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The Ministerial Exception: Theological and Legal Perspectives from Finland and Europe

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The issue of so-called ministerial exceptions from generally applicable laws has been widely and rather passionately debated in recent times. This essay approaches the issue by means of a succinct inquiry into the question of to what extent religious communities are, can, and should be exempt from general law. In elaborating on this issue, the article offers an account of two concrete examples of how governance through law in matters of faith is being conceptualized and approached: in the Evangelical Lutheran Church of Finland, and in the jurisprudence of the European Court of Human Rights.[1]

The Future Legal Arrangements of the Evangelical Lutheran Church of Finland

The Evangelical Lutheran Church of Finland, a majority church, is currently revisiting its legal relations to the State and making decisions on how its activities ought to be regulated in law in the future.[2] This is one dimension of an extensive review of all aspects and activities of the Church's organization and administration. The goal is to improve the Church's ability to carry out its foundational tasks in the future and to make sure that it is able to respond in an adequate way to the needs and challenges of the contemporary age. Is this, for example, best secured by the Church holding status under public law, or not? The overall work is headed by a special 'ELFC Committee for the Future' (*Kirkon tulevaisuuskomitea*) appointed by the General Synod of the Evangelical Lutheran Church.[3]

At present, a Church Act (*Kirkkolaki* (1054/1993)) regulates relations with the State and the order and administration of the Evangelical Lutheran Church of Finland. Here the order of enactment is central: The Church itself decides on the content of the Act collectively through its General Synod. The Finnish Parliament can only approve or reject an ecclesiastical bill. As stated in the Church Act: 'The Church has the exclusive right to make legislative proposals for

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[1] This essay was written as part of the author's personal Academy of Finland Academy Research Fellow project "Management of the Sacred – A Critical Inquiry" (2013-2018). The essay in part expands some thoughts from a co-written article published in the *Oxford Journal of Law and Religion*. In it, we raised certain general theoretical questions that pertain to the matter of a ministerial exception, and we offered an overview of how the matter is being handled in international human rights law, within the United Nations and the European human rights systems. Pamela Slotte and Helge Årsheim, 'The Ministerial Exception – Comparative Perspectives', in Special Issue on The Ministerial Exception, (2015) 4 *Oxford Journal of Law and Religion* 2, 171–98.

[2] I refer the reader to the recording of the speech by Lisbet Christoffersen at the Fourth ICLARS conference in Oxford, 8–11 September 2016, for a good overview of the current Nordic situation as regards state-religion relationships. Available at https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016). For a more comprehensive account see also Lisbet Christoffersen, Svend Andersen, and Kjell Å. Modéer, eds, *Law and Religion in the 21st Century: Nordic Perspectives* (Djøf Publishing 2010).

[3] Kirkkohallitus, *Kirkon tulevaisuuskomitean mietintö*, Suomen ev.-lut. Kirkon julkaisuja 47 (Kirkkohallitus 2016), 3. Available at http://sakasti.evl.fi/sakasti.nsf/0/EE4CA05F09EA5A22C2257E70003B1F1B/$FILE/Kirkon%20tulevaisuuskomitea_Mietint%F6.pdf (accessed 27 October 2016).

the enactment of the Church Act in all matters which concern solely its own affairs. It has the same right to propose amendments and repeal of the Church Act.'[4] Thus, we are talking about a collective internal law, recognized by the State,[5] which is expressive of the Church's self-understanding as both a social community and importantly a community of believers, and hence linked to the theological underpinnings of the Church. The confession of the Church is mentioned in the first paragraph of the Act, where it is also stated that it is further elaborated in the Church Order (*Kirkkojärjestys* (1055/1993)).[6] There is also a Church Election Order (*Kirkon vaalijärjestys* (416/2014)) that further specifies some of the rules on elections in the Church Act.[7] The last two regulative instruments are subject to the exclusive authority of the General Synod.[8]

As a majority church, the Evangelical Lutheran Church is very much intertwined with the Finnish State, which is manifested in the legal arrangements. For example, many parts of general administrative law and labor law apply to the Church. 'Worldly law' actually forms part of the law of the Church itself; the Church Act makes explicit references to relevant generally applicable laws. To take but one example, both office-holders and contractual employees – depending on whether their employment relationship is based on public law or not (and also ordained ministers can stand in an employment relationship) – have certain recourse to the judicial review of secular courts, either administrative or civil, in matters that concern

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[4] Church Act (*Kirkkolaki*) 26.11.1993/1054, Chap. 2 Sec. 2(1). Translation taken from *Ahtinen v. Finland*, App. No. 48907/99 (ECtHR, 23 September 2008), § 17. The Constitution of Finland 11.6.1999/731, § 76 reads as follows:

> 'Provisions on the organization and administration of the Evangelic Lutheran Church are laid down in the Church Act. The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code. In church law is enacted the constitution and administration of the Evangelical Lutheran Church. As concerns the order of enactment of church law and the initiative concerning church law, that which is in force is laid down in the aforementioned law separately.'

Available at http://www.finlex.fi/sv/laki/kaannokset/1999/en19990731.pdf (accessed 27 October 2016). See also, for example, Kimmo Kääriäinen, 'Religion and State in Finland', (2011) 24 *Nordic Journal of Religion and Society* (2) 155–171, 160–161 and Pekka Leino, *Kirkko ja perusoikeudet* (doctoral dissertation) (Suomalainen Lakimiesyhdistys 2003), 103–109.

[5] What we see expressed here is a so-called 'East Nordic' understanding of the Church with its own internal order. It differs from how the situation developed after the Protestant Reformation in the West Nordic countries. See e.g. Lisbet Christoffersen, 'The Argument for a Narrow Conception of "Religious Autonomy"', (2015) 4 *Oxford Journal of Law and Religion* (2) 278–302, 279.

[6] As is stated in Chapter 1 of the Church Act:

> Section 1. Confession: The Evangelical Lutheran Church of Finland professes the Christian faith which is based on the Bible and which has been expressed in the three creeds of the old church and in the Lutheran Confessions. The confession of the Church is articulated in more detail in the Church Order.
> Section 2. Task: In accordance with its confession, the church preaches God's word and administers the sacraments and also otherwise seeks to spread the Christian message and realize neighborly love.

[7] For a compilation of the laws and other regulations of the Evangelical Lutheran Church of Finland as it stood on 1 January 2016, see http://sakasti.evl.fi/sakasti.nsf/0/84759E9DB769A9A6C2257D94002752D4/$FILE/Kirkkolainsaadanto_2016_netti.pdf (accessed 25 October 2016).

[8] See e.g. Leino, supra note 4 at 170-173. There are also other laws that have been enacted exclusively for the purpose of being applied in the Evangelical Lutheran Church of Finland, for example the Law on the Collective Labor Agreements of the Evangelical Lutheran Church (*Laki evankelis-luterilaisen kirkon virkaehtosopimuksista*) 20.12.1974/968. With regard to these, the previously mentioned order of enactment does not apply. Kirkkohallitus, 'Kirkkolainsäädännön kodifioinnin esitysluonnos', 22 March 2016, 10, available at http://sakasti.evl.fi/sakasti.nsf/0/FF04BB5160743CC8C2257F85002195AE/$FILE/Kodifiointiehdotus%202016,%20maaliskuu.pdf (accessed 25 October 2016).

their employment.[9] Certain employment matters – although not, for example, the issue of whether someone should or should not be ordained in the first place – can be and have upon appeal been dealt with in regular administrative or civil courts, and courts have at times ruled that discrimination has taken place, that proper procedures have not been followed, etc.[10]

This confirms, at least as far as the Evangelical Lutheran Church of Finland is concerned, what Russell Sandberg has noted, namely that while 'religious law can be defined by reference to its purposes, sources, [and] subject-matter',[11] in all these areas there are overlaps with general law.[12] Moreover, the Evangelical Lutheran Church assumes various functions related to public administration on behalf of the State, such as tasks in relation to the maintenance of the population register as well as funeral and burial services. All this may come with some cost of autonomy. However, the other side of the coin is that a change in status could eventually lead to less presence, less funding, and fewer possibilities to carry out the work of the Church, as this work is identified to its relevant parts as a 'low-threshold' majority church[13] that seeks to make it easy for people to partake in church activities and make everyone feel welcome.

The alternative future scenarios that the Committee for the Future initially put forward regarding the Church's legal status and relations and legal code would have potentially expanded or limited the Church's ability to decide fully independently what are the Church's 'own matters', regarding personnel issues or other matters. The first option would have been to carry on more or less as before. A second option was a more succinct so-called 'framework law of the Church', in relation to which the initiative in accordance with the order of enactment would remain with the Church. A third option was to pursue a 'law of the Church', which would be enacted as a normal law by Parliament; hence, the initiative for legislative changes would lie with the State, although the Church would be invited to give its views on the proposed changes.[14] The last scenario would not give the Evangelical Lutheran Church quite the same influence over new legislation which concerns it. It is based on the idea of the State delegating authority and power to the Church.[15] On the other hand, the last scenario would potentially distinguish more clearly between state and religion.[16]

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[9] See Church Act (*Kirkkolaki)* 26.11.1993/1054, Part II, Chapters 5 and 6. Here, a change took place in 1997 when Cathedral Chapters became part of the internal administration of the Church. They were no longer considered independent judicial bodies, something required for purposes of securing legal protection as required under the Finnish Constitution § 21, or Article 6 of the European Convention on Human Rights. (They were later dealt with in *Ahtinen v. Finland*.) Opinions differ as to what it has meant. Pekka Leino, who is an expert on Finnish ecclesiastical law, finds that this change has limited the autonomy of the Church. Leino, supra note 4 at 3. However, in a study conducted for the Committee for the Future, Juha Meriläinen observes that this change had few effects, in principle or in practice, for the Church. It simply meant the removal of the Cathedral Chapters as first instances of redress with regard to certain decisions by ecclesiastical bodies in their capacity as public authorities. Juha Meriläinen, 'Kirkon julkisoikeudellinen asema', 18 November 2015, 7, available at http://sakasti.evl.fi/sakasti.nsf/0/EE4CA05F09EA5A22C2257E70003B1F1B/$FILE/JuhaMeril%E4inen-Kirkonjulkisoikeudellinenasema.pdf (accessed 1 November 2016).

[10] For a review of some recent cases, see Johannes Heikkonen and Pamela Slotte, 'Religion and Discrimination Law in the European Union: Finland', in 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), 125–144.

[11] Russell Sandberg, *Law and Religion* (Cambridge University Press 2011), 13.

[12] Sandberg at 172–178.

[13] See also Kirkkohallitus, supra note 3 at 135–139.

[14] Expert opinion to the Committee for the Future by Pekka Leino, 'Kirkon organisaatiota ja hallintoa suunnittelevalle ja kirkon tulevaisuutta pohtivalle Kirkon tulevaisuuskomitealle', 16 October 2015, 4–5. On file with the author.

[15] Christoffersen, supra note 5 at 289.

[16] To understand what it could mean, Pekka Leino refers to the current Law of the Orthodox Church (*Laki ortodoksisesta kirkosta*) 10.11.2006/985, which he finds actually regulates in some detail a number of issues related to administration, economy, processes of appeal, the general duties of priests, deacons, organists, etc.

In March 2016, the plenary session of the National Church Council (*Kirkkohallitus*), one of the Church's central administrative bodies, deliberated a proposal that a new Church Act replace the Church Act of 1993 by 2020 at the latest.[17] As part of this, the legal system of the Church would be revised. It would include no drastic changes to the legal arrangement, being instead a structural reform aimed at simplifying and clarifying the current system. The proposal aims to combine three existing regulative instruments – the Church Act, the Church Order, and the Church Election Order – into one Church Act and one Church Order.[18]

Under this proposal, the Church Act would regulate only those matters that require regulation in ordinary law – by implication, those matters that have a connection to the State. Moreover, independently of issues of autonomy, the Constitution requires that the rights and duties of the individual and 'other matters that belong to the realm of law' be regulated in law. Thus, this also applies – 'with some flexibility perhaps' – to the regulation of the Church. While the Church Act would regulate matters on a level of principle, the Church Order would concretize those principles.[19] The Church Order could also include matters not covered by the Church Act, such as matters regarding the creed. In general, the Church Order would regulate matters in which the Church has 'legislative authority' *and* which do not require regulation in ordinary law.[20]

As regards matters of employment pertaining to ordained ministers and other staff, these would continue to be regulated extensively and with reference to generally applicable law in the Church Act. Certain other dimensions, such as the qualifications needed for ordination to ministry, would continue to be regulated in the Church Order.[21]

It is curious that the proposed new Church Act in Chapter 1, Section 5 still includes an order of enactment that repeats *verbatim* the current one: 'The Church has the exclusive right to make legislative proposals for the enactment of the Church Act in all matters which concern solely its own affairs. It has the same right to propose amendments and repeal of the Church Act.'[22] One would think that the Church Act would make known the Church's perspective on matters of 'shared' concern rather than matters that are 'solely' the Church's own, and which would be regulated in the Church Order.[23]

Various parties, such as the Employers' Office of the Church (*Kirkon työmarkkinalaitos*), the Bishops' Conference, the Cathedral Chapters, local congregations, and certain public authorities, have since been specially invited or otherwise allowed to give their opinions regarding the proposed changes. To mention just one important voice, in August 2016 the Bishops' Conference issued its statement in response to the request by the National Church

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Leino, supra note 8 at 5. The Law of the Orthodox Church is available at http://www.finlex.fi/fi/laki/alkup/2006/20060985 (accessed 1 November 2016).

[17] Kirkkohallitus, supra note 8. For a short summary, see also http://sakasti.evl.fi/sakasti.nsf/sp?open&cid=Content3F92AE (accessed 25 October 2016).

[18] http://evl.fi/EVLUutiset.nsf/Documents/CBC92DE19F5E67AAC2257F620048543A?OpenDocument&lang=FI (accessed 26 October 2016) and Kirkkohallitus, supra note 8 at 12–13.

[19] Kirkkohallitus at 12. The status of the Church under public law partly determines what can be regulated in the Church Act and the Church Order respectively. For example, the principle of the rule of law in Section 2 of the Constitution is important here. (Observation of Pirjo Pihjala, head of the Department of Administration of the National Church Council; on file with the author.)

[20] Kirkkohallitus at 12–13.

[21] Kirkkohallitus at 51–79 and 127–136.

[22] 'Kirkolla on yksinoikeus ehdottaa kirkkolakia kaikesta, mikä koskee ainoastaan kirkon omia asioita, sekä kirkkolain muuttamista ja kumoamista.' Kirkkohallitus at 158. Translation, as before, taken from *Ahtinen* v. *Finland*, supra note 4.

[23] On the other hand, the phrasing has a historical pedigree. Its roots can be traced back to the first Church Act of the Evangelical Lutheran Church of Finland, the Church Act of 1869. At the time, Finland was a Grand Duchy of the Russian Empire. I am grateful to Pirjo Pihjala for pointing this out.

Council. In it, the bishops note that the principled position of the Church and its relations to the State would not change because of the amendment of the law. What is at stake is primarily a legal-technical reform, the work on which has been carried out in awareness of what the Finnish Constitution and other relevant legislation requires. While adding some remarks that were partly of a critical nature, the bishops welcomed the overall proposed changes, finding that they satisfy current needs. Of interest here is that the bishops found that the reform would lead to something they have previously advocated for, namely a more succinct Church Act. The Act would refer to generally applicable laws of the land that apply to the Church, and it would regulate separately only those matters in which the Church wants to 'deviate' from generally applicable law. In turn, the Church Order, over which the Church has full authority, would include rules concerning internal matters of the Church.[24]

The final report of the Committee for the Future was published in October 2016. It supports the position of the proposal by the National Church Council, stating that, in fact, 'the significant streamlining of the Church Act and the transfer of regulations to the Church Order . . . would increase the Church's autonomy',[25] and also make internal decision-making easier.[26] It does not want to take a stand on the actual content of the proposal of the National Church Council and so interfere in its work. Yet, while the Committee for the Future sees that proposal as a step in the right direction, it would actually prefer an even 'lighter' Church Act.[27]

In addition, during the drafting of the proposal for the future vision of the Church, which, as noted, also includes matters other than law, it was likewise the case that various parties with a vested interest were heard, as were external experts. This also included a large online discussion to hear feedback from people working in the Church as well as from those in positions of trust within the Church.[28] Over 1,200 persons were invited to participate and of these 206, or about 17%, registered as participants.[29] In this discussion, everyone underlined the importance of church autonomy, and a law and an order for the Church were considered important in order to safeguard this autonomy. However, opinions differed as to what should be the Church's public law status in future, if indeed it should have one. Would it help the Church in its mission, and if so, in relation to which foundational tasks? In what respect is it to the advantage of the Church and in what respect is it not?[30]

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[24] For the statement of the Bishops' Conference on the proposal for a new Church Act see http://evl.fi/EVLUutiset.nsf/0/668C157713194B10C2258020003FD16B/$file/Kodifiointi_lausunto.pdf (accessed 26 October 2016). The Bishops' Conference together with the General Synod and the National Church Council are the important organs of the central administration of the Evangelical Lutheran Church of Finland. Kirkkohallitus, supra note 3 at 177. In correspondence with Pirjo Pihjala on 19 November 2016 (on file with the author), Pihjala interestingly observed the following regarding statements made by the Ministry of Justice and the Ministry of Education and Culture with regard to the draft: The Ministry of Justice considered it possible to develop the Church Law in such a way that the regulation of 'internal matters' would become a matter where the Church has legislative authority, *provided*, however, that the demands of the Constitution are taken into account. The Ministry of Education and Culture observed that it *may* be possible, also from the perspective of constitutional law, to move more of the regulation that relates to the administration and economy of the Church to the organs of the Church itself. According to Pihjala, this shows that drawing a line between the Church Act and the Church Order is not unambiguous.

[25] Kirkkohallitus at 183; see also 56–57.

[26] Kirkkohallitus at 175.

[27] Kirkkohallitus at 56.

[28] Kirkkohallitus at 4–5.

[29] See the report 'Suomen evankelis-luterilaisen kirkon työntekijöiden ja luottamushenkilöiden kuuleminen' by Kirkon tulevaisuuskomitea, available at http://sakasti.evl.fi/sakasti.nsf/0/EE4CA05F09EA5A22C2257E70003B1F1B/$FILE/Meri-AnnaHintsala-Verkkokeskustelu.pdf (accessed 25 October 2016).

[30] Kirkon tulevaisuuskomitea at 27.

Another important group whose points of view the Committee for the Future took extra care to gather were the young members of the Church.[31] In a course in comparative 'religious and religion law' in spring 2016, I also asked my students – most of whom were theology students who imagine that they will have a career in the Church – to reflect on the three earlier mentioned proposed future alternatives in their final essays. A clear majority of the students favored the status quo.[32]

As always, what is at stake here and elsewhere are differing views of how God acts in the world, which values are foundational to Christianity and more specifically Lutheranism, the view of man and life here and now, and the relationship to the surrounding society. These affect how one relates to worldly law and those articulations of justice and foundational values which national, regional, and international law give expression to. Does one find that there are overlaps, common denominators, values, and purposes (for example, because one believes that humans even in the postlapsarian phase gain insight into what is right and good)? Or is the basic perspective that of contrasting the Christian community with the worldly community, from which it follows that 'religious' life is and should be reserved for the faithful themselves? For example, some of my students feared that the Church is being secularized both from within and from without and that law, including non-discrimination law, plays an important part here. They are surely not alone in this.

The Ministerial Exception and 'Secular' Laws: Who Decides When Exceptions are Due?

The same diagnosis – that religious communities have to ponder how to relate to worldly law and that easy answers or a uniform position on the matter can be hard to find– can be made in many other, diverse cases. We only need to consider how the position of the Evangelical Lutheran Church of Finland seems to differ from that of the Hosanna-Tabor Evangelical Lutheran Church in the United States, whose position in employment matters and worldly law and judicial review in relation to these in the case of 'ministers' was scrutinized in the high-profile case of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[33] To take just one example, the two churches clearly differ as regards the extent to which 'Lutheran teachings require that disputes over ministry must be resolved internally', with the U.S. church insisting on more autonomy in this area.[34]

The diversity of religions, even among those who are closely related theologically, is certainly one reason for the manifoldness we witness in the field of religion and law. Even

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[31] Kirkkohallitus at 5.

[32] Importantly, with the exception of a couple of students, they clearly saw national, regional, and international law not as a threat but as a complement to the internal regulation of the Church. On the other hand, there were also some students who found, for example, non-discrimination law and human rights law deeply problematic from the perspective of what they called a traditional Christian Lutheran view based on the Bible and the Confessions, and which, importantly for them, includes not accepting female priesthood. Yet these students favored the current model, surely for the present public role they wish to retain for Christianity in Finland. However, within it, they wanted to undo particular legislation and increase the scope of what would count as internal matters exclusive to the Church itself. Moreover, they were concerned with the way decision-making in the Church is detrimental to conservative minority positions within it.

[33] *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. ___ (2012). The case has been the subject of ample commentary. For just a few reviews representing different opinions, see Douglas Laycock, 'Hosanna-Tabor and the Ministerial Exception', (2012) 35 *Harvard Journal of Law and Public Policy* (3) 339–362, 849 and Marie Ashe, '*Hosanna-Tabor*, the Ministerial Exception, and Losses of Equality: Constitutional Law and Religious Privilege in the United States', (2015) 4 *Oxford Journal of Law and Religion* (2) 199–223.

[34] Laycock at 849.

scholars of religion find it difficult to define what religion is;[35] no wonder that legislators and courts struggle to decide what it means to have freedom of, for, from, and within religion, in a way that does not simply depict in a descriptive manner existing religious ways of being, but normatively and in a more generalizing fashion takes a stand on how freedom should be looked at and regulated in matters of faith, so as to provide tools for solving conflicts where interpretation stands against interpretation, 'fundamental right' against 'fundamental right', and so forth – as far as this essay is concerned, in questions that concern employees in churches, religious organizations, and other workplaces with a faith-based ethos.

The ministerial exception could be seen as a way to conceptualize and handle frictions between collective religious views of life and society's legislation. In an article co-written with Helge Årsheim in 2015, we note, by reference to Christopher Lund, that the ministerial exception can be defined as denoting 'a cluster of legal statutes and practices that allow certain exclusive exemptions from otherwise generally applicable laws to religious organizations'.[36]

Certainly, both perspectives are important here. Certain themes which are significant to a religious group, and which the group regulates, are of no obvious interest beyond the group itself. It is not that there would be no 'compelling state interest'; there really is no interest at all. Or, phrased differently, one may not share the religious group's position concerning a particular matter, but it is not something one finds that society's legislation should concern itself with – quite the reverse. This also shows in the great agreement within law and among experts regarding certain matters. Creeds, for example, are considered virtually unanimously matters only for the religious groups themselves. Of course, it is always important to ask to what extent that which we take as self-evident is expressive of a blindness towards some expressions of faith.

Likewise, at the other extreme, there are certain actions with purportedly religious motivations which cannot be tolerated at all, and states can legitimately prevent these. The question of a ministerial exception certainly does not belong in this category.[37]

Certain themes, perhaps quite a few – particularly for majority religions, we might want to add – are of overlapping interest to both the religious community and the generally applicable law, among which employment is a salient one. Many times, religious communities find worldly legislation on employment matters adequate, and they accept it. Then the question of ministerial exception is moot. Additionally, in some matters where interests overlap, the legislation may perhaps be primarily of a technical nature to the state and an exception, if desired, is then not connected to great concessions.

However, to a certain extent we are dealing here with legislation which in a particular way is seen as giving expression to societal values and principles of justice – and I am here speaking of something else than what is just 'popular' – like non-discrimination legislation. These situations are often labelled 'hard cases'.

It is clear that worldly authorities hold a trump card here.[38] We are speaking of 'exceptions' from generally applicable law. Yet simultaneously, it is not – or we do not want to make it – as

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[35] Slotte and Årsheim, supra note 1 at 2. For a short overview, see also Paul Weller et al., eds, *Religion or Belief, Discrimination and Equality: Britain in Global Contexts* (Bloomsbury 2013), 6–8.

[36] Slotte and Årsheim at 5. See also Christopher C. Lund, 'In Defense of the Ministerial Exception', (2011) 90 *North Carolina Law Review* 1–72, 3.

[37] Cecile Laborde touched upon this in her speech at the Fourth ICLARS conference in Oxford 8–11 September 2016. The recording is available at https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016).

[38] For example, Christoffersen has pointed out that in the East Nordic countries (Finland and Sweden) up until the end of the twentieth century, even if the majority churches were granted the right to develop internal norms, this was seen 'from a jurisprudential perspective as a delegation of state powers'. Christoffersen, supra note 5 at 280.

easy as to simply allow worldly authorities to decide unilaterally when exceptions are due. There are various reasons for this; a topical way to make this point today is to point out ways in which ostensibly neutral and 'religiously disinterested' law in fact has its own biases about religion. Alvin Esau, for example, makes this point with reference also to the work of Benjamin Berger, who has held that 'law's modesty is always false'.[39] In fact, he goes a step further and assigns to law its own 'liberal' faith, which ultimately takes precedence in so-called hard cases:

> I would say that law has its *own* religion that may well clash with other religions. And 'law's religion,' as Berger has called it, will talk about accommodation and tolerance, but when the stakes are high enough, it will pull out its guns and enforce its own integrity. *Charter* values will trump church values. The 'rule of law' becomes at some stage the notion that 'law rules,' and indeed that 'law overrules' contrary claims by individuals and groups that their God rules and reigns. People who have a robust religion will live their lives within a theocracy, which simply means the rule of God. The rule of God may clash with the rule of law.[40]

The relevant question thus becomes not *whether* generally applicable laws should yield, but *whose* perspective should take precedence when it comes to deciding *which* questions and in *what* situations generally applicable law should yield.[41] There are those who assert that the interpretative prerogative should always belong to the religious groups themselves. These know best when the friction becomes so great that, from a religious perspective, they would be forced to make too significant sacrifices were they required to follow generally applicable law.[42] Nevertheless, not everyone reasons in this way.

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[39] Benjamin L. Berger, 'Law's Religion: Rendering Culture', (2007) 45 *Osgoode Hall Law Journal* (2) 277–314, 311, available at http://digitalcommons.osgoode.yorku.ca/ohlj/vol45/iss2/2 (accessed 1 November 2016). As Berger puts it: '[L]aw defines rights and uses power and violence to enforce its vision, its claim rapidly assumes the greater form – the comprehensive claim about religion. . . . what religion relevantly *is*. This is the essence of Robert Cover's insight that law is *jurispathic*: that, whether it intends it or not, the very nature of law is that it kills other normative arrangements and interpretations.' Berger wants to speak of law being 'epistemologically colonial'. Berger at 311–312. See also Robert M. Cover, 'The Supreme Court 1982 Term – Foreword: *Nomos* and Narrative', (1983) 97 *Harvard Law Review* (4).

[40] Alvin J. Esau, '"Islands of Exclusivity" Revisited: Religious Organizations, Employment Discrimination and *Heintz v. Christian Horizons*', (2009-2010) 15 *Canadian Labour & Employment Law Journal* (3) 389–434, 429. See also Berger, supra note 39. Berger makes certain observations regarding law's religion in a Canadian constitutional context to tease out the cultural embeddedness of the legal approach. What Berger sheds light on resonates with other recent work trying to tease out implicit understandings of law that influence 'secular' adjudication in matters of faith: religion is seen as largely a private matter; the focus is on the individual, on choice and autonomy. Berger at 283.

[41] I am simplifying here for the sake of the argument. This matter can be further qualified by asking at what level and stage decisions on exceptions for religion from generally applicable law should be made – either for specifically identified groups or particular activities or in general 'neutral' terms – and what the consequences of this are. Should it be done when a law is enacted or when it is interpreted? Marie Ashe, for example, finds the situation in the United States problematic, where after the 1990 Supreme Court decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, and the subsequent Religious Freedom Restoration Act of 1993 (RFRA) and Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), the statutory protection of religious liberty and accommodation for religion has drastically increased beyond what was earlier guaranteed under the U.S. Constitution. Ashe, supra note 39 at 209–210. See also for example Yossi Nehushtan, 'The Case for a General Constitutional Right to be Granted Conscientious Exemption', (2016) 5 *Oxford Journal of Law and Religion* (2) 230–254 and Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press 2013), 359–361, for a discussion of this.

[42] This may come accompanied by the further assertion that this religious appraisal that accommodation is necessary cannot legitimately become the object of external assessment and judicial evaluation. Deference is required not only because, for example, the judiciary is poorly equipped when it comes to religious expertise, but also because this would be to venture into an area which is none of one's business. Mark O. DeGirolami, 'Religious Accommodation, Religious Tradition, and Political Polarization', *Lewis & Clark Law Review*, forthcoming 2017, available at https://ssrn.com/abstract=2835231 (accessed 11 November 2016).

At the beginning of the article co-written with Årsheim, we mention the central distinction between an internal and an external perspective regarding religion. Should religious traditions be conceptualized with the help of their own categories, vocabularies, and ways of reasoning, or should we approach them from the outside with the help of 'neutral' categories that are not at home in any specific tradition? The latter seems impossible to achieve, not least given the diversity among religions,[43] but also for reasons such as those pointed out by Esau and Berger, amongst others. We note that religious traditions form their own identities and provide self-definitions. The question is, though, whether these are sufficient in all situations and for all purposes, for example, when the task is to decide whether an exception should be made to generally applicable law.[44]

I want to argue that it is one thing to affirm as a matter of principle that, usually, an individual will have the best insight into who he or she is and wants. (Although we should not underestimate the human ability of intentional or unintentional self-deception.[45]) What weight can or should be attributed to this in different situations is a different question, though. When we are dealing with a collective, the matter is rendered more difficult still by the fact that, as the short snapshots from current discussions within the Evangelical Lutheran Church of Finland and among my students show, an internal perspective is seldom completely uniform;[46] nor can we always unambiguously distinguish between an internal and an external perspective. Both as regards notions and values, and concrete regulation, there are overlaps, as I already noted with reference to Sandberg.

Now, religious traditions have different ways of viewing and localizing authority and making decisions. This naturally must be taken into account and respected.[47] Yet, what this should or will mean in practice is not completely clear-cut, precisely for other reasons, such as those I have mentioned above. Various presentations at the Fourth ICLARS conference in Oxford in September 2016 put forward ways to go about this.[48] Here I merely wish to offer an overview of how the European human rights system currently handles these issues, in the context of which it has also dealt with a case concerning the Evangelical Lutheran Church of Finland, *Ahtinen v. Finland*.

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[43] Slotte and Årsheim, supra note 1 at 2. See also Russell T. McCutcheon, ed., *The Insider/Outsider Problem in the Study of Religion: A Reader* (Cassell 1999), which through its selection of classic and contemporary contributions examines this matter from a variety of perspectives.

[44] Slotte and Årsheim at 2.

[45] Here I refer the reader to the talk by Andrew Koppleman at the Fourth ICLARS conference in Oxford 8–11 September 2016. The recording of the talk is available at https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016).

[46] See also, for example, Greg Walsh, 'Anti-Discrimination Legislation and Regulation of Employment Decisions of Religious Schools in Australia', in W. Cole Durham, Jr. and Donlu Thayer, eds, *Religion and Equality: Law in Conflict*, ICLARS Series in Law and Religion (Routledge 2016), 80–81.

[47] This is of course also something law does. For example, the way that the ECHR is currently interpreted, an individual cannot make a claim to religious freedom against the community of which she forms a part, other than by exiting that community, nor against the religious community or organization for which she works and whose rules she has signed up to and must follow. In this respect, the perspective differs from the focus on the individual so central to human rights law. See, for example, *X v. Denmark*, App. No. 7374/76 (ECmHR, 8 March 1976), 158. See also, for example, Carolyn Evans, *Freedom of Belief under the European Convention on Human Rights* (Oxford University Press 2001), 85; Ahdar and Leigh, supra note 41 at 392–393; Walsh, supra note 46 at 84–85; and Laycock, supra note 24 at 856.

[48] For recordings of the talks at the conference, see https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016). Some of the written presentations have also been published at https://www.iclrs.org/event.php/ICLARS+IV+(Oxford)+2016/Presentations/English (accessed 28 October 2016). For examples of what positions theorists take as far as religious exemptions to non-discrimination legislation are concerned, see also, for example, Ahdar and Leigh, supra note 41 at 361–363.

The Discussion within the European Human Rights System

On the question of the ministerial exception, where does the European human rights system stand after cases such as *Lombardi Vallauri v. Italy*, the German cases of *Obst*, *Schüth*, and *Siebenhaar*, the chamber and Grand Chamber judgments of *Fernández Martínez v. Spain* and *Sindicatul "Păstorul cel Bun" v. Romania*, the recent case of *Travaš v. Croatia*, or indeed *Ahtinen v. Finland*? These are cases which have dealt with the character of a particular office or employment, the nature of the employment relationship, reasons for dismissal or non-renewal of contract, and related matters.[49]

Within the European human rights system, the matters at stake are conceptualized in terms of collective religious autonomy or church autonomy, and its scope and limits, rather than explicitly in terms of 'ministerial exceptions'.[50] It is not a surprising way of framing what is at stake. Rex Ahdar and Ian Leigh have defined 'religious group autonomy' as 'broadly speaking, the right of religious communities to determine and administer their own internal religious affairs without interference from the state'.[51] Adding to this, Julian Rivers has defined this autonomy as 'the power of a community for self-government under its own law'.[52]

Religious communities as such enjoy rights under the European Convention of Human Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights in Strasbourg considers religious autonomy to be an important part of the freedom of religion or belief and connects it with an idea of justified religious diversity, making clear that religious autonomy presupposes state neutrality, in the sense of non-interference and 'disinterest', to a certain extent. Religious communities can freely determine their own doctrines and also how they want to communicate these, for example, through rituals and worship. Communities can freely regulate membership, i.e. choose and exclude followers. This also goes for the persons whom they wish to entrust with religious tasks.[53] It is to be assumed that this may include voluntarily adhering to the standards of generally applicable law in certain respects, as the Evangelical Lutheran Church in Finland does.

However, in Europe the organizational life and internal governance of religious communities is not completely beyond judicial scrutiny, and state interference can be justified on certain grounds. As Dominic McGoldrick has stated, comparing the situation in Europe to that in the United States, 'the legal black hole is decisively small and even within it some legal principles apply.'[54] In regard to the chamber judgment in the case of *Fernández Martínez v. Spain*, McGoldrick notes that the role of the Strasbourg court is to make sure that the foundational principles of general national law and the dignity of the individual are respected,

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[49] *Lombardi Vallauri v. Italy*, App. No. 39128/05 (ECtHR, 20 October 2009); *Obst* v. *Germany*, App. No. 425/03 (ECtHR, 23 September 2010); *Siebenhaar v. Germany*, App. No. 18136/02 (ECtHR, 3 February 2011); *Schüth v. Germany*, App. No. 1620/03 (ECtHR, 23 September 2010); *Fernández Martínez v. Spain*, App. No. 56030/07 (ECtHR, 15 May 2012; Grand Chamber, 12 June 2014); *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09 (ECtHR, 31 January 2012; Grand Chamber, 9 July 2013); and *Travaš v. Croatia*, App. No. 75581/13 (ECtHR, 4 October 2016).

[50] Slotte and Årsheim, supra note 1 at 10.

[51] Ahdar and Leigh, supra note 41 at 376, making reference to Mark E. Chopko, 'Constitutional Protection for Church Autonomy: A Practitioner's View', in Gerhard Robbers, ed., *Church Autonomy: A Comparative Survey* (Peter Lang Publishers 2001), 95–116, 96.

[52] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010), 334. Of course, we may ask what is meant by 'own law', for example, in light of how the Evangelical Lutheran Church of Finland sees the law of the land also in part as its own law.

[53] See e.g. *Hasan and Chaush v. Bulgaria*, App. No. 30985/96 (ECtHR, 26 October 2000), §§ 60 and 62, and *Fernández Martínez* (Grand Chamber), § 127.

[54] 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* (4) 759–786, 783.

and states must judiciously balance the rights and interests of the different parties.[55] What does this mean?

When it comes to matters of employment, it seems that religious associations or organizations with a faith-based ethos that function as employers (and I here use 'employer' and 'employee' in a generic sense for reasons of simplicity) cannot deviate from generally applicable law, including from labor law and non-discrimination law, to an extent that would disregard the fundamental rights of the employees.

Certainly, depending on the nature of the work, deviation from generally applicable norms may be acceptable practice when it comes to employees performing religious tasks. Moreover, religious organizations can demand loyalty – in some cases even a 'heightened' duty of loyalty – from those working for them, provided that the demands are not 'unreasonable' and concern issues that are central or indeed of crucial importance to the organization in question.[56] Still, by taking up employment in a religious organization, employees cannot be considered to have waived all their rights, like the right to freedom of expression[57] or the right to privacy or family life, in their entirety.[58]

Moreover, employees should enjoy procedural protection. They should have access to judicial review of decisions affecting them.[59] From this it follows that when dealing with situations of conflict involving a private employer and its employees, states have a positive duty under the ECHR to make sure that employees have the opportunity 'to have a decision that concerns the terms of employment and its possible termination examined by a court of law'.[60] Examples here include the three German cases mentioned above, where the employees were dismissed on grounds of having acted in ways that contradicted the doctrines of the religious organizations for which they worked.

Importantly, and following Carolyn Evans and Anna Hood, it seems that the approach of the Court at this point in time may signal something more than 'simply' procedural safeguards. Evans and Hood want to speak of substantive limitations on employment autonomy,[61] for once a case ends up before the Strasbourg court, it will submit the actions of the state to scrutiny: have employees had the possibility to submit their cases for review by public authorities and have national courts struck a fair balance between the rights, freedoms, and interests of employees and religious employers?[62] Have these taken into account the position of the employee in the organization, the nature of the work – where depending on its nature and status there may even have been a heightened duty of loyalty – the length of employment, the possibility to find other work, and so forth?

This evaluation may include taking into account religious law as part of valid law, to the extent that state law has recognized this, for example, following international agreements between the state and a church. The cases of *Fernández Martínez v. Spain* and *Sindicatul "Păstorul cel Bun" v. Romania* offer examples of this, as does the most recent case of *Travaš*

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[55] McGoldrick at 783.

[56] See, for example, Merilin Kiviorg, 'Collective Religious Autonomy *versus* Individual Rights: A Challenge for the ECtHR?', (2014) 39 *Review of Central and East European Law* (3–4) 315–341, 330; Ioana Cismas, *Religious Actors and International Law* (Oxford University Press 2014), 131; and *Rommelfanger v. The Federal Republic of Germany*, App. No. 12242/86 (ECmHR, 26 June 1986), § 161.

[57] See Kiviorg at 329 and *Rommelfanger*.

[58] See Kiviorg at 332.

[59] Slotte and Årsheim, supra note 1 at 23. See, for example, *Rommelfanger* and Cismas, supra note 56 at 131.

[60] Slotte and Årsheim at 11.

[61] 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* (1) 81–107, 101–102 and 105–106. See also McGoldrick, supra note 54 at 775; Ian Leigh, 'Human Rights Conflicts under the European Convention', (2012) 1 *Oxford Journal of Law and Religion* (1) 109–125, 119–120; Cismas, supra note 56 at 128 and 133.

[62] See, for example, *Schüth*, § 67; *Siebenhaar*, § 45; and *Sindicatul "Păstorul cel Bun"* (Grand Chamber), § 159.

v. Croatia. In this last case, the applicant challenged his dismissal as a layman teacher of religious education due to the fact that he had entered into a new civil marriage without a previous annulment of his earlier religious marriage. According to the applicant, the dismissal lacked a valid legal basis.[63] The Strasbourg court found that there was an international agreement between Croatia and the Holy See on education and cultural affairs, and an act ratifying this agreement – an international treaty – had come into force. This made the agreement, which among other things spelled out the terms of employment and the qualifications that teachers of religious education needed to meet, part of the law of the land.[64] The interference with what the applicant claimed was his right to private life and family life was lawful. (The Strasbourg court also made direct reference to relevant parts of the Code of Canon Law in its judgment.[65])

Returning to Finland, in the case of *Ahtinen v. Finland*, for example, a pastor in the Evangelical Lutheran Church of Finland disputed the presence of a valid legal basis for his transfer from one parish to another. However, the Strasbourg court, making reference amongst other things to the Church Act of 1993, found that the decision by the Cathedral Chapter in question was based on domestic law in force at the relevant time, and that the applicant's procedural rights had not been violated.[66]

We may, of course, also have cases where the state has been directly involved in a case,[67] and its actions – resulting in an interference – are submitted to the usual tests of legality, necessity, and proportionality. This test will *de facto* include careful scrutiny of many, if not most, of the aspects mentioned above; not least given the fact that it is difficult to pinpoint 'the boundaries between the State's positive and negative obligations', and similar 'applicable principles' apply, including a fair balance between different interests and rights.[68]

Now, certainly, the Strasbourg court does not want to take a stand on what is or is not religion, or indeed orthodoxy.[69] Apart from in 'very exceptional cases', it is not considered justified under Article 9 for states to assess the legitimacy of religious, or indeed other, beliefs or the means by which they are expressed.[70] Approval or disapproval should not be a standard criterion when deciding whether or not to afford religious freedom protection to individuals or groups. Yet perhaps what we are witnessing is partly a downplaying of what denoting something as religion or religious accomplishes in the context of European human rights law. It is not about relativizing religion *per se*, nor about denying that something is a religious matter, but that denoting something as religious – and the Strasbourg court may accept at face value

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[63] *Travaš*, §§ 10–15. To be sure, before his dismissal, an attempt was made to find suitable tasks for him in the two schools where he had previously taught Catholic religious education. No such tasks could be found, however, which resulted in the applicant's dismissal. § 107. The applicant argued that the Agreement had not been implemented nationally in the correct manner. According to him, for example, certain issues pertaining to laymen teachers of religious education remained unresolved. § 60.

[64] *Travaš*, § 79.

[65] *Travaš*, §§ 45, 91–92, and 94–95.

[66] *Ahtinen*, §§ 39–41 and 43.

[67] Actually, this was deemed the situation in, for example, the Grand Chamber judgment of *Fernández Martínez*. The Strasbourg court found that the state authority had been directly involved in the process, which dealt with the non-renewal of an employment contract as teacher of Catholic religous education. *Fernández Martínez* (Grand Chamber), §§ 114–115.

[68] *Fernández Martínez* (Grand Chamber), § 113, in reference to Article 8.

[69] *Lombardi Vallauri*, § 50.

[70] *Manoussakis and Others v. Greece*, App. No. 18748/91 (ECtHR, 26 September 1996), § 47; *Hasan and Chaush*, § 78; *Leyla Şahin v. Turkey*, App. No. 44774/98 (Grand Chamber, 10 November 2005), § 107; *Refah Partisi (the Welfare Party) and Others v. Turkey*, App. Nos 41340/98, 41342/98, 41343/98, and 41344/98 (Grand Chamber, 13 February 2003), § 91; *Fernández Martínez v. Spain* (ECtHR), § 80; and *Fernández Martínez v. Spain* (Grand Chamber), § 128.

the framing of a matter as put forward by the religious community itself[71] – does not necessarily move the matter completely beyond examination. Nor does it automatically posit it above other issues (values and interests) at stake, nor beyond the reach of generally applicable law.

The situation under consideration, though in part 'religious' in nature, may still simultaneously be a 'non-religious matter' in certain respects and hence not fully beyond 'secular' law.[72] The two perspectives are not mutually exclusive.[73] As the Strasbourg court noted in the Grand Chamber judgment of *Sindicatul "Păstorul cel Bun" v. Romania* with regard to a group of priests of the Romanian Orthodox Church, it may be that some of the priests' duties could 'amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11'.[74] Referring to the standards of the International Labour Organisation (ILO), the Strasbourg court found that many characteristics of the employment relationships were *de facto* present alongside duties of a more spiritual or religious nature. This was so independently of how the parties themselves had framed the relationship in question, by way of contract or in another way.[75]

Moreover, in the Grand Chamber judgment of *Fernández Martínez v. Spain*, the Court did assess the quality of the original ecclesiastical decision, finding that it was sufficiently reasoned, was not arbitrary, and had been made for the purpose of exercising religious autonomy.[76]

In the same judgment, the Court also noted that to justify a religious community in reacting to a threat arising from actions of dissenters, the threat must be 'probable and substantial',[77] echoing the Grand Chamber ruling in *Sindicatul "Păstorul cel Bun" v. Romania*, where it stated that the threat had to be 'real and substantial'.[78] That ruling stated that religious communities have a right to react to what threatens 'their cohesion, image or unity',[79] or 'integrity', to pick up Cecile Laborde's terminology from her presentation during the Fourth ICLARS conference

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[71] Hence, the Strasbourg court does not resort to reliance on such a narrow concept of religion that certain things simply do not qualify as such, nor need to be considered for a possible exception from generally applicable law. See Christoffersen, supra note 5 at 286.

[72] For further discussion of religious and secular views as regards so-called employment, see, for example, Ahdar and Leigh, supra note 41 at 338–348. With reference to Esau, on a matter later revisited in the article I have referred to above, they distinguish between an 'instrumental' and an 'organic' approach to work, the former focusing narrowly on the specific work task of a person, the latter expecting the employee 'to participate in the mission of the organization as a whole in a way that cannot be confined to a job description'. Ahdar and Leigh at 338–339; Alvin Esau, '"Islands of Exclusivity": Religious Organizations and Employment Discrimination', (2000) 33 *University of British Columbia Law Review* (3) 719–827. According to Ahdar and Leigh, adopting the former approach leads to a narrow view of when exemptions are due to religious organizations. They seem to want to make the point that a religious view on work equals an organic approach, being most obvious, of course, in the case of religious ministers. Ahdar and Leigh at 339 and 373–374. Yet, presumably, we could think of instances where it is appropriate to talk of an 'instrumental' or 'organic' approach also in relation to other types of work than those which in one way or another are related to religion.

[73] Even if, for example, the third party intervener the European Centre for Law and Justice (the ECLJ) claimed this in the Grand Chamber case of *Sindicatul "Păstorul cel Bun"*, arguing: '[W]here, 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 8–12 of the Convention, since these Articles protected rights which the individual concerned had freely chosen not to exercise.' *Sindicatul "Păstorul cel Bun"*, § 126.

[74] § 141.

[75] § 142. In that particular case, however, the Strasbourg court found that while there had been an inference with Article 11, such was justified if there was a real risk to the religious community's autonomy and the measure to safeguard this, in this case disallowing the registration of the applicants' union, was necessary. National courts had examined the situation and struck a fair balance. There was no violation. §§ 161–173.

[76] *Fernández Martínez* (Grand Chamber), § 151. The dissenting judges would have wanted this coupled with an assessment of whether the so-called 'secular reaction' to that ecclesiastical decision was sufficient. Slotte and Årsheim, supra note 1 at 23 and *Fernández Martínez* (Grand Chamber), dissenting opinion, § 35.

[77] *Fernández Martínez* (Grand Chamber), § 129.

[78] *Sindicatul "Păstorul cel Bun"*, § 159.

[79] § 165.

in Oxford.[80] However, the risk brought about by, for example, the actions of employees, has to be real and substantial. Moreover, actions taken must not 'go beyond what is necessary to eliminate the risk', and may not serve any purpose 'unrelated to the exercise of the religious community's autonomy'.[81] This points to an external assessment being possible even with regard to what may be framed as 'religious matters', at least as far as the implications are concerned.

Likewise, in *Travaš v. Croatia*, the Strasbourg court, making reference to the case of *Fernández Martínez v. Spain*, stated that in addition to the fact that actions taken must be for the purpose of eliminating a risk related to the exercise of church autonomy, '[i]t should be remembered that such an autonomy is not absolute and cannot be exercised in a matter affecting the substance of the right to private and family life.' It is to certify that the above criteria are met that an in-detail and in-depth scrutiny and the balancing of different interests are of utmost importance.[82]

Concluding Discussion

Some commentators will surely see the position of the Strasbourg court as judicial second-guessing of and excessive meddling in internal religious governance, perhaps even arguing that when a community draws on both religious law and the generally valid law in going about its business, this should not be seen as opening the possibility of external judicial review.[83] Still, the position of the Strasbourg court is one position among many today. It is clear that within different jurisdictions, different (legal) conceptions of what constitutes 'law' and 'religion' (and the 'secular') are at play, resulting in very different conditions for religious communities. The exceptions from otherwise generally applicable law may be narrowly or widely construed.[84] Moreover, religious communities hold different views of what exceptions are needed and they seek to regulate their communal life accordingly, as the review of the discussion within the Evangelical Lutheran Church of Finland makes clear.

Reflecting on this diversity and acknowledging also the extent to which non-discrimination legislation has increased and been extended to new issues and groups, and also that religious diversity has increased within many states,[85] it seems that sticking to rigid categories of law and religion will not take us very far. This expansion and diversification of both the legal and the religious realms has consequences for how we might judge suggestions for how to go about identifying the space of justified religious autonomy and for how we allocate authority. Some will say that given the diversity, and also given the lack of trust toward the state that perhaps especially minority religious communities will exhibit, the way to deal with it all in a sensitive manner would be to hand over authority whole-heartedly to the communities themselves.

However, in relation to this, Saba Mahmood, in her recent book *Religious Difference in a Secular Age,* points out, with reference to Talal Asad, that asserting that religion belongs 'to a private sphere to be ruled by its own unique set of laws . . . amplifies the secular distinction between civil and religious jurisdictions', where in addition 'in the modern dispensation, secular law by virtue of its claim to universality necessarily appears neutral and, by contrast,

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[80] The recording of Laborde's talk is available at https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016).
[81] *Sindicatul "Păstorul cel Bun"*, § 159. This is also repeated almost verbatim in *Fernández Martínez* (Grand Chamber), § 131.
[82] *Travaš*, § 102 and *Fernández Martínez* (Grand Chamber), § 13.
[83] For a discussion on this with regard to the United States see Ahdar and Leigh, supra note 41 at 392.
[84] Slotte and Årsheim, supra note 1 at 1. This point was made by Esau, too, with reference to Berger.
[85] Slotte and Årsheim at 5–6.

religious law appears particular and partial.'[86] This is a very one-sided picture that seems difficult to retain in light of the actual diversity, and it may come at the cost of reification of unfeasible notions and distinctions.

What I am inclined to believe at the moment is that we are, in a way, left with a paradox. It is exactly the presumed legitimate inability to compromise that will activate the need for accommodation and ministerial exceptions. Yet as Isaac Weiner has pointed out, if we portray religion as 'absolutist, inflexible, [and] resistant to compromise', 'flexibility' and 'pragmatic compromise' in matters of religion will be viewed with skepticism, and this will favor rigid religious positions rather than those (individuals and groups) who in various ways 'negotiate their religious identities from within disciplinary power structures'.[87] Religious freedom, according to Weiner, is then turned 'into a tool for enforcing orthodoxy, allowing little space for difference and dissent, let alone inconsistency and inconstancy', 'collapsing internal heterogeneities into an idealized model of communal consent'.[88]

In light of this, the current position of the Strasbourg court does seem prudent, despite the criticism that so often also rightly has been directed at it. It seems that, in Europe at least, authority in matters of religion is, in fact, multi-located and multi-voiced. Depending on the concrete subject matter, it is also more or less clearly allocated with religious communities themselves or the governance is shared.[89]

Finally, I imagine that in the end, we do not get around the fact that it comes down to values and value choices at a general level and at a specific level in particular contexts. We have to take a stand, and to some extent fill that void of meaning at the heart of legal governance to which Zachary Calo was alluding in his talk at the Fourth ICLARS conference in Oxford.[90] What are the concerns for which granting a ministerial exception may seem an adequate societal response? And when is it not acceptable? The values have to be articulated – be it about integrity, giving due recognition to minority positions, etc. – and choices have to be justified.

Yet, boundaries have been drawn differently during different times in history and in different legal and religious contexts, and so it will remain.[91] The direction is not simply about moving towards more or less religious autonomy and exceptions. Instead, it is about

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[86] Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton University Press 2016), 117, 127, and 131; Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003), 228. Making a similar conceptual point, this time more specifically in the context of faith-based arbitration tribunals, Ayelet Shachar has talked of such deference of governance as 'privatized diversity', and pointed to its dangers. 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation', in Rex Ahdar and Nicholas Aroney, eds, *Shari'a in the West* (Oxford University Press 2010), 115–133.

[87] Isaac Weiner, 'On the Unreasonableness of Legal Religion', *The Immanent Frame*, 2015, available at http://blogs.ssrc.org/tif/2015/01/08/on-the-unreasonableness-of-legal-religion/ (accessed 29 October 2016).

[88] Weiner. A similar remark could be made with regard to a focus on 'integrity' as a way to identify that which deserves protection. Would such an emphasis rule out an ability or willingness to protect incoherent or inconsistent positions as incompatible with integrity?

[89] Not surprisingly, the Strasbourg court acknowledges this lack of 'consensus' as a reason for giving deference to states in matters of state-religion relations, including in matters at issue in this essay. See e.g. *Sindicatul "Păstorul cel Bun"*, § 171.

[90] The recording of Calo's talk is available at https://www.iclrs.org/index.php?pageId=4&linkId=225&contentId=21&blurbId=67428 (accessed 28 October 2016).

[91] In this essay, I have not seen as my task to take a stand on whether religion deserves – or is best served by – this form of protection at all. For an overview of the current discussion as regards singling out religion for special protection, and the various positions that are taken in that discussion, see, for example, John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (4th edn, Oxford University Press 2016), 282–288. Nor do I find the space here to think about how, if one can or should, one can justify similar exemptions for non-religious groups. See, for example, Peter Danchin, '*Hosanna-Tabor* in the Religious Freedom Panopticon', *The Immanent Frame*, 2012, available at http://blogs.ssrc.org/tif/2012/03/06/hosanna-tabor-in-the-religious-freedom-panopticon/ (accessed 30 October 2016).

continuously being aware of the complexity of the matters at hand and about making well-considered decisions which for the moment will hopefully come across as the ‘legally correct’ ones and be acceptable to those concerned, but which we, at least with the limited perspective of life here on earth, can take neither as absolute nor as unchangeable.