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How Far Is Too Far? A Critical Appraisal Of Exemptions For Religious Organizations From Non-Discrimination Principle in Employment. Europe and the US

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Abstract

With the expansion of equality law, religious autonomy became a subject of stricter scrutiny. The "how far is to far?" paradigm illustrates the ongoing academic discussion on the reasonableness and limits to religious autonomy. This work endeavors to provide a critical appraisal of the autonomy-equality nexus, with a particular focus on the tension between the autonomy of religious organizations and the principle of non-discrimination in employment. In doing so, a comparative analysis of the selected-case law of the European Court of Human Rights, the Court of Justice of the European Union, and the Supreme Court of the United States will be conducted and critically engaged with academic literature. This work argues that we are currently in *medias res* of the developments related to the autonomy-equality nexus. On the one hand, academic scholarship is divided on how to set boundaries for religious autonomy, and how to justify exemptions which religions are granted in an increasingly non-religious and egalitarian society. On the other hand, the courts' jurisprudence concerning religious exemptions from the principle of non-discrimination is in flux, with only a few criteria being set so far.

1 Introduction

If every age has its own character, it could be claimed that a significant part of the 20th and especially 21st century is a time particularly concerned with equality and non-discrimination. The wave of emancipation started even earlier than that of course, but only in this century did identity politics gain such momentum. Although many claim that identity politics help marginalized groups and their interests to feature in the public square and gain an agenda, many remain critical. As Fukuyama claims, identity politics in its present form, by the ongoing segmentations of people according to the 'ever-narrower identities' leads to social disruptions, ever-growing tensions and consequently, endangered democracy.[1]

This rise of identity politics is not without importance for matters related to religious freedom. For, as anyone observing the legal and policy landscape in Europe and in the United States of America (the US) would note, the rise of groups that perceive equality as their foundational norm and their mission statement was met with certain resistance from religious communities.

To a great extent, religion is entangled within the so-called culture war(s), used to describe a conflict between social groups and their struggle for cultural, social, and legal dominance of their respective views and believes.[2] The then-Kulturkampf of the 19th century, launched by Prussian Chancellor Otto von Bismarck, against the influence of the Roman Catholic Church, is used to denote major political cleavage in contemporary politics.[3] It would be of course unjust

[1] For a critical appraisal of identity politics and its negative impact on democracy, see Fukuyama Francis, "Against Identity Politics, The New Tribalism and the Crisis of Democracy", *Foreign Affairs*, 2018, 97: 90.
[2] Hunter, J.D., 1987. Culture Wars: The Struggle to Define America. 1991. *Klatch, Rebecca. Women of the New Right.*
[3] *Ibid.*

towards religions to pursue a simplistic and in fact untrue claim that theirs agendas are in direct opposition to the principle of equality, as one can trace to religions' such powerful messages as unity of all human beings, and therefore also their equality.[4] However, in this culture war of values, a principal bone of disagreement could be said to lie within broad issues of sexual ethics (or, for some, morality). What a great number of religious leaders and faithful condemn as grave sins – gay rights, abortion, contraception, etc. – very many others perceive to be fundamental human rights without which one cannot speak of a just and well-functioning democracy.[5] Consequently, religious liberty is increasingly becoming a controversial matter, seen by many as an obstacle to an egalitarian society.

Today, religious institutions are ever-more intertwined in the states' regulatory apparatus, be it education, healthcare or employment, profoundly affecting the lives of many people around the world. The Catholic Church is one of the largest private employers in the world; in America, it employs over 1 million people, being the nation's second largest employer after Walmart, according to data calculations by The Economist.[6] In Germany, the mainstream Christian churches employ circa 1.5 million people[7], making them the second biggest employer after the state.

Therefore, if we are to accept that tensions between freedom of religion and equality are "destined to be a significant, frequent, and controversial feature of contemporary political and legal life,"[8] it is only reasonable to follow Calo in concluding that at the heart of it will be the

[4] See, for example, Galatians 3:28, Holy Bible, "There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus."
[5] Laycock, D., 2014. Religious liberty and the culture wars. *U. Ill. L. Rev.*, p.839.
[6] The Economist, The Catholic church in America. Earthly concerns, Available at: <https://www.economist.com/briefing/2012/08/18/earthly-concerns> Last accessed [26 Sept 2019]
[7] Robbers G., 2010. Law and Religion in Germany, *Kluwer Law International*, p.479
[8] Scharffs, B.G., 2012. Equality in Sheep's Clothing: The Implications of Anti-Discrimination Norms for Religious Autonomy. *Santa Clara J. Int'l L., 10, p.108*

"negotiation over religious autonomy involving churches, schools, hospitals, universities, and businesses."[9]

Indeed, a review of existing academic literature on the topic suggests that the nexus between religious autonomy and the principle of non-discrimination in employment has already became a hot-button issue. The stakes of human rights protection here are high, pertaining to collective religious freedom and a whole range of individual rights that may be affected. On top of that, an answer (if any) to "how far is too far" is also inscribed into the wider and ongoing discussion on secularism and state-church separation. Extending the applicability of Laycock's argument from the United States also to Europe, we could say that "whether and to when exempt religious practices from regulation is the most fundamental religious liberty issue."[10]

This work endeavors provide a critical appraisal of the autonomy-equality nexus, with a particular focus on the tension between the autonomy of religious organizations and the principle of non-discrimination in employment.

Firstly, I will provide a conceptual overview of religious autonomy, the principle of non-discrimination, and the issue of exemptions; including, a brief outline of non-discrimination framework both in Europe and in the United States. In Chapter 2, I aim to sketch a current state of art in legal developments in the three chosen jurisdictions. To do so, I will conduct an analysis of selected case-law of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the Supreme Court of the United States (SCOTUS). Thereafter, I

[9] Calo, Z.R., 2019. Law, Religion, and Secular Order. *Journal of Law, Religion and State*, *7*(1), p.125
[10] Laycock, D., 2009. The Religious Exemption Debate. *Rutgers JL & Religion*, *11*, p.139, 145

endeavor to critically discuss the autonomy – exemptions nexus, utilizing theoretical underpinnings of, among others, secularism.

While the title of this thesis centers around the "how far is too far" paradigm, this work, for several reasons, will *not* to try and draw exact borders around religious autonomy. Given the complexity of the problem, and the importance of the specific circumstances surrounding each case, such a task would be futile. Rather, this work investigates a plethora of scenarios in which the tension between these issues arise, and critically links them to the broader and theoretical discussions concerning them. The question of exemptions afforded to religious organizations from anti-discrimination laws is thus treated as a case study for the wider themes of autonomy and equality. Overall, it could be argued that a great dose of uncertainty surrounds the "how far is too far" paradigm. On the one hand, academic scholarship is divided on how to set boundaries for religious autonomy, and how to justify exemptions religions are given in an increasingly non-religious and egalitarian society. On the other hand, the courts' jurisprudence concerning religious exemptions from the principle of non-discrimination is in flux, with only a few criteria being set so far.

2 Chapter I

2.1 Religious Autonomy

As religious autonomy is at the very heart of the topic at hand, the following section will engage briefly with this concept's development and definition(s).

In contemporary discussions on the matter, religious autonomy (sometimes referred to as church autonomy or institutional religious autonomy,) takes on multiple meanings. Tracing it back to its roots in Greek language, we can establish that 'autonomy' has been derived from two words: 'auto' which stands for 'self' and 'nomos' which stands for 'law' or 'legal rule.'[11] It is not surprising, therefore, that most encyclopedias define autonomy as self-government, be it of a state, or of political, or private body.

When it comes to the language of politics and law, autonomy is understood "as the granting of internal self-government to a region or group of persons, thus recognizing a partial independence from the influence of the national or central government."[12] As such, autonomy is therefore a tool or rather a substitute for the right to full autonomy – sovereignty – in cases where the latter, for whatever reason, cannot be granted. The state, recognizing right to self-determination, delegates that partial autonomy to ethnic and national minorities, territorial units,

[11] Eide, A., 1998. Cultural Autonomy: Concept, Content, History and Role in the World Order. In M Suksi (ed), Autonomy: Applications and Implications, *Kluwer Law International*, p.251
[12] *Ibid.*

and of course to religious communities, too. In the jargon used by constitutionalists, this process is sometimes also described as the state *sharing* the public domain or *delegating* public tasks.[13]

In the context of state and church relationship, the concept of autonomy as such is not exactly new. Historically speaking, a plethora of various forms and degrees of autonomy can be identified in church-state relations across the European continent. These models were shaped respectively by the churches' own understanding of their independence from state, and the state's own understanding of just how much control it deems desirable to exercise over religions. In the European (predominantly Christian) history, various denominations – mostly Catholics and Protestants, but also Orthodox Christians – are parties to an ongoing debate, dating centuries back, on the exact borders of religious competence. A flagship Biblical quotation often used in these debates, prompts to "render unto Caesar the things which are Caesar's, and unto God the things that are God's."[14]; and although its interpretations are diverse and contested, in modern-day light, it is oftentimes used as a call for a decisive separation between sacred and profane. A separation of state and church features prominently also within the area of political thought and history of ideas, with Locke arguing already in the 19th century that it is "above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and other."[15]

With the passage of time, the separation between sacred and profane strengthened, and religious bodies (by and large, as they are still valid and often active participants in political life) have no authority to outright dictate laws, unlike it was in the Middle Ages, when the Church did

[13] *Ibid.*
[14] Matthew 22:21, Holy Bible,
McConnell, M.W. 'Believers as Equal Citizens' in NL Rosenblum (ed), Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies (Princeton University Press, Princeton 2000) 94.
[15] Locke, J. Essay on Toleration, The Works, Vol 6 (1823; photo reprint, 1963), p. 1, 9

so. Given the long and protracted history of church-state symbiosis, Davis called an institutional separation between church and state at which we have arrived now a "novel experiment in the human history."[16] Paraphrasing slightly Supreme Court Justice Wiley Rutledge, most modern states have put their "very existence…on the faith that complete separation between the state and religion is best for the state and best for religion."[17] Indeed, even religious institutions themselves – like the Catholic Church – seem to have made their peace (at least to an extent) that the ancien régime of intertwined state-church roles belongs to the past, and try find themselves anew within the secular order, and position themselves within the plural and diverse societies.

It could be argued that the "the legal problem of religious autonomy,"[18] as Dane puts it, describes the attempts of secular law to understand religious self-governance, and to an extent also transpose it within a workable framework. While there seems to be an agreement that a certain degree of autonomy for religious organizations is non-disputable, across the spectrum there is a variety of opinions on how broad that autonomy should be. This is even more difficult to establish in light of the different legal conceptions and practices of what does *religion*, *law* and *secular* entail, this results in significantly different functioning conditions and borders of exemptions for religious communities across the jurisdictions. However, the way in which most European countries (and the US, arguably, too) have approached state interventions in religious matters have been described in literature as a "classical model," with Lagoutte and Lassen noting, that the model, by and large, gives religious communities and individuals "extended freedom"[19] to decide

[16] Davis, D.H., 2016. Law, the US Supreme Court, and Religion. In *Oxford Research Encyclopedia of Religion*, p.5
[17] *Everson v. Board of Education*, 330 U.S. 1 (1947), 59. The Justice was referring to the US only: "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."
[18] Dane, P., 2001. The varieties of religious autonomy. In *Church Autonomy: A Comparative Survey Gerhard Robbers, ed., Peter Lang., 117.*

[19] Lagoutte, S. and Lassen, E.M., 2008. 10 The Role of the State in Balancing Religious Freedom with Other Human Rights in a Multicultural European Context. In *Cultural Human Rights* (pp. 207-222). Brill Nijhoff, p. 208

upon their own affairs. The religious autonomy, in Mousin's view, enables religious organizations "to define a specific mission, to decide how ministry and ecclesiastical government fulfill their mission and to determine the nature and extent of institutional interaction with the larger society."[20]

The significance of protecting the autonomy of religious organizations could be backed up by a variety of different arguments. Some argue that its instrumental importance stems from the need to protect the identity and self-determination of individuals which form religious communities.[21] An operational definition of a religious community adopted in this work has it as a "a community of people sharing a common religious faith…organize themselves and structure their corporate life according to their own ethical and religious precepts."[22] In that way, the collective dimension of religious autonomy is therefore crucial for individual believers, as it appears to be often necessary to secure their rights. However, the collective religious autonomy has an intrinsic value too, the collective dimension of religious faith and practice is oftentimes is an inseparable part of one's religion or faith

Here, it is important to also mention that many are critical of the notion that any religion whatsoever should receive special protection, making it somewhat a preferred freedom, in secular legal orders.[23] Notwithstanding, the situation at present is that "virtually all legal systems . . . do in fact accord special respect to freedom of religion and belief."[24] Religious autonomy has almost

[20] Mousin, C.B., 2001. State Constitutions within the United States and the Autonomy of Religious Institutions. *Church Autonomy: A Comparative Survey. New York: Peter Lang*, p. 401
[21] See, for example: Kiviorg, M., 2014. Collective Religious Autonomy versus Individual Rights: A Challenge for the ECtHR?. *Review of Central and East European Law*, *39*(3-4), pp.315-341.pp.14-17
[22] Rivers, J., 2001. Religious liberty as a collective right. In O'Dair,R. and Lewis A.(eds) *Law and Religion*, p. 231
[23] Gey, S.G., 1990. Why is Religion Special: Reconsidering the Accomodation of Religion under the Religion Clauses of the First Amendment. *U. Pitt. L. Rev.*, *52*, p.75.
[24] Durham Jr, C. and Sewell, E.A., 2006. Definition of Religion. In Religious Organizations in the United States: A Study of Identity, Liberty, and the Law 3, James A. Serritella, ed., Carolina Academic Press. p.29–30.

always been linked to certain legal exceptions or 'favorable treatment' with respect to issues such as tax or property, examples of which we can find in the constitutions of many European states. Here, the *exempli gratia* would be the provisions of the Weimar Constitution of 11 August 1919 (in particular, Article 137)[25] which is an integral part of the current German Basic Law (Article 140 on religious denominations). Yet, with the rise of secularism, the existence of any type of exemptions for religious organizations became even more controversial. This is especially true with respect to exemptions in the field of recruitment and employment, with some defining it as a dispensation for "discrimination in the name of the Lord."[26]

2.2 The nexus between non-discrimination and religious exemptions

Having considered the concept of religious autonomy, it is now time turn to what it is often juxtaposed against it: equality. First, this section will outline the European and American non-discrimination frameworks, with particular focus on religious-based exemptions. Then, key points of contention will be highlighted.

As Friedman wrote, "equality as an ideal shines brightly in the galaxy of liberal aspirations,"[27] and yet it is not merely a theoretical ideal, as attempts to enshrine it across international, regional, and domestic legal and policy documents were (and are) in abundance. Of course, the very subject of equality is a potent academic field, with law being assisted by philosophy, sociological and

[25]Article 137 of the WRV states: "…3. Each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone. It shall confer its offices without the involvement of the State or the civil municipality…"

[26] Bagni, B. N.,1979, Discrimination in the name of the Lord: A critical evaluation of discrimination by religious organizations. *Colum L. Rev.*, *79*, p. 1514

[27] Fredman, S., 2011, Discrimination Law, Oxford University Press, 2nd edition,p.1

political studies in grappling with its meaning. In the context of employment, equality is realized through the principle of non-discrimination.

Broadly speaking, the anti-discrimination (also referred to as non-discrimination) laws refer to a body of legislation which is put in place to prevent discrimination against particular groups of people, often denoted as protected groups or protected classes.[28] Although certain specifics within anti-discrimination and labor laws may vary between the countries, the essence of it remains the same.

Simply put, we may speak of discrimination when an unjustified and disadvantageous differential treatment occurs, based on a criterion or characteristic which the law prohibits from use when making legal distinctions.[29] With time, a distinction of direct and indirect discrimination has also been introduced, enhancing the scope of protection.[30] It certainly was a great achievement of the broad equality movement to have the courts and legislators accept that, even the apparent and phrased as such neutral laws may in fact have discriminatory effect on certain individuals or segments in the society. The notion of logic of indirect discrimination is also sometimes applied in the quest for religious-based exemptions from neutral and general laws.

Although the development of anti-discrimination laws has followed slightly different path within the American and European frameworks, with the former being at the outset concerned with racial discrimination, and the latter with sex discrimination, currently the core elements of both overlap. As Dane highlighted, religion-based exemptions are characterized by diversity.[31]

[28] *Ibid.*
[29] Lopatowska J., 2009. Discrimination based on religion or belief in the EU legal framework. *Derecho y Religion, IV*., p.75
[30] Handbook on European non-discrimination law 2018 edition, Available online at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf>
[31] Dane, P., 2016. Scopes of Religious Exemption: A Normative Map. *Religious Exemptions (Oxford University Press, 2018), Kevin Vallier & Michael Weber, eds*.,p.138

These were included in a diverse set of laws, including insurance mandates, compulsory education laws, tort laws, tax laws or photograph requirements in driving licenses. Proponents of institutional exemptions argue that these are absolutely essential for protecting religious freedom and autonomy, as without them, the state may intrude into private religious sphere with regulations that interfere with free exercise of religious belief.[32] Still, some others fear that giving religious institutions freedom to self-determination, may in fact undermine individual rights of all kinds by sanctioning the institutions usage of extensive – if not coercive – power. Indeed, it has also been argued that exemptions for religious organizations are nothing less but undue preferential treatment that undermines efficacy of the law. Special protection, as the argument goes, is a "micro-principle"[33] of religious freedom. For, "people cannot practise their religion freely if rules of general applicability disadvantage them in particular ways by virtue of their religious needs."[34]

2.3 EU and the US: anti-discrimination frameworks

Under the European Convention on Human Rights, the prohibition of discrimination is conveyed within Article 14:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, *religion*, political or other opinion, national or social origin, association with a national minority, property, birth or other status." (emphasis added)

[32] See, for example: Durham Jr, C., 2001. The Right to Autonomy in Religious Affairs: A Comparative View. *Church Autonomy. Frankfurt a. M.: Peter Lang*, pp.683-714.
[33]Doe, N., 2009. Towards a 'common law' on religion in the European Union. *Religion, State & Society*, *37*(1-2), p.149
[34]*Ibid*.

However, Article 14 is not a 'self-standing' right, in that it must always be brought up in conjunction with other articles. As per the Court's own definition, Article 14 "has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter…"[35]

The ECtHR, over the years, accumulated a relatively significant body of jurisprudence related to various forms of discrimination, which it defined as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations.[36] The Court has also reiterated that states do enjoy margin of appreciation "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." This, according to the Court, applies "in particular" to " the conclusion of agreements between the State and a particular religious community establishing a special regime in favour of the latter does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so."[37]

In allowing a "special regime" favoring a religious community, the Court has nonetheless left it for its assessment to establish whether the difference in treatment has 1) objective and reasonable justification, whether it pursues 2) legitimate aim, and whether there is 3) "reasonable relationship of proportionality"[38] between the employed means and stated aims. Simply put, states are free to

[35] ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, No. 7798/08, 9 December 2010, para.55
[36] *Ibid*., para. 85
[37] *Ibid*., para.85
[38] *Ibid*., para.85

pursue 'special regime' arrangements but that regime must be accessible for all religious communities that qualify.

In the Court's view, "special treatment undoubtedly facilitates a religious society's pursuance of its religious aims."[39] However, given a number and nature of privileges given under that special regime, it is necessary for the states authorities to remain neutral in granting access to it. Thus, whenever a state "sets up a framework for conferring legal personality on religious groups to which a specific status is linked, *all religious groups* which so wish must have *a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner*."[40] (emphasis added)

Within the European Union, the questions of equality and non-discrimination are protected through various instruments, with Article 2 of the Treaty on the European Union (TEU) stating that the principle of non-discrimination is one of the Union's basic values. The EU's 'bill of rights' – Charter of Fundamental Rights – in Article 21 also prohibits discrimination on a number of grounds, including also religion. The Union's legal framework concerning prohibition of discrimination based on religion or belief within employment is based on Article 19 of TEU:

> "1. Without prejudice to the other provisions of the Treaties and *within the limits of the powers conferred* by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, *may take appropriate action* to *combat discrimination* based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[39] ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, App. No. 40825/98, 31 July 2008, para.92
[40] *Ibid.*

1. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1."[41]

That Article itself does not prohibit discrimination *per se* but authorizes the Council to take 'appropriate action' to tackle discrimination. A more explicit and active commitment on the part of the Union is however expressed through Article 10: "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[42]

The EU anti-discrimination framework has been subject to rather extensive developments, with currently four Directives being in force that regulate prohibition of discrimination and equal treatment. The 2000/78/EC Employment Equality Directive is of greatest relevance to this work, as it outlaws discrimination based on religion or belief in employment and outlines a legal framework for religious organizations that are simultaneously employers. The legal composition of the Directive is twofold, as it provides space the individual religious freedom in employment and accommodates for the collective dimension of religious freedom by allowing for a difference of treatment; following on that, it outlines exemptions in which actions by religious organizations in employment are not classified as discrimination. In Article 4(1), the Directive sets out its entity-based scope to "churches and other public or private organisations the ethos of which is based on

[41] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 19
[42] *Ibid*., Article 10

religion or belief,"[43] and as per Article 3, it covers issues related to access to employment, working conditions, occupation, promotions and dismissals, vocational trainings, membership and involvement workers' organizations. The religious exemptions of the EU anti-discrimination framework will be analyzed in greater depth in Chapter 2 V(b). section, together with the Court of Justice of the European Union's relevant case-law.

In the American context, the Civil Rights Act of 1964 was a landmark civil rights and labor law act that prohibited discrimination of employees across a wide spectrum, including race, color, religion, national origin, or sex. Title VII of the Act, safeguarding equal employment opportunity, prohibits discriminatory treatment in workplace, including also on the basis of religious beliefs and requires employers to make reasonable accommodations needed by employees. Title VII is applicable to employers that have 15 or more employees, and it also includes the federal government, the state, and local governments. Individuals alleging to be victims of employments discrimination can file a complaint with the enforcement body, Equal Employment Opportunity Commission (EEOC), that enforces Title VII against private employers. The US Department of Justice is responsible for enforcing Title VII against state and local governments, however it is mandated to act only after the EEOC conducted an initial investigation.[44]

Importantly, Title VII does not apply to all cases of discrimination and it grants religious bodies an exemption – although not an absolute one – from certain prohibitions, making it possible for them to consider religion in their employment decisions. In particular, Title VII prohibition is not applicable to:

[43] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

[44] Brougher, C., 2011. Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations, p. 1

"*a religious corporation, association, educational institution, or society* with respect to the employment [i.e., hiring and retention] of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[45] (emphasis added)

Although the statue itself only lists broad types of religious bodies that may be exempted from Title VII prohibition, respective court decisions have indicated several factors that should be taken into account when deciding on granting the exemption.[46] These criteria include: i.) the mission of organization; ii.) its ownership, affiliation, or financial support sources iii.) requirements placed by the organization on its staff and members; and iv.) the nature and extent of its religious practices in products and services that it offers.[47]

Title VII also allows employers to discriminate on the basis of the protected characteristics in cases where these are "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[48] However, the *bona fide* occupational qualifications exemption is a narrow one, with courts rendering that it is valid only when religion plays a significant part of the job environment.[49]

Having examined briefly the definitional aspects of religious autonomy, non-discrimination, and exemptions as well as the way in which they feature in the frameworks of the US, EU and ECHR, it must be stated that *prima facie* they seem to operate on very similar assumptions. The anti-discrimination frameworks recognize religious-based exemptions, with

[45] See, for example: *Zelman v. Simmons-Harris*, 536 US 639 (2002)
[46] *Supra note*, p.2
[47] *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3rd Cir. 2007), 226-27
[48] 42 U.S.Code § 2000e-2(e)(1). Unlawful employment practices, Available online at: <https://www.law.cornell.edu/uscode/text/42/2000e-2> [Last accessed: 10 Nov 2019]
[49] See, for example: *Dothard v. Rawlinson*, 433 US 321 (1977).

putting up some criteria that sketch the scope and width of exemptions that could be granted. The next section will aim to investigate the ways in which the above described frameworks play out in the courts' adjudication.

3 Chapter II

3.1 A comparative approach

While the nexus between the law and religion is predominately one that plays out at a state level, the issues of religion and religious freedom have obviously expanded beyond domestic legal orders, becoming a subject of regional and international legal regimes too. Although the chosen jurisdictions are courts, this thesis is not a legal work *sensu stricto*, and therefore the following analysis of the jurisprudence of the respective courts is by no means an exhaustive one. Notably, the comparative section was thus tailored to serve the purpose of illustrating only a basic and introductory view of the legal landscape. As such, only selected case-law related to the research question will be scrutinized in greater depth, with a view of establishing grounds for a discussion on reasonableness and desired borders of religious autonomy.

In the following section, an analysis of case-law of respectively the European Court of Human Rights, the Court of Justice of the European Union, and the Supreme Court of the United States will be conducted.

However, prior to the comparative analysis, a short note must be made on the comparative approach employed in this work. Needless to say, the most obvious and noticeable difference between the three courts is that two of them – further referred to as 'European' for brevity's sake – are international courts. This is of course not to say that a comparing exercise between a domestic and international courts is a futile one, as it is indeed an approach regularly used in academic

literature.[50] Still, it is important to note and keep in mind the inherent differences between these tribunals, which are related to their statutory make-up and their mandate.

International courts allegedly also face some unique challenges in their work, especially in the age of neo-sovereignty that has been denoted, for several reasons, to mean "hard times"[51] for these courts. International courts appear to be particularly susceptible to criticism, with issues of backlash, contestation and resistance being widely discussed as problems they face in academic literature.[52] Again, it is crucial to note that domestic courts, such as SCOTUS, also face challenges of their own, which to a great extent are similar to those faced by international courts. For, when it comes to protecting fundamental rights, all courts are rather susceptible to being accused of what Lord Dyson called "human rights imperialism."[53]

Referring back to the concept of culture wars, and religion's place in it, it must be admitted that all three courts came under fire on several occasions for their respective rulings on matters directly or indirectly related to religion and religious freedom. There were too many 'religiously controversial' cases to list them, especially since they are only loosely related to the topic at hand, and only a handful will be referenced to illustrate the polarizing effect these have on public debate. Supreme Court's 2015 decision to legalize same-sex marriage *Obergefell v. Hodges* case sparked not only nation-wide but world-wide debate, with many prophesizing this as a beginning of an end of the religious liberty in the US, and a possible future threat to religious bodies that will oppose recognizing same-sex marriage, or to the conscientious objection rights for civil servants who will

[50] See, for example: Roberts, A., 2011. Comparative international law? The role of national courts in creating and enforcing international law. *International & Comparative Law Quarterly*, *60*(1), pp.57-92.
[51] Krisch, N., 'The Backlash Against International Courts', Verfassungsblog, 16 December 2016. Available at: http://verfassungsblog.de/backlash-international-courts-2/ [Last accessed 1 November 2019].
[52] See, for example: Lord Dyson, The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One? University of Essex, 30 January 2014, para. 2, p.
[53] *Ibid.*

refuse to register same-sex marriage.[54] Arguably, these comments were motivated more by the fear of possible snowball effect that this ruling may cause in curbing religious liberties (a slippery slope logic) rather than the actual language of the ruling, which was carefully crafted to convey reassurances for religious liberties at stake. Similarly, the 2011 *Lautsi v. Italy* case, in which the ECtHR decided that display of crucifixes in school classrooms does not violate the Convention, was widely publicized and hotly debated in mass media, with the UK-based the Guardian calling it "a worrying development in the fight for secular equality."[55]

Religion, in one form or another, is continuously present in the public, legal and policy levels in Europe and America alike. Thus, a final point, albeit obvious, that needs to be made with reference to this comparative exercise is that law does not arise or operate in a vacuum. Thus, it is not an overstatement to say that the country's religious past – in varied degrees and forms of influence – continues to influence its legal present. That is not to say that other fundamental rights lack this broader reference points, however very few of them can 'relay' on such strong institutional, historical and cultural grounding as religion has on the European and American continents.

[54] Coker, C.R., 2018. From exemptions to censorship: religious liberty and victimhood in Obergefell v. Hodges. *Communication and Critical/Cultural Studies*, *15*(1), pp.35-52.
[55] Paul Sims, The Guardian, "Compulsory crucifixes in Italian classrooms? Not a good sign" 25 march 2011, Available online at: < https://www.theguardian.com/commentisfree/belief/2011/mar/25/crucifixes-italian-classrooms-echr> Last accessed [12 Nov 2019]

3.2 The European Court of Human Rights

As a starting point in examining the European Court of Human Rights jurisdiction with regards to the topic of this work, it is important to cite in full the Article 9 on freedom of thought, conscience and religion from the Convention, of which the Court is a guardian:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or *in community with others and in public or private, to manifest* his religion or belief, in worship, teaching, practice and observance
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are *prescribed by law* and are *necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*."[56] (emphasis added)

Article 9 is widely understood to thus include both, freedom to adopt religion or belief of one's choice (*forum internum*) and a freedom to manifest it (*forum externum*). The limitation clause used by the Court in its assessment of the cases as per Article 9(2) was phrased by Weiler in more abstract terms (but useful for deepened analysis) as follows:

> "Another way of describing the play of the ECHR in this context is to say that it defines the margin within which States may opt for different fundamental balances between

[56] Council of Europe, 1952 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9

government and individuals. It defines the area within which fundamental boundaries may be drawn."[57]

Having regard to the theme of this work, it needs to be stated that Article 9 inherently also defines the boundaries that may be drawn for the autonomy of religious organizations. In fact, as the consulted case-law reveals, the protection of pluralism in a democratic society is one of the key principles underlined by the Court in making its case for a certain degree of autonomy for religious communities:

> "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 right [of religious communities] to an autonomous existence is at the very heart of the guarantees in Article 9."[58]

A vast majority of the cases relevant to the topic at hand have been litigated, and decided, (in various configurations) under Articles 9 (FORB), 11 (freedom of association), 14 (non-discrimination – always read in conjunction with other articles, as explained previously), and in cases of employment also Article 8 (right to private life). By and large, the Court framed the cases as belonging to the church/religious autonomy spheres. However, due to the limited space of this work, only a handful will be analyzed in greater detail below. Importantly, the Court reiterated on several occasions that since "religious communities traditionally and universally exist in the form of organized structures and that, where the organization of the religious community is at issue,

[57] Weiler, J.H., 1999. Fundamental rights and fundamental boundaries: On the conflict of standards and values in the protection of human rights in the European legal space. *THE CONSTITUTION of Europe: do the new clothes have an emperor*, p. 107

[58] ECtHR, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 31 July 2008, para. 78-79

Article 9 of the Convention must be interpreted in the light of Article 11"[59] to protect it from undue interreference from the state.

A three important cases for the issue of religious autonomy litigated in front of the Court were three German cases: *Obst v. Germany, Schuth v. Germany, Siebenhaar v. Germany*, respectively concerning a public affairs director of the Mormon Church and an organist at the Catholic Church – both dismissed for extramarital affairs; and a day-care teacher at a kindergarten run by the Protestant Church dismissed for attending and teaching at the Universal Church. When analyzing these cases, the Court looked at how the national courts carried out the balancing exercise between the conflicting rights at stake and found a violation of Article 8 of the Convention only in the *Schuth* case, due to the lack of a proper balancing test conducted at the domestic level. In all the cases, the Court was first and foremost interested in assessing how the state fulfilled its positive obligations under the Convention through a balancing exercise of rights of the employee and the employer. A professional position of the employee, the nature and length of its work were among some of the factors it had considered in its assessments.

Yet, as Zachary highlighted, the very end-results of and decisions made in these cases is of lesser importance to the methodology employed by the Court in arriving at said conclusions.[60] Although the Court naturally did affirm a certain degree of autonomy for religious organizations that enables them to operate outside of general labor laws, this principle was "imprecisely defined and subject to fact-intensive analysis."[61] In the case of *Obst*, the Court considered the church's interest in maintaining its credibility vis-à-vis the nature of the employee' position and a possible injury that may be inflicted upon the applicant (who was rendered to be quite young and could

[59] ECtHR, *Schuth v. Germany*, App. no. 1620/03, 23 December 2010, para.58
[60] Calo, Z.R., 2019. Law, Religion, and Secular Order. *Journal of Law, Religion and State*, *7*(1),p.123
[61] *Ibid.*

find alternative employment relatively easily) should his employment were terminated. In contrast to that, when analyzing the *Schüth's* case, the Court found that the positions of an organist and choirmaster did not quite fall within range of persons who needed to be fired for the religious body to be able to maintain its integrity and credibility. On top of that, the Court noted that the applicant's employment contract with the church limit his claims under the Article 8 only "to a certain degree"[62] Consequently, the Court decided that the applicant's interests carry greater weight than those of the church.[63] In *Siebenhaar's* case, the balancing exercise carried out by the Court upheld the German labor court's finding that the applicant's guaranteed rights under Article 9 had not been violated. In this instance, the decisive factor was the applicant's contract with the church which did indeed state that she must not be a member of any other body with views contrary to the mandate of her religious employer.

Arguably, the Court's methodology in these cases did not reveal a structural commitment to the religious autonomy, but rather positioned it as one of the many elements that must be considered in rendering a judgement. More so, the decisions in the above-described cases did not provide much detailed and substantial guidance for when the collective and institutional religious freedoms could as per Article 9 trump other factors in these contexts.

The court does, however, insist throughout its rulings that religious autonomy "means that it was not for secular courts, including the ECtHR, to make determinations on religious teachings or Orthodoxy"[64]. This position was reiterated in other cases, with the Court stating that: "…[except] for *very exceptional cases*, the right to freedom of religion as guaranteed under the

[62] ECtHR, *Schuth v. Germany,* Application no. 1620/03, 23 December 2010, para.71
[63] *Supra note*, p.123
[64] Evans, C. (2014) Principles and Compromises: Religious Freedom in a Time of Transition' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement, Hart,p.233

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…"[65] (emphasis added) This is perhaps the highest level of autonomy the Court confirmed for religious bodies, stating clearly that secular courts are not mandated to assess religious teachings, and put a high threshold on the states' discretion to decide on the legitimacy of belief or means used to express thereof.

Yet, the Court's reasoning in *Lombardi Vallauri v. Italy* case of a professor at a Catholic University in Milan, who was dismissed from his teaching position of 20 years for holding views which are contrary to the Catholic faith, illustrates that the church autonomy is not absolute. The Court held that while the religious autonomy may justify an institution's (in this case, the university's) refusal to hire someone that allegedly does not conform with its religious ethos, it could not justify a blanket refusal to explain the basis for that refusal. Consequently, the Court found a violation of the Convention on the procedural grounds of Article 10 (freedom of expression) and Article 6.1 (right to a fair trial). In the *Lombardi Vallauri* case, the Court thus recognized and set out procedural limits on the religious autonomy, claiming that the courts can and should play a supervisory rule in employment disputes to ensure a certain degree of procedural fairness.

Taking into account the Court's methodology and consequently the outcomes in above-described *Obst, Schüth,* and *Siebenhaar* cases, the subsequent decision in *Fernández Martinez v. Spain* case from 2014 arguably makes for a certain shift. The Chamber judgment appears to embrace a broader version of religious autonomy, with some commentators going as far as to conclude that the Court through its ruling carved out a "ministerial exception to the protection of

[65] *ECtHR, Schuth v. Germany,* Application no. 1620/03, 23 December 2010, para.58

individual human rights."[66] The applicant in this case was a married Catholic priest who worked as a Catholic religion and ethics teacher in public school; his employment contract was not renewed after his active involvement in a movement opposing Church doctrine had been made public. Much like Obst and Schüth, Fernández Martinez argued his dismissal interfered with his right to privacy as guaranteed by Article 8. When commenting on the existing tension between religious freedom and privacy in this case, the Court stressed once again that religious autonomy is "indispensable for pluralism in a democratic society." It further added that "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." Needless to say, in upholding the employer's decision of not renewing the contract with the employee, the Court's argumentation focused on the necessity of defending a space of autonomy for religious bodies. Here, in contrast to other cases briefly analyzed before, while balancing religious autonomy against a plethora of other factors, the Chamber judgement seemingly adopts a presumption in favor of religious autonomy. Although autonomy does need to be still somehow balanced against other factors, the deference is given to religious organizations due to their position within the states' constitutional order.

A subsequent Grand Chamber judgment upheld by a narrow 9–8 vote the Chamber ruling in finding violation of Article 8 (and did not examined the complaint under Articles 14 & 9), however it did so on more circumscribed terms. The Court rendered that a "heightened duty of loyalty" (para. 135) was required of the applicant in this case (similarly to Obst case para. 50; in contrast to Schuth para. 71) because he voluntarily accepted employment contract which limited

[66] Stijn Smet, 24 May 2012, "Fernández Martínez v. Spain : Towards a 'Ministerial Exception' for Europe?," *Strasbourg Observers*. Available at: <http://strasbourgobservers.com/ 2012/05/24/fernandez-martinez-v-spain-towards-a-ministerial-exception-in-europe/> Last accessed [5th October 2019]

the scope of protection under Article 8. However, the Court also explained that religious autonomy is not by any means absolute, and "a mere allegation by a religious community that there is an actual or potential threat to its autonomy"[67] cannot justify interference with Article 8 guarantees of its members. Furthermore, a religious community must demonstrate that the "the risk alleged is probable and substantial…and does not serve any other purpose unrelated to the exercise of the religious community's autonomy."[68]

The Grand Chamber judgement, unlike that of the Chamber, did not venture into analyzing the distinctive characteristics of religious institutions. While it is clear that religious communities have rights as associations, the Court has left it largely unaddressed whether religious bodies' legal rights differ to those of non-religious associations under Article 11. It could be thus argued that while affirming a certain version of religious autonomy, the Grand Chamber in the *Fernández Martinez* ruling, pulled back the jurisprudence to be more in line with balancing approach of the previous cases of Obst, Schüth, and Siebenhaar.

Yet, the 2017 *Nagy v. Hungary* case concerning a church minister that was removed from his post following a church disciplinary proceeding appears to have also reaffirmed a relatively broad realm of religious autonomy. The Court ruled that since his pastoral service was "governed by ecclesiastical law…decision to discontinue the proceedings cannot be deemed arbitrary or manifestly unreasonable."[69] As such, the Court stated the applicant had no 'right' that could be recognized under domestic laws, arguably going against its procedural fairness claim in *Lombardi Vallauri,* where it noted that courts can carry out judicial review of employment disputes.

[67] ECtHR, *Fernández Martínez v. Spain*, App. No. 56030/07, 12 June 2014, para.132
[68] *Ibid.*
[69] ECtHR, *Karoly Nagy v. Hungary*, Application no. 56665/09, 14 September 2017,para. 76

Since both, *Fernández Martinez v. Spain* and *Nagy v. Hungary* cases were decided with narrow majority, a subsequent counter-arguments of the dissenting opinions will be used in Chapter 3 in the discussion on the desired extent of religious autonomy.

3.3 The Court of Justice of the European Union

Having consideration to the complex body of the European Union's law, it could be said that the Court of Justice of the European Union approaches the interplay between anti-discrimination law and religious autonomy from a slightly different perspective to that of ECtHR.

Although the CJEU's jurisprudence on fundamental rights is complex and varied due the evolving competencies of the Union in this matter, its very first ruling on the religious freedom was in the *Prais v. Council of Europe* case from 1976, where the Court held that while discrimination on religious grounds is indeed contrary to the community law, having an exam scheduled on Friday for a Jewish candidate did not amount to violation of freedom of religion.[70]

The protection of religious freedom has Treaty basis (as per Article 17 TFEU) and thus the EU does offer a significant level of protection for religious communities, which entails that certain historical privileges for particular religious traditions and a variety of state-church models are accepted:

"1. The Union *respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States*.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

[70] *Prais v Council of Ministers*, C-130/75 [1976] ECR 1589, para.20

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."[71] (emphasis added)

On top of that, religious freedom is also guaranteed through Article 10 of the Charter of Fundamental Rights[72], which uses the same phrasing as the one used in previously quoted European Convention on Human Rights.

Indisputably, the Union has a limited competence with respect religious freedom issues, having a Treaty obligation to respect and not prejudice against the religious organizations' status in respective member states. However, employment law is regulated at the EU level and the principle of non-discrimination is one of the basic values of the Union as outlined in Article 2 of the TEU. Thus, the Court is also bound by EU Directives (directives regulate prohibition of discrimination and equal treatment) which consistently underline that a decisive rationale in discrimination cases is whether differential treatment satisfies proportionality test, and whether there was a genuine occupational requirement involved.

The recent two German cases from 2018 (*Egenberger* and *IR v. JQ)* are arguably best equipped to sketch the Court of Justice of the European Union's guideline to the member states on how to deal with the tensions between the two. The CJEU's reasoning in these cases mark a certain shift whereas the Court has placed more weight on the proportionality, with the need for balancing exercise between the equality rights of the employees and the autonomy of the confessional employers.

[71] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Art. 17
[72] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, Official Journal of the European Union 2012/C 326/02, Art.10(1)

The *Egenberger* case is certainly deserving a greater deal of attention as it illustrates well not only the tensions between religious organizations' autonomy and anti-discrimination laws, but also that between the national law and the EU law (here, the German Basic Law which has had come in sovereignty conflict with community law in the past); lastly, it is important for the solution(s) the Court worked out. The applicant, Ms Egenberger, applied for a position advertised by an organization associated with a German Protestant (Evangelical) church; one of the criteria set by the organization to successful applicants was a requirement to be a member of a Protestant church, and the applicant, being of no denomination, was unsuccessful in the recruitment process.

With regards to the legal basis under EU law relied upon in this case, Article 17 of TFEU, and Articles 10 and 22 of the Charter were used in support of the autonomy of religious organizations, whereas the workers' rights were invoked as protected under Article 10 of the TFEU, Article 47 of the Charter, and the Directive 2000/78 (general framework for equal treatment in employment). The religious organizations that qualify for the exemptions under the Directive are churches public/private organizations which ethos is based on religion or belief.

Article 4 of the Directive reiterates the Union's respect for the national church-state models, and further allows member states to carve out a set of 'genuine, legitimate and justified occupational requirements' for religious organizations where, a difference in treatment based on person's belief or religion, will not be in violation of the non-discriminatory spirit of the Directive. Article 4(2) therefore states that:

> "Member States may maintain national legislation in force…or provide for future legislation… *in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief*, a difference of

treatment based on a person's religion or belief shall not constitute discrimination where, *by reason of the nature of these activities or of the context in which they are carried out*, a person's religion or belief constitute a *genuine, legitimate and justified occupational requirement*, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground."[73] (emphasis added)

The flashpoint in this case proved to be the German transposition of above-quoted Article 4, which in the paragraph 9(1) of the German General Law on equal treatment reads as follow:

"-… a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, *in view of its right of self-determination* or because of the type of activity."[74] (emphasis added).

Needless to say, the right of self-determination as qualifying the religious organizations to define, by themselves and without effective judicial review, the justified occupation requirement is an extra-added value as compared to the Directive. Importantly, the church's right of self-

[73] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art.4(2)
[74] German General Law on equal treatment, para.9(1) cited in CJEU Case C-414/16, *Egenberger*, para.16 [17 April 2018]

determination (Article 140 of the German Basic Law) is one of the German constitutional principles which goes back to the Weimar Republic's Constitution. Notwithstanding, the CJEU stated that the objective of Article 4(2) was to ensure a fair balance between the autonomy of religious organizations and the worker's rights. More so, the Court was adamant in that the religious organizations may not 'authoritatively' determine the occupational requirements criteria (that is, without effective judicial review as per Article 47 of the Charter) because that would be contrary to the EU law and even the guarantees of Article 17 of the TFEU cannot invalidate that. Consequently, the CJEU rendered that the national courts ought to either, re-interpret or disapply the relevant national law. More importantly to the Court provided some more specific instructions for the national authorities on how to carry out the balancing exercises in cases of similar disputes. Simply put, the national courts should consider the 'genuine, legitimate and justified' (the meaning of which was further elaborated in paragraphs 62 through to 67) and additionally apply the proportionality test.

The *IR v. JQ* case concerned a chief doctor in a Catholic hospital that was dismissed purely on the grounds that his divorce and remarriage was considered to be at odds with the church's doctrine of lifelong marriage.[75] Having regard to the Court's reasoning in it, it could be seen as a natural follow-up to the *Egenberger* case. The Court held that a genuine occupational requirement of Article 4 was not met since the company that run the hospital has chosen chief doctors irrespective of their religion (or lack of thereof), and it did not demand conduct consistent with Catholic ethos from non-Catholic employees. Nevertheless, the Court in the preliminary ruling did not say that it was wrong to demand conduct consistent with Catholic ethos from head doctors,

[75] CJEU Case C-68/17, *IR v. JQ*, [11 September 2018]

rather it highlighted the difference of treatment between Catholics and non-Catholics and rendered this to be in violation of the EU law.

3.4 The Supreme Court of the United States

For obvious reasons, the jurisprudential take on the tensions between religious autonomy and anti-discrimination laws in the United States has a longer history than that of the ECtHR or CJEU. The struggle for preeminence between freedom and equality in the field of law and religion is evident in both Establishment Clause and Free Exercise Clause which read:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[76]

According to Dane, the issues arising under the Establishment Clause, related to, for example, financial support for the religious institutions from state "can be understood as efforts to work out principles of separation and deference at a general or "wholesale" level."[77] At the same time, matters under the Free Exercise Clause matters "out of the need to adjust those principles at the "retail" level to particular religions and religious individuals. The most crucial of these "retail" questions, whose solution remains bitterly contested, is the problem of religion-based exemptions…"[78] Needless to say, a vast majority of cases related to the autonomy-equality tension were thus litigated and decided as a Free Exercise Clause matter.

[76] Constitution of the United States, Amendment I (1791), Available at: <https://www.senate.gov/civics/constitution_item/constitution.htm> Last accessed [24 Nov 2019]
[77] Dane, P., 2001. The varieties of religious autonomy. In *Church Autonomy: A Comparative Survey Gerhard Robbers, ed., Peter Lang., 117*. p. 119-120
[78] *Ibid*.

Overall, it is possible to identify two main ways in which said tension is navigated in the US legal framework: i) the state and federal legislatures compiled statutory exemptions for religious organizations, ii) the circuit courts carved out some judicial exemptions for religious organizations from the anti-discrimination laws. Noting the complexity of the US legal system, this section will nonetheless focus solely on the Supreme Court's jurisprudence in this matter.

The Free Exercise jurisprudence since the end of the World War II has been preoccupied with the question as to whether any burden on religious exercise was justified by a compelling state interests, and whether limitations put on freedom of religious were indeed the least restrictive means of achieving state's interest.[79] By and large, the presumption in such cases was arguably in favor of religious freedom. In 1952, in the *Kedroff v St Nicholas Cathedral* case, the Supreme Court held that under the First Amendment, the religious organizations enjoy "an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"[80]. However, the Court has made a certain shift from religious autonomy towards equality in the *Employment Division v. Smith* case from 1990, stating that state interferences with religious interests are permissible if these flow from neutral laws of general applicability.[81]

The narrow scope of religious autonomy as per the *Employment Division v. Smith* has been challenged by an apex case for this work's topic – the 2012 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* case in which the Court unanimously endorsed the "ministerial exception" doctrine. The case concerned a lawsuit brought by a teacher at a Lutheran school, Cheryl Perich, who had been subsequently dismissed from her

[79] *Sherbert v. Verner*, 374 US 398 (1963)
[80] USSC, *Kedroff v St Nicholas Cathedral*, 344 US 94, para.116 (1952)
[81] USSC, *Employment Division v. Smith*, 494 US 872, para. 888 (1990)

position. Perich argued that her dismissal violated both the state and federal disability laws, while the Lutheran church counter-argued that these laws did not apply because of the "ministerial" nature of Perich's position.

As beforementioned, the Court was unanimous in affirming the ministerial exemption that gives religious employees a certain leeway from general employment laws. It emphasized, in an opinion written by Chief Justice John Roberts, that:

> "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[82]

The Supreme Court further added that even though "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[83] Arguably, the Court to an extent rejected a balancing exercise in cases of employment disputes of this kind, as it also asserted that "the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[84]

However, the Court applied a more circumspect approach when attempting to establish who – besides clergy – ought to be included within the "minister" classification for the purposes of the doctrine of ministerial exemption. In the case at hand, deciding that a teacher qualified for the ministerial exemption, the Court considered the fact that the plaintiff was a 'called' teacher, as

[82] USSC, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012) 132 US 694, para.706.
[83] *Ibid.,* para.710.
[84] *Ibid.,* para. 710

opposed to a 'lay' one, and she also enjoyed the federal tax credits available clergy. It was also not without importance that Perich, in addition to secular subjects, also led students in devotional exercises and taught religious education. Taking into account all that, the Court rendered that she for all intent and purpose she could be classified as minister, and thus covered by the ministerial exemption. The decision did not offer a decisive criterion in deciding who could qualify for the exemption, as the Court expressly held that there was no need to "adopt a rigid formula" to determine ministerial status.

An academic literature on the topic underlines that a lack of clear definition of what groups of people can classify as 'ministers' is indeed a problematic one. Praxis in response to the ruling revealed that some religious organizations see a great possibility in the vaguely defined ministerial exemption doctrine. For example, the Catholic Archdiocese of Cincinnati, reportedly added the title 'minister' to all its school employees, not only religious education teachers, in order to benefit from the exemption from the antidiscrimination laws.[85]

The exact borders of ministerial exemption seem to be still in flux since *Hosanna-Tabor*, with many hoping to prompt the Court to clarify the doctrine. To exemplify, a Catholic school in Los Angels has filed an appeal with the Supreme Court against United States Court of Appeals for the Ninth Circuit's decision that its employee had a right to pursue a lawsuit against the school under the federal Age Discrimination in Employment Act as she lacked religious title or training. The school however underlined that since "this court left many of the exact contours of the ministerial exception for a later day,"[86] the Ninth Circuit's insistence on credentials and title is

[85] Candiotti, S., Welch C., CNN, (31 May 2014), Available online at: https://edition.cnn.com/2014/05/30/living/catholic-teachers-morality/index.html [Last accessed: 15 November 2019]

[86] *Our Lady of Guadalupe School v. Agnes Morrissey-Berru*, Petition for a writ of certoriari, p.28, Available online at:< https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-267.html>

unduly rigid and would deprive religious groups of discretion to define the roles of their employees. At the time of writing this thesis, the petition was still awaiting to be considered.[87]

3.5 A comparative recap: main points of convergence and divergence

In very broad terms, academic scholarship tends to underline that despite differences, there is an emergence of "a shared accounting of religion, secularity, and moral order in the late modern West."[88] Notwithstanding, one must conclude that it would not be possible to unequivocally state that there is a great deal of divergence between the three courts with respect to issues arising between religious autonomy and non-discrimination.

The US Supreme Court has certainly pioneered the ministerial exemption doctrine, and although there were voices post-*Fernandez Martinez* arguing that the ECtHR may follow its lead, the term as such has not been used yet by the Court. The Supreme Court's jurisprudence on the matter, especially when comparing shift from *Employment Division v. Smith* to *Hosanna-Tabor*, seems to be the most exposed to uncertainty. If we are to accept that *definitions matters*, and they matter twofold in adjudication and legal certainty, the praxis of how the tensions between religious autonomy and equality are settled in employment is set to be haunted by uncertainty until the Court establishes precise criteria as to who may to establish who may be included within the 'minister' category.

The European Court of Human Rights jurisprudence, albeit clearer in drawing borders of religious autonomy, is still nonetheless scattered and cautionary. Although the Court deployed margin of appreciation in many other cases regarding religious matters, highlighting a lack of

[87] As of 27th November 2019, the petition was still in relisted and set to be considered at the Justices' next Conference on 12/13/2019.
[88] *Ibid.,* p.104

European Consensus on the matter, it did not overtly utilize that adjudication tool in the religious autonomy-equality cases. In addition, the Court certainly established that even with employment contracts, religious institutions cannot expect their employees to waive all their rights – such as privacy – completely. Further, the claims of religious community must pass the Court's standard assessment, including reasonableness and proportionality test, with individual circumstances (here, of the employees) sometimes also featuring as having a role in the test (although there is a mixed record of that). A centrality of the matter to the religion's doctrine has also featured as an important element, albeit the discussion of the court's legitimacy and competency to establish what religious 'own matters' are, persists.

Although the protection afforded by the European Union and by the Council of Europe reveal many synergies between, and there were attempts made to tighten the European human rights framework even more, different approaches adopted by the courts as to the content of fundamental rights in general, and with respect to religion in particular, between.[89] Not without importance seems to be the different nature of two legal orders which they represent, with the EU operating on the principle of conferred powers, and the Council of Europe being an international order, based on the consensus of the High Contracting Parties.[90] The divergence – amid the overlapping nature of the European human rights regime – was previously noted by scholars, with McCrea noting in 2016 their different approaches to matters related to religious autonomy and

[89] Lenaerts, K., 2018. The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection. *Il Diritto dell'Unione Europea*, (1), p. 9
[90] Zaccaroni, G., 2019. Egenberger, or the place of non discrimination on the ground of religion in the EU constitutional legal order. *Stato, Chiese e Pluralismo Confessionale*.

non-discrimination in employment.[91] In the light of the latest judgements of the ECtHR and CJEU analyzed in this section, it could be argue that the divergence has become even more apparent.

Perhaps the *par excellence* of the two court's divergence on the freedom of religion concerns the autonomy of religious organizations and the exemption from anti-discrimination laws. Although it cannot be stated that the Strasbourg court has embraced a model of ministerial exemption, it could be argued that – notwithstanding the language of *Fernández Martínez v. Spain* – there is not much room *de facto* balancing once autonomy is granted. ministerial exemption, which excludes a proportionality review of a dismissal decision if the employer is deemed a 'minister'[92] is at odds with the CJEU's decisions in the *Egenberger* and *IR v. JQ* cases from 2018. The Court of Justice increasingly invests in a proportionality-driven approach with an emphasis on the balancing exercise between the equality rights of the employees and the autonomy of the confessional employers, and this arguably has pushed it jurisprudence to be increasingly more equality-oriented. The Court's 2018 decisions are landmark in that they mark a shift from the traditional respect for the autonomy of religious organizations and the Member States' deciding on their own the peculiarities of their state-church relationship.

Needless to say, the new approach of the CJEU towards the autonomy of religious organizations may contribute to the sense of anxiety which these have with respect to the issue of religious freedom of Europe. Possibly, the noted divergence between the two Courts may, whenever plausible, also lead to applicants' forum-shopping.

[91] McCrea, R., 2016, Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State. *Oxford Journal of Law and Religion*, *5*(2), pp. 183-210.

[92] Note that, for example in the US, after the Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), the religious organizations can effectively decide who is a 'minister' even if the occupational activity is not religious

4 Chapter III

"Just as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos."[93]

/Eleanor Roosevelt/

Having considered the definitional basis of religious autonomy and non-discrimination, as well as a comparative landscape that emerges from the jurisprudence of the courts, it is not time to turn to a critical appraisal of the 'how far is to far?' question. In order to do so, a deepened discussion into the reasonableness of religious autonomy in general (and in connection to employment) must be carried out. If answering in positive, that some degree of autonomy is indeed desirable to religious organizations, the next step to investigate whether it is possible to establish the scope of that autonomy – and for that, a question of religious 'own matters' need re-consideration.

As was mentioned before, the topic of this thesis is a interdisciplinary one, and it raises many issues under different strains of academic disciplines. Due to space constrains, it is not plausible to engage with all the relevant factors that are at play (i.e. constitutional order and its importance to the in the church-state relations, including autonomy aspects), however overlapping issues will be also mentioned.

[93] E Roosevelt, 8 December 1952, The Universal Validity of Man's Right to Self-Determination, US Dept of State Bulletin, 27, p. 919.

3.1 Reasonableness of religious autonomy

As it was touched upon in earlier sections, there is a heated debate on the very *need* for religious autonomy, with variegated justifications for the reasonableness of it (or lack of thereof). Needless to say, proponents of the two most opposite ends of the spectrum advocate either a very narrow scope for religious autonomy (possibly also depriving it of the 'special status' recognition that puts them above other groups and privileges that go with it), or a very broad autonomy, which they argue is the only viable paradigm for religious organizations to operate in and secure religious freedom.

If one was to offer a sociological argument in favor of *favoring* religious communities, the 'no man is an island' prism comes in handy. As Margalit & Raz argued, the well-being and flourishment of individuals is obtained through culture, and culture in turn is sustained by groups. As the circle goes, the well-being of cultural groups is *sine qua non* of their member's well-being, while self-determination is what is necessary to secure protection for them.[94] And although the authors related this argument originally to national minorities, the same logic also applies to other groups, including religious communities. Given that religious communities are traditionally organized structures which is important in their relationship with faithful, it is true that autonomy of theirs with respect to 'own matters' aids the cause of securing individuals' freedoms (including first and foremost religious freedom) of those that belong to these organizations. For, they follow rules that are seen as being of divine provenance, and their ceremonies oftentimes are perceived as sacred and valid by a recognized minister and in accordance to those rules. Needless to say, the position of religious minister is therefore of great importance to all the members of religious

[94] A Margalit, A. and Raz, J., 1990. National self-determination. *The journal of philosophy*, *87*(9), pp.439-461

community."[95] However, this becomes a bit blurrier once we move from what can be agreed upon as purely religious activities, to more secular-in-nature functions, such as titular employment.

To put this in more concrete terms, is it justifiable to grant religious organizations the right to discriminate when choose cleaning staff (even if it is a church that needs to be cleaned), or the right to discriminate for a religiously-affiliated university in choosing their cooking staff at campus, or finally (a situation which may strike as familiar) the right for a Catholic hospital to fire a doctor for living life deemed to be contrary to the tenets of the faith? Of course, many more variations are here possible – some of which we have also seen in the court-cases – but these here are the cases which are precisely most affected by the 'how far is too far?' dilemma.

From a secular and non-religious point of view a demand to push the scope of exemptions that far may appear unreasonable. Therefore, I consider it important to give voice to a perspective that expresses the logic behind religious reasoning for wanting to have, for all intent and purpose, almost unbound autonomy in employment matters. Robbers described it as follows:

> "Religious life within a religious community is not necessarily or exclusively dependent on the leading or "visible" people. Spiritual experiences can occur anywhere. Sometimes it may be the cook in the church kitchen, the gardener in the churchyard or anyone else within the religious community who impresses somebody else by his deeds and beliefs - or, on the other hand, who compromises the teaching of the religious community."[96]

In other words, the less visibly religious functions are considered to be an integral part of religious "spiritual experiences," and in that way should be included within religious "own matters."

[95] Robbers, G., 2010. Church Autonomy in the European Court of Human Rights—Recent Developments in Germany. *Journal of Law and Religion*, *26*(1), p.308
[96] *Ibid*.

There is certainly a strain of academic scholarship, albeit perhaps decreasing in numbers, which religious organizations are entitled a *sui generis* legal exemption due to their unique purpose of serving a rather specific human interest. To exemplify, Laycock argued that almost unbound autonomy is needed in order to safeguard people's unique interest in "express[ing] their beliefs and channel[ing] their spiritual lives."[97] Laycock goes takes his argument relatively high, arguing against any types of collective bargaining directed at religious employers, even when these would serve to protect employees from exploitation.[98] Needless to say, the argumentations for 'unique' nature of peoples' interest in realizing and expressing their faiths and spiritual experiences have been met by a great deal of academic scrutiny and critique together with a claim that these deserve special protection and leeway from the state, unlike expressions and activities of the non-religious or rather non-theological interests of other citizens.[99] Some scholars, such as Nussbaum, highlight that these religious commitments, in contrast to the non-religiously oriented ones, are designated for "searching for the ultimate meaning of life"[100] and consequently lead individuals and groups to answer the most fundamental questions, reducing their existential fears.[101] In such line of reasoning, under a *sui generis* claim, it would be certainly possible to state that the religious autonomy can hardly ever be pushed 'too far'.

However, the mere presenting of religious as the ultimate way of answering questions "that the state must not try to answer,"[102] in my view, does not provide an adequate justification for

[97] Laycock, D. 1981. "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy." Columbia Law Review 81 (7), p. 1373
[98] *Ibid.* p. 1374, p. 1398–1400
[99] See, for example: Dworkin, Ronald. 2013. Religion without God. Cambridge, MA: Harvard University Press.
[100] Nussbaum, M., 2008. Liberty of Conscience: In Defense of America's Tradition of Religious Equality. New York: Basic Books, p.169
[101] Marshall, W., 1993. "The Other Side of Religion." *Hastings Law Journal* 44:843.
[102] Koppelman, Andrew. 2009. "The Troublesome Religious Roots of Religious Neutrality." Notre Dame Law Review 84, p.881

unbounded autonomy. To accept such presumption, one would necessarily need to prove that it is impossible for the state to interfere with and limit religious autonomy without prior answering of the ultimate questions. This claim is further weakened in that it is unsuccessful in providing a compelling argument for singling out religious organizations. For, there is a plethora of other philosophical and else institutions, also grappling with the ultimate questions of meaning, that are not recognized in the same way and granted special treatment in their quest for truth and meaning. Therefore, if restrictions can be tailored in such a way as to interfere with the religions' search for finding answers to fundamental questions, there is no reason why they should not be acceptable under this presumption.

Some academics, such Laycock, have turned to the church-state separation claims to find 'neutral' justifications for religious exemptions.[103] In their view, if a liberal democracy can impose certain restrictions on churches with respect to them using public resources for advancing their spiritual mission, it is not reasonable that religious bodies would ask for certain privileges as a compensation. Needless to say, this argument seems to be a bit detached from the lived reality of many contemporary liberal democracies, where churches are in fact state contractors for a plethora of public services, and oftentimes there are little restrictions put on them. Finally, there are also those who somewhat reject the commitment to neutrality, claiming that since religion itself is a public (and social) good, the state ought to promote it, and granting sui generis autonomy is an optimal way of doing so.

It was previously mentioned that some argue the protection of the collective dimension of religious freedom – via its autonomy postulates – is instrumental in aiding the individual

[103] Laycock, D. 1981. "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy." Columbia Law Review 81 (7)

dimension. As a last point, it is worth to note a great deal of scholarship also noted the existence of a certain tension between the two. To exemplify, Kiviorg claimed that an individual (personal) autonomy-based framework should be put forward the courts (her article was preoccupied specifically with the ECtHR) to deal with these conflicts.[104] Commenting on the Court's jurisprudence, the she posited that "there is lack of attention to individual autonomy in the Court's practice today which leaves it without a good argument for the protection of the communal life/communal freedom of religion or belief in a case where it conflicts with individual rights."[105] Although some would argue that the ECtHR should be more courageous in its attempts to protect human rights within its individual dimension, Kiviorg claimed it should nonetheless "proceed with caution…not to erode the autonomy of religious communities."[106] In his view, an overtly intrusion into the autonomy of religious communities could in turn "give tools to states for restricting the activities of any unwanted minority communities,"[107] — specifically in Central and East European, post-communist countries.

3.2 Religions' "own matters"

As it emerges from this work, the central aspect of the matter is between that which is inherently and intimately linked to the religious bodies' spiritual purpose and that which is not. Although mostly referring to the German context, von Campenhausen nonetheless claimed that "today it is mostly agreed upon what the so called 'own matters' are and where the line has to be drawn between state matters, church matters and such matters, in which both claim competence,

[104] Kiviorg, M., 2014. Collective Religious Autonomy versus Individual Rights: A Challenge for the ECtHR?. *Review of Central and East European Law*, *39*(3-4), pp.315-341.
[105] *Ibid*., p.314-317
[106] *Ibid.*, p. 325
[107] *Ibid.*

the so-called common matters."[108] However, a problematic aspect of this assumption is that, as academic literature and case-law seem to suggest, the "own matters" are, paradoxically, still contested and controversial.

The level of definitional confusion is indeed great, because as Gunn pointed out, the very term *religion* is a contested one. While "…the absence of a definition of a critical term does not differentiate religion from most other rights identified in human rights instruments and constitutions," according to Gunn, religion's complexity makes "the difficulty of understanding what is and is not protected is significantly greater….While academics have the luxury of debating whether the term "religion" is hopelessly ambiguous, judges and lawyers often do not."[109]

Arguably, one-side framing of the 'how far is too far' dilemma could suggest that the state must not put undue burden on the religious communities that would interfere in any way with their religious commitment. In doing so, the courts and legislators should be mindful of what Cordelli referred to as "essential versus nonessential decisions."[110] From a certain perspective, it is entirely plausible to argue that all decisions made by a religious institution relate somehow to its spiritual mission and purpose, and thus should be made in accordance with internal procedures, however arbitrary and/or authoritarian. However, stretching the 'nonessential' category for autonomy purposes in matters that merely affect or relate to the association's purpose can open a Pandora box of unlimited autonomy claims.

[108] A Freiherr von Campenhausen, 2001, 'Church Autonomy in Germany' in G Robbers, G., *Church Autonomy: A Comparative Survey*, Peter Lang, Frankfurt am Main, p. 79
[109] Gunn, T.J., 2003. The complexity of religion and the definition of religion in international law. *Harv. Hum. Rts. J.*, *16*, p.189. p.190-191
[110]Cordelli, C., 2017. Democratizing Organized Religion. *The Journal of Politics*, *79*(2), p.587

Yet, one could also question the state's (and courts) competence to decide *for* religious organizations which functions are *essential* to its doctrines and which are not. Since the ECtHR noted in several judgements that religious bodies can require a heightened duty of loyalty from its employees, perhaps courts should also require them to introduce gradations into that duty of loyalty within its internal structures. As the argument goes, this could result in religious communities feeling pressured "to structure itself according to actual or presumed and uncertain expectations of non-religious authorities."[111] Although such claim relies on many presumptions and what-if scenarios, it is nonetheless true that legal certainty in this matters would be also beneficial for religious institutions in knowing exactly when, under what circumstanced, and which of its employees they may require to comply with its religious teachings.[112]

Having said that, the lines must be drawn for the scope of religious exemptions in employment, and these must be supported by the outer borders of church autonomy which if shielded from state interference. The balance that needs to be worked out is vital, as imbalances have consequences. In the words of Fisher: "if too narrow a perimeter is drawn, the state risks encroaching upon religious autonomy. That is, a church may lose its vital freedom of self-governance when the state determines which activities are religious. Conversely, if the state defers too broadly to a group's definition of religion, the religious group might become a law unto itself."[113]

It was stated in the section dedicated to the jurisprudence of the European Court of Human Rights at a later stage, this work will return to some of the cases analyzed there in order to consider

[111] Robbers, G., 2010. Church Autonomy in the European Court of Human Rights—Recent Developments in Germany. *Journal of Law and Religion*, *26*(1), p.308
[112] *Ibid.*
[113] *Ibid*,p. 418

the counter-arguments put forward by the dissenting judges. In the *Fernández Martinez v. Spain* case, where narrow majority opted in favor of relatively broad religious autonomy, Judge Sajó highlighted that the respect that the state ought to display towards religious autonomy "is a matter of degree,"[114] with it being greater when it comes to internal affairs and governance, and "absolute when it comes to defining a religion's doctrines."[115] Further, he outlined a criterion, focused on external effects, for establishing when religious organization's decision and activities may be put under judicial scrutiny. In other words, "where *the impact* of a decision that originates in the autonomous activities and decision-making of a religious organization *concerns relations outside that organization*, the weight of the religious organization's autonomy diminishes." (emphasis added) Importantly, as per the dissenting opinion, the Court in this case choose not to grapple with the concept of limited autonomy, even though "functional limits" of it were touched upon. Simply put, a religious body is entirely free to hold its own internal reasons for the decisions it is making (i.e. personnel-wise), however it must "translate" them as to show it is not violating the Convention.

As mentioned in the previous chapter, the Court's decision in the more recent *Karoly Nagy v. Hungary* case, establishing that a minister in ecclesiastical service has 'no right' that could be recognized under the domestic law, effectively weakened judicial review and due process guarantees over such employment disputes. However, Judges Sajó, Lopez Guerra, Tsotsori, and Laffranque in their dissenting opinion highlighted broader consequences of it, stating that "ultimately, this judgment risks endorsing the position that all appointments and service agreements formed with religious institutions that are subject to internal rules fall outside the

[114] *Fernández Martínez v. Spain*, Application No. 56030/07, 12 June 2014. Dissenting opinion, para.4
[115] *Ibid*.

jurisdiction of the State."[116] This would of course be nothing less but an endorsement of a *sui generis* (and absolute) autonomy of religious organizations with regards to all of their employment and personnel decisions.

However, as Sajó pointed out in *Fernández Martinez v. Spain*, "church autonomy does not mean public recognition of a sovereign religious legal regime."[117] Even though tribunals "often consider semi-autonomous and 'alien' legal regimes," an absolute autonomy in employment matters would not constitute a semi-autonomous legal regime, but rather a completely separate one. And, as the Court previously held in *Refah Partisi (the Welfare Party) and Others* case, legal pluralism simply cannot be accepted under the Convention.

Interestingly, also Justice Scalia of the US Supreme Court in the *Employment Division v. Smith*, argued that a constitutionally guaranteed "private right to ignore generally applicable laws" would be (with some exceptions) not a "constitutional norm" but a "constitutional anomaly."[118] The stakes are high, as in Christoffersen's view, the logical consequence of a legal pluralism owing to religious autonomy would necessarily face the risk of including the Catholic canon law and Islamic Shari'a in the land of the law as a result of a widened recognition of the religious autonomy.[119] According to Christoffersen, courts and legislators must be thus mindful of the division of powers and the overlapping nature of some legal norms, when engaging with religious autonomy matters.

[116] *Károly Nagy v Hungary*, Application No. 56665/09, 14 September 2017, Dissenting opinion of Judges Sajó, Lopez Guerra, Tsotsori, and Laffranque, p. 32
[117] *Supra note.*
[118] *Employment Division v. Smith*, 494 U.S. 872, 886 (1990)
[119] Christoffersen, L., 2015. The Argument for a Narrow Conception of 'Religious Autonomy'. *Oxford Journal of Law and Religion*, *4*(2), pp.278–302

Another way into approaching the 'own matters' dilemma would be to re-consider the realms of public and private. For, as much as religious bodies are emerged within the state's apparatus, more they choose to act like a public institution, the more worldly they become. In operating in the public market, religious institutions invite the profane into its internal sphere, and thus it is not unreasonable to require from them to relinquish some of its religious privileges, as providers of important (public) goods and services.[120] As Christoffersen exemplifies with a church-affiliated adoption agency, if such an institution considers anti-discrimination laws to be threat upon its functioning, it has a choice to refuse state funding and re-brand into an exclusive religious entity that services only to church members. Of course, such solution is not an optimal one (also because it is not always possible to re-brand in such way), but it is certainly true that state financing and the extend of inclusivity and public nature of religious organizations' work should be considered in deciding how far-reaching its autonomy can be. Consequently, the "drawing of the line' is not a question of arbitrariness but has to be done in accordance with different functions of the state and the religious communities."[121]

3.3 Secularism

A critical appraisal of "how far is too far," would not be complete without an engagement of broader theoretical underpinning for the topic at hand, namely the notion of secularism. For, as Tebbe declaed: "no category is more central to assessing the structure of contemporary law and religion jurisprudence than the secular. Law, moreover, is the site of negotiation over the meaning of the secular."[122] Needless to say, there is of course a plethora of definitions of secularism, but

[120] *Ibid.*
[121] A Freiherr von Campenhausen, 2001, 'Church Autonomy in Germany' in G Robbers, G., *Church Autonomy: A Comparative Survey*, Peter Lang, Frankfurt am Main
[122] *Ibid*, p.104

for the purpose for this work it is accepted that secularism "merely assumes a social, political, and legal arrangement that does not follow considerations based on the transcendental or the sacred."[123]

Both, Europe and the United States in the past decades have experienced significant secularizing pressures, with ever-more people considering themselves non-religious and, importantly, non-members of any religious communities. It is not surprising to note that the law itself is also secularizing, arguably pushing religion more to the margins of political and societal order.[124] Such sentiment is shared by many, with Scharffs stating that the current trends (at least, in some places) of jurisprudence in matters of religious freedom and equality are "quite troubling" in that "equality has been privileged over freedom in systematic, structural ways that bode ill for religious freedom."[125] Yet, both American and European legal orders remain largely open to a constructive relationships with religion, in that they provide multiple protections for religious freedom as well as preserve (some) public space for religions to shape the societal, cultural, and political realms.

According to Calo, the cases concerning religious exemption are of particular importance to the question of secularism, as they implicate the structure of secular order in utmost intense manner. In the late modern society, the 'how far is too far' queries concern the very nature of the secular, ultimately, giving rise not only to the issue of religious freedom but "the ontological structure of the legal order."[126] Thus, despite the importance and high visibility of cases

[123] Sajó, A., 2008. Preliminaries to a concept of constitutional secularism. *International Journal of Constitutional Law*, *6*(3-4), p. 607
[124] Calo, Z.R., 2019. Law, Religion, and Secular Order. *Journal of Law, Religion and State*, *7*(1)
[125] Scharffs, B.G., 2012. Equality in Sheep's Clothing: The Implications of Anti-Discrimination Norms for Religious Autonomy. *Santa Clara J. Int'l L.*, *10*, p.108
[126] *Ibid*., p.125

concerning individual religious freedom, it is only the disputes regarding institutions that "reveal the subtle ways"[127] in which the secular (legal) order sets to regulate religion and religious freedom. What Calo considered as "puzzling" is the very fact that the courts jurisprudence recognizes religious autonomy, and is willing to grant it, which, in his view, enables "the projection of strong moral identity into secular life."[128] Yet, we are to considers the still prevailing somewhat religious culture in both, the US and Europe, and accounts for the rise of "strong religion" is re-surfacing in political, social, cultural, and legal domains, it is becomes less surprising (aside the justifications and human rights protections considerations) that the courts recognize religious autonomy. Still, however, the author is predicting that the current secular legal discourse and praxis problematizes the basis and justifications for religious autonomy, and that process is bound to accelerate. In his view, "but rooting religious autonomy in a liberal logic renders it susceptible to erosion, particularly because it grants space to the very sort of moral communities that are problematic."[129] With law being unable to sustain such contradiction, it is destined to gradually but necessarily move to limit the scope of religious autonomy.

It is possibly true that in defining the 'how far is too far' for religious organizations and their autonomy, we are currently at *medias res* time when these matters are bound to be, in due time, clarified. Even if the law will significantly push religion towards a private and preferential zone, curbing its meaning and activities within the public square and market. However, should the secular order not preserve religious autonomy, some prophesize that it would lead to state supremacy at best, and even a form of a state totalitarianism. The end-result of it would mean that state neutrality, together with "undisturbed authenticity of religious life and practice" would be

[127] *Ibid*, p. 125
[128] *Ibid*., p.126
[129] *Ibid.*

compromised. [130] As Robbers claimed, in respecting and protecting religious bodies from "general secular behavior," the state is protecting pluralism from becoming just an empty word without any institutional grounding.

[130] Robbers, G., 2010. Church Autonomy in the European Court of Human Rights—Recent Developments in Germany. *Journal of Law and Religion*, *26*(1), p.283

5 Conclusion

Perhaps the greatest difficulty concerning this work is that it endeavored to critically appraise "debate that won't go away."[131] More importantly, it could be argued that we are currently in *medias res* of the developments related to the autonomy-equality nexus. The principle of non-discrimination made a meteoric career in the past decades, and having established itself in legal and policy frameworks, it challenged the scope of religious autonomy in general, and in employment in particular. Consequently, religious organizations "find themselves…more strictly scrutinized, as a consequence of the ongoing horizontal application of fundamental rights within the current secular legal framework."[132] At the same time, as Tebbe noted, "expansion of equality law has contributed to a sense among some religious traditionalists that there has been an inversion," prompting a sense of anxiety in which religious communities start to perceive themselves as "minorities who require protection from an overweening liberal orthodoxy." [133]

Unsurprisingly, both sides started to also challenge each other in the courtrooms. However, as the analysis of the three jurisdictions showed, we can hardly speak of a singular 'European' or even 'American' model worked out by the courts with respect of the scope of religious autonomy. The courts have only established a few criteria for navigating the "how far is too far" paradigm, leaving many scenarios unclear. In addition, the general pattern of courts' jurisprudence is characterized by a significant level of volatility, and for that reason it is not easy to predict their respective approach in the future cases. This is especially true for the US Supreme Court and the

[131] Weiler J., 2010, 'State and Nation; Church, Mosque and Synagogue – the Trailer' 8 International Journal of Constitutional Law, p. 162–163.
[132] Torfs, R., 2007. Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities. *Religious Studies Review*, *1*(1), p.67
[133] Tebbe, N., 2016. How to Think About Religious Freedom in an Egalitarian Age. *U. Det. Mercy L. Rev.*, *93*, p.353

European Court of Human Rights which, as the case-law shows, have a history of going back and forth on the scope of religious autonomy. On the other hand, the Court of Justice of the European Union have made a landmark shift recently, curbing a broad understanding of the right to self-determination, and it remains an open question whether it will continue to do so in future cases.

The reasonableness of religious autonomy, and validity of exemptions given to religious organizations, remain a contentious issue also in academic scholarship. Many fear that the courts, in granting broad religious autonomy, will effectively create a "a legal vacuum where law does not go."[134] Others worry that equality demands will erode religious freedom. The human rights community is also "caught in heated debates on state intervention in such religious practices which are incompatible with the norms of society at large."[135] Needless to say, law and religion as well as autonomy and equality, in the foreseeable future, are set to be continuously juxtaposed against each other.

It is impossible to provide a uniform answer to "how far is too far?" precisely because a "one-size-fits-all" answer would prove to be futile for such a complex problem, in which so much depends on specific circumstances. The exemptions, it seems, are here to stay, for they provide a solution to "the age-old dilemma of how religious freedom and civil law can coexist in an ordered society when secular law clashes with what religious believers consider a higher moral law."[136] However, the ongoing inquiry whether religious organizations *ought* to be in any case placed outside of the law (or above it), to what extent and for what reasons, is also here to stay.

[134] McGoldrick, D., 2012. Religion and Legal Spaces—In Gods we Trust; in the Church we Trust but need to Verify. *Human Rights Law Review*, *12*(4), pp. 781
[135] *Ibid.*, p.208
[136] Fisher, L.N., 2014. Institutional Religious Exemptions: A Balancing Approach. *BYU L. Rev.*,p. 417

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