

Special Issue Article  
***The Ministerial Exception – Comparative Perspectives***

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ABSTRACT: This essay introduces the theme of the special issue on the legal practice of granting 'ministerial exceptions' to religious organizations and the relation of this practice to the principle of collective religious autonomy. It introduces and situates the other essays and their analyses of how concrete national and regional jurisdictions address calls for collective religious autonomy and ministerial exceptions within the wider debate regarding the nature of and relation between 'religion' and (secular) 'law' in late modern, religiously diverse societies. Additionally, the essay contributes to the special issue theme with an analysis of the ministerial exception in the international human rights framework, examining the practice of the United Nations and the case-law of the European Court of Human Rights. The essay suggests that some of the difficulties law encounters with collective religious autonomy may be due to the rigidity of formerly established (modern) categories for thinking about law and religion in the constitutions of liberal states.

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Across a broad range of national, regional and international jurisdictions, the question of the legal recognition of religion seems to be increasingly important: From the UN Human Rights Committee (HRC) to the European Court of Human Rights (ECtHR) and to the Supreme

Court of The United States, the proper boundaries between religious individuals and communities and supposedly secular, civil law are contested, negotiated and redefined. Across these jurisdictions, different legal conceptions of what constitutes ‘law’, ‘religion’ and the ‘secular’ are at play, resulting in very different conditions for religious communities, ranging from wide exceptions from otherwise applicable laws, to near-equality with communities founded for entirely different purposes.

In the essays gathered in this special issue, authors from theology, religious studies and law come together to provide multidisciplinary analyses of how different legal regimes handle the status of religious communities, and what mechanisms decide major cases that trigger different varieties of the ‘ministerial exception’; the theologically infused legal concept whereby some communities are granted special privileges and exceptions due to their religious nature. This introduction provides a short sketch of how fields like law, theology and religious studies have approached the intersections of law and religion and examines the ministerial exception as it has been negotiated in some recent cases at international and regional levels, before briefly introducing the papers contained in the special issue.

## I. THE PROBLEM OF RELIGION

Since the early years of its academic study, the contents of religion have been continuously discussed and contested. Commonly associated with the ground breaking studies of Orientalist scholar Friedrich Max Müller (1823–1900) and his Gifford lectures on natural religion (1888),<sup>1</sup> the field of religious studies and the history of religions have been riddled with discussions on what exactly constitutes the common field of inquiry. Despite early

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<sup>1</sup> Friedrich Max Müller, *Natural Religion: The Gifford Lectures Delivered Before the University of Glasgow in 1888* (Longmans, Green and Co. 1907).

widespread acceptance of an exclusive, yet amorphous, club of ‘world religions’,<sup>2</sup> discussions concerning the outline and composition of each individual ‘religion’ have continued unabated.<sup>3</sup> From William James’ assertion in his version of the Gifford lectures in 1901–1902 that the researcher can stipulate for him or herself what the concept should contain,<sup>4</sup> to the list of more than 50 possible definitions supplied by James H. Leuba in 1916,<sup>5</sup> the early academy agreed to disagree on the proper outline of religion.

A key issue in this disagreement is the distinction between the ‘inside’ and the ‘outside’ of religion; should religious traditions be conceptualized according to their own categories, vocabularies and forms of reasoning, or should they be approached from the outside, using ‘neutral’ categories, not derived from any particular tradition, but rather from neighbouring scientific disciplines?<sup>6</sup> Religious traditions shape their own identities and offer various self-presentations – but do these suffice in all situations and for all purposes, and what weight should they be given? Adding to this complex issue is the call for a problematizing of

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<sup>2</sup> Tomoko Masuzawa, *The Invention of World Religions: or how European Universalism was Preserved in the Language of Pluralism* (University of Chicago Press 2005).

<sup>3</sup> The nature and composition of different ‘religions’ is a hot topic in the field of religious studies, with new contributions being added frequently. For a historical overview of some of the controversies surrounding the concept of religion, see Brent Nongbri, *Before Religion: A History of a Modern Concept* (Yale University Press 2013). For an assessment of the different schools and traditions engaged in the debate on the content of the category, see Gavin Flood, *Beyond Phenomenology: Rethinking the Study of Religion* (Cassell 1999).

<sup>4</sup> William James, *The Varieties of Religious Experience: A Study in Human Nature. Being the Gifford Lectures on Natural Religion Delivered at Edinburgh in 1901–1902* (28th edn, Longmans, Green and Co. 1917), 30.

<sup>5</sup> James H. Leuba, *The Psychological Study of Religion: Its Origin, Function, and Future* (The MacMillan Company 1912), 339–61.

<sup>6</sup> See Russell T. McCutcheon (ed), *The Insider/outsider Problem in the Study of Religion: A Reader* (Cassell 1999) for a selection of readings exploring this problem from a variety of perspectives.

dividing lines between religions and their immediate surroundings – like the law, which is the central topic of the present special issue.

## II. LAW AND RELIGION

On the surface, modern Western law is the ultimate outsider of religion. The legal orders of liberal democracies employ technical, rational language to regulate human affairs and solve societal problems, appealing to a non-partisan conception of the common good of society. Religion, as it has been modelled in the late modern Western imagination, on the other hand, is intensely personal, indeed decidedly ‘private’, tied to personal convictions and sentiments that by and large are explicitly extra-rational and that thrive on the differentiation of people according to their moral virtues.<sup>7</sup> While Western imaginations of religion have also incorporated a collective dimension, even a collective *public* dimension in the very recent past,<sup>8</sup> the individual dimension has increasingly enjoyed a privileged interpretative status.

Looking more closely, however, the dividing line between law and religion is complex: While no other sector of society in the West may have been so thoroughly ‘secularized’, law simultaneously shares many of its defining structural characteristics with religion. Indeed; several scholars of law and religion today argue that the relation between law and religion in the Western tradition is symbiotic, with religion furnishing the law with spirit, morals and meaning, and the law providing religion with structure and institutional coherence.<sup>9</sup>

Furthermore, the institutional expressions of ‘religions’ need legal tools to provide structure,

<sup>7</sup> Winnifred Fallers Sullivan, ‘Normative Pluralism: Islam, Religion and Law in the Twenty-first Century’ (2005) 35 *Religion* 31, 32.

<sup>8</sup> Cf. Alessandro Ferrari and Sabrina Pastorelli (eds), *The Burqa Affair Across Europe: Between Public and Private Space* (Ashgate 2013).

<sup>9</sup> John Witte Jr. and Frank S. Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press 2008) 1.

rules and order, both internally and in their relations to society at large.<sup>10</sup> The proclaimed secularity of law has also become increasingly questioned from post-colonial, deconstructive perspectives, drawing on the same rationale as the critique levelled against the insider/outsider problem in the study of religion: positing law as a secular enterprise according to an imagined, non-religious gold standard presupposes a reified distinction between secularity and religion that does not appear to describe reality in accurate terms.<sup>11</sup>

These different strands of criticism can loosely be labelled ‘post-secular’ approaches, in the sense that they all start from the assumption that the borders between religion and secularity, formerly considered more or less self-evident, are not sufficient, and should be replaced with approaches that are more attuned to the shifting borders between religion, law and society.

While post-secularity can denote a wide range of perspectives,<sup>12</sup> two main trends have materialized over the course of the last decade, proposing different distinctions between law and religion.

<sup>10</sup> Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 6.

<sup>11</sup> The dividing line between purportedly secular law and religion has been problematized in several volumes lately, notably Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford Law Books 2011), Lisbet Christoffersen, Kjell-Åke Modéer and Svend Andersen (eds), *Law and Religion in the 21st Century – Nordic Perspectives* (DJØF 2010) and Thomas G. Kirsch and Bertram Turner (eds), *Permutations of Order: Religion and Law as Contested Sovereignities* (Ashgate 2008).

<sup>12</sup> The post-secular has become an academic buzzword lately, leading to considerable terminological confusion. See the different attempts to clear up the field in James A. Beckford, ‘Public Religions and the Postsecular: Critical Reflections’ (2012) 51 *Journal for the Scientific Study of Religion* 1; Veit Bader, ‘Post-Secularism or Liberal-Democratic Constitutionalism?’ (20012) 5 *Erasmus Law Review* 5; and Michele Dillon, ‘2009 Association for the Sociology of Religion Presidential Address: Can Post-Secular Society Tolerate Religious Differences?’ (2010) 71 *Sociology of Religion* 139.

First, Jürgen Habermas has called for the necessity of letting religion ‘back in’ to the public square, provided that religious claims are ‘translated’ into a universal, non-denominational vocabulary when these claims are made in the formal proceedings within political bodies rather than in the informal, ‘pre-parliamentarian’ political public domain.<sup>13</sup> Habermasian post-secularity, then, seeks to reinstitute and re-install a place for religion in politics as a significant normative actor, rectifying its perceived ‘exile’ from politics imposed on religion by doctrinarian secularization theory and secularism.<sup>14</sup> According to this line of reasoning, any sharp line between law and religion will distort the long-lasting historical ties and mutual benefit between legal and religious conceptualizations of the common good.

Second, however, scholars like John Caputo, Markus Dressler and Arvind Mandair understand post-secularity as a facet of the larger movement towards ‘post-Enlightenment’, questioning the universality and applicability of rigid Enlightenment categories that emphasize rationality, objectivity and modernity, while simultaneously acknowledging the important heritage from the Enlightenment project.<sup>15</sup> Hence, this position is also critical of any sharp dividing line of law and religion, mainly because it would entail the acceptance of the predominance of ‘Enlightened’ law over its perennial other, i.e. religion.

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<sup>13</sup> Jürgen Habermas, ‘Religion in the Public Sphere’ (2006) 14 *European Journal of Philosophy* 1, 10; Jürgen Habermas, ‘Notes on Post-Secular Society’ (2008) 25 *New Perspectives Quarterly* 17, 28. See further NN 2010.

<sup>14</sup> The ‘exile’ of religion from the public sphere is widely considered to have ended by the turn of the millennium, due to a variety of factors. See Fabio Petito and Pavlos Hatzopoulos, *Religion in International Relations. The Return from Exile* (Palgrave Macmillan 2003) and Scott M. Thomas, *The Global Resurgence of Religion and the Transformation of International Relations: The Struggle for the Soul of the Twenty-First Century* (Palgrave Macmillan 2005) for attempts to explain this return and what it means for contemporary world society.

<sup>15</sup> John Caputo, *On Religion* (Routledge 2001) 60–1; Markus Dressler and Arvind Mandair (eds), *Secularism and Religion-Making* (Oxford University Press 2011) 20.

While united in the attempt to move beyond entrenched dichotomies or separations, and the promotion of more nuanced analyses of matters pertaining to religion, the positions representing the two main trends end up with diverse normative visions where the interpretative prerogative is differently located. Importantly, with regard to the matters at stake in this special issue, these different post-secular turns have important implications for the legal conception of religion: If dividing lines between religion, law and the secular are no longer sufficient or applicable to describe or regulate social reality, what does this do to the legal right to religious freedom? While this problem is largely irrelevant to the *individual* conception of religious freedom, which is all but secularized as a freedom of belief, thought and conscience decoupled from institutional expressions of religion, it is far more troublesome for the *collective* dimension of religious freedom, which is largely the result of historical configurations between religious communities and state power that stretch back in time, sometimes across several centuries. These issues are pinpointed in the legal concept of offering special exceptions for decisions affecting the inner life of religious communities and organizations – the so-called ministerial exception, to which we now turn.

### III. THE MINISTERIAL EXCEPTION

The ministerial exception denotes a cluster of legal statutes and practices that allow certain exclusive exceptions from otherwise generally applicable laws to religious organizations, in particular in the field of employment.<sup>16</sup> Although the term and legal doctrine is mainly associated with US jurisprudence, where it has a particularly long history, similar arrangements can be traced in several other countries, and at the international and regional levels, as documented by the articles in this special issue. The content and range of such

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<sup>16</sup> Christopher C. Lund, ‘In Defense of the Ministerial Exception’ (2011) 90 *North Carolina Law Review* 1, 3. See also NN in this issue.

exclusivism tells us something about how the borders between religion – and law – are perceived across different jurisdictions. While the principle in theory should extend to non-religious organizations by virtue of the general freedom of thought, belief and conscience recognized in international instruments like the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950) and the International Covenant on Civil and Political Rights (ICCPR, 1966), in reality and legal practice, most states only extend some such exceptions to religious organizations. This exclusivism is partly due to the longer history of religious organizations staking their claims in the public square, and partly due to the issues that most often provoke differential treatment: few non-religious organizations have displayed comparably strong opinions concerning otherwise generally applicable laws.

The question of whether religious organizations should be granted a ministerial exception has become gradually more important, and more hotly contested, as the social acceptance of state interference with the inner life of organisations to protect the rights of individuals in general has increased, particularly on the topic of non-discrimination.<sup>17</sup> In the US, for instance, the early twentieth century saw the Supreme Court reject early moves to impose non-discrimination norms onto private employers on the basis of largely unfettered employer decision-making.<sup>18</sup> In the twenty-first century legal landscapes of many jurisdictions, however, control over the employer who seeks to discriminate on prohibited grounds is

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<sup>17</sup> For a recent volume that provides short overviews of how European Union member states have implemented recent European Union Directives on discrimination 2000/43/EC and 2000/78/EC and interpret these with regard to religious organization, see Mark Hill (ed), *Religion and Discrimination Law in the European Union – La discrimination en matière religieuse dans l'Union Européenne, Proceedings of the Conference, Oxford, 29 September–2 October 2011 – Actes du Colloque, Oxford, 29 septembre – 2 octobre 2011* (European Consortium for Church and State Research 2012)

<sup>18</sup> *Adair v US*, 208 US 16 (1908).

generally accepted, and asserted; not only as for private employers in general, but also to some extent for ethos-based employers such as religious communities.

At the same time, the extent of non-discrimination norms has also increased – in the UK, for instance, from race, to gender, to religion, to disability, to sexual orientation (see the contribution from NN in this special issue). As the willingness of the state to apply non-discrimination norms, and the breadth of those norms, has increased, so has the religious diversity within many states, and the lessening in many of these states of the link between the values of a majority religion, and those of the state itself. The potential for a religious organisation to have its internal practices judged as contrary to societal values, as outlined above, has increased correspondingly.

Ministerial exceptions, of whatever breadth, represent balances struck by the state between non-discrimination and collective religious autonomy. As such, it represents a singularly important moment to illuminate our understanding of the evolution of the conception of *the religious* – individually or collectively – by the state. The ministerial exception can thus be seen in part as an attempt to deal with the modern Western biased imagination and give increased due attention to the collective dimension of religion. This special issue seeks to examine this tension, between non-discrimination and collective religious autonomy, as it plays out at the international and regional levels, and in a variety of selected jurisdictions.<sup>19</sup>

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<sup>19</sup> By comparison, see e.g. Ernest Lim, 'Religious Exemptions in England' (2014) 3 *Oxford Journal of Law and Religion* 440, for a recent study that focuses more on religious exception for individuals from generally applicable laws. See also the various articles in the special thematic issue on 'Reasonable accommodation of religious claims in workplaces? Basic tensions, socio-legal debates, and (quasi-)judicial decisions in six European countries', edited by Veit Bader, Katayoun Alidadi and Floris Vermeulen in (2013) 13 *International Journal of Discrimination and the Law*. Adopting a sociological approach, the articles in the issue explore the accommodation of individual freedom of religion and belief in 'secular' workplaces as well as challenges that

The remainder of this introductory article maps the ministerial exception as it appears in the UN system and the European human rights system, before briefly introducing the other articles of the special issue.

#### IV. THE UNITED NATIONS

The approach within the UN to ministerial exceptions for religious communities must be understood as a subset of how the world organization deals with religious freedom more generally. The normative framework on religious freedom codified in the International Bill of Rights (the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) is principally individualist; article 18 of the UDHR and the ICCPR only indirectly hints at the existence of a collective dimension to the right by promoting the freedom to manifest one's religious beliefs 'alone or in community with others', granting no particular rights to religious collectives. The more detailed, but less binding 1981 Declaration on the Elimination of All Forms of Religious Intolerance offers more pronounced protection for religious communities in its article 6, including the right to assembly and the establishment of places for worship in connexion[sic] with a religion or belief; the establishment and maintenance of charitable or humanitarian institutions; to teach a religion or belief in places suitable for such purposes; and to train and appoint leaders. While neither of these rights give rise to specific exceptions from otherwise applicable laws, they do oblige states to facilitate the establishment and maintenance of organizations inspired by the 'requirements and standards' of a variety of different religious convictions, an obligation that risks being at odds with general legislation on a variety of issues, generating dilemmas

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anti-discrimination legislation raise for faith-based workplaces, and so to collective religious freedom. The six countries that stand in focus are Bulgaria, Denmark, England, France, the Netherlands and Turkey.

concerning the scope of the inner jurisdiction of religious organizations, particularly as societies around the world experience increasing religious diversity.

The freedom of religion or belief is principally monitored at the UN by the Human Rights Committee (HRC) and the Special Rapporteur on the Freedom of Religion or Belief, the former dedicated to the monitoring of the ICCPR, the latter to the 1981 Declaration.<sup>20</sup> Clarifying the scope of article 18 of the ICCPR in its General Comment no. 22 in 1993, the HRC has observed that article 18, like article 6 of the 1981 Declaration, also covers 'acts integral to the conduct by religious groups of their basic affairs', such as to 'choose leaders, priests and teachers', and to establish seminaries or schools, effectively adding a collective dimension to article 18.<sup>21</sup> The limits to this collective dimension have not been addressed by the HRC under its periodic reporting mechanism.<sup>22</sup> Under its individual communications procedure, the issue was briefly commented upon by the HRC in *Delgado Paéz v. Colombia* in 1990.<sup>23</sup> In this complaint, where the HRC found numerous violations, the author alleged that his rights under article 18 of the ICCPR had been violated because he had been refused by Colombian educational authorities, acting under advice from the local Apostolic Prefect, to teach religion in the school where he was hired as a teacher, because of his liberal religious views. The HRC found no violation of article 18, observing that Colombia may allow Church authorities both to decide who may teach religion and the manner it should be taught. While

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<sup>20</sup> Due to the 'holistic' nature of human rights provisions, religious freedom can also be monitored by other treaty-based instruments, such as the Committee on the Rights of the Child, and by other Special Measures mandate holders.

<sup>21</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, at 4.

<sup>22</sup> See NN (forthcoming) for an in-depth examination ... [information omitted in view of peer review].

<sup>23</sup> UN Human Rights Committee (HRC), *William Eduardo Delgado Paéz v. Colombia*, Communication No. 195/1985, 23 August 1990, CCPR/C/39/D/195/1985.

the decision does not create a specific, religious exception from generally applicable legislation, it does allow states to recognize a considerable institutional autonomy for religious organizations in the area of education, akin to the ‘margin of appreciation’ doctrine of the ECtHR (see below).

While the HRC has not recognized specific rights or exceptions for religious communities, the Special Rapporteur on the Freedom of Religion or Belief has been more outspoken on the topic: On the general topic of state involvement with the internal affairs of religious communities, the then rapporteur Abdelfattah Amor recalled, during his visit to Greece in 1996, the ‘...need to refrain from interfering in the affairs of a religion, apart from the restrictions provided for in international law, and [calls for] the respect for the traditions of each religious group within the framework of internationally recognized norms’.<sup>24</sup> While Amor stopped short of specifying the scope of restrictions in international law or the framework of internationally recognized norms, the statement clearly indicated an emphatic defence for religious group autonomy as a part of article 18. Visiting Pakistan, Amor furthermore pointed out that, while official state religions in themselves were not in violation of international law, ‘[t]he State should not ... take control of religion by defining its content, concepts or limitations’, affirming the right of religious communities to self-determination in strictly religious matters.<sup>25</sup> In his visit to Viet Nam, Amor shed some light on the contents of acceptable limitations, observing that state limitations of religious communities’ extensions of

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<sup>24</sup> UN General Assembly, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, Note by the Secretary General, 7 November 1996, A/51/542/Add.1 at 139.

<sup>25</sup> UN Economic and Social Council, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1995/23 Addendum. Visit by the Special Rapporteur to Pakistan*, 2 January 1996, E/CN.4/1996/95/Add.1 at 81.

their religious activities into social, health or educational matters would be examples of restrictions that would go beyond the scope of acceptable limitations.<sup>26</sup>

The question of the legitimacy of state interference with the affairs of religious communities typically involves vulnerable groups, which for the purpose of religious freedom tend to include women and children in particular. In his report on the interrelationship between religious freedom and women’s rights, Amor pointed to practices of female genital mutilation and the *trokosi* system of ritual enslavement as practices that could legitimately be prevented by state involvement, for instance by providing practitioners of FGM or *trokosi* with alternate sources of income, or by stimulating the creation of ‘alternative ritual practices’ that were less harmful to women. Additionally, Amor suggested that religious leaders should be engaged to inform women of ‘...rights that have been established by religious precepts, [but] misunderstood, infringed or manipulated by conflicting patriarchal traditions’, thereby entrusting religious leaders with the task to develop, teach and disseminate versions of their religious traditions compatible with international human rights law.<sup>27</sup>

The present special rapporteur, Heiner Bielefeldt, issued a special thematic report in 2012 on meanings of ‘recognition’ of religious communities and the role of the state, in which he expresses his concerns with too entrenched recognitions of majority religions, but stopped short of commenting specifically on the nature of acceptable exceptions from generally

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<sup>26</sup> UN Economic and Social Council, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18 Addendum. Visit to Viet Nam*, 29 December 1998, E/CN.4/1999/58/Add.2 at 117 (h).

<sup>27</sup> UN Economic and Social Council, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2001/42 Addendum. Study on freedom of religion or belief and the status of women in the light of religion and traditions*, 24 April 2009, E/CN.4/2002/73/Add.2 at 199–200 and 205.

applicable laws granted to religious organizations.<sup>28</sup> In a recent journal article on ‘misperceptions’ of religious freedom, the rapporteur concluded by stressing the importance of human dignity and the necessity of recognizing dissent and diversity among believers, both internal to, and across, religious traditions, indicating a continued preference from Bielefeldt for a primarily individualist conception of religious freedom.<sup>29</sup>

Significantly, the question of the ministerial exception has not been an issue at the political level of the UN, whether in the General Assembly, the Economic and Social Council, or at the Human Rights Council. Nor has the recently inaugurated Universal Periodic Review mechanism, where states review the human rights performance of other states, touched upon the issue. The lack of attention at the universal level to the concept of ministerial exceptions – which this special issue clearly demonstrate are prevalent and profound in a number of domestic jurisdictions – can probably be read as an outcrop of the general suspicion towards collective conceptions of religious freedom in international law. While the pre-history of religious freedom starts with state recognition of the differences in creeds and deeds of distinct minority communities, the last century of religious freedom legislation at the international level has been firmly anchored in the sanctity of the conscience of individuals.<sup>30</sup> Hence, although the international norms on religious freedom and their interpretation by the HRC and consecutive special rapporteurs seem to allow a certain degree of autonomy for religious communities, these are always restricted to actions that do not collide with the

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<sup>28</sup> UN General Assembly, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, 22 December 2011, A/HRC/19/60 at 72.

<sup>29</sup> Heiner Bielefeldt, ‘Misperceptions of Freedom of Religion or Belief’ (2013) 35 *Human Rights Quarterly* 33, 68.

<sup>30</sup> For an overview centered mainly on European developments as regards the pre-history, see Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997), parts I–II.

overriding responsibility of states to ensure that individuals do not experience discrimination for their religious beliefs, nor barriers against their rights to hold and manifest religious and other forms of deeply held beliefs.

## V. THE EUROPEAN COURT OF HUMAN RIGHTS

### A. Recognition of collective rights as such

Within the framework of the Council of Europe, the concept of a special ‘ministerial exception’ as related to religious communities can most suitably be discussed as part of a general discussion related to matters of freedom of religion and belief, and more specifically the religious freedoms of groups. The ECtHR, entrusted with jurisdiction over the Contracting Parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR), has repeatedly stated that freedom of religion entails a collective dimension: ‘While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares.’<sup>31</sup> What is more, the ECtHR has continually affirmed that religious communities as such enjoy rights under the ECHR.

The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one’s religion, protected by Article 9 of the Convention.

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State

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<sup>31</sup> *Hasan and Chaush v Bulgaria*, (App no 30985/96), 26 October 2000, para 60.



intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.<sup>32</sup>

Accordingly, Article 9 of the ECHR has on several occasions been read in conjunction with Article 11 (freedom of association) and we can conclude that the ECtHR acknowledges that religious collectives have rights. In cases dealing with employment, the matters have often also been dealt with under Article 8 (right to private life). Rather than a 'ministerial exception' as such, the religious freedom of groups is conceptualised by the ECtHR in terms of 'religious autonomy' or 'church autonomy', and their scope and limits. But as we shall see, recent decisions connect the ECtHR to the discussion that has taken place in the United States, as well as the other jurisdictions discussed in this special issue.

The 'ministerial exception' asks what matters primarily or exclusively belong to religious communities and organisations with a faith-based ethos, and emerges at the ECtHR particularly with regard to the character of a particular office or employment and its requirements, the nature of the employment relationship, and the reasons for dismissal or non-renewal of contract. In the recent jurisprudence of the court, these questions have repeatedly been addressed, in a string of cases that give slightly different answers to the current scope of the ministerial exception. In the following, we offer an account for how the ECtHR dealt with the case of *Fernández Martínez*, the position it took, its reasoning, and how it reflected or perhaps also departed from the reasoning in earlier cases and what it tells us about how the ECtHR at the moment understands the ministerial exception. This discussion will also be

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<sup>32</sup> *ibid* para 62. See also e.g. *Fernández Martínez v Spain*, (App no 56030/07), Grand Chamber, 12 June 2014, para 127.

linked to the recent chamber judgment and Grand Chamber judgments of *Sindicatul "Păstorul cel bun" v Romania*.

## **B. Earlier case law**

The earlier case law of the ECtHR can be summarised by pointing to particular trends with regard to the matters at stake in this special issue. In earlier cases that have concerned employment in religious organizations or private employers with a faith-based ethos, the ECtHR has concluded that the state has a positive duty to make sure that it is possible for employees to have a decision that concerns the terms of employment and its possible termination examined in a court of law.<sup>33</sup> In this examination, the ECtHR has expected the national courts to strike a fair balance between the interests at stake, and allowed national authorities a 'margin of appreciation' in the exercise. This approach is visible in three German cases of fairly recent origin, *Obst v Germany*, *Schüth v Germany* and *Siebenhaar v Germany*.<sup>34</sup> In these cases, the employees – a Director of Public Affairs, an organist and a day-care teacher – had their respective contracts of employment terminated because they were seen to have acted in ways that contradicted the doctrines of the religious organizations for which they worked. Only in the case of *Schüth* did the ECtHR find a violation of the ECHR

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<sup>33</sup> *Obst v Germany*, (App no 425/03), 23 September 2010, paras 43–45, 69; *Siebenhaar v Germany*, (App no 18136/02), 3 February 2011, para 42; *Schüth v Germany*, (App no 1620/03), 23 September 2010.

<sup>34</sup> For a detailed discussion of the cases, see e.g. Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1 *Oxford Journal of Law and Religion* 81; as well as Donlu D. Thayer, 'Religious Autonomy in Europe and the United States – Four Recent Cases' (2012) 1 *Oxford Journal of Law and Religion* 510; and Santiago Cañamares Arribas, 'Churches, Religious Autonomy, and Employment Law in Spain, the European Court of Human Rights, and the United States' (2014) *Journal of Church and State* (Advance Access published September 21, 2014).

(Article 8), as the national courts had not performed an appropriate balancing act between the rights and interests at stake.

Also another, only slightly earlier case, *Lombardi Vallauri v Italy*, deserves to be mentioned here. Lombardi Vallauri was a professor at a Catholic university in Italy who had his contract terminated after it had been regularly renewed for twenty years. The reason for the non-renewal was that he was deemed to hold views that clearly contradicted Catholic doctrine.<sup>35</sup> The ECtHR found that Italy had violated ECHR on a number of procedural grounds. Still, it also becomes clear in the case that the ECtHR assumes that religious autonomy ‘means that it was not for secular courts, including the ECtHR, to make determinations on religious teachings or Orthodoxy’.<sup>36</sup>

Carolyn Evans and Anna Hood find that the ECtHR in this slightly earlier case adopted a more minimalistic procedural approach to what can be demanded of religious employers and thus also become the object of external review. The requirements are that religious employers explicate clearly what are the requirements of employment positions, the basis for termination of contracts and furthermore give the employee a chance to answer to the allegations and offer reasons for why their contract should not be terminated. Even if it does signify a slight interference of religious autonomy, Evans and Hood seem to view this as a more balanced position, provided that it is accepted that the reasons cannot always be made public, for example, because some circumstances may have become known during confession and are thus covered by professional secrecy.<sup>37</sup>

<sup>35</sup> *Lombardi Vallauri v Italy*, (App no 39128/05), 20 October 2009, para 8.

<sup>36</sup> Evans and Hood (n 34) 97; *Lombardi Vallauri v Italy*, para 50.

<sup>37</sup> Evans and Hood (n 34) 102, 105–6. See also Dominic McGoldrick, ‘Religion and Legal Spaces – In Gods we Trust; in the Church we Trust, but need to Verify’ (2012) 12 *Human Rights Law Review* 759, 775; Ian Leigh,

However, Evans and Hood find it more difficult to assess the approach that the three German cases testify to, and which to their mind show that religious autonomy has not only procedural limitations. Given that the ECtHR expected national courts to take the rights of the employee ‘full and proper’ into consideration in the way described above, Evans and Hood find that the ECtHR has ‘started to develop a substantive limitation on employment autonomy’.<sup>38</sup> Contrary to the strictly procedural criteria, this can potentially leave both the religious employers and the employees in a state of uncertainty<sup>39</sup> and also fuel litigation. However, it is, on the other hand, in coherence with the stand taken by the ECtHR in the later recent case of *Eweida and Others v the United Kingdom*, where the ECtHR asserted that rights and freedoms under the ECHR are not adequately safeguarded simply because an employee is free to resign from the employment in question. Instead, states have a positive obligation to balance the rights, interests and needs of employees and their public or private non-religious ethos employers.<sup>40</sup>

### C. The case of *Sindicatul “Păstorul cel bun” v Romania*

The approach of the ECtHR with regard to religious autonomy can be illuminated further if we turn shortly to the even more recent case of *Sindicatul “Păstorul cel bun”*. The ECtHR handed down both a chamber judgment and a Grand Chamber judgment in this case. In the chamber judgment, which came a few months before the chamber judgment in *Fernández Martínez*, the ECtHR ruled in favour of the applicants, finding a violation of Article 11 of the

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‘Human Rights Conflicts under the European Convention’ (2012) 1 *Oxford Journal of Law and Religion* 109, 119–20.

<sup>38</sup> Evans and Hood (n 34) 101.

<sup>39</sup> *ibid* 103.

<sup>40</sup> *Eweida and Others v the United Kingdom*, (App nos. 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013, paras 83–84.

ECHR.<sup>41</sup> In the Grand Chamber judgment, which arrived after the chamber judgment in *Fernández Martínez*, this decision was overturned.<sup>42</sup>

In short, the case concerned a group of 32 Orthodox priests as well as three lay employees within the Romanian Orthodox Church who wanted to form a trade union but did not count with the support of the ecclesiastical authorities of the Romanian Orthodox Church. The Romanian first-instance court, relying also on international law, ICCPR Article 22 and ECHR Article 11, found that they had a right to form a trade union. They were all contractual employees and hence had a statutory right to this effect. The right to form a trade union could not be circumscribed because of their religious affiliation nor could it be made dependent on the prior consent on part of the authorities of the Romanian Orthodox Church. The court did not find any permissible grounds for restricting the rights of the applicants to form a trade union. It found that the trade union activities in effect could give a positive contribution to the Church rather than undermine its workings.<sup>43</sup>

The Church appealed the judgment arguing among other things that upon ordination, the priests had vowed to stay faithful to the church and to abide by its rules. In addition, the setting up of trade unions was 'in breach of the law, the canons and the Church's Statute.'<sup>44</sup> The Dolj County Court overturned the judgment of the first-instance court, affirming hereby the right of religious denominations to govern their internal affairs.<sup>45</sup>

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<sup>41</sup> *Sindicatul "Păstorul cel bun" v Romania*, (App no. 2330/09), 31 January 2012.

<sup>42</sup> *Sindicatul "Păstorul cel bun" v Romania*, (App no. 2330/09), Grand Chamber, 9 July 2013.

<sup>43</sup> *ibid* para 16.

<sup>44</sup> *ibid* para 19. See also para 41 for Article 50 of the Statute of the Romanian Orthodox Church, where this is regulated.

<sup>45</sup> *Sindicatul "Păstorul cel bun" v Romania* [GC] (n 42) para 22.

In contrast with the view of the Romanian Orthodox Patriarchate that held that 'priests were forbidden to apply to domestic and international courts without the consent of their hierarchy' and wished the priests to confirm in writing that they would not pursue the matter further<sup>46</sup>, a number of the applicant priests ultimately sought redress with the ECtHR.

The Third Section in its judgment ruled in favour of the applicants, finding a violation of Article 11. It considered, firstly, that the employment relationships at stake, being contractual employment relationships, were not fully beyond civil law. While the refusal to register the trade union of the applicants was a measure that was based on law and pursued the legitimate aim to protect the Orthodox Christian tradition, the Third Section reached the conclusion that the measure had not been warranted. The County Court had based its decision on purely religious reasons showing no proper regard for the interests of the applicants. Neither had it assessed 'whether the ecclesiastical rules prohibiting union membership were compatible with the domestic and international regulations enshrining workers' trade-union rights.'<sup>47</sup> On top of this, domestic courts had already in other instances recognised a 'right of Orthodox Church employees to join a trade union'.<sup>48</sup>

The matter concerned the limits of collective religious autonomy. Did the setting up of a trade union for purposes of ensuring the respect for fundamental rights of trade union members and the implementation of labour law provisions, negotiating labour contracts and many more things usually identified as core tasks of trade unions,<sup>49</sup> jeopardize the autonomy of the Romanian Orthodox Church?

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<sup>46</sup> *ibid* para 24.

<sup>47</sup> *ibid* paras 82–85.

<sup>48</sup> *ibid* para 86.

<sup>49</sup> *ibid* para 6.

The Third Section of the ECtHR in its chamber judgment observed that ‘government restrictions designed to protect the autonomy of religious bodies enjoyed no special treatment under Article 11 of the Convention’,<sup>50</sup> and added that ‘religious employment relationships’ ‘cannot be excluded from the scope of Article 11 of the Convention. National authorities may at most impose “lawful restrictions” in accordance with Article 11 § 2.’<sup>51</sup>

Critics of the judgment by the Third Section disapprove of the way the Court chose to distinguish between religious and non-religious aspects of religious employment. This cannot be done in an unadulterated fashion, they claim. The consequence of course would be that ‘secular’ ideas in the form of labour law and trade union activities would encroach on matters that it should be up to the religious authorities to decide upon. If labour unions were allowed, it would be impossible to safeguard proper collective religious autonomy.<sup>52</sup>

They furthermore criticise the Third Section for ignoring the importance of Article 9 rights when interpreting other rights and freedoms under the ECHR and reaching a judgment, as well as missing the importance priests hold as representatives or rather ‘personifications’ of the Romanian Orthodox Church. Thus, to their mind, the idea that priests could form a trade union and consequently among other things raise claims against their own employers correspond to a distorted view of the actual position and concerns of priests within the Romanian Orthodox Church.<sup>53</sup>

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<sup>50</sup> Erik Rassbach and Diana Verm, ‘Analysis of *Sindicatul “Păstorul cel bun” v Romania*’, <<http://www.becketfund.org/wp-content/uploads/2012/03/Analysis-of-Sindicatul-final.pdf>> 5, accessed 8 January 2015.

<sup>51</sup> *ibid*; *Sindicatul “Păstorul cel bun” v Romania* (n 41) para 65.

<sup>52</sup> Rassbach and Verm (n 50) 11–12.

<sup>53</sup> *ibid* 12.

It does not appear, however, that in making a case for the interdependence and interrelatedness of different ECHR rights and freedoms, they really want to underscore the importance of balancing different interests and rights, such as the rights of the Romanian Orthodox Church under Article 9 and the right of the applicants to freedom of association under Article 11. Rather, in the end, they make a case for straight-out church autonomy in these matters. Moreover, they do not see any reason why the interpretation of the scope of church autonomy should differ between the Council of Europe and its member states and the United States.<sup>54</sup>

There were many third party interveners in the case before the Grand Chamber, all on behalf of the respondent Government. These third party interveners made a case for collective religious autonomy, finding that State neutrality with regard to religion demanded that religious communities be free to regulate their internal affairs with regard to the matters at stake. Some advocated a wide margin of appreciation and also took up other points mentioned by the critics of the chamber judgment above, for example regarding the nature of the office of the priests.<sup>55</sup> Just to pick up one observation, the non-governmental organisation European Centre for Law and Justice (ECLJ) – which in fact also intervened before the Grand Chamber in *Fernández Martínez* making a similar point – remarked that ‘where, as in the present case, the facts in dispute were of a religious nature, the interference in issue could not be reviewed by means of a proportionality test weighing up the interests of religious communities against the interests which individuals could claim under Articles 8 to 12 of the Convention, since these Articles protected rights which the individual concerned had freely chosen not to

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<sup>54</sup> *ibid* 13. Both of the authors represent the Becket Fund, a non-governmental organization based in the United States and which along with a number of other parties was granted the leave to intervene in the written procedure before the European Court.

<sup>55</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) paras 111–28.

exercise.’<sup>56</sup> Putting it starkly, in religious matters, a ‘secular’ ‘individualistic’ human rights perspective does not enter the equation. In fact, they seem to actually emphasize the modernist image of domestic and international law as being outright ‘secular’, asking the ECtHR to reinforce this conception, this secularist profile of the law.

As observed, the Grand Chamber did overturn the chamber judgment. It reiterated its principled reasoning as presented above regarding religious communities, their status and rights under the ECHR, underlining among other things the principle of autonomy. It emphasised the right of the individual to exit a religious community with which he or she disagrees, and it also underlined that in cases where state practice differs to a high degree, domestic decision-making bodies held significance.<sup>57</sup>

Following Ian Leigh, emphasising the individual’s right to exit echoes a traditional view of the ECtHR.<sup>58</sup> Within a religious community, individuals reasonably can be requested to adjust to the life and ways of the community. If you wish to conduct your religious life in a completely different manner, it would seem only reasonable that you seek out other like-minded persons instead of destabilising the group that you are presently in. That is the trade-off that you must expect. And the ECHR protects religious groups exactly from having to allow its members to actually weaken the group itself under the pretext of freedom.<sup>59</sup>

Importantly, however, the Grand Chamber did not agree with the respondent Government that the clergy could make no case under Article 11 because they answered to the Bishop and so were not covered by domestic labour law. Instead of taking this rigid stand – and without

<sup>56</sup> *ibid* para 126. See also *Fernández Martínez v Spain* [GC] (n 32), para 99.

<sup>57</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) paras 136–38.

<sup>58</sup> Leigh (n 37) 125.

<sup>59</sup> Cf. *ibid* 115–16, including for a critique of the downsides related to a right to exit.

wanting to take sides in an internal dispute over how to understand the duties performed by the clergy – the Grand Chamber saw as its task to determine if the duties in question could to some extent ‘amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11’. Making reference to the standards of the International Labour Organisation (ILO), it found that many characteristics of an employment relationship were *de facto* present alongside duties of a more particular spiritual or religious nature. For this and other reasons it found that there had been an interference with the rights of the applicants under Article 11.<sup>60</sup>

On the other hand, such interference was justified if the threat to the religious community was real and it could be shown that the measures taken were necessary in order to safeguard the autonomy. It was up to the national courts to conduct ‘an in-depth examination of the circumstances of the case and a through balancing exercise’.<sup>61</sup> The Grand Chamber found that the national courts had done this and struck a fair balance. Among the factors weighing in were the facts that the applicants had not to all parts followed the right procedure as laid down by the Roman Orthodox Church, requesting the Bishop for permission to form a trade union. The Church in question also did not absolutely prohibit trade unions, and there were existent ones that the applicants could join.<sup>62</sup>

#### **D. The case of *Fernández Martínez v Spain***

<sup>60</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) paras 140–49. The ECtHR notes that according to the ILO, the existence of an employment relationship should be established based on ‘the facts relating to the performance of the work and the remuneration of the worker’, not on the basis of how the parties have framed the relationship in question by way of a contract or in another way. *ibid* para 142.

<sup>61</sup> *ibid* para 159. The European Court here refers to the cases of *Schüth* (n 33) para 67, and *Siebenhaar* (n 33) para 45.

<sup>62</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) paras 168–73.

Turning now to the latest in this row of cases, in 2012 the ECtHR in the case of *Fernández Martínez v Spain*, concerning the firing of a Catholic school teacher, found no violation of Article 9.<sup>63</sup> Following appeal by the plaintiff, the ECtHR delivered a Grand Chamber judgment in 2014, upholding the earlier chamber judgment.<sup>64</sup> The case concerned a married catholic priest whose contract as a teacher of religion in a public (state) school was not renewed. The reason given for not renewing the contract was that he had caused a ‘scandal’ by publically presenting himself as a representative for a group called Movement for Optional Celibacy. The movement questioned the position of the Catholic Church vis-à-vis abortion, divorce, sexuality and contraception. It also called for celibacy to be optional and aspired for more influence from laymen in the church. The priest himself had recently been granted an exemption from his celibacy. The bishop in charge of the appointment issue found that in light of his actions the priest could no longer be considered for the teaching post. The bishop also took into consideration the parents of the prospective pupils of the teacher, and their right to expect an education that was in conformity with the doctrines of the Catholic Church. The bishop considered the goals of the movement to contradict with the doctrines of the Catholic Church and found the priest unsuitable for the position as teacher of religion, using here his ‘prerogative in accordance with the Code of Canon Law’.<sup>65</sup>

<sup>63</sup> *Fernández Martínez v Spain* (n 32).

<sup>64</sup> *Fernández Martínez v Spain* [GC] (n 32).

<sup>65</sup> *Fernández Martínez v Spain* (n 32) para 19. For an overview of the Spanish arrangement as regards teachers of Catholic religion in public schools and their accreditation, see the essay by NN in this special issue. See also the essay by NN for an in-depth discussion of how the ECtHR in both the case of *Fernández Martínez v Spain* and *Sindicatul “Păstorul cel bun” v Romania* includes ‘religious law’ (Catholic and Orthodox Canon law) when it identifies the relevant ‘valid law’, given that in the states in question, a link between canon law and state law can be established. NN points out that in both cases, also the minorities ‘accept that the decisions are based on existing law’.

Hearing the case, the Constitutional Court of Spain did not find that the decision not to renew the contract of employment breached the law. Rather, the Court observed that the reasons given for why the contract was not renewed were of an ‘exclusively religious nature’ and it did not want to assess them as this would contravene the state’s duty to be neutral. It was up to the religious organizations themselves to determine the requirements with regard to teachers of religion. However, the Constitutional Court did see it as its task to determine whether the action taken by the bishop (and so by the Catholic Church) and which interfered with the applicants’ constitutional rights were ‘disproportionate’ or ‘unconstitutional’. It came to the conclusion that such was not the case. The action was in keeping with the Constitution, and ‘the right to religious freedom in its collective or community dimension’ (Article 16 § 1).<sup>66</sup>

#### 1. *The case before the ECtHR*

The Third Section of the ECtHR in its chamber judgment dealt with the case of *Fernández Martínez* under Article 8 (right to private life) and Article 14 (non-discrimination) ‘read separately or together with’ Articles 9 and 10 (freedom of expression). According to the ECtHR, the right to private life should be given a broad reading and may encompass also aspects of a person’s professional life.<sup>67</sup> The ECtHR asserted that Article 8 seeks to protect

<sup>66</sup> Excerpt from the Constitutional Court as reproduced in *Fernández Martínez v Spain* (n 32) para 27. In this special issue, NN elaborates the more specific aspects of the Spanish legislation with regard to these matters, and the way in which the case was dealt with in Spanish courts. NN, in turn, in her essay, looks at the case of *Fernández Martínez* and a number of other cases from the perspective of European Union Law.

<sup>67</sup> *Fernández Martínez v Spain* (n 32) paras 56–57; *Bigaeva v Greece*, (App no 26713/05), 28 May 2009, para 23; *Schüth v Germany* (n 33) para 53; *Sidabras and Džiutas v Lithuania*, (App nos. 55480/00 and 59330/00), 27 July 2004, para 43; *Niemietz v Germany*, (App no 13710/88), 16 December 1992, para 29; *Campagnano v Italy*, (App no 77955/01) 23 March 2006, para 53; *Mólka v Poland*, (App no 56550/00), decision on admissibility, 11 April 2006), 16.

individuals from the arbitrary interference by public authorities. States are not only obliged not to interfere. They also have a positive duty to make sure that the relations between two private parties do not develop in a way that violates the right to private life.

In line with its earlier case law, the ECtHR repeated that the state has a positive duty to make sure that employees can have a decision that concerns the terms of employment and its possible termination examined in a court of law.<sup>68</sup> Had a 'fair balance' been achieved between the interests at stake? States are here allowed a 'margin of appreciation', i.e. an opportunity to adapt international law to local conditions.<sup>69</sup> The ECtHR, therefore, understood as its task to investigate whether the state in the concrete case concerned to a sufficient degree had sought to safeguard the individual when it had balanced the rights of the applicant to private life against the right of the Catholic Church to not renew the applicant's contract, on the presumption that the Church holds certain rights under Article 9 and Article 11.<sup>70</sup>

In paragraph 80 of the chamber judgment, the ECtHR laid down the principles that it considered central in relation to the issue of religious autonomy in the present case, in long parts repeating what was mentioned above.

... the Court reiterates that religious communities traditionally and universally exist in the form of organised structures and that, where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The Court further reiterates that, but for very exceptional cases, the right to freedom of religion as guaranteed under the

<sup>68</sup> *Obst v Germany* (n 33) paras 43–45, 69; *Siebenhaar v Germany* (n 33) para 42.

<sup>69</sup> *Fernández Martínez v Spain* (n 32) para 78, with reference to *Evans v United Kingdom*, (App no 6339/05), Grand Chamber, 10 April 2007, paras 75–77; *Rommelfanger v Germany*, (App no 12242/86), Decision by the ECmHR, 6 September 1989; *Fuentes Bobo v Spain*, (App no 39293/98), 29 February 2000, para 38.

<sup>70</sup> *Fernández Martínez v Spain* (n 32) para 79, with reference to *Schüth v Germany* (n 33) para 57.

Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate ... Moreover, the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty ... Lastly, where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.<sup>71</sup>

Thus, religious autonomy is presented as a principally vital part of Article 9 and is connected with the overarching idea of religious pluralism as one of the cornerstones of the democratic society that the ECHR protects. Religious communities are, with few exceptions, allowed to freely determine their doctrines and the ways in which they wish to communicate them. They may independently choose and exclude members, and this also includes those persons whom they wish to entrust with religious tasks. Religious autonomy presupposes state neutrality in certain respects. The ECtHR here simply summarized its earlier case law.

In the chamber judgment, the ECtHR joined the Spanish Constitutional Court in assuming that the basis for the decision not to renew the applicant's contract was of a purely religious nature and that the principles of religious freedom and neutrality hindered it from assessing these grounds. What the ECtHR did consider itself justified to take a stand on, was whether the foundational principles of national law or the applicant's 'dignity' had been violated. It concluded that such was not the case. The ECtHR observed that teachers of religion were not like any other teachers but that more loyalty could be demanded from them. In *Fernández Martínez*, the trust between the ecclesiastical authorities and the applicant had been broken. With reference to religious autonomy, the ecclesiastical authorities had a right to act as they

<sup>71</sup> The European Court here referred to *Hasan and Chaush v Bulgaria* [GC] (n 31) paras 62, 78; *Svyato-Mykhaylivska Parafiya v Ukraine*, (App no 77703/01), 14 June 2007, para 146; *Leyla Şahin v Turkey*, (App no 44774/98), Grand Chamber, 10 November 2005, para 109.

did, and thus, the Spanish High Court of Justice and Constitutional Court had made the right assessment.

The applicant also could not have been ignorant of the religious criteria put on teachers of religion, and which were meant to help guarantee 'freedom of religion in its collective dimension'.<sup>72</sup> The ECtHR therefore concluded that the applicant was bound by a 'heightened loyalty' (in keeping with *Obst* para. 50, and in contrast to *Schüth* para. 71) yet chose to act and express himself publicly in a way that was not in keeping with the position of the Catholic Church (in contrast to *Schüth* para. 72).<sup>73</sup> Finally, the ECtHR also considered that the professional requirements that were imposed on the applicant '...stemmed from the fact that they were established by employer whose ethos was based on religion and belief'. Here, the ECtHR referred both to the cases of *Schüth* (para 40), *Obst* (para 27), *Lombardi Vallauri* (para 41), and to Directive 78/2000/EC.<sup>74</sup>

The ECtHR listed a few further aspects in favour of its assessment, for example, that the teacher would be teaching 'a vulnerable group' comprising underage children, and the fact that the applicant had managed to find other work. Its conclusion was that the national courts had managed to strike a fair balance between the interests at stake and had 'adequately demonstrated that duties of loyalty were acceptable in that their aim was to preserve the

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<sup>72</sup> *Fernández Martínez v Spain* (n 32) para 97.

<sup>73</sup> *ibid* para 86. The applicant here claimed that parents had not complained about him even though they had been aware about his civil status. Also the Church had been aware of this. *ibid* para 70. We may assume that the Church adopted a pragmatic approach which meant that the person concerned was also expected to keep a low profile.

<sup>74</sup> *ibid* para 87. For a closer analysis and discussion of the EU law we refer to the article by NN in this special issue.

sensitivity of the general public and the parents of the school's pupils'.<sup>75</sup> There was no violation of Article 8. The ECtHR also held that it need not examine whether there had been a violation of Article 14 taken separately or together with Articles 8 and 10.

In the Grand Chamber judgment, the ECtHR upheld the chamber judgment, finding, however, that 'the question in the present case is not whether the State was bound, in the context of its positive obligations under Article 8, to ensure that the applicant's right to respect for his private life prevailed over the Catholic Church's right to refuse to renew his contract'. It here contrasted the present case to the three German cases. Sure enough, the decision of non-renewal had not been taken by the public authorities, but they did serve as the applicant's employer and did enforce the non-renewal decision. They were, thus, 'directly involved in the decision-making process'.<sup>76</sup>

In its reasoning, the ECtHR repeated many of its earlier observations. The ECtHR found that the interference with Mr Fernández Martínez private life had not been disproportionate. It found that the domestic courts had taken all factors adequately into account and 'weighed up the interests at stake in detail and in depth' in the case. They had not afforded undue weight to the principle of autonomy of religious groups.<sup>77</sup> Article 9 of the ECHR 'does not enshrine a right of dissent within a religious community'. Quite the opposite, religious communities have a right 'to react, in accordance with their own rules and interests, to any dissenting movements emerging within them that might pose a threat to their cohesion, image or unity'.<sup>78</sup> The threat to autonomy, however, had to be 'probable and substantial'.<sup>79</sup> The ECtHR

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<sup>75</sup> *ibid*, referring, *mutatis mutandis*, to *Obst v Germany* (n 33) para 51.

<sup>76</sup> *Fernández Martínez v Spain* [GC] (n 32) para 115.

<sup>77</sup> *ibid* para 151.

<sup>78</sup> *ibid* para 128 (reference omitted).

<sup>79</sup> *ibid* para 129.



found that the decision of non-renewal was based on applicable Spanish law, and that it had pursued a legitimate aim, namely to protect ‘the rights and freedoms of others, namely those of the Catholic Church, and in particular its autonomy in respect of the choice of persons accredited to teach religious doctrine.’<sup>80</sup> It affirmed the Third Chamber’s assessment that religious communities in the name of autonomy could demand loyalty and in some instances heightened loyalty from its workers and representatives, and that the applicant had failed in this regard.<sup>81</sup> The duty of loyalty was independent of the fact that it was in fact the Spanish state that paid the salary.<sup>82</sup>

Moreover, upon voluntarily signing successive employment contracts, the applicant would have been aware of the demands as regards loyalty and able to foresee possible consequences should he act in a way detrimental to this duty of loyalty. Also, the applicant had been able to turn to domestic courts to appeal the decision of non-renewal of his contract of employment.<sup>83</sup> In consequence, there had been no violation of Article 8.

## 2. Discussion

The chamber judgment has been commented on as a case where the ECtHR establishes that there is something like a ministerial exception. The ECtHR has moreover been criticized for adopting the kind of interpretation that the US Supreme Court did in the case of *Hosanna-Tabor Evangelical Lutheran Church and School*<sup>84</sup>, which NN analyses in more detail in her

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<sup>80</sup> *ibid* para 122.

<sup>81</sup> *ibid* paras 131, 141.

<sup>82</sup> *ibid* para 143.

<sup>83</sup> *ibid* paras 119, 141, 146, 148.

<sup>84</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 Sup. Ct. 694 (2012). The case concerns a teacher in a religious school, who after a period of sick-leave and

essay in this special issue and where she finds that the Supreme Court categorically privileges collective religious autonomy in an absolutist fashion.<sup>85</sup> Instead of – as in the three German cases of *Obst*, *Schüth* and *Siebenhaar* – seeing it as decisive whether the State had fulfilled its positive obligations with regard to the rights and freedoms of the individual under the ECHR, by carefully balancing the fundamental rights and freedoms of the employee and the employer (religious organization) taking into account the position the employee had held in the organization, the nature of the work, the length of the contract of employment, the employee’s possibility to find other work, as well as other relevant factors, critics now assert that the ECtHR is separating a space as being beyond national and international judicial review in a more categorical fashion.

Picking up the terminology of Dominic McGoldrick, religion is conceptualised as creating an ‘empty legal space’,<sup>86</sup> ‘a legal vacuum where law does not go’. The internal religious governance is not subjected to legal control.<sup>87</sup> While McGoldrick finds this to be the case with the ministerial exception in the US, he does not reach the same conclusion with regard to the ECtHR – and here he differs from the critical commentator mentioned above. The legal black hole as exposed in the chamber judgment of *Fernández Martínez* is decisively small ‘and even within it some legal principles apply’. Among other things, McGoldrick observes that the ECtHR set out to verify ‘that the fundamental principles of the internal legal order and the dignity of the individual have been maintained’ and states must carefully balance rights and having received a disability diagnosis wished to return to her job. Instead, however, she was dismissed from her post.

<sup>85</sup> For the critique of the ECtHR, see Stijn Smet, ‘Fernández Martínez v Spain: Towards a ‘Ministerial Exception’ for Europe?’ < <http://strasbourgobservers.com/2012/05/24/fernandez-martinez-v-spain-towards-a-ministerial-exception-in-europe/> > accessed 13 January 2015.

<sup>86</sup> McGoldrick (n 37) 760.

<sup>87</sup> *ibid* 781.

interests of the parties involved.<sup>88</sup> This, as said, followed from the States' positive obligations under the ECHR. And as seen in the Grand Chamber judgment, the ECtHR, in contrast, found the public authorities to be directly implemented in the matter at stake and took this as the basis for the assessment.

In their article, written before the case of *Fernández Martínez*, Evans and Hood insist that the ECtHR has made clear that 'domestic courts cannot simply defer to the judgment of religious organizations or take only their needs into account'.<sup>89</sup> The critic of the chamber judgment would argue that this is no longer the case. McGoldrick, in turn, finds that the *Fernández Martínez* case does carry on the approach that the German cases testify to, and in approving words, he calls the position taken by the ECtHR 'sophisticated, balanced and elegant'.<sup>90</sup>

In the case of *Fernández Martínez*, the ECtHR in both judgments did repeatedly refer to its early case law, such as the German cases, the case of *Lombardi Vallauri*, and the case of *Sindicatul "Păstorul cel bun"*, in order to point out differences and similarities. Among other things, the ECtHR in both instances claimed that the case of *Fernández Martínez* differed from the three mentioned German cases, in that the person in question was a priest – admittedly a so-called 'secularized' priest – and not a layman. According to the ECtHR, this is a reason why it is relevant to talk of a higher duty of loyalty.

Also this observation has met with criticism, and this critique, as well as the criticism mentioned earlier, seems to accord with the dissenting or partly dissenting opinions that

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<sup>88</sup> *ibid* 783.

<sup>89</sup> Evans and Hood (n 34) 106–7.

<sup>90</sup> McGoldrick (n 37) 786. Also Ian Leigh finds mentioned approach appealing and in principle 'more nuanced and context sensitive than the Court's earlier jurisprudence.' Leigh (n 37) 123.

accompany the judgments.<sup>91</sup> In his partly dissenting opinion to the chamber judgment, Judge Saiz Amaiz made a point out of asserting that it was formally not the ecclesiastical authorities who were the employer. They only suggested the persons who could be considered for the position of teacher of religion. Consequently, Saiz Amaiz concludes that we are dealing with the filling of a public office where the applicant's fundamental civil rights have not been appropriately taken into account. Both the national courts and the ECtHR place too much emphasis on 'the doctrinal and institutional autonomy of the Church'. They do not question whether we are actually dealing with a 'scandal' in the present case. Saiz Amaiz did not think so.<sup>92</sup>

A decisive point in the case of *Fernández Martínez* consequently is whether something is of religious and moral nature and as a result cannot be called into question 'on the basis of civil-law criteria', as the Spanish Government asserted.<sup>93</sup> It relates to the assessment of whether something is a scandal or not? Does certain action convey disloyalty or not? The ECtHR sided with the national courts in proclaiming that it could not determine this matter because of the religious nature of the grounds for non-renewal of contract. The assessment of the situation by the church authorities is taken at face value.

Identifying something as exclusively religious apparently invests it with such importance that the applicant's own interpretation of the meaning or relevance of what an employee does

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<sup>91</sup> In fact, in the Grand Chamber judgment, the dissenting judges disagreed on almost all parts of the reasoning, finding, among other things, that the case concerned the applicant's right to respect for private life and family life, rather than his employment rights (following from a broad reading of Article 8). Joint dissenting opinion of Judges Spielmann, Sajo, Karakas, Lemmens, Jäderblom, Vehabovic, Dedov and Saiz-Arnaiz, *Fernández Martínez v Spain* [GC] (n 32) paras 1, 9–11.

<sup>92</sup> Partly dissenting opinion by Judge Saiz Arnaiz in *Fernández Martínez v Spain* (n 32) paras 1–2.

<sup>93</sup> *ibid* para 63.

privately, and how this affects or does not affect his work is rendered unimportant for the interpretation of what is religiously relevant. The applicant raised this objection before the ECtHR. He presented a different interpretation of what was incompatible with the doctrines of the Catholic Church. He declared that he had not denied God's existence, criticized the Pope or questioned the divinity of Christ or whether the Virgin Mary had actually been a virgin when giving birth to the baby Jesus.<sup>94</sup> According to the applicant, such statements would have fallen short as an expression of loyalty to the institution he was set to serve.

As in the case of *Hosanna-Tabor*, we are here dealing with an employee – in the position of 'ministry' – whose contract of employment was terminated (or in the present case not renewed) because the person had acted in a fashion that contradicted the doctrine of the religious community. The decision is justified on grounds that are said to be theological and foundational. The conflict is consequently defined as a situation where the religious community in question need not follow 'neutral, generally applicable laws'.<sup>95</sup> Both employees put forward alternative interpretations of what is religiously relevant and in consequence how public authorities should deal with the matter and whether 'secular law' is normative. Neither of them had their views recognised.

If the ECtHR would engage with this question, it would start to take a stand on matters of religious doctrine, and this it does not want to do.<sup>96</sup> However, it is worth noting that at the end of the Grand Chamber judgment, the ECtHR actually assesses the quality of the decision taken by the Bishop, noting that it 'cannot be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of

<sup>94</sup> *ibid* para 69.

<sup>95</sup> See Stanley Fish, 'Is Religion Above the Law?' *The New York Times* (17 October 2011)

<[http://opinionator.blogs.nytimes.com/2011/10/17/is-religion-above-the-law/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/10/17/is-religion-above-the-law/?_r=0)> accessed 14 January 2015.

<sup>96</sup> Evans and Wood underline that this would be problematic. Evans and Hood (n 34) 98.

the Catholic Church's autonomy.<sup>97</sup> Thus, in this sense, no absolute preferential right of interpretation is afforded church authorities.

This aspect is also followed up in one of the dissenting opinions. While agreeing with much of the principled reasoning regarding religious autonomy, and underlining that this autonomy is not absolute, the eight dissenting judges do seem to want to go further than what the majority ended up ruling. In reference to *Lombardi v Italy*, they conclude that the secular 'courts should not so confine themselves, for instance, to merely verifying the existence of a decision taken by the competent religious authority and then attach civil consequences to that decision'. From 'a formal point of view', courts have to review such decisions to make sure that these are 'duly reasoned', and neither arbitrary nor taken for purposes 'unrelated to the exercise of autonomy by the faith group concerned'. And while secular courts should not assess the religious grounds underlying a decision, they would need to make sure that in effect does not interfere 'disproportionately with the fundamental rights of those affected by the decision'. The dissenting judges assert that the right of respect of autonomy of religious communities has to be properly balanced against the human rights of individuals.<sup>98</sup> In the present case, this should have called for closer scrutiny of the so-called 'secular reaction', the decision that the public authorities took as a result of the Bishop's decision and whether or not other alternative measures could have been possible.<sup>99</sup>

#### **E. The scope and limits of the 'legal black hole' and the (im-)possibility of translation**

The cases of *Fernández Martínez* and *Sindicatul "Păstorul cel bun"*, as well as the other cases referred to above, actualise questions that are central in this special issue. How should

<sup>97</sup> *Fernández Martínez v Spain* [GC] (n 32) para 151.

<sup>98</sup> Dissenting opinion to *Fernández Martínez v Spain* [GC] (n 32) paras 20–22.

<sup>99</sup> *ibid* para 35.

we understand the idea of the ministerial exception and its scope? The ECtHR assigns to the sphere of collective religious autonomy the doctrines of a religious community as well as (at least) the ways in which these doctrines take expression in worship and rituals, issues of membership and the election of persons in a religious position. When it comes to the employment of laymen, religious organisations are not in the same self-evident manner able to deviate from valid law, including ordinary labour law and non-discrimination legislation, and disregard the fundamental rights of the employees in this respect. Depending on their tasks, also religious personnel may to some extent fall within the scope of neutral generally applicable law. Above all, they enjoy procedural protection and should have access to judicial review of decisions affecting them,<sup>100</sup> even if that which is deemed of ‘religious’ nature is beyond the reach of ‘secular courts’.

But when is, for example, an employment of religious nature? Who gets to determine the criteria of these employments? Who is authorised to determine when the criteria are met: public authorities, church authorities, or the employees themselves, and what importance should be attached to these different positions? As Stanley Fish observes in an article about the case of *Hosanna-Tabor*: ‘who gets to say whether a “certain conduct” is religious and centrally so?’<sup>101</sup> Or as asked at the beginning of this article: whose categories, vocabularies and ways of reasoning should take precedence under what circumstances? It is a dilemma. Fish notes that one way of dealing with this dilemma would be to not consider ‘religion’ special in this respect and thus allow no deviation from valid law.<sup>102</sup> He concludes, however,

<sup>100</sup> This last thing seems to distinguish the position of the European Court from the position of US Courts. See *McGoldrick* (n 37) 780; *Leigh* (n 37), 111.

<sup>101</sup> See Fish (n 95).

<sup>102</sup> Regarding the question of whether religion is or is not ‘special’, see e.g. Christopher L. Eisgruber and Lawrence G. Seger, *Religious Freedom and the Constitution* (Harvard University Press 2007), and Sonu Bedi,

that this would hardly be regarded as a satisfactory solution in the American context. Also in the European context, ceasing to accommodate religious employers would break what has been the trend.

On the other hand, it is interesting to observe that a so-called third party intervener in front of the ECtHR in the case of *Sindicatul “Păstorul cel bun”* also was highly engaged in the case of *Hosanna-Tabor*, placing the latest decision first on its list of top-ten achievements. This intervener, the Becket Fund for Religious Liberty, obviously finds that the US jurisprudence could offer valuable insights with regard also to the way church-state relations should be organised in Europe and the ECHR be interpreted.<sup>103</sup> In their address together with the International Center for Law and Religion Studies, the Becket Fund appealed to US case law confirming the ‘ministerial exemption’, like the case of *Hosanna-Tabor*. To their mind, ‘the position of the United States Supreme Court was consistent with that of the European Court as regards protection of the autonomy of religious communities in their relations with the clergy.’ The chamber judgment had deviated from this position.<sup>104</sup>

While it lies outside of the immediate scope of this introductory essay, this raises important questions regarding the possibilities of ‘translation’ between different legal orders, the level at which – and by whom – matters of church and state should primarily be elaborated and

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‘Debate: What is so Special About Religion? The Dilemma of the Religious Exemption’ (2007) 15 *The Journal of Political Philosophy* 235, and Micah Schwartzman, ‘What If Religion Is Not Special?’ (2012) 79 *The University of Chicago Law Review* 1351, for three critical interventions in a discussion especially animated and extensive in the United States.

<sup>103</sup> See e.g. *Rassbach and Verm* (n 50) 2.

<sup>104</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) paras 127–28. Also in the Grand Chamber judgment in *Fernández Martínez*, third party interveners refer to the case of *Hosanna-Tabor*, as well as other US cases, and also the HRC case of *Delgado Páez v Colombia*. *Fernández Martínez v Spain* [GC] (n 32) paras 100–1.

resolved, and according to which criteria. It is, for example, clear that the historical, cultural, political and ‘religious’ context partly differs depending on the country and region of the world. What role should that play in the assessment? Or are we dealing with matters that can be decided on a principled level without resort to such contextual concerns? Thus far, the ECtHR has underlined that its role, particularly as regards matters about which no consensus exists, is to supervise the actions of member states, rather than to replace national-decision making processes and assessments. This it also states in the Grand Chamber judgment in *Sindicatul “Păstorul cel bun”*:

... where questions concerning the relationship between the State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national-decision-making body may be given special importance ... This will be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious denominations.<sup>105</sup>

The ECtHR, then, does not want to decide at a principled level once and for all the limits for incursions by ‘secular’ law into ‘religious matters’ and the ‘internal’ governance of religious communities.

## VI. OVERVIEW OF THE SPECIAL ISSUE

By examining the concept of ministerial exemptions from a variety of perspectives, the papers in this special issue contribute to the broader discussion on how we should relate to and regulate religion, how power is and should be distributed in society, what values we want to cherish, and how we wish to rank these. We do not provide comprehensive answers to these questions, nor do we even think that this would be possible for us. However, we provide one starting point for these discussions by examining legal regulations and case law on various forms of ministerial exemptions in jurisdictions with which we are acquainted.

<sup>105</sup> *Sindicatul “Păstorul cel bun” v Romania* [GC] (n 42) para 138.

In so doing, and as a contribution to the wider discussions on law and religion, the contributors to this issue unpack the concept of ‘secular’ law: examining national law, European law, international law, common law and civil law jurisdictions, as well as contexts where religious law is recognized (like in United Kingdom and Spain) or alternatively is dismissed on theological grounds (which is the case in Denmark with the Danish Folkschurch). The issue highlights the fact that different ideas about ‘religion’ and ‘the secular’ inform these judicial practices, and the extent to which religious organizations are granted special exemptions from otherwise generally applicable law.

These differences are particularly evident in how different jurisdictions seem to provide ministerial exemptions relative to their more general approach to religious diversity: In her article on US law, NN traces the increased willingness of the Supreme Court of the United States to provide special exemptions for religious ministers to a shift in the religion jurisprudence of the Court, which up to the 1980s had been supportive of the national ‘religious pluralism’ project, by which religious minorities were gradually awarded the same rights as majority mainstream Protestantism, partly through the introduction of anti-discrimination legislation. However, with the 1990 *Smith*-decision, which was widely seen as an attack on religious liberty, a new phase of gradually increasing ‘religious preferentialism’ was inaugurated. NN traces this shift in the increased role of legislators seeking to ‘restore’ religious freedom following the decision in *Smith*, resulting in the adoption of legislation tailor-made to expand the scope of religious autonomy. NN shows how the extent to which religious preferentialism has taken over from the earlier practice of accommodating pluralism is evident in the recent Supreme Court decision in *Hosanna-Tabor* (2012), where a religious school was exempted from its obligations to one of its employees under the Americans with Disabilities Act, in order to protect its religious autonomy.

By contrast, NN shows in her article how EU law approaches the question of religious pluralism, anti-discrimination law and the availability of specific exemptions to further religious autonomy from a different perspective. Freedom of religion or belief is a core component of the legal framework created by the Union as is the principle that the Union shall respect the status afforded to churches and other religious communities or associations under the national laws of the member states. Historical privileges are accepted. Simultaneously, the proceedings of the Commission of the EU with regard to the implementation of EU directives protecting against discrimination have consistently favored a balancing approach where the decisive factor in cases of differential treatment is whether such treatment is related to genuine occupational requirements, and whether it is proportionate to the legitimate aim sought. Hence, whereas the present jurisprudence of the US Supreme Court on the ministerial exemption seems to take religious autonomy as the core value to be protected, the Commission of the EU emphasizes the value of non-discrimination, apparently at the expense of an unbridled, collective religious freedom.

Taken together, the different approaches to the ministerial exception favored by the UN, the ECtHR, the US and the EU are marked by the tension between on the one hand, the protection of the collective dimension of the freedom of religion or belief, and on the other, a robust set of legal provisions set to prohibit discrimination in any way or form. While these jurisdictions balance these concerns quite differently, they rely on a basic distinction between a purportedly ‘secular’ legal order and a ‘religious’ domain that should be given a certain degree of protection, although its access to exceptions from otherwise generally applicable laws is hotly contested.

In the jurisdictions examined in the three last articles of this special issue, however, the borders between ‘secular’ law and its relation to and influence over the ‘religious’ domain are

considerably more blurred, as the legal frameworks on religion in the United Kingdom, Spain and Denmark, as in much of Europe, are influenced by the historical dominance of majority churches.<sup>106</sup> The legal role of these majority churches complicates the reach of ‘secular’ law, including anti-discrimination law from which these churches have traditionally been granted a variety of exceptions. In his article on the United Kingdom, NN demonstrates how the predominant position of the Church of England was embedded in the legal approach to religious employment relations, which were considered to be of a ‘special nature’ beyond regular employment legislation until the adoption of the Human Rights Act in 1998, which made the ECHR part of English law. While combined with the introduction of anti-discrimination laws which allows for two kinds of exceptions for religious employers, the Human Rights Act has removed earlier exceptions offered to religious employment relations, effectively cancelling their ‘special’ status. Moreover, UK courts have not incorporated the turn towards religious autonomy developing at the ECtHR, leading NN to question whether any such thing as a ministerial exception presently exists in the UK.

Similarly, in her article on the ministerial exception in Spain, NN observes a similar turn from the legal predominance of the Catholic Church to the increased recognition of religious freedom and anti-discrimination law with the adoption of the 1978 Constitution, laying the foundations of a new juridical order coinciding with increased immigration, further pluralizing and complicating the ‘religious’ domain and its relation to ‘secular’ law. The 1978 Constitution accords the same rights and privileges to all religious denominations, where

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<sup>106</sup> To be sure, observers have also claimed that the adjudication of the ECtHR exposes particular religious biases relative to historically influential religious traditions in Europe. See e.g. Silvio Ferrari, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Qualitative Analysis of the Case Law’ in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers 2012); NN 2012.

ministerial exceptions may be granted if they are proportional to the aim sought, as laid down in the agreements concluded between the Spanish state and the major religious denominations in the country. Despite this legal equality, NN observes that the Catholic Church still enjoys special status due to its historical and social importance in Spain, as evinced in the hiring and dismissal of teachers of Catholicism, where the Church has been allowed considerable autonomy.

The final article of this special issue is written by NN, who deepens the perspective further by critically framing the issue as one of ‘legal pluralism’, situating the discussion on the ministerial exception and religious autonomy as it has been conceptualized by the ECtHR in a Nordic and especially Danish context where the role of Canon law carries less weight than other European countries. While collective religious freedom is protected in all the Nordic countries, NN finds that the Nordic countries tend to interpret exceptions narrowly, in contrast to much of the situation elsewhere, including the position of the ECtHR. In these strict interpretations, individual fundamental freedoms and human rights play important roles in laying down the boundaries for collective religious autonomy. NN makes a case against strong extensive protection of religious autonomy, which would be at odds with a Nordic legal culture centered on the preeminence of ‘the law of the land’. Instead of ministerial exceptions, then, NN argues for state recognition of ‘semi-autonomous religious governance structures’, without conceptualizing this in terms of ‘autonomous law’, and for judicial review by secular courts, including a balancing approach where collective religious autonomy does not necessarily hold the same fundamental weight as other human rights.

Taken together, the articles in this special issue suggest that the post-secular call of Habermas and others for a reintroduction of religion to the public sphere may be gaining traction as the

US Supreme Court, and to some extent the ECtHR, allowing gradually increasing ministerial exceptions in order to protect religious autonomy. Simultaneously, however, the relative lack of impact of the religious autonomy argument at the UN, in the EU, the UK and the Nordic countries indicate the continued strength of anti-discrimination legislation that denies any ‘special’ status to ‘religion’ as a domain eligible for particular exceptions or protective measures.

Moreover, it remains clear throughout the contributions to this special issue that the variety in how different jurisdictions handle the concept of ministerial exceptions display how calls for ‘the return of religion’ rely on a rigidity in the difference between secular law and religion that rarely matches social and legal reality. Numerous empirical examples presented in the following show how the boundaries between religion and the secular, which are commonly considered foundational to the liberal constitutional order in late modernity, no longer enjoy their earlier self-evident status, as societies become more religiously diverse, and the hegemony of the organizations of majority religions in the public sphere are waning. What constitutes a religious organization and a ‘minister’ of religion, which of the tasks performed by such ministers should be beyond the reach of general legislation, and who should decide these vexing issues is anything but self-evident, confirming the skepticism towards the Habermasian conception of the post-secular society expressed by scholars like John Caputo.

Finally, as many of the contributors to this special issue point out, the ministerial exception is first and foremost a US legal concept, growing out of the specific history of how US courts have interpreted the religion clauses of the US Constitution. While comparable exceptions exist in numerous other jurisdictions, such exceptions tend to grow out of different concerns than the religious autonomy argument dominating in US courts, in particular the special status of historically dominant churches. To the extent that international, regional or domestic

varieties of the religious autonomy argument can be identified outside the US, it seems to arise from the continued efforts of religious liberty activists, such as the increased involvement of the Becket Fund, a US legal firm specializing in religious liberty jurisprudence, in cases before the ECtHR.