, as far as disputes between faith workers and churches is concerned, is that responsive judges could be more likely to view the dispute as a manifestation of an institutional problem within the religious organisation – one of tension between the guarded autonomy of the church and the professed right of the faith worker to certain basic entitlements. The judge's role would be to conceptualise the need to accommodate two master ideals, perhaps to be labelled for the purposes of this article as *autonomy* and *equity*. An outcome between the parties should be encouraged that achieves both – an equitable solution to the faith worker's claim with minimal interference with the dogmatic, structural or disciplinary issues that could threaten the character and autonomy of the faith group itself.

This article has been partly motivated by a concern to achieve a socially inclusive legal response to faith work that will aim for an equitable balance between the demands of faith workers for justice and the needs of churches for autonomy and freedom. This will inevitably involve the joint responsibility of legislators, regulators, courts and churches, although there is unlikely to be a universally conclusive approach for those jurisdictions in which the common law remains central. Contemporary community expectations would support the legal validation of certain fundamental rights for all workers, even those whose work includes matters spiritual. It is argued that the community would expect also that such validation should not be achieved at the risk of undermining valuable social institutions that are embedded in the funded experience and customs of society. A responsive law approach, although admittedly tenuous and not risk-free, as Selznick himself would admit, would incorporate a range of flexible regulatory and judicial strategies. However, autonomy and equity are likely to remain unachievable ideals without also the requisite competence of religious organisations themselves in addressing the institutional barriers to justice faced by their ordained workers that compel them to seek redress in the law.

⁸⁶

Ibid 263.