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Religious Communities and Their Employees

Ola Johan Settem
Associate Professor, Department of Accounting and Law, University of Stavanger
ola.settem@uis.no

Abstract
This article discusses the balance that must be struck, pursuant to the European Convention on Human Rights, between the right to autonomy of religious communities and the fundamental rights of the employees of such communities. A religious community can require at least some of its employees to show loyalty to the religious and moral doctrines of the community, but at the same time, such loyalty requirements can affect the fundamental rights of the employees, as when a religious community prohibits its clergy to marry. With regard to disputes concerning such loyalty requirements, the European Court of Human Rights has outlined a proportional balancing test. This article analyses the proportionality assessments conducted by the Court in respect of such disputes and aims to contribute to a more comprehensive and clearer understanding of various aspects of these assessments. The article also draws on case law of other international tribunals in respect of some of the questions to which religiously based loyalty requirements can give rise, in order to compare and contrast their approach with the approach of the European Court of Human Rights.

Keywords
religious liberty, religious communities, employee rights, conflict of rights, European Convention on Human Rights

1. Introduction

The topic of this article is the tension, under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), between the autonomy of religious communities and the fundamental rights of their employees, with particular focus on the proportionality assessments of the European Court of Human Rights in this regard. Article 9 ECHR enshrines each person's right to religious liberty, and, more specifically, the 'freedom, either alone or in community with others (…) to manifest his religion or belief'. Article 9(2) ECHR stipulates that manifestations of religion 'shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society' in pursuance of certain specified aims, such as 'the protection of the rights (…) of others'.

The European Court of Human Rights (also referred to herein as 'ECtHR', 'Strasbourg Court' or simply 'the Court') has made it clear that Article 9 ECHR, when read in light of Article 11 ECHR (which protects the freedom of assembly and association), safeguards the autonomy of religious communities. Religious communities themselves have a right to freedom of religion and belief,[1] and thus have a right to govern their own internal affairs. As the ECtHR states in its fundamental Grand Chamber judgment of *Hasan and Chaush v Bulgaria* of 2000:

1. As emphasised by eg Javies Martínez-Torrón, 'Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights' in Jeroen Temperman, Jeremy Gunn and Malcolm Evans (eds), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill Nijhoff 2019) 57, 68.

> Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[2]

The right of religious communities to 'autonomous existence' has implications for how the State authorities should address conflicts between a religious community and its employees. I refer to such disputes as 'religious employment cases'. In such cases, the State authorities may have positive as well as negative obligations in respect both of the employee's fundamental rights *and* the religious community's right to autonomy. This is elucidated in section 3.1 below.

According to the Strasbourg Court's case law, the right to autonomy applies to an association whose ethos is based on religious beliefs, even if it is not a religious community in the strict sense.[3] Such associations will often be run by a religious community and charged with more specific tasks that the community at issue regards as religiously significant. Typical examples are charitable foundations[4] and educational institutions.[5]

The aim of this article is to contribute to a more comprehensive understanding of the balance that, in certain situations, must be struck between the autonomy of religious communities and the fundamental rights of their employees, by analysing the proportionality assessments conducted by the Strasbourg Court in this regard. In relation to some of the elements of such assessments, the article also highlights how various other international tribunals have approached comparable questions. Such comparisons can serve either to buttress the considerations of the Strasbourg Court, or challenge them, as well as contribute to a broader understanding of the Court's own approach. It conforms to the Court's own interpretative principles to have regard to how other international tribunals have interpreted and applied similar human rights provisions as those in the ECHR.[6]

The article first considers the conflicting interests that are involved in religious employment cases (section 2). It then proceeds to an elaboration of a number of key features of the ECtHR's approach to such cases (section 3), which leads on to an analysis of a number of factors of potential importance to the concrete proportionality assessment in such cases (section 4). Section 5 provides concluding comments.

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2. See *Hasan and Chaush v Bulgaria* [GC], no 30985/96, § 62, ECHR 2000-XI. The importance of religious communities' freedom to govern their own internal affairs is also highlighted in the *travaux préparatoires* to the ECHR: see Council of Europe, *Information Document prepared by the Secretariat of the Commission*, DH (56) 14 § 116.
3. See *Siebenhaar v Germany*, no 18136/02, § 46, 3 February 2011.
4. See *Rommelfanger v The Federal Republic of Germany*, no 12242/86, decision 6 September 1989 by European Commission of Human Rights (hereinafter 'Commission'), Decisions and Reports 62. This concerned the relationship between a Catholic hospital and one of its employees.
5. See *Siebenhaar v Germany* (n 3), which concerned the relationship between a kindergarten run by the Evangelical Church and one of its employees.
6. See eg *Palomo Sánchez and Others v Spain* [GC], nos 28955/06 and 3 others, § 56, ECHR 2011.

2. The Interests Involved in Religious Employment Cases

On the one hand, it is obviously in a religious community's interest that at least some of its employees work in loyalty to the aims and doctrines of the community. It is, after all, essential to the autonomy of a religious community that the community itself decides its doctrines, and that it can organise its activities in accordance with these doctrines.[7] This fundamental point of departure entails consequences for the relationship between a religious community and its employees.[8] As the ECtHR has put it, 'as a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them'.[9]

On the other hand, such loyalty requirements can function as restrictions on individual employees' exercise of various fundamental rights. An employee who realises that they do not share the community's views on specific issues, or who wants to lead their life in a way that the community does not approve of, may have to suppress deeply held views or desires, or else risk being sanctioned by the community for acting faithlessly. The case may also be that the religious community, in connection with its *hiring decisions*, and on the basis of its religious doctrines, puts emphasis on attributes that, pursuant to anti-discrimination regulations or other rights provisions, an employer should not regard as relevant, such as the job applicant's religious views, sexual identity or gender.

Various ECHR rights may be affected in such situations, such as the employee's or job applicant's right, pursuant to Article 8 ECHR,[10] to lead their private life as they see fit, or the right to freedom of expression pursuant to Article 10 ECHR.[11] The right not to be discriminated against, pursuant to Article 14 ECHR or other national or international anti-discrimination regulations, may also be invoked by the employee or job applicant.[12]

At this point, let it be noted that it is important not only to religious communities to be able to require, of employees, loyalty to specific values and viewpoints. Other types of associations will also, to a greater or lesser extent, approach their relationship with employees in this manner, and will, pursuant to Article 11 ECHR, have a right to do so. If not, their right to freedom of association would be impaired, as this freedom implies that an association must be able to employ persons who will work for the realisation of the political or ideological aims of the association. Think, for example, of political parties or environmental organisations.

With regard to religious communities, the loyalty demanded of their employees will often be affected by their special features. The tension between the freedoms of association and religion on the one hand and the fundamental rights of the employees on the other can therefore be particularly tense in the religious context. In contrast to many other types of

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7. See *Fernández Martínez v Spain* [GC], no 56030/07, § 127, ECHR 2014 (extracts).
8. As emphasised also by eg Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1(1) *Oxford Journal of Law and Religion* 109, 109–111. These aspects of religious freedom have been emphasised also by the General Assembly of the United Nations: see Art 6(g) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res. 36/55 (25 November 1981).
9. See *Fernández Martínez v Spain* (n 7) § 131.
10. As illustrated by *Schüth v Germany*, no 1620/03, §§ 53–73, ECHR 2010.
11. As illustrated by *Rommelfanger v FRG* (n 4).
12. As illustrated by the case law of the Court of Justice of the European Union (CJEU): see eg Case C414/16, *Egenberger v Evangelisches Werk*, judgment of 17 April 2018 (Grand Chamber) (ECLI:EU:C:2018:257), a preliminary ruling concerning the interpretation of Article 4(2) of Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Anti-Discrimination Directive).

associations, religious communities will often base their activities on an integrated set of doctrines that purport to direct how the adherents of the religion should lead their lives, private affairs included. As the Strasbourg Court has emphasised, 'it is a common feature of many religions that they determine doctrinal standards of behaviour by which their followers must abide in their private lives'.[13]

3. How to Approach Religious Employment Cases

3.1. Variations of the Problem

Let us now take a closer look at how the ECtHR has approached cases where respect for the autonomy of a religious community and regard for an employee's fundamental rights are in conflict with each other.

The problem can be formulated, on the one hand, as a question of what *positive obligations* the State authorities have when it comes to protecting employees' fundamental rights. On the other hand, the problem can be formulated as a question of what *negative obligations* the State authorities have not to intervene in the internal affairs of the religious community. The case may be, for example, that a religious community has dismissed an employee, and the national courts, in the context of subsequent judicial proceedings, must take both the employee's fundamental rights and the religious community's autonomy into account.[14]

According to the circumstances, the case may also be that the State authorities are regarded as having restricted the fundamental rights of an employee, in order to actively protect the autonomy of the religious community[15] – or, alternatively, it is claimed that the State authorities should have done so.

The fundamental question is arguably the same, however, in all these relations; namely, what balance should be struck between the religious community's right to autonomy and the employee's fundamental rights. As the Strasbourg Court has stated in a judgment concerning the State authorities' dismissal of a religion teacher because the respective religious community had withdrawn its authorisation of him, the 'boundaries between the State's positive and negative obligations (…) do not lend themselves to precise definitions', but 'the applicable principles are nonetheless similar'.[16]

In the *Sindicatul 'Pastorul Cel Bun' v Romania* Grand Chamber judgment of 2013, concerning the State authorities' restriction of religious employees' right under Article 11 ECHR to form a trade union, in order to protect the autonomy of the religious community, the ECtHR observed:

> (…) the outcome of the application should not, in principle, vary according to whether it was lodged with the Court under Article 11 of the Convention, by the person whose freedom of association was restricted, or under Articles 9 and 11, by the religious community claiming that its right to autonomy was infringed.[17]

13. See *Jehovah's Witnesses of Moscow and others v Russia,* no 302/02, § 118, 10 June 2010.
14. See eg *Schüth v Germany* (n 10) §§ 55–57; *Obst v Germany,* no 425/03, §§ 41–43, 23 September 2010; *Siebenhaar v Germany* (n 3) §§ 38–40.
15. See eg *Fernández Martínez v Spain* (n 7) §§ 115–116.
16. ibid § 114.
17. See *Sindicatul 'Pastorul Cel Bun' v Romania* [GC], no 2330/09, § 160, 9 ECHR 2013 (extracts).

3.2. From 'Definitional Balancing' to 'Proportional Balancing'

In its earlier case law, the European Commission of Human Rights (now dissolved) appears to have regarded the so-called *exit option* as decisive in cases concerning the relationship between religious communities and their employees.[18] As long as the employee had been free to leave their post and the community in case of doctrinal disagreement, this was regarded as a sufficient protection of the employee's rights to freedom of religion and freedom of expression. Such rights were not regarded as interfered with on account of the community's sanctions against the dissident employee (not even if the religious community was a State church),[19] nor did the State necessarily have any duty to take positive measures to protect the employee's fundamental rights in such cases.[20]

It has been claimed that the Commission in these earlier cases applied what can be termed as a 'definitional balancing' approach to religious employment cases.[21] That is, the Commission demarcated the applicability of the rights claims at issue in a way that precluded a conflict between them. This approach has been contrasted with what can be termed the 'proportional balancing' approach,[22] which has been applied by the ECtHR in judgments concerning religious employment cases from at least 2009 onwards.[23] Under this approach, the Court does not resolve the issue by demarcating the respective spheres of application of each right, but through 'a thorough balancing exercise between the competing interests at stake'.[24] It is illustrative of this approach that in its Grand Chamber judgment in *Sindicatul* of 2013, the Court rejected the respondent state's allegation that the right to form trade unions pursuant to Article 11 ECHR was not *applicable* to the applicants, because they were *clergy*, performing special religious duties.[25] The special features of the employment relationship were instead treated as relevant to the assessment of whether the interference with the exercise of the right to form a trade union had been 'necessary in a democratic society', which entailed a proportionality assessment.[26]

One can say that Article 9 ECHR does not ground a 'ministerial exception' from the other provisions of the ECHR or from anti-discrimination legislation, on the model of how the Supreme Court of the United States has interpreted the First Amendment to the US Constitution.[27] The ECHR rights are *applicable*, in various ways, to disputes between a religious community and its employees, clergy included, but regard for the autonomy of the religious community is important to the proportionality assessment.

The Strasbourg Court's reasoning has been said to represent an *open-ended* and *ad hoc* 'proportional balancing exercise or test'.[28] As such, it has been criticised for being 'vul-

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18. See Leigh (n 8) 114–116.
19. See eg *X v Denmark*, no 7374/76, Commission decision of 8 March 1976, Decisions and Reports 5; *Knudsen v Norway*, no 11045/84, Commission decision of 8 March 1985, Decisions and Reports 42; *Karlsson v Sweden*, no 12356/86, Commission decision of 8 September 1988, Decisions and Reports 57; *Spetz v Sweden*, no 20402/92, Commission decision of 12 October 1994, unreported; *Williamson v The United Kingdom*, no 27008/95, Commission decision of 17 May 1995, unreported.
20. See *Rommelfanger v FRG* (n 4).
21. See Ian Leigh, 'Reversibility, Proportionality, and Conflicting Rights: Fernández Martínez v. Spain' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 218, 225.
22. ibid 220–227.
23. See eg *Lombardi Vallauri v Italy*, no 39128/05, §§ 42–46, 20 October 2009.
24. See *Fernández Martínez v Spain* (n 7) § 132.
25. See *Sindicatul 'Pastorul Cel Bun' v Romania* (n 17) §§ 140–150.
26. ibid §§ 159–173.
27. As regards the 'ministerial exception' in American constitutional law, see eg Mark P Strasser, *Free Exercise of Religion and The United States Constitution* (Routledge 2018) 26–39 with further references.
28. See Stijn Smet, 'Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test' in Smet

nerable to the charges of arbitrariness, subjectivity, and irrationality'.[29] Various alternative approaches have been suggested.[30] My view is that by reflecting on the assessments actually conducted by the ECtHR, the appearance of arbitrariness can be weakened, as the following analysis aims to demonstrate.

In what follows, I analyse more closely various aspects of the proportional balancing test, as it pertains to religious employment cases. The purpose is to contribute to a clearer and more comprehensive picture of the nature of this test. I begin with a basic outline of the ECtHR's approach.

3.3. An Outline of the Proportional Balancing Test

In its Grand Chamber judgment of *Fernández Martínez v Spain* of 2014, the ECtHR set out general principles for how to approach cases where the autonomy of religious communities must be balanced against the fundamental rights of employees. The judgment concerned an applicant who had been employed as a teacher of Catholic religion and ethics in a state-run secondary school. After six years of teaching, from 1991 to 1997, his employment was terminated, as the Ministry of Education decided not to renew his contract. The reason for the non-renewal was that the local bishop had decided to withdraw the applicant's authorisation to teach the Catholic religion in public institutions. This withdrawal was occasioned by newspaper reports on the applicant's family situation. The applicant had been ordained as a priest, but had then married, without having waited for the Vatican's decision on his application for dispensation from the obligation of celibacy. That teachers of the Catholic religion in State schools had to be approved by the Catholic Church was stipulated in an international agreement – a *concordat* – between Spain and the Holy See.[31]

After the national administrative and judicial authorities had rejected the applicant's complaint against the Ministry's decision, the applicant complained to the Strasbourg Court.[32] Before the Court, the applicant alleged that the non-renewal of his contract of employment had violated his right to respect for his private and family life pursuant to Article 8 ECHR.[33] Both the Chamber and the Grand Chamber found that the Spanish State had not violated this provision in respect of the applicant, but the Grand Chamber was divided, with a bare majority of 9 judges against 8 judges.[34]

The Grand Chamber agreed that Article 8 was applicable to the case, as the non-renewal affected 'his chances of carrying on his specific professional activity' and was due to 'events mainly relating to personal choices he had made in the context of his private and family life'.[35] The non-renewal decision was, furthermore, regarded as an interference by a public authority with the applicant's right to respect for his private life.[36]

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and Brems (n 21) 38, 39. See also Leigh (n 21) 220–227; María J Valero Estarellas, 'State Neutrality, Religion, and the Workplace in the Recent Case Law of the European Court of Human Rights' in W Cole Durham and Donlu D Thayer (eds), *Religion and Equality: Law in Conflict* (Routledge 2016) 35, 46–48.

29. See Smet (n 28) 39.
30. See eg ibid 45ff (proposing a 'structured balancing test'); Leigh (n 21) 235ff (proposing a 'reversibility test'); Estarellas (n 28) 55 (criticising the ECtHR for 'its deviation from the longstanding principle of the incompetence of public authorities to take positions in doctrinal matters or to interfere with the internal affairs of religious communities', and thus seemingly advocating a return to the definitional balancing of earlier years).
31. See *Fernández Martínez v Spain* (n 7) §§ 12–21.
32. ibid §§ 22–48.
33. ibid § 68.
34. ibid §§ 69–72, 152–155.
35. ibid § 113.
36. ibid §§ 114–116.

The interference was considered to have been 'in accordance with the law' pursuant to Article 8 ECHR,[37] and to have 'pursued the legitimate aim of protecting the rights and freedoms of others, namely those of the Catholic Church, and in particular its autonomy in respect of the choice of persons accredited to teach religious doctrine'.[38]

Thus, the decisive question was whether the non-renewal decision was 'necessary in a democratic society', which, according to established case law, is the case 'if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient"'.[39]

In this regard, the ECtHR stressed that 'it is called upon to rule on a conflict between two rights that are equally protected by the Convention', namely, 'the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other', and to 'weigh up the interests at stake'. The Court furthermore observed that the 'State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued'.

The Court then observed as follows:

> (…) [A] mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 (…). In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake (…).[40]

As we see, the Court emphasised the importance of a proportionality assessment. In *Fernández Martínez*, the question, from the Court's perspective, was whether the national authorities' interference with the applicant's rights under Article 8 ECHR, was proportionate to the aim of protecting the autonomy of the Catholic Church. As explained above in section 3.1, the contours of the assessment will be the same if the question is whether a limitation of the religious community's autonomy, in order to protect employees' rights, was justified pursuant to Article 9 ECHR, and also if the question is whether the national authorities fulfilled their positive obligations to the religious community or the employee.

In section 3.4, I add some comments on the relationship in such cases between the Strasbourg Court and the national courts. In section 3.5, I consider more closely some of the fundamental characteristics of the proportionality assessment as it pertains to religious employment cases.

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37. ibid §§ 117–121.
38. ibid § 122.
39. ibid § 124, with further references.
40. ibid § 132.

3.4. Comments on the 'Margin of Appreciation'

As regards the relationship between the ECtHR and the national courts in religious employment cases, the central question is what margin of appreciation the Court grants the national authorities in such cases. The 'margin of appreciation' is a multifaceted concept, and its exact meaning and implications are contested.[41] In its broadest sense, it can be said to mean that 'the State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right'.[42] For the purpose of this article, the national authorities are regarded as having been given a 'margin of appreciation' in respect of the concrete proportionality assessment when the ECtHR, to a greater or lesser degree, *defers* to the national authorities' substantive proportionality assessment, and instead focuses on the fairness of the procedures leading to the various national decisions, as well as on the question of whether the reasons adduced to justify the interference at issue were 'relevant and sufficient'.[43]

In *Fernández Martínez*, the Strasbourg Court explicitly observed that 'in this context', that is, in respect of the balance that has to be struck between the right to private and family life and religious communities' right to autonomy, 'the State has a wide margin of appreciation'.[44] Later in the same judgment the Court emphasised, as a general point, that there will 'usually be a wide margin if the State is required to strike a balance between (…) different Convention rights'.[45] This statement is applicable to religious employment cases in general.

On the basis of these statements, as well as on the basis of the Strasbourg Court's specific reasoning in various judgments, a few additional points should be noted.

First, the ECtHR has been adamant that each CoE State has a particularly wide margin of appreciation when it comes to the relationship between the State and various religious communities. As the Court has put it,

> where questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ widely, are at stake, the role of the national decision-making body must be given special importance (…). This will be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious denominations (…).[46]

This particularly wide margin of appreciation as far as the relationship between the State and religious communities is concerned, has played a role in certain types of religious employment cases, as where the public authorities have dismissed a publicly employed religious education teacher. The Strasbourg Court has held that arrangements whereby religious communities authorise publicly employed teachers who are to teach specific religious doctrines to pupils belonging to the religious creed at issue, are not *per se* a violation of the

41. See eg Ola Johan Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings* (Springer International Publishing 2016) 31–33.
42. See David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 14–15.
43. Which should correspond roughly to what has been termed as a 'structural margin of appreciation concept' by George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 81–84.
44. See *Fernández Martínez v Spain* (n 7) § 123.
45. ibid § 125.
46. ibid § 130.

ECHR. Whether there has been a violation of the individual teacher's fundamental rights in case of dismissal will depend on the specific circumstances.[47]

Second, when it comes to the concrete proportionality assessment in religious employment cases, the wide margin of appreciation the ECtHR has said that the national authorities enjoy does not imply that the Court refuses to concern itself with the substance of the assessment at all, and only focuses on the fairness of the decision-making procedure. For one thing, there will be limits to the margin of appreciation, as 'the final evaluation of whether the interference is necessary remains subject to review by the Court.'[48]

More importantly, by focusing on the *relevance and sufficiency* of the national court's reasoning, the Strasbourg Court *in effect* scrutinises how *substantively persuasive* the reasoning appears to be, at least to some extent. I elaborate on this point in section 4.7 below.

Furthermore, by outlining general principles for the assessment, and evaluating the national court's reasoning in light of these general principles, the ECtHR provides guidance for how the national decision-making bodies should proceed when conducting a proportionality assessment in a religious employment case.[49]

Third, the Court has not been entirely consistent as regards the width of the margin of appreciation in religious employment cases. There are cases where the Court has said that the margin of appreciation will be limited,[50] or where it can be claimed that the Court in reality evaluates in some detail the proportionality assessment of the national court.[51] In light of the circumstances of these cases, it can perhaps be said that the less a case concerns a community's *core religious activities*, and the more other fundamental rights have been restricted, the more strict the scrutiny of a national court decision in the community's favour will be. Conversely, it can be assumed that the more a case *does concern* a community's core religious activities, and the less other fundamental rights are restricted, the more strict the scrutiny of a national court decision in the employee's favour will be.

3.5. Fundamental Characteristics of the Proportionality Assessment

The task now is to consider in more detail some of the fundamental characteristics of the proportionality assessment in religious employment cases. In this regard, an important question is how much of a break with prior case law the 'proportional balancing' approach of *Fernández Martínez* and other judgments really signify, and, furthermore, what role the 'exit option' can be said to play in the context of the current approach.

One point is that in the earlier case law concerning religious employment cases, the Commission occasionally referred to the need to weigh the contradictory interests involved. This is most particularly the case in the *Rommelfanger* decision of 1989, where a Catholic hospital had dismissed a physician on account of his public stance in favour of abortion rights. The German labour courts had upheld the dismissal. The Commission found that the State authorities had not failed to comply with their positive obligation to protect the employee's rights under Article 10 ECHR. In this regard, the Commission emphasised that the national courts had been 'required to weigh the applicant's interests, including his inter-

47. ibid §§ 130, 143; *Travaš v Croatia*, no 75581/13, §§ 90, 100, 4 October 2016.
48. See eg *Fernández Martínez v Spain* (n 7) § 125 ('the final evaluation of whether the interference is necessary remains subject to review by the Court').
49. The significance of which is illustrated by eg *Travaš v Croatia* (n 47) § 113.
50. See *Lombardi Vallauri v Italy* (n 23) §§ 43–46.
51. See *Schüth v Germany* (n 10) §§ 61–75.

est in freedom of expression, against (…) the right of the church to regulate its internal affairs'.[52]

Thus, the approach in the *Rommelfanger* decision resembles more the proportionality assessments in *Fernández Martínez* and other judgments from the last 15 years than the allegedly strict definitional balancing approach of other Commission decisions. The latter decisions were for the most part concerned with allegations from clergymen that their individual right to freedom of religion had been violated because they had been sanctioned on account of doctrinal disagreements or the way they had performed their clerical functions.[53]

These observations give rise to the question of whether the ECtHR's approach to religious employment cases will vary with the provisions that are invoked and the specific facts of the complaint – that is, whether complaints that concern a minister's individual freedom of religion will be held to fall outside the scope of the ECHR.[54] In my view, the approach to religious employment cases should not be assumed to differ as to fundamentals, according to such variables. If the employee's conduct, for which they have been sanctioned, can be regarded as an exercise of a fundamental right when viewed in isolation, then the proportionality test set out in *Fernández Martínez* and other judgments should be considered to apply. It appears unnecessarily obfuscating to operate with different types of tests according to the variables highlighted above, and the Strasbourg Court has not stipulated that different types of tests should apply.

That said, in practical terms, the dismissal of a minister who refuses to conform to the doctrines of the community will typically be regarded as unquestionable for ECHR purposes. One can easily and foreseeably reach that conclusion by applying the proportionality test set out in *Fernández Martínez*, however, without having to resort to a different type of test for this particular type of case. After all, it lies at the core of religious communities' right to autonomy that they can require clergy to conform to the doctrines of the community and to perform religious ceremonies in particular ways.

This consideration leads to the second main point that should be highlighted with respect to the relationship between the current proportionality test and the so-called definitional balancing approach of earlier times. This point is that the ECtHR has continued to attach great importance to the ability of religious communities to employ persons who are committed to the doctrines of the community, as long as the requirements appear relevant under the circumstances.[55] As the Court has put it, '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'.[56] The Court has, furthermore, continued

52. See *Rommelfanger v FRG* (n 4).
53. See (n 19).
54. See eg Santiago Canamares Arribas, 'Churches, Religious Autonomy, and Employment Law in Spain, the European Court of Human Rights, and the United States' (2014) 57(4) *Journal of Church and State* 658, 681 (arguing, under influence of the 'ministerial exception' to ordinary labour legislation in American constitutional law, that with respect to 'ministers of worship' (or individuals in a similar position), the ECtHR should, in contrast to cases where the employee was not a 'minister', recognise the 'absolute autonomy' of the religious community).
55. The ECtHR has been criticised by some authors for continuing to put too great an emphasis on religious communities' right to autonomy in religious employment cases: see eg Ioana Cismas, 'Freedom of Religion or Belief and Freedom of Association: Intersecting Rights in the Jurisprudence of the European Convention Mechanisms' in Temperman, Gunn and Evans (n 1) 260, 281. Conversely, other authors have criticised the Court for, on occasion, and in the context of concrete proportionality assessments, failing to appreciate properly the religious aspects of the relationship between the religious community and the employee: see Javier Martínez-Torrón, 'Fernández Martínez v. Spain – An Unclear Intersection of Rights' in Smet and Brems (n 21) 192, 212.
56. See *Fernández Martínez v Spain* (n 7) § 129.

to refer to the so-called *exit option* as the ultimate safeguard of the employee's fundamental rights, and this perspective should be regarded as constituting a distinctive feature of the proportionality assessment in religious employment cases. As the Grand Chamber stated in *Fernández Martínez*, 'in the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual's freedom of religion is exercised by the option of freely leaving the community'.[57]

At the same time, it is emphasised in *Fernández Martínez* that if the religious community's actions affect the employee's right to respect for their private or family life, the community can be expected to explain why the actions were important in order to safeguard its autonomy, and to show that the actions were not too far-reaching.[58] That is, the community itself must have acted *reasonably and proportionately*. If not, the State authorities should not follow up and give effect to the community's decision (if the State is the formal employer, as in *Fernandez Martinez*), or, alternatively, the State authorities may have a positive obligation to protect the employee against the decision of the community, for example by finding in the employee's favour in a subsequent labour dispute.[59]

These principles should be regarded as applicable also with regard to interferences with other fundamental rights, such as the employee's right to freedom of expression,[60] or the employee's right to freedom of religion.[61] The principles should also be regarded as applicable, *mutatis mutandis*, where the State authorities have acted to protect the employee against the religious community's decision, and the community complains that the State authorities have violated its right to autonomy.[62] In order to substantiate its complaint, the community should then explain why its actions were a reasonable and proportionate response to the perceived threat to its cohesion and autonomy.

In all such cases, the task of the national courts will be to conduct 'an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake'.[63] The ECtHR, for its part, will review the concrete assessment conducted by the national courts.

The balancing exercise must not, however, be a more or less arbitrary weighing of different interests. To avoid this, and in order to harmonise the above highlighted elements of the proportionality test with a continued emphasis on the right to autonomy of religious communities, including the importance of the 'exit option', the following observation appears pertinent. The assessment of whether the religious community's actions were a reasonable and proportionate response must be conducted having regard for the fundamental premise highlighted above, in section 2, namely that it is up to the community itself to define its own doctrines, and that it is entitled to organise its activities in accordance with these doctrines. The community's actions must, therefore, as a starting point and main rule, be assessed in light of *its own doctrines and beliefs*, not in light of whatever doctrines and beliefs the State

57. ibid § 128. See also *Sindicatul 'Pastorul Cel Bun' v Romania* (n 17) § 137; *Travaš v Croatia* (n 47) § 87. General philosophical treatises have also emphasised the significance of the 'exit option' as the ultimate safeguard of individual liberty, and as an important aspect of how the legal order can accommodate the continued existence of religious communities with their own religious and moral doctrines: see eg John Rawls, *Political Liberalism* (Columbia University Press 2005) 468–469.
58. See *Fernández Martínez v Spain* (n 7) § 132.
59. As illustrated by eg *Schüth v Germany* (n 10) §§ 53–75.
60. As illustrated by *Lombardi Vallauri v Italy* (n 23) §§ 42–56.
61. As illustrated by *Siebenhaar v Germany* (n 3) §§ 36–48.
62. See *Sindicatul 'Pastorul Cel Bun' v Romania* (n 17) § 160.
63. See *Fernández Martínez v Spain* (n 7) § 132.

authorities regard as reasonable. This point is extremely crucial to grasp in order to get to grips with the nature of the proportionality assessment in religious employment cases. The State authorities cannot evaluate the reasonableness of the community's employment decisions without regard for how the community understands itself.[64]

4. Important Factors in Religious Employment Cases

4.1. Introductory Comments

On the basis of the above reflections on the fundamental nature of the proportionality assessment in religious employment cases, I now proceed to a more detailed consideration of a number of *factors* that may be of importance to the concrete assessment.

In its *Travaš v Croatia* judgment of 2017, the ECtHR summarised those factors that, according to its earlier jurisprudence (particularly the *Fernández Martínez* judgment), could be considered to be of particular importance 'in instances where the employment contract of a religious education teacher was terminated because the Church deemed that he or she was no longer suitable'. The Court referred to the following factors: 'status of the applicant; exposure of the applicant's situation; State's responsibility as an employer; severity of the sanction; and review by the domestic courts'.[65]

As the Strasbourg Court has highlighted these factors as particularly relevant in at least some cases where the autonomy of a religious community and the fundamental rights of an employee are in tension with each other, it appears expedient to take this enumeration as a *point of departure* for a further exploration of the details of the proportionality assessment. As the following exploration will show, however, other parts of the case law imply that also other factors than those explicitly enumerated in the *Travaš* judgment can be important. The following identification and discussion of various factors are based, therefore, on the Court's case law as a whole.

At this point, it bears stressing that, at the end of the day, the Court will conduct an *overall assessment and balancing* of all those factors that are regarded as relevant in light of the circumstances of the specific case at hand. The following discussion of specific factors is not meant to distract from this important feature of the Court's approach. The purpose of focusing on specific factors is to contribute to a more comprehensive understanding of the proportionality assessment, by highlighting the *role and weight* of each of the factors, and by facilitating discussion of a number of contested *questions* that the various factors give rise to.

After having focused on the role of specific factors in sections 4.2 to 4.7, I proceed in section 5 to gather up some of the threads, and provide some concluding comments on the overall assessment that must be conducted.

4.2. What Loyalty the Community can Require of the Employee

Let us first consider the first of the factors highlighted in the *Travaš* judgment, namely *the status of the applicant*. The case law shows that this expression refers to various types of considerations, which can be distinguished from one another.

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64. That the ECtHR can be said, in effect, to have given significant protection to religious communities' right to autonomy in connection with religious employment cases has been underscored also by eg Lucy Vickers, 'Freedom of Religion or Belief and Employment Law: The Evolving Approach of the European Court of Human Rights' in Temperman, Gunn and Evans (n 1) 235, 238.
65. See *Travaš v Croatia* (n 47) § 88.

One central question in this regard will be whether the community can impose a *heightened duty of loyalty* on the employee,[66] or can, at least, require the employee to conform to religious doctrines of importance to the community in their private life, in their public expressions and so on.

This will depend, first, on *the nature of the employee's post.* The more closely linked this post is to the community's *proclamatory mission* or to *important religious functions* – that is, to its teaching activities, the dissemination of its doctrines, the performance of religious rituals and so on – the stricter the requirements that the community can reasonably impose on the employee are.[67] The requirements can probably be particularly strict in respect of leadership positions,[68] as well as in respect of employees tasked with special religious duties, such as clergy.[69] This constitutes an *objective perspective* on the question of what degree of loyalty the community can require of the employee.

In addition, it is of importance whether the employee can be said to have 'knowingly and voluntarily accepted a heightened duty of loyalty towards' the religious community.[70] It can be asked whether the applicant, on the basis both of what has been explicitly stipulated in the employment contract and other circumstances, *waived* aspects of their fundamental rights. This constitutes a *subjective perspective* on the question of what degree of loyalty the community can require of the employee.

The objective and subjective perspectives should be regarded as closely linked with each other. A person who assumes, for example, a teaching post with a religious community, can typically be presumed to have had an understanding of the community's doctrines, and of the requirements of loyalty to these that the community expects.[71] The more explicit the community has been beforehand, however, with regard to its loyalty requirements, the less questionable will it appear that the community imposes a heightened duty of loyalty, and sanctions expressions or conduct which contradict the community's doctrines.[72]

Conversely, the less crucial the employee's work tasks appear to be to the community's proclamatory mission, the more questionable will it be that the community imposes a heightened duty of loyalty, or that the community at all requires the employee to act in specific ways apart from performing their specific tasks. Think of cleaning staff, janitors, office staff and so on.

A court can, however, be faced with difficult considerations in this regard. The religious community may claim that all, or most, of its employees have an important role with regard to community's proclamatory mission. That they, irrespective of their formal role or job title, are expected to bear witness to the community's faith in various ways. By way of example, in Norway there have been instances of religiously based schools claiming that as all teachers at the school, irrespective of what subjects they teach, are expected to deliver brief devotionals to the pupils, and in other ways act as Christian role models, they should be allowed to impose a heightened duty of loyalty on all their teachers.[73]

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66. See eg *Fernández Martínez v Spain* (n 7) § 131.
67. As illustrated by eg *Fernández Martínez v Spain* (n 7) § 131; *Schüth v Germany* (n 10) § 69; *Siebenhaar v Germany* (n 3) § 44. The importance of the proximity between the post and the community's mission is highlighted also by eg Ben Vermeulen and Marjolein van Roosmalen, 'Freedom of thought, conscience and religion' in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 752.
68. As illustrated by *Obst v Germany* (n 14) §§ 47–53.
69. As illustrated by *Sindicatul 'Pastorul Cel Bun' v Romania* (n 17) §§ 163–166.
70. See eg *Fernández Martínez v Spain* (n 7) § 135.
71. ibid § 135; *Obst v Germany* (n 14) § 50; ECtHR *Travaš v Croatia* (n 47) §§ 91–94.
72. See eg *Travaš v Croatia* (n 47) § 93.
73. See the following newspaper article: May-Helen Rolfsnes, 'Lærere må ta avstand fra homofile ekteskap' ['Teach-

Thus, a consideration of the nature of the post may, on occasion, itself raise questions as to the meaning and scope of the fundamental right to autonomy of religious communities. The community may claim that its own consideration of what loyalty requirements to impose in respect of various posts, should be decisive, and not be subjected to judicial scrutiny.

It then becomes a pertinent question how a court should approach claims like these.[74] The difficulty of the question is illustrated by case law from various national jurisdictions, such as the case law of the Supreme Court of the United States.[75]

The Strasbourg Court's case law, for its part, indicates that the national courts should evaluate critically the religious community's claim that a specific post is important to the community's proclamatory mission, at least if this *prima facie* appears questionable. Take, for instance, the *Schüth* judgment of 2010. This judgment concerned an organist and choirmaster at a Catholic parish church who left his wife and found a new partner. This eventually led to the parish church dismissing him from his post 'on the ground that he had breached his duty of loyalty under (…) the Catholic Church's Basic Regulations'. The extramarital relationship was not in conformity with 'the Catholic Church's fundamental principles enshrining the sanctity of marriage', and the applicant was therefore deemed to be unfit to continue as the parish organist.[76]

The organist took his case to court, but the final decision of the national courts was that the dismissal was justified.[77] The organist then complained to the ECtHR. The crucial question before the Court was 'whether the State was required, in the context of its positive obligations under Article 8, to uphold the applicant's right to respect for his private life against his dismissal by the Catholic Church', which depended on 'how the German employment tribunals balanced the applicant's right with the Catholic Church's right under Articles 9 and 11'.[78]

The Court conducted a critical evaluation of the reasoning of the national courts in this regard. The Employment Appeal Tribunal had found the dismissal justifiable 'on account of the proximity of his work to the Church's proclamatory mission'.[79] The Court found the national court's reasoning questionable on this point, as the Employment Appeal Tribunal 'did not examine the question of the proximity between the applicant's activity and the Church's proclamatory mission, but appears to have reproduced the opinion of the employing Church on this point without further verification'. The Court furthermore observed that a dismissal based on a breach of loyalty cannot be subjected 'only to a limited judicial scrutiny exercised (…) without having regard to the nature of the post'.[80]

There are other judgments that also indicate that the national courts should evaluate critically the religious community's allegations as to the nature of the post.[81] Such an approach

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ers must disapprove of same-sex marriages': author's translation] *Stavanger Aftenblad* (Stavanger, 20 July 2015) <https://www.aftenbladet.no/innenriks/i/dLadB/laerere-maa-ta-avstand-fra-homofile-ekteskap> (accessed 15 January 2023).

74. By way of illustration of a possible theoretical approach to this issue, see *Fernández Martínez v Spain* (n 7), Dissenting Opinion of Judge Sajó, arguing that a requirement of 'translation' should be invoked in religious employment cases, that is, that '[a]dequate judicial supervision cannot be provided unless religious considerations which affect civil or public law can be made legally cognisable for the benefit of the judicial authority.'
75. See *Hosanna-Tabor Evangelical Lutheran Church & School v Equal Employment Opportunity Commission* 565 US 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 591 US _ (2020).
76. See *Schüth v Germany* (n 10) §§ 7–14.
77. ibid §§ 15–29.
78. ibid § 57.
79. ibid § 61.
80. ibid § 69.
81. See eg *Fernández Martínez v Spain* (n 7) § 151; *Travaš v Croatia* (n 47) § 111; *Obst v Germany* (n 14) §§ 47–53.

appears to harmonise with EU law concerning the relationship between employees' protection against discrimination and religious communities' autonomy to base their employment decisions on, for example, the religious affiliation of the employee. The 2018 *Egenberger v Evangelisches Werk* judgment of the Court of Justice of the EU (CJEU) sets out some fundamental principles in this regard.[82] This was a preliminary ruling concerning the interpretation of Article 4(2) of the EU's Anti-Discrimination Directive (ADD).[83] The request had been made in proceedings concerning a claim for compensation for discrimination on grounds of religion allegedly suffered by a job applicant in a recruitment procedure.[84]

Article 4(2) ADD establishes that in connection with 'occupational activities' within religious communities, a 'difference of treatment (…) based on (…) religion' does not have to be regarded as prohibited discrimination, as long as religious affiliation, 'by reason of the nature of these activities', constitutes 'a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. Furthermore, pursuant to Article 4(2), a religious community can, in general, 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. We thus see that the ADD attempts to balance protection against discrimination with the interest of religious communities in employing persons who believe in, or at least support, the doctrines of the community.

What is important for our purposes is that the CJEU in its *Egenberger* judgment stated that if a religious community asserts that a job applicant's religion constitutes a justified requirement pursuant to Article 4(2), 'it must be possible for such an assertion to be the subject (…) of effective judicial review'.[85] Thus, the consideration of this question cannot depend solely on the religious community's own view of what degree of adherence to its doctrines the post at issue requires. The national court should, from the point of view of the community's own doctrines, and in light of the nature of the post, critically evaluate whether the requirement was justified.[86]

4.3. The Nature and Gravity of the Applicant's Conduct

Another important consideration in connection with the status of the applicant is the nature and gravity of the applicant's breach of loyalty. The more explicit and the graver the breach of loyalty was, the more reasonable it can be said to be that the community sanctioned the breach.

This gives rise to the question of how the national authorities should approach the religious community's allegations concerning the gravity of the applicant's conduct. Again, regard must be had to the autonomy of the religious community, which implies that, as a starting point, it is up to the community both what doctrines its adherents are expected to live in accordance with, and how grave various kinds of breaches are.

The national courts should, however, be competent to evaluate, at least up to a point, how reasonable the religious community's reaction, in light of the community's own doctrines, appears to be. The community's reaction should not appear as *arbitrary.*

The *Travaš v Croatia* judgment of 2016 provides an illustrative example of an assessment by the Strasbourg Court of how grave, in the light of the religious community's own doc-

82. See *Egenberger v Evangelisches Werk* (n 12).
83. See Council Directive (EC) 2000/78 (n 12).
84. See *Egenberger v Evangelisches Werk* (n 12) §§ 1–2.
85. ibid § 60.
86. ibid §§ 60–69. See also Case C-68/17, *IR v JQ*, judgment of 11 September 2018 (Grand Chamber) (ECLI:EU:C:2018:696) § 44.

trines, the applicant's breach of loyalty could reasonably be considered to be. The judgment concerned, like the *Fernandez Martinez* judgment of two years earlier, a teacher of Catholic religious education who had been dismissed from his post in the public school system after his canonical mandate had been revoked.[87] The mandate had been revoked because he had violated, in his private life, church doctrines on marriage.[88] In the subsequent judicial proceedings, the national courts conducted a balancing exercise where they weighed the interests involved, and upheld this dismissal.[89]

With regard to how grave the applicant's breach of loyalty had been, the Strasbourg Court observed as follows:

> 95. The Court notes however that although the applicant was aware of the importance of the sacrament of matrimony for the Church he decided to enter into a new civil marriage without regularising the situation with regard to his religious marriage with T.F. as provided under the Code of Canon Law (…)
> 96. It is therefore apparent that the applicant decided to disregard the requirements of special allegiance towards the teachings and doctrine of the Church, concomitant with his status of a teacher (…). He thus brought himself in a situation in which he lost his canonical mandate (…)[90]

There are several other judgments where the Court put emphasis on the nature and gravity of the applicant's breach of loyalty.[91] The assessment of how grave the breach of loyalty had been must depend on the circumstances of the specific case. In general, a choice to lead one's life in contravention of central ethical doctrines of the religious community can be regarded as graver than more isolated incidents.[92]

4.4. The Exposure of the Applicant's Situation

One of the explicitly enumerated factors in the *Travaš* judgment is the exposure of the applicant's situation. Other judgments also show that public exposure is of potential importance to the assessment. This is particularly so if the employee has deliberately drawn public attention to their disagreements with the community's doctrines. The Strasbourg Court's perspective appears to be that the more public attention the employee draws to the situation, the more reason the community has to reconsider whether they can continue in a post where they are a representative, in certain ways, for the community and its doctrines.[93]

At the same time, the Strasbourg jurisprudence shows that this factor is of limited importance compared to several of the other factors, such as the nature of the applicant's post. The Court has made it clear that if the breach of loyalty, in light of the nature of the post, gives the religious community reason to question the employee's eligibility for the post, then a lack of publicity does not mean that the community cannot dismiss him.[94] Thus, the exposure of

87. See *Travaš v Croatia* (n 47) § 15.
88. ibid §§ 6–15.
89. ibid §§ 16–26.
90. ibid §§ 95–96.
91. See eg *Fernández Martínez v Spain* (n 7) § 146; *Obst v Germany* (n 14) § 48; *Siebenhaar v Germany* (n 3) § 44.
92. As illustrated by *Obst v Germany* (n 14) § 48.
93. See *Fernández Martínez v Spain* (n 7) § 137. See also *Schüth v Germany* (n 10) § 72 (where it was stressed, in the applicant's favour, that the national court did not give sufficient consideration 'to the fact that (…) the applicant's case had not received media coverage (…)'.
94. See *Obst v Germany* (n 14) § 51; *Travaš v Croatia* (n 47) §§ 97–99.

the applicant's situation can play a role as one of several factors of relevance to the proportionality assessment, but other factors will typically be of greater weight.

4.5. The Consequences for the Applicant

Yet another factor highlighted by the ECtHR in its *Travaš* judgment is the severity of the sanction. The more severe the sanction against the employee is, the more strongly must the religious community's interests have been affected by the employee's conduct. Dismissal can be, in important respects, regarded as the ultimate sanction at the religious community's disposal. In order to justify such a sanction, the community should explain why it would be damaging to its credibility 'regarding the binding nature of its religious and moral precepts' if the employment relationship is not terminated.[95]

An additional question in this regard is whether the *wider consequences* for the employee of a dismissal are relevant to the proportionality assessment. Such consequences may not be within the control of the religious community. The case law nevertheless shows that it may be of some relevance to the overall assessment how detrimental a dismissal, in the circumstances, will be to the employee.

The *Schüth* judgment is illustrative of the importance also of this factor. As indicated above, the judgment concerned the dismissal, on account of marriage infidelity, of the organist in a Catholic parish church. The ECtHR placed some weight on the fact that, due to the applicant's 'specific qualifications', it would be 'difficult, or even impossible' for him 'to find a new job outside the Church'. More generally, the Court stressed that 'the fact that an employee who has been dismissed by a Church has limited opportunities of finding another job is of particular importance'. That the national courts had not taken such circumstances explicitly into account was regarded as a deficiency, which contributed to the finding that there had been a violation of the applicant's Article 8 rights.[96]

Conversely, in the *Siebenhaar* judgment, the applicant had been employed at the kindergarten for only a brief period of time, and was young, so presumably had good opportunities to find other work. These circumstances were referred to as arguments in favour of the religious community.[97]

As a continuation of the above considerations, a further and important question is whether, and in what ways, the *specific consequences for the employee's fundamental rights* can impact the concrete proportionality assessment in religious employment cases. The *Sindicatul* judgment of 2013 provides an example of the ECtHR placing weight on this factor. The main question in this judgment was whether the state's refusal to register the applicants' trade union had been a proportionate interference with their right to form and to join a trade union pursuant to Article 11 ECHR. The national authorities had refused to register the trade union in order to protect the right to autonomy of the Romanian Orthodox Church, as the applicants were members of the clergy of this church and their application for registration 'did not satisfy the requirements of the Church's Statute because its members had not complied with the special procedure in place for setting up an association'.[98] The Strasbourg Court's Grand Chamber found that there had been no violation of Article 11 ECHR.[99] In this regard, the Court highlighted, as one factor, that 'the Statute of the Roman

95. As illustrated by *Schüth v Germany* (n 10) §§ 63–66.
96. ibid § 73. See also, by way of illustration, *Fernández Martínez v Spain* (n 7), Joint Dissenting Opinion of Judges Spielmann and others § 35.
97. See *Siebenhaar v Germany* (n 3) § 44.
98. See *Sindicatul 'Pastorul Cel Bun' v Romania* (n 17) § 168.
99. ibid § 172.

Orthodox Church does not provide for an absolute ban on members of its clergy forming trade unions', and that there were already similar associations within this church that the applicants could join.[100] The refusal to register the trade union thus did not completely deprive the applicants of their right to form and to join such associations.

Conversely, in the *Schüth* judgment, which, as noted above, concerned the dismissal of a parish organist on account of marriage infidelity, the Court found that the national courts had 'failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention'.[101] The national courts had not put emphasis on the consequences of the dismissal for the applicant's right to respect for his private and family life pursuant to Article 8 ECHR.[102]

The reasoning in this and other judgments gives occasion to highlight a few points of general significance in this respect. First, if an employee is sanctioned *on account of* their private or family circumstances, then the dismissal is to be regarded as affecting the employee's interest in respect of their right to private and family life, not only as affecting their interest in being employed.[103] The same type of considerations must apply in respect of other fundamental rights.[104]

Second, when considering whether the restriction of the employee's fundamental rights by the religious community was justifiable, it may be of some relevance how extraordinary or peculiar the community's requirements appear to be, both compared to other religions and religious communities, and in light of the moral values that are prevalent in the wider legal and societal order. In the *Obst* judgment of 2010, which, as noted above, concerned the dismissal of a religious leader on account of marriage infidelity, the ECtHR approved of the national court's emphasis on the fact that marriage fidelity is an important value to many religions and religious communities, and that such fidelity could be regarded as an important value also pursuant to the German constitution.[105]

It can be questioned whether such reasoning is consonant with the Court's consistent view that, 'but for very exceptional cases, the right to freedom of religion as guaranteed under the 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'.[106] In light of this fundamental tenet, it can appear questionable that judicial authorities, in connection with religious employment cases, evaluate how peculiar or problematic the religious and moral doctrines at issue are.

Yet, when it comes to the concrete proportionality assessment in such cases, the national authorities are to be given a wide margin of appreciation, as noted in section 3.4 above. If the religious community's doctrines lead to a restriction of specific employees' fundamental rights, it can be claimed to be within the state's margin of appreciation to put some emphasis on how peculiar or problematic the doctrines at issue appear to be. It can be argued that the employee has a stronger interest in not being sanctioned for a breach of doctrines which are

100. ibid § 170
101. See *Schüth v Germany* (n 10) § 74.
102. ibid §§ 67, 71.
103. See eg *Fernández Martínez v Spain* (n 7) §§ 114–116; *Schüth v Germany* (n 10) §§ 57, 67, 72; *Obst v Germany* (n 14) §§ 39–43.
104. As illustrated by *Rommelfanger v FRG* (n 4) (which concerned the applicant's rights under Article 10 ECHR); *Lombardi Vallauri v Italy* (n 23) § 30 (which concerned the applicant's rights under Article 10 ECHR); *Siebenhaar v Germany* (n 3) §§ 36–40 (which concerned the applicant's rights under Article 9 ECHR).
105. See *Obst v Germany* (n 14) § 47.
106. See *Fernández Martínez v Spain* (n 7) § 129. See also eg *Schüth v Germany* (n 10) § 58; *Obst v Germany* (n 14) § 44.

very peculiar, than for the breach of doctrines which are grounded in values that saturate either other religious communities or society at large, or both.

It can, therefore, be regarded as justifiable that the *peculiarity* of the religious doctrines at issue is of some relevance, particularly when the sanction strongly affects core aspects of one or more fundamental rights. Judicial authorities should be hesitant, however, to put great emphasis on such considerations, in order not to undermine the fundamental tenet that it is not up to the State to evaluate the legitimacy of various religious beliefs.

Third, a religious community will, in general, have a wider leeway to sanction explicit *opposition* to its doctrines, in the form, for example, of public utterances, than to sanction the employee for how they conduct their private life. It is illustrative that the ECtHR, in its *Schüth* judgment, stated that the applicant 'did not appear to have challenged the stances of the Catholic Church, but rather to have failed to observe them in practice'.[107] This does not mean, however, that a religious community generally cannot sanction an employee for their private conduct. It is borne out by several Court judgments that a religious community can do so under many circumstances.[108] It does mean that the religious community must give a convincing explanation for why the employee's private conduct is incompatible with the post, even if they have not publicly opposed the community's doctrines.

It must be underscored that it is challenging, in light of the case law and in light of the societal developments in many CoE member states, to fully get to grips with exactly how protection of the employee's fundamental rights is to be balanced against the right of the religious community to autonomy. This is perhaps particularly so when it comes to the relationship between religious communities' moral doctrines regarding marriage and sexual conduct, and the widespread expectation, in our day, that one's sexual orientation and one's decisions on private matters cannot justifiably be condemned or sanctioned, nor lead to a difference of treatment.

It is illustrative that in the *Fernández Martínez* judgment, Judge Dedov, in his dissenting opinion, argued that the Catholic Church should, in effect, be prohibited from requiring its clergy to live in celibacy 'as the celibacy rule contradicts the idea of fundamental human rights'.[109] Furthermore, there are authors who have argued that religious communities, irrespective of their moral doctrines regarding sexual conduct, should not be allowed to treat persons differently on the basis that homosexual acts, for example, are regarded as 'sinful'.[110] The same has been argued with regard to religious doctrines which stipulate that certain religious positions are reserved for men.[111] The protection of various groups' right not to be discriminated against in connection with employment is then regarded as more important than respect for religious communities' autonomy and their corresponding right to organise their activities in accordance with their religious and moral precepts.[112]

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107. See *Schüth v Germany* (n 10) § 72.
108. See *Fernández Martínez v Spain* (n 7) §§ 123–153; *Obst v Germany* (n 14) §§ 39–53; *Travaš v Croatia* (n 47) §§ 87–115.
109. See *Fernández Martínez v Spain* (n 7), Dissenting Opinion of Judge Dedov.
110. See eg Stella Coyle, 'The Queer, the Cross and the Closet: Religious Exceptions in Equality Law as State-Sponsored Homophobia' (2021) 10(4) *Laws* 83 (arguing that 'restrictions on gay, lesbian, bisexual and queer lives, through religious exceptions to equality law, operate as harms which constitute degrading treatment contrary to Article 3 of (…) ECHR' (section 1)).
111. See eg Kathryn Chan, 'Religious institutionalism: A feminist response' (2021) 71 *University of Toronto Law Journal* 444, 446 (arguing, in respect of the question of whether to accord freedom of religion to religious institutions pursuant to the Canadian Charter of Rights and Freedoms, that there is 'a tension between recognising (…) gendered experiences of marginalization and recognising religious institutions as constitutional persons in their own right').
112. A variation of this view is expressed by Ioana Cismas, *Religious Actors and International Law* (Oxford University

As a matter of practical realities, such viewpoints can be regarded as a call for the public authorities to confront and suppress specific religious and moral doctrines, including doctrines that appear to be rather widespread among the major world religions, such as opposition to same-sex marriage,[113] or that not all religious positions and functions are open to both sexes.[114] It is illustrative that in the largest religious community in the world, the Roman Catholic Church (1.2 billion members), the official doctrines stipulate that clerical positions are only for men[115] and that homosexual acts are morally wrong.[116]

Equality considerations can be said to underpin the call for such a confrontation. However, as highlighted above, the ECtHR has stressed that the State should not, 'but for very exceptional cases', evaluate the legitimacy of religious beliefs. As shown above, conservative views on questions of marriage and sexuality, as well as on the question of who is eligible for ordination into the clergy are not as yet really exceptional among religious communities. It therefore appears questionable if the State in effect evaluates the legitimacy of such beliefs by prohibiting religious communities to make employment decisions on the basis of them, at least as long as the religious community does not engage in speech that incites to hatred and violence towards certain groups,[117] or advocates for a violent change in the State's constitutional foundations.[118]

This is substantiated by several of the Strasbourg Court's judgments in religious employment cases. Several of these show that the religious community is entitled to its own doctrines when it comes to marriage issues, and to require loyalty to such doctrines from its employees if this appears relevant in light of the nature of the post. The case law gives examples that a religious community could dismiss employees who had violated religious rules regarding marriage fidelity (*Obst)*, celibacy (*Fernández Martínez)* and remarriage (*Travaš*).

It should be added, however, that a religious community's right to organise its activities in accordance with doctrines that may appear controversial or questionable on the basis of equality considerations, is strongest in a typically religious context, or in connection with activities that are essential to the community's proclamatory mission, such as education.[119]

4.6. The State's Responsibility as an Employer

One of the factors highlighted by the *Travaš* judgment is *the state's responsibility as an employer*. This factor is of relevance if the public authorities themselves employed the applicant, and then sanctioned the applicant's conduct, in order to follow up a special arrangement according to which the public authorities and one or several religious communities cooperate with regard to a specific service.

The prime example is that the public school system offers pupils religious education in accordance with each pupil's (or the parents') religious affiliation, and the religious edu-

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Press 2014) 144–150, namely, that the 'best defence for religious organisations seeking to protect rights to religious autonomy, is to uphold human rights by assuming their human rights responsibilities'.

113. See eg Britannica, The Editors of Encyclopaedia, 'same-sex marriage' *Encyclopedia Britannica* (2023) <https://www-britannica-com.ezproxy.uis.no/topic/same-sex-marriage> . This and all other URLs were last accessed 15 January 2023.
114. See eg Britannica, The Editors of Encyclopaedia, 'clergy' *Encyclopedia Britannica* (2016) <https://www-britannica-com.ezproxy.uis.no/topic/clergy-Christianity>.
115. See *Catechism of the Catholic Church* #1577 <https://www.vatican.va/archive/ENG0015/__P4X.HTM>.
116. See *Catechism of the Catholic Church* #2357 <https://www.vatican.va/archive/ENG0015/__P85.HTM>.
117. That religious speech primarily can be interfered with only if it incites to violence, hatred or intolerance, was emphasised in eg *Ibragim Ibragimov and Others v Russia*, nos 1413/08 and 28621/11, §§ 97–99, 28 August 2018.
118. See *Moscow Branch of the Salvation Army v Russia*, no 72881/01, § 92, ECHR 2006-X.
119. In contrast, see *Staatkundig Gereformeerde Partij v The Netherlands* (dec), no 58369/10, §§ 58–79 10 July 2012, which concerned party-political activity.

cation teachers, while formally employed by the state, must be approved by the respective religious communities.[120] For the purpose of the following discussion, I will refer to such arrangements as *religious education arrangements*.

The Strasbourg Court has not found that such arrangements in themselves are questionable pursuant to the ECHR, nor that they 'affect the duty of loyalty imposed (…) vis-à-vis the respective religious community'. The Court has, in this regard, referred to the 'fact that, in the majority of Council of Europe member States, the Churches and religious communities concerned have a power of co-decision (…) in the appointment and dismissal of religious-education teachers'.[121] The forbearance shown by the Court in respect of such arrangements, is linked to the 'margin of appreciation' given to the contracting states when it comes the relationship between the State and religious communities.[122]

It can be added that the United Nations Human Rights Committee (HRC) has approached religious education arrangements in a similar manner,[123] under the International Covenant on Civil and Political Rights (ICCPR).[124]

The fact that the public authorities formally sanction the employee for conduct that contradicts religious doctrines, in order to safeguard the autonomy of a religious community, is anyway of some relevance to the proportionality assessment. The main point in the ECHR context appears to be that while the State may have to respect the withdrawal of the religious mandate by the religious community, with the consequence that the employee can no longer fill the position of religious education teacher, the employee should not automatically be dismissed. The public authorities should examine whether there are alternative tasks or posts for the applicant at the same educational institution. Alternatively, the authorities should assist or compensate the employee in some other way.

The *Travaš* judgment illustrates these points, as the ECtHR here 'attaches particular importance to the fact that the applicant was not dismissed directly following the withdrawal of his canonical mandate'.[125] In this judgment, the state's responsibility as an employer was regarded as particularly important because the reason for the withdrawal of the canonical mandate was that the applicant had made personal decisions that conflicted with the doctrines of the religious community, but at the same time constituted a core expression of his rights as guaranteed by the ECHR (Articles 12 and 8).[126]

It can be asked whether the ECtHR, in cases concerning religious education arrangements, has put insufficient emphasis on the state's responsibility as employer and as the provider of public education, and, consequently, on the importance of principles of equality and non-discrimination *in this particular context*. That the Court's approach to such cases can be questioned is evinced by the 9–8 vote in the respondent state's favour in the *Fernández Martínez* Grand Chamber judgment. Several of the dissenting judges considered that the majority did not put sufficient weight on the state's responsibility as the applicant's employer, and its duty 'to make sure that the secular reaction to the Bishop's decision was adapted to the applicant's situation and in particular that it did not interfere disproportionately with his right to respect for his private and family life.'[127]

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120. See *Fernández Martínez v Spain* (n 7) §§ 12–21; ECtHR *Travaš v Croatia* (n 49) §§ 6–15.
121. See *Fernández Martínez v Spain* (n 7) § 143.
122. ibid § 130.
123. See Human Rights Committee, *Páez v Colombia* (1990) UN Doc. CCPR/C/39/D/195/1985 §§ 5.7–5.8.
124. International Covenant on Civil and Political Rights (adopted 16 December 1966; in force 23 March 1976) 999 UNTS 171 (ICCPR).
125. See *Travaš v Croatia* (n 47) § 103.
126. ibid §§ 100–102.
127. See *Fernández Martínez v Spain* (n 7), Joint Dissenting Opinion of Judges Spielmann et al § 36.

Furthermore, it is of interest that the Inter-American Court of Human Rights (IAC) has, in its recent *Pavez Pavez v Chile* judgment concerning the rights to privacy and work pursuant to the American Convention on Human Rights (ACHR),[128] taken a much stricter approach than the Strasbourg Court to the state's responsibility as an employer in the case of religious education arrangements. The *Pavez Pavez* judgment concerned an employee at a Chilean public high school who had been a Catholic religion teacher. Pursuant to Chilean legislation, religious education teachers had to be in possession of a certificate of suitability granted by the corresponding religious authority. In *Pavez Pavez*, the teacher's certificate had been revoked by the Catholic church authorities on account of the revelation that she was 'living publicly as a lesbian'. Because of the revocation, she was prevented from continuing to teach Catholic religion classes. Instead, the high school appointed her to the position of inspector general at the school, which was regarded as a promotion.[129]

The teacher anyway alleged that the revocation of the certificate and her removal from the post of religion teacher had violated her fundamental rights. The IAC found that, 'due to the discriminatory treatment she had suffered' on account of her sexual orientation, several of her rights pursuant to the ACHR had been violated by the Chilean state.[130] The treatment was not justified by 'the advantages obtained in terms of protecting religious freedom'. It was not proportionate in the strict sense. The teacher's rights to privacy and work had, therefore, not been respected 'without discrimination' pursuant to Article 1(1) ACHR.[131]

There are several aspects of the IAC's reasoning that appears to differentiate its approach from the ECtHR's approach in its cases concerning religious education arrangements.

First, the way the IAC saw it, the church authorities' decision to revoke the certificate is itself regarded as a kind of exercise of public authority, for which the State must take responsibility, as the State had chosen to delegate this power in respect of public education to the church authorities. The decision of revocation should therefore itself respect the rights enshrined in the ACHR, the right to non-discrimination on account of sexual orientation included. The decision should also be subject to judicial review.[132]

Second, the religious community's right to autonomy was regarded to be of limited significance in the circumstances of the case, namely, that the case concerned *the area of education in public establishments*. The IAC considered that in this context, the right of employees and other actors not to be discriminated against on account of a protected characteristic, such as sexual orientation, must take precedence over religious communities' interest in loyalty to its creed from religious education teachers.[133] In the IAC's view, religious classes in the public education context 'are not within the scope of religious freedom that should be free from any interference by the State, since they are not specifically related to religious beliefs or to the organisational life of the communities'.[134] That the teacher had knowingly decided to live her life in contravention of the doctrines of the Catholic Church did not appear to be seen as relevant by the IAC either, which contrasts with the Strasbourg Court's approach in its judgments concerning religious education arrangements.

128. American Convention on Human Rights (in force 18 July 1978) OAS Treaty Series no 36 (1969) (ACHR).
129. See *Pavez Pavez v Chile*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C no 449 (4 February 2022) §§ 1, 15–29.
130. ibid §§ 33, 146, 134–136, 140–141.
131. ibid §§ 144–145.
132. ibid §§ 99–101, 134–135.
133. ibid § 144.
134. ibid §§ 127–131.

Third, the IAC, in contrast to the Strasbourg Court's *Travaš* judgment, where the State was given credit for having examined *the possibility* of finding another suitable post, and for having paid an indemnity, did not place much importance on the fact that the public authorities had attempted to rectify the restriction of the teacher's rights by *promoting her* and giving her alternative job tasks. The IAC appeared to regard the teacher's right not to be treated differently on account of her sexual orientation as close to absolute in the public education context. Thus, her reassignment was regarded as discriminatory treatment, compensatory measures notwithstanding.[135]

It should be regarded as questionable that the IAC regarded the issuance and revocation of a certificate of suitability to teach a specific religious creed in public schools as decisions that did not really concern a religious community's organisational life, or its religious beliefs, with the consequence that the community's right to autonomy was regarded as close to unimportant in the circumstances. The essence of the arrangement at issue in *Pavez Pavez* was that religious classes in the public schools were *optional* and that the pupils or their parents could decide for themselves *which religious creed* to be taught. When religious communities and public authorities cooperate on the basis of such principles, as a way to implement the parents' right, pursuant to Article 12(4) ACHR, to provide for their children's' religious education, it appears strained to regard the approval of religious education teachers as anything else than an integral part of the organisational and religious life of the respective religious community.

It cannot be ruled out that the IAC's reasoning, along with other considerations, will have an impact on the Strasbourg Court's approach to religious education arrangements, and that this approach will become stricter. In view of the above considerations, the Strasbourg Court should not, however, adopt the same approach as the IAC, which would entail that the autonomy of religious communities were regarded as close to unimportant in such contexts.

4.7. The Review of the National Courts

The last of the generally relevant factors highlighted by the ECtHR in its *Travaš* judgment is 'the review of the domestic courts'. This factor is of a procedural nature, as distinct from the factors discussed above, which were of a substantive nature. It is from the perspective of the Strasbourg Court that the review of the domestic, or national, courts is of importance as a factor. For the national courts themselves, the task is to conduct a proportionality assessment that takes the various substantive factors into account so that the Strasbourg Court can afterwards conclude that the review conducted by the national courts was satisfactory. In this way, the substantive and procedural factors are interlinked.

The question then becomes how the Strasbourg Court approaches the evaluation of how satisfactory the national court's review was. A few points should be highlighted in this regard. First, it is a common feature of proportionality assessments pursuant to Articles 8 to 11 ECHR that the Court has focused, to a greater or lesser degree, on the fairness of the national decision-making procedures and on how convincing the national courts' reasoning was – that is,[136] whether 'the reasons adduced (…) to justify' the interference with the right at issue were 'relevant and sufficient'.[137] The Court will therefore focus both on how well the applicant's interests were represented in the national decision-making procedure, and on the quality of the reasoning of the national decision-making bodies. It is the decision-making

135. ibid §§ 134–135, 140, 144.
136. See eg *Fernández Martínez v Spain* (n 7) §§ 124, 147.
137. ibid § 124.

procedure as a whole that must be satisfactory. As regards the quality of the reasoning of the national decision-making body, the focus will typically be on the final court decision at the national level. This decision may, however, to a greater or lesser extent refer to lower courts' or administrative bodies' reasoning. Thus, several judgments or decisions may have to be read in light of each other.[138]

Second, when the Court has considered whether the reasons adduced by the national court in a religious employment case were 'relevant and sufficient', the focus has been on how well the national court decision reflects the fundamental principles and guidelines for the proportionality assessment that can be derived from Strasbourg jurisprudence. This includes an evaluation of whether the national court appears to have put emphasis on those *substantive factors* that, according to Strasbourg jurisprudence, are of particular relevance in religious employment cases. This is illustrated by several ECtHR judgments.[139]

Third, it may, in certain circumstances, be important to the Strasbourg Court's assessment whether the national courts had put sufficient emphasis on alleged shortcomings of the decision-making procedures of either the national administrative authorities, *or of the religious community itself*. Both points are illustrated by the *Lombardi Vallauri* judgment of 2009. The applicant had been employed as a teacher of a specific course (philosophy of law) at a Catholic University in Milan and had for more than 20 years seen his contract renewed, on a year-on-year basis. In 1998, however, his contract was not renewed for the following academic year. The reason was that the Congregation for Catholic Education, an organ of the Holy See, had informed the leadership of the University that the applicant held views that contradicted Catholic doctrine. He should therefore not continue to teach the course at issue to the students at the University.[140]

The national courts did not annul the University's decision not to renew the applicant's contract.[141] The applicant complained to the Strasbourg Court and alleged that his right to freedom of expression pursuant to Article 10 ECHR had been violated on account of the University's refusal to renew his contract, and the national court's failure to annul the University's decision.[142]

The Strasbourg Court considered that the refusal to renew the contract constituted an interference with the applicant's right under Article 10 ECHR to freedom of expression, including his right, as a university teacher, to academic freedom, as the University was governed by public law. At the same time, the proportionality of the interference would depend on a weighing of the applicant's right to freedom of expression against the Catholic University's interest in providing an education in conformity with the doctrines of the Catholic Church, as there were strong links between the University and the Catholic Church.[143]

The Strasbourg Court found that there had been a violation of the applicant's rights under Article 10 ECHR. In this regard, the Court highlighted various procedural deficiencies, both the decision-making procedure before the University's faculty council and certain features of the decision of the Holy See on the applicant's accreditation. The faculty council had not explained clearly to the applicant exactly what opinions he held that were regarded as unacceptable, nor how these were presumed to be reflected in his teaching. The faculty council had only referred to the refusal of accreditation by the Holy See, but the content

138. As illustrated by eg *Obst v Germany* (n 14) §§ 47–50.
139. See eg *Schüth v Germany* (n 10) §§ 66–70; *Siebenhaar v Germany* (n 3) §§ 44–46; *Travaš v Croatia* (n 47) § 113.
140. See *Lombardi Vallauri v Italy* (n 23) §§ 4–11.
141. ibid §§ 12–18.
142. ibid §§ 25, 34–35.
143. ibid §§ 38–39, 43.

of this refusal had not been disclosed to the applicant.[144] The national court decisions, for their part, did not emphasise these deficiencies of the procedures of the administrative and clerical authorities.[145] Altogether, the applicant had not been provided with the requisite protection of his interests before the national decision-making bodies. Article 10 ECHR had therefore been violated, the University's interest in providing a Catholic-inspired education notwithstanding.[146]

We thus see that the national court, as part of its review of the religious community's decision to sanction the employee, may be required to evaluate the fairness of the community's procedures in this regard, including what information the employee had been given and whether they had been given the opportunity to explain themselves.[147]

5. Concluding Comments

I now conclude this discussion of the importance of various factors by highlighting a number of important points with regard to *the overall assessment in religious employment cases*. When assessing the proportionality and reasonableness of the religious community's actions towards the employee, it is important take note of the following points.

First, the nature of the employee's post will often be crucial to the assessment, in particular if the religious community, in light of the nature of the post or what the employee explicitly consented to, was justified in imposing a *heightened duty of loyalty on the employee*. If the religious community was justified in imposing a heightened duty of loyalty, the requirements with regard to the employee's viewpoints and conduct, even when it comes to private matters, can be particularly strict. Even dismissal will often be a proportionate sanction, particularly if the employee leads their life in a way that is in conflict with the community's religious or moral doctrines. For practical purposes, regard for the community's autonomy comes to the forefront in such cases, and the importance of the other factors is diminished.

Second, where the religious community cannot reasonably impose such a heightened duty of loyalty, the proportionality assessment becomes more open-ended. Regard for the community's autonomy is anyway not irrelevant, as long as the community, under the circumstances, can reasonably require a *certain loyalty* to its doctrines from the employee. Other factors may, however, be of decisive significance, such as how strongly the community's actions affect the core of the employee's fundamental rights.

Third, regard for fundamental rights implies certain limits to the loyalty requirements the community can impose, even with respect to leadership positions, clerical positions and so on. These may be linked either to *how onerous the requirements are*, or to *how problematic the doctrines at issue can be said to be*, or both. The national authorities should, however, be hesitant to impose specific views on religious communities, due to such communities' fundamental right to autonomy.

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144. ibid §§ 47–49.
145. ibid §§ 50–54.
146. ibid §§ 55–56.
147. See also, by way of illustration, *Fernández Martínez v Spain* (n 7), Joint Dissenting Opinion of Judges Spielmann et al §§ 31, 33.