

**EUROPEAN COURT OF HUMAN RIGHTS**

**GRAND CHAMBER**

**APPLICATION NO.**

**56665/09**

**NAGY**

**v.**

**HUNGARY**

**WRITTEN OBSERVATIONS  
OF THIRD PARTY INTERVENER:**

**ADF International**

**Filed on  
17 June 2016**

## **(a) Introduction**

1. ADF International is a legal organisation dedicated to protecting fundamental freedoms including the right to life, marriage and the family, and freedom of religion. In addition to holding ECOSOC consultative status with the United Nations,<sup>1</sup> ADF International has accreditation with the European Commission and Parliament, the Organization of American States, the Organization for Security and Co-operation in Europe, and is a participant in the Fundamental Rights Platform of the Fundamental Rights Agency of the European Union. ADF International works with a legal alliance of more than 3,000 lawyers dedicated to the protection of fundamental human rights and through which it has been involved in over 500 cases before national and international tribunals, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as this Court and the Inter-American Court of Human Rights.
2. The European Court of Human Rights (“the Court”) has consistently recognized the need for churches and religious organisations to operate freely without State intervention. This essential freedom, enshrined in Article 9 (freedom of religion) and 11 (freedom of association) of the European Convention on Human Rights (“the Convention”) is necessary for the proper functioning of religious institutions and even democracy itself.<sup>2</sup> Although the right to religious autonomy may sometimes affect other Convention claims under Article 6 (fair trial), Article 8 (private and family life), and even Article 9 itself (where the rights of an individual may compete with the rights of a religious community), where competing interests are in conflict, it is incumbent upon this Court to weigh those competing interests.<sup>3</sup>
3. Given the fundamental nature of Article 9 of the Convention, the centrality of “church autonomy” within Article 9 protections, and the State’s duty of neutrality towards religious institutions, this brief<sup>4</sup> will argue that Member States and this Court should defer to churches in matters of ecclesiastical disputes. While this may, on rare occasions, have an impact on Convention-based claims, any other course of action would likely place other Convention rights above the fundamental right to freedom of religion and would position this Court as the ultimate arbiter of religious disputes.

## **(b) The preeminence of freedom of religion**

4. Freedom of thought, conscience and religion is a fundamental human right not only enshrined in Article 9 of Convention, but also in many other seminal international and regional human rights treaties and non-binding documents,<sup>5</sup> including Article 18 of the Universal Declaration of Human Rights (1948), Article 18 of the International

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<sup>1</sup> Registered as “Alliance Defending Freedom.”

<sup>2</sup> *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inokentiy) v. Bulgaria*, Application nos. 412/03 and 35677/04, § 119, 22 January 2009.

<sup>3</sup> See *Öllinger v. Austria*, no. 76900/01, § 34, 29 September 2006.

<sup>4</sup> This is an updated version of the brief ADF filed before the Second Section (15 April 2014).

<sup>5</sup> See also, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981; UN Resolution on the Elimination of all forms of religious intolerance 1993; OSCE Vienna Concluding Document 1989, Principle 16.

Covenant on Civil and Political Rights (1966) and Article 10 of the Charter of Fundamental Rights of the European Union (2000).

5. The Court has recognized that the rights guaranteed by Article 9 are a cornerstone of democracy and one of the vital elements that make up the identity of believers and their conception of life.<sup>6</sup> Accordingly, Article 9 has taken the position of a substantive right under the European Convention.<sup>7</sup> Indeed, of all the qualified rights in the Convention, Article 9 is given the widest scope and is the least qualified.<sup>8</sup> Article 9 is thus “a precious asset”<sup>9</sup> that should not be interfered with easily.

### **(c) Church autonomy and the collective aspect of freedom of religion**

6. Under both United Nations treaties and the Convention, the right to freedom of religion is not only limited to individuals but also extends collectively to religious communities and associations.<sup>10</sup> Indeed, as explained by this Court, without the protection for religious communities, any protection for the individuals who comprise those communities becomes threatened.<sup>11</sup>
7. In 1988 the Parliamentary Assembly of the Council of Europe (“PACE”) produced an extensive list of recommendations on the situation of churches and freedom of religion in Eastern Europe, many of which touched upon the right of church autonomy.<sup>12</sup> In the year following the PACE resolution, the Organization for Security and Cooperation in Europe (“OSCE”) held its third summit in Vienna, Austria. The Vienna Concluding Document (1989) dedicated a number of paragraphs to freedom of religion, and once again respect for church autonomy was a key component of this freedom. Principle 16.4 states:

In order to ensure the freedom of the individual to profess and practise religion or belief, the participating States will ... respect the right of these religious communities to establish and maintain freely accessible places of worship or assembly, organize themselves according to their own hierarchical and institutional structure, select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State, solicit and receive voluntary financial and other contributions.

8. In 2004 the OSCE together with the Venice Commission produced “Guidelines for Review of Legislation Pertaining to Religion or Belief.” In section 2(F)(1) the guidelines state: “Intervention in internal religious affairs by engaging in substantive

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<sup>6</sup> See *Kokkinakis v. Greece*, no. 14307/88, § 31, 25 May 1993.

<sup>7</sup> See *Vojnity v. Hungary*, no. 29617/07, § 36, 12 February 2013.

<sup>8</sup> See Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001, p. 137. Evans also points out that when the Convention was being written, the final draft of Article 9(2) was the narrowest of the proposed articles.

<sup>9</sup> Sir Nicolas Bratza, The ‘Precious Asset’: Freedom of Religion Under the European Convention on Human Rights, *Ecclesiastical Law Journal*, Vol. 14, Issue 2, May 2012, pp 256-271.

<sup>10</sup> See Julian Rivers, *The Law of Organized Religions*, OUP, 2010, pp.50-71.

<sup>11</sup> *Hasan & Chaush v. Bulgaria*, no. 30985/96, § 62, 26 October 2000.

<sup>12</sup> Recommendation 1086 (1988) on the situation of the Church and freedom of religion in Eastern Europe. For example, recommendation 10(i) referred to “the right of religious associations to unhindered existence and recognition under the law” and 10(iii) called for the provision of “the right to free election of church officers and bodies without interference.”

review of ecclesiastical structures, imposing bureaucratic review or restraints with respect to religious appointments, and the like, should not be allowed.”<sup>13</sup>

9. Similarly, the European Union has recognized the special relationship that exists between churches and those who work for them. In Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, section 4(2) states:

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.<sup>14</sup>

10. This unique provision highlights the special need for the autonomous existence of religious organizations.
11. Thus, in an EU directive directed at prohibiting discrimination in the field of employment, churches and religious organizations are given heightened protection, because of the particular duty of loyalty that exists between a church and its ministers.
12. In the last fifteen years, this Court has heard a number of cases that centre on the issue of church autonomy. In the seminal case of *Hasan and Chaush v. Bulgaria*, the Court held that the State had wrongfully interfered with the internal life of the Muslim community by removing Mr. Hasan as Chief Mufti of the Bulgarian Muslims. In its judgment, the Court made several striking observations regarding the nature of Article 9, in particular:
- (a) The personality of religious ministers is of vital importance to every member of the religious community;
  - (b) The believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention;
  - (c) The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is at the very heart of the protection which Article 9 affords;
  - (d) Church autonomy has a direct impact on the organisation of the community but also the effective enjoyment of the right to freedom of religion by all its active members;
  - (e) If the organizational life of the community was not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable.<sup>15</sup>

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<sup>13</sup> See also the OSCE *Guidelines on the Legal Personality of Religious or Belief Communities*, 2014.

<sup>14</sup> For other EU provisions, see EU Charter of Fundamental Rights (2000), Articles 10 and 12 and EU Guidelines on the promotion and protection of freedom of religion or belief, *Foreign Affairs Council Meeting*, Luxembourg, 24 June 2013, § 6.

<sup>15</sup> *Hasan & Chaush v. Bulgaria*, Application no. 30985/96, judgment of 26 October 2000, § 62.

13. The Court went on to state that, “[F]acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers’ freedom to manifest their religion within the meaning of Article 9 of the Convention.”<sup>16</sup> Accordingly, the Court held that the respondent State had violated Article 9 of the Convention. The Court’s decision in *Hasan and Chaush* significantly developed the complementary principles of State neutrality and church autonomy and has since been reinforced in later decisions.
14. In *Metropolitan Church of Bessarabia and Others v. Moldova*, the court ruled that the State could not interfere with the internal workings of a church even to ensure healthy and peaceful relationships among the adherents and clergy. Thus, any State measures that favour a particular leader or compel the religious community to be placed, against its will, under a single leadership, constitute an infringement of freedom of religion.<sup>17</sup> Moldova refused to recognize and register the applicant church because it was not connected to the Russian Orthodox Church. The Court held that the State had a positive obligation to ensure judicial protection of the Church while at the same time protecting the Church’s autonomy.<sup>18</sup> Citing *Hasan and Chaush*, the Court emphasized that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very centre of Article 9 protections.<sup>19</sup> Moreover, it was held that “a State’s duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.”<sup>20</sup>
15. Recently, in the case of *Holy Synod of the Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, the Court reaffirmed this reasoning and correctly posited that if church autonomy was not protected, all other aspects of an individual’s freedom of religion would become vulnerable.<sup>21</sup> In the *Holy Synod* case, the Court dealt with an internal dispute regarding leadership with a competing Synod developing out of a schism. The Bulgarian government – seeking to end the dispute and maintain religious unity in the predominately Orthodox country – drafted a new religions law which in essence stripped the alternative Synod of its legal personality and automatically registered the majority of the Synod of Maxim as the only lawful Orthodox Church in Bulgaria.
16. While the Court held that it was a legitimate aim to seek the peaceful co-existence of members of the Bulgarian Orthodox Church, it could not do so by interfering with the internal workings of the church itself: “It follows that the unity of the Bulgarian Orthodox Church, while it is a matter of the utmost importance for its adherents and believers and for Bulgarian society in general, cannot justify State action imposing such unity by force in a deeply divided religious community.”<sup>22</sup> Again, the Court reiterated that State measures favouring a particular leader or seeking to compel the

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<sup>16</sup> *Id.*, at § 78.

<sup>17</sup> *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 117, 13 December 2001.

<sup>18</sup> *Id.*, at § 118.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.*, at § 123.

<sup>21</sup> *Holy Synod*, cited above, § 103.

<sup>22</sup> *Id.*, at § 149.

community, or part of it, to place itself under a single leadership against its will would constitute an infringement of freedom of religion.

17. Thus, in order to uphold the collective aspect of freedom of religion as enshrined in Article 9 of the Convention interpreted in the light of Article 11, States must avoid interfering with the internal workings of the Church. Not only does Article 9 guarantee religious autonomy, it also “impose[s] on the State authorities a duty of neutrality.”<sup>23</sup>
18. It is respectfully submitted that the same principles of religious autonomy and neutrality must also apply to this Court. In circumstances in which the respondent State has refused to become embroiled in what is essentially a religious dispute within a religious community, it should not be the Court’s place to adjudicate the dispute. Indeed, to do so would be to weigh other Convention rights above the right to freedom of religion and would place the Court in the uncomfortable position of ultimate arbiter of religious disputes.

#### **(d) The right to select, appoint and replace personnel**

19. A major component of church autonomy is the ability to select, appoint, and replace personnel without undue interference by the State. Recognising the limitation of State jurisdiction over the affairs of the church, many countries in Europe have well-established ecclesiastical court systems that deal with such disputes.
20. For example, in the United Kingdom a complex body of ecclesiastical courts deals with matters relating to the Church of England – including the discipline of clergy.<sup>24</sup> Moreover, the British courts have repeatedly held that church ministers, even in denominations outside the Church of England, are not employees for the purposes of employment law, and as such cannot bring claims in secular employment tribunals against the church.<sup>25</sup>
21. In predominantly Catholic countries, special ecclesiastical courts have been established for the purpose of settling disputes. And in some European countries a wide variety of ecclesiastical courts exist for smaller denominations and members of other faith communities.<sup>26</sup> Indeed, throughout Europe a number of systems are in operation, reflecting the cultural and religious diversity and pluralism existent within the region. Moreover, in many constitutional arrangements the secular courts are precluded from fully reviewing the decisions taken by church authorities.<sup>27</sup> Thus, not only are the systems within each country different, the way each system works varies

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<sup>23</sup> *Id.*, at § 139.

<sup>24</sup> See Mark Hill, *Ecclesiastical Law (Third Edition)*, Oxford University Press, 2007.

<sup>25</sup> Most recently the Supreme Court held in the case of *President of the Methodist Conference v. Preston* [2013] UKSC 29 that the claimant Church Minister was not an employee for the purpose of the Employment Rights Act 1996. As Lord Templeman explained in *Davies v. Presbyterian Church of Wales* [1996] ICR 280: “The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God.”

<sup>26</sup> See Michael Germann, ‘The German Perspective’ in *Transformation of Church and State Relations in Great Britain and Germany*, Nomos, 2013, pp.107-115.

<sup>27</sup> See the disputes at the centre of the following recent cases: *Müller v. Germany*, no. 12986/04, 6 December 2011 and *Fernández Martínez v. Spain*, no. 56030/07. Discussed below.

widely. Rather than seeing churches as being “above the law,” such systems operate on the basis that the state is not best placed to adjudicate internal church matters, which are necessarily linked to doctrinal questions beyond the state’s expertise or remit. Thus, restraint on behalf of the state in ecclesiastical disputes is vital for the proper functioning of both the church and state.

22. As the Grand Chamber has rightly held, given the “wide variety of constitutional models governing relations between States and religious denominations in Europe,” it is necessary that “the State enjoys a wider margin of appreciation in this sphere.”<sup>28</sup> Similarly, the Grand Chamber has also held that where questions concerning the relationship between church and state are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given “special importance.”<sup>29</sup> More generally, the Court has held that Member States generally enjoy a wide margin of appreciation in cases where a balance has to be struck between competing private interests or different Convention rights.<sup>30</sup>
23. As the following line of jurisprudence makes clear, given the wide variety of constitutional models in existence, the Court has generally been very reluctant to override the decision of the national authorities when the case involves the relationship between the Church and those who work for it.
24. In the case of *Dudová and Duda v. the Czech Republic*<sup>31</sup> two Czech priests brought a claim before the Czech courts, claiming unlawful dismissal. The Czech Constitutional Court rejected the constitutional complaint, noting that the dismissal of clergy falls under the autonomy of churches, and should not be interfered with by the state.<sup>32</sup> The claim was then pursued before this Court. However, the Third Section declared the application inadmissible. Regarding the alleged breach of a right to a fair trial, the Court concluded that the proceedings initiated by the applicants were not based on a right which is guaranteed by Czech law. The Court ruled that where there is a guarantee of church autonomy in Czech law, it is not a breach of a right to fair trial if the courts refuse to review the dismissal clergy.
25. In *Obst v. Germany*,<sup>33</sup> the applicant was dismissed as the European Director of Public Relations for the Church of Jesus Christ of Latter-day Saints after he entered into an adulterous relationship contrary to the teachings of the Church. He claimed that his dismissal breached Article 8 of the Convention. However, reiterating that the autonomy of religious communities was protected against undue interference by the State under Article 9 read in the light of Article 11, the Court dismissed his claim.
26. In *Siebenhaar v. Germany*,<sup>34</sup> the applicant was dismissed from her role as a childcare assistant in a day-nursery run by Baden Protestant Church on the grounds of her involvement in a religious community whose teachings were incompatible with those of the Protestant Church. Relying principally on Article 9, the applicant claimed that

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<sup>28</sup> *Sindicatul “Păstorul Cel Bun” v. Romania* [GC], no. 2330/09, § 171, 9 July 2013.

<sup>29</sup> *Şahin v. Turkey* [GC], no. 44774/98, § 109, 10 November 2005.

<sup>30</sup> See *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, 10 April 2007.

<sup>31</sup> *Dudová and Duda v. the Czech Republic* (dec.), no. 40224/98, 30 January 2001.

<sup>32</sup> Decision No. I. ÚS 211/96.

<sup>33</sup> *Obst v. Germany*, no. 425/03, 23 September 2010.

<sup>34</sup> *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011.

her dismissal by the Church breached her freedom of religion. However, the Court held that there had been no breach of Article 9. The German courts had previously held that her dismissal had been necessary to preserve the Church's credibility, which outweighed her interest in keeping her job, and the Fifth Section of the Court accepted these findings.<sup>35</sup>

27. Both *Obst* and *Siebenhaar* involved the discipline of laypersons. However, the Court has also considered cases involving clergy or ordained ministers. In such cases, the Court has repeatedly emphasized the rights of the church to organizational and internal autonomy.
28. In the case of *Müller v. Germany*,<sup>36</sup> the applicants, Hanna and Peter Müller, joined the Salvation Army as officers and signed a declaration in which they expressly accepted that they were not employed by the Salvation Army and had not entered into an employment contract with it.<sup>37</sup> During their missionary service they were the subject of complaints, and after being placed on a leave of absence, the Salvation Army terminated their service as officers on the basis that they were no longer fit to perform such service. Rather than appealing to the Salvation Army board of inquiry, the applicants sought what was effectively an unfair dismissal claim against the Salvation Army before the civil courts. However, in view of Germany's constitutional arrangements and the case-law of the Federal Court of Justice, the applicants' claim in the civil courts was dismissed as unfounded.<sup>38</sup>
29. The applicants then claimed before this Court that the decision of the national authorities violated their Article 9 rights and their rights under Article 6 on the basis that their claim had not been properly heard. After dismissing the Article 9 claim in 2008, the Court later dismissed the Article 6 claim in an admissibility decision of 6 December 2011.
30. The Court noted that access to a court is not an absolute right and may be subject to legitimate limitations. It also accepted that Germany was within its right to only offer a very limited review of the case, given its deference to the internal affairs of the church. Within its limited review, the German courts concluded that there were no grounds for finding that the Salvation Army's decision had been arbitrary or contrary to public morals or public policy. Moreover, the fact that the applicants had not appealed against their dismissal before the Salvation Army board of inquiry meant that the applicants could not argue that they had been deprived of the right to obtain a decision on the merits of their claim. Accordingly, the applicants' complaint alleging lack of access to a court was considered unfounded and was rejected.

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<sup>35</sup> By contrast, in the case of *Schüth v. Germany*, no. 1620/03, 23 September 2010, the Court held that the dismissal of an organist and choirmaster from a Roman Catholic parish for leaving his wife and settling with a new partner was a breach of the applicant's right to private life under Article 8. This case and the Court's reasoning appear to be anomalous to the judgments in *Dudová*, *Obst*, *Siebenhaar*, *Müller*, *Fernández Martínez* and *Sindicatul "Păstorul Cel Bun"*.

<sup>36</sup> *Müller v. Germany* (dec.), no. 12986/04, 6 December 2011.

<sup>37</sup> Salvation Army Officers are ordained as ministers and are not considered "employees".

<sup>38</sup> In Germany the right to church autonomy is guaranteed by Article 137 § 3 of the 1919 Weimar Constitution (a provision incorporated in the German Basic Law).

31. The case of *Müller* was soon followed by the case of *Fernández Martínez v. Spain*.<sup>39</sup> The case concerned the decision of the Catholic Church not to renew the contract of a priest, who was married with five children, to teach Catholic religion and morals. The decision followed the publication of an article disclosing his membership of the “Movement for Optional Celibacy” – a group that indicated their disagreement with the Church’s position on abortion, divorce, sexuality and contraception.
32. The Court was again asked to weigh two competing rights, in this instance the Article 8 violation claimed by the applicant and the right to freedom of religion of the denomination and its adherents. The Third Section of the Court held that because the circumstances used to justify the non-renewal of the applicant’s contract were of a strictly religious nature:
- the requirements of the principles of religious freedom and neutrality preclude it from carrying out any further examination of the necessity and proportionality of the non-renewal decision, its role being confined to verifying that neither the fundamental principles of domestic law nor the applicant’s dignity have been compromised.<sup>40</sup>
33. Thus, because the applicant in *Fernández Martínez* was a member of the clergy, and because the dispute was religious in nature, the Court accepted Spain’s deference to the autonomy of the Church and refrained from an in-depth analysis of the State’s handling of the case.
34. On 12 June 2014, the Grand Chamber upheld the decision of the Third Section. Although the Court ultimately sided in favour of the collective right to “church autonomy” over the individual right to “private life,” the Court made it clear that it does not accept “church autonomy” arguments *carte blanche*: the mere allegation by a religious community of a threat to autonomy is not sufficient to render any interference compatible with the Convention. In *Fernández Martínez* the Court reserved some power to State oversight, holding that they can determine whether the risk to church autonomy is “probable and substantial,”<sup>41</sup> and whether it goes beyond what is necessary to eliminate that risk or whether it serves any purpose unrelated to the exercise of the organization’s autonomy.
35. Thus, although the Court did not accept that the notion of church autonomy can be used as a trump card against all other competing claims, it reaffirmed that the autonomy of religious groups is necessary for a democratic and pluralistic society, and goes to the very heart of religious freedom. Accordingly, the Grand Chamber continued the Court’s long line of cases in recognizing the autonomy of churches to select, appoint and replace their personnel without undue state interference.
36. The last case in this line of authorities is the Grand Chamber decision of *Sindicatul “Păstorul Cel Bun” v. Romania*.<sup>42</sup> The case involved thirty-two Orthodox priests and three lay employees who attempted to form a trade union. The purpose of the trade union was to protect the interests of its membership in their dealings with Orthodox

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<sup>39</sup> *Fernández Martínez v. Spain* [GC], no. 56030/07, 12 June 2014.

<sup>40</sup> Third Section judgment, delivered 15 May 2012, at § 84.

<sup>41</sup> Grand Chamber judgment at § 132.

<sup>42</sup> *Sindicatul “Păstorul Cel Bun” v. Romania* [GC], no. 2330/09, 9 July 2013.

Church hierarchy and the Ministry of Culture and Religious Affairs. The Romanian State refused to register the trade union on the basis that the principles of religious autonomy and State neutrality prevented it from becoming involved in the internal operations of the Romanian Orthodox Church. Overturning a chamber decision of the Third Section, the Grand Chamber agreed with the submissions of the Romanian State, holding that:

Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them.<sup>43</sup>

37. Accordingly, the refusal to register the applicant union did not overstep the margin of appreciation afforded to the national authorities and was not disproportionate.<sup>44</sup>
38. The Court's approach to disputes between religious communities and competing Convention claims is heavily fact-specific and the Court has currently stopped short of adopting a legal doctrine akin to the United States' "ministerial exception" doctrine (discussed below). Instead, the Court seeks to balance competing rights based on the facts of each case, which necessitates a relatively high degree of oversight and judgment in each case in order to determine which rights have primacy.
39. Nevertheless, as the above case-law makes clear, in conducting its balancing exercise, the overwhelming majority of cases before the Court uphold the autonomy of religious communities over and against competing claims.

#### **(e) The 'Ministerial Exception' doctrine**

40. The Court's case-law can be compared with the "ministerial exception" doctrine developed in the jurisprudence of the US. In the 2012 case of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>45</sup> the US Supreme Court confronted the question of whether the First Amendment of the US Constitution barred an employment discrimination lawsuit when the employer is a religious organization and the employee is one of the group's ministers.<sup>46</sup> In a unanimous decision, the US Supreme Court held that the US Constitution prevented the court from interfering with the decisions of churches in matters of ecclesiastical disputes.
41. The claimant in *Hosanna-Tabor* was a minister in the Lutheran Church and worked as a teacher at a small church-run school. Amongst other things, she taught a class on religion, led students in prayers and occasionally led a chapel service. After entering into a dispute with the Church, she was ultimately dismissed from her position and the Equal Employment Opportunity Commission (EEOC) brought a case against Hosanna-Tabor on her behalf.

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<sup>43</sup> *Id.*, at § 165.

<sup>44</sup> *Id.*, at § 172.

<sup>45</sup> 565 U.S.132 S.Ct. 694 (2012).

<sup>46</sup> The first section of the First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

42. In siding with *Hosanna-Tabor*, the Supreme Court held that a “ministerial exception” was grounded in the First Amendment of the US Constitution and it precluded the application of employment legislation, such as the Civil Rights Act 1964, to claims concerning the employment relationship between a religious institution and its ministers.<sup>47</sup> The Court explained that the ministerial exception ensured that “the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”<sup>48</sup> Accordingly, it was not for the State to interfere with the disciplinary decisions the Church had made in the circumstances. The Court held that:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.<sup>49</sup>

43. As in many judgments of this Court, the US Supreme Court recognized that the case involved a clash of competing interests. On the one hand an individual sought legal redress for alleged employment discrimination. On the other hand the church sought to maintain its autonomy free from State interference. The Court’s answer to this clash was to refrain from adjudicating the dispute:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.<sup>50</sup>

#### **(f) Conclusion**

44. In the same way that the US Supreme Court concluded that the First Amendment has struck the balance for it in matters of ecclesiastical disputes, it can also be argued that Article 9 of the Convention has struck the balance for this Court.

45. The need for churches and religious organizations to operate freely without State intervention is at the heart of the protections that Article 9 affords. Not only is church autonomy essential for the maintenance of true religious freedom, it is also necessary for the proper functioning of democracy. It is inevitable that the claims of an individual will on occasion collide with the collective rights of a religious community. However, in these circumstances Member States and this Court must decide who is the ultimate arbiter of such a dispute – the Church or the State? The Intervener submits that Article 9 of the Convention ensures the answer must be the Church.

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<sup>47</sup> *Hosanna-Tabor*, cited above, § 705.

<sup>48</sup> *Id.*, at § 709. Citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952), § 119.

<sup>49</sup> *Id.*, at § 706.

<sup>50</sup> *Id.*, at § 710.

For the Intervener:

A handwritten signature in blue ink, appearing to read 'P. Coleman', written in a cursive style.

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