ARTICLE

Can Churches Discriminate? Religious Freedom, Non-Discrimination, and the Search for an Inter-American Standard

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When delimiting the power of churches to discriminate, U.S. and European jurisprudence have developed significantly different responses. The U.S. Supreme Court has embraced an "absolutist approach" by using the ministerial exception doctrine, which allows churches to discriminate against their ministers even if the grounds for discrimination are not based on religious doctrine. The European Court of Human Rights, on the other hand, has adopted a "balancing approach," according to which the rights conflicting in each case must be weighed. The result is that acts of discrimination by churches that are not based on religious doctrine do not appear to be protected in Europe.

The Inter-American Court of Human Rights has recently taken a different approach to the permissibility of discrimination by religious communities. While influenced by U.S. and European jurisprudence, the Inter-American Court has rejected both the United States' "absolutist approach" and Europe's "balancing approach" in favor of a more "egalitarian approach." This third approach remains unclear in many aspects but doubtlessly implies changes in the way the right to religious freedom is interpreted. The more "egalitarian approach" has already reached prohibiting churches from discriminating in public schools (even if based on religious belief), a prohibition that may be extended to private schools as well. Under the Inter-American approach, discrimination may at times be permitted in the internal sphere of churches, but under restrictions that appear more stringent than in the United States and Europe.

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By identifying the salient features of the Inter-American standard, this Article analyzes a new adjudicative approach to the tensions between non-discrimination and religious freedom.

I. INTRODUCTION

Religious freedom has historically been recognized as a human right protecting not only the freedom to manifest one's religion in worship,

teaching, practice, and observance,[1] but also the collective right to choose religious leaders, priests, and teachers; to establish seminaries or religious schools;[2] and to decide on matters of doctrine and the internal organization of the religious community.

However, the right of religious institutions to organize themselves as they see fit often lies in tension with the individual rights and freedoms of their members and employees. Indeed, many religious beliefs challenge basic assumptions about equality. The refusal to allow women to join the Roman Catholic priesthood or enter an Orthodox rabbinical seminary, the promotion of a patriarchal family structure, and the condemnation of same sex couples provide examples of religious principles that clash deeply with the principles of equality and non-discrimination.[3]

Various legal systems have struggled to resolve the tension between the collective dimension of religious freedom and the liberal legal framework that attempts to protect individuals from all forms of discrimination based on universal principles that supersede creeds and personal beliefs.[4] Although ordinary laws generally apply to religious organizations, exceptions are frequent.[5] The extent to which church autonomy should be respected (or tolerated) when it conflicts with equality may be one of the most difficult questions of law and religion and is far from resolution.[6] Should all secular laws apply to internal church decisions regarding the hiring, discipline, or dismissal of clergy? Should a fair trial be guaranteed? What about religion

1. *See, e.g.*, Organization of American States, American Convention on Human Rights art. 12, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

2. *See, e.g.*, U.N. Hum. Rts. Comm., CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (1993).

3. Johan D. van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, *in* FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 85, 87 (Tore Lindholm et al. eds., 2004).

4. *See, e.g.*, Paul Karp, *Catholic Schools to Oppose LGBTQ+ Teacher and Student Law Reform Proposal*, GUARDIAN (Jan. 31, 2023), https://www.theguardian.com/australia-news/2023/jan/31/catholic-schools-to-oppose-lgbtiq-teacher-and-student-law-reform-proposal?; Pamela Slotte & Helge Årsheim, *The Ministerial Exception—Comparative Perspectives*, 4 OXFORD J.L. & RELIGION 171, 196 (2015).

5. *See* Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom*, *in* 4 CURRENT ISSUES IN LAW AND RELIGION 367, 373–76 (Silvio Ferrari & Rinaldo Cristofori eds., 2016) (explaining why religious organizations are generally subject to civil and criminal law, but not to sex discrimination law); *see also* Reynolds v. United States, 98 U.S. 145, 165–66 (1878) (maintaining that religious belief is not a valid defense for criminal behavior). Chief Justice Waite provided the paradigmatic statement of this balance between religious liberty and temporal authority:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. *Id.* at 166–67.

6. Marie Ashe, Hosanna-Tabor*, the Ministerial Exception, and Losses of Equality: Constitutional Law and Religious Privilege in the United States*, 4 OXFORD J.L. & RELIGION 199, 203 (2015).

teachers, or grade school teachers for whom religion happens to be a required subject? Should it matter whether they work in a private or public school?

In the context of employment discrimination, the United States and the European Union have answered these challenging questions differently. In the United States, the case law has led to a jurisprudential "ministerial exception" that exempts religious institutions from compliance with anti-discrimination laws that would apply to decisions concerning their "ministers."[7] For its part, the jurisprudence of the European Court of Human Rights (ECtHR) has adopted a "balancing approach" that weighs both the fundamental rights and freedoms of the employee and those of the religious community, taking into account, among other factors, the employee's position in the organization, the nature of the work, and her ability to find another job.[8]

These two seemingly irreconcilable models influenced the first Inter-American Court of Human Rights (IACtHR) decision in which it was called to reconcile religious freedom with the principles of equality and non-discrimination. In *Pavez Pavez v. Chile*, a public school Catholic religion teacher was transferred after the diocese deemed her unsuitable for her position because of her sexual orientation.[9] In its decision, the IACtHR invoked both the U.S. and European models, referring to both the ministerial exception doctrine and the ECtHR's "balancing approach."

This Article analyzes the *Pavez Pavez* decision and its implications for the protection of religious freedom and equality in the Americas.[10] We will suggest that, in the end, the IACtHR decided the case by relying neither on the U.S. ministerial exception nor on the European balancing model. We argue that, in contrast to the U.S. and European models, the IACtHR opted for, what we call, a more "egalitarian approach" that limits religious freedom

7. *Id.* at 200.

8. Slotte & Årsheim, *supra* note 4, at 190.

9. Pavez Pavez v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 449 (Feb. 4, 2022).

10. *Pavez Pavez* feeds into several theoretical debates. We will focus only on a few. We will not examine, for example, whether *Pavez Pavez* involved both direct and indirect discrimination. In terms of direct discrimination, the basis of dismissal appears to have been the perceived intrinsic wrongness of same-sex relationships. *See* Alba Rueda et al., *Amicus curiae*, *in* LÍMITES A LA POTESTAD DE LA RELIGIÓN CATÓLICA PARA DISCRIMINAR. SOBRE EL CASO PAVEZ PAVEZ Y LOS *AMICI CURIAE* EN FAVOR DE SU PRETENSIÓN 67, 76 (Laura Saldivia Menajovsky ed., 2021). In terms of indirect discrimination, Pavez Pavez explained at the public hearing that there is inequality in the teaching of religion in the public schools in Chile. Students do not always have the opportunity to choose religion classes taught by teachers of their own faith. Pavez Pavez mentioned that she had students of different faiths, which can be interpreted as students not having the opportunity to attend other classes. *See* Corte Interamericana de Derechos Humanos, *Audiencia Pública. Caso* Pavez Pavez Vs. Chile. *Parte 1*, YOUTUBE (May 12, 2021), https://youtu.be/qj823JUWgHo, at 33:29–34:00. For a theoretical exploration of these issues, see generally SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION (2020).

and, above all, prioritizes the court's tradition of protecting equality. To this end, Section I describes some of the key features of the U.S. and European models. Section II focuses on the IACtHR decision in *Pavez Pavez*. After presenting the facts of that case, Section II analyzes the court's use of European and U.S. jurisprudence and the ensuing implications. Finally, the Article concludes by summarizing the main features of the new Inter-American standard.

II. TWO APPROACHES TO THE TENSION BETWEEN NON-DISCRIMINATION AND RELIGIOUS FREEDOM

A. The U.S. Standard: An "Absolutist Approach" in Favor of Religious Freedom

Unlike some European countries and most Latin American countries, the United States has a strong tradition of separation of church and state. The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] With this amendment, the framers sought to preclude the possibility of a national church and ensure that the new federal government would have no say over who held ecclesiastical offices.[12] According to the U.S. Supreme Court, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[13]

Since the 1960s, the U.S. Congress has enacted several anti-discrimination laws to protect employees from discrimination in the workplace.[14] These laws provided a narrow exemption allowing religious institutions to discriminate on the basis of their principles, i.e., they are allowed to hire or fire employees based on the institution's religious beliefs or practices.[15] Although the laws do not exempt religious employers from liability for discrimination on the basis of the protected categories of race, color, sex, national origin, or disability,[16] lower federal courts have found a constitutional exemption to anti-discrimination law since 1972. In *McClure v. Salvation Army*,[17] the U.S. Court of Appeals for the Fifth Circuit held that

11. U.S. Const. amend. I.

12. Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 183–84 (2012).

13. *Id.* at 184.

14. Ashe, *supra* note 6, at 212.

15. *Id.*

16. *Id.*

17. 460 F.2d. 553 (5th Cir. 1972). In *McClure*, a female employee brought a sex discrimination claim against the Salvation Army. McClure was commissioned as a Salvation Army officer and received various assignments within the organization. *Id.* at 555. After her officer status was terminated, she

a minister's assignment, salary, and duties are matters of church administration and governance in which the public officials must not intrude.[18] According to the Fifth Circuit, application of the anti-discrimination provisions to the church would "result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[19] Herein lies the origin of the ministerial exception[20] that was subsequently reaffirmed by all other circuits and has been interpreted to bar claims not only based on sex discrimination but also, for example, race discrimination.[21]

The overall consensus among the federal courts notwithstanding, a great deal of disagreement exists among them when it comes to whom the "ministerial" exception applies. It certainly does not apply to all employees of religious institutions, but some teachers are certified ministers while others might also be seen as "administering" the faith.[22] The U.S. Supreme Court analyzed the ministerial exception for the first time in its 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[23] In *Hosanna-Tabor*, a Lutheran school fired a teacher who taught both religious and non-religious classes when she returned from a medical leave of absence.[24] The Equal Employment Opportunity Commission charged the congregation with violating the Americans with Disabilities Act.[25] In its defense, the church invoked the ministerial exception, arguing that the case should be dismissed because the dispute involved an employment relationship between a religious institution and one of its ministers.[26] In a unanimous decision, the Court recognized

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brought a civil action against the organization, alleging that she received less pay and fewer benefits than similarly situated male officers. The court found that the application of the anti-discrimination provisions to the employment relationship between a church and its minister "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *Id.* at 560.

18. *Id.* at 560.

19. *Id.*

20. Ashe, *supra* note 6, at 214. Ashe explains that the term "ministerial exception" was in fact first used in *Rayburn v. General Conference of Seventh-Day Adventists*, 722 F.2d 1164, 1168 (4th Cir. 1985), which traced the exemption back to *McClure*. *See Hosanna-Tabor*, 565 U.S. at 202–03 (Alito, J. concurring).

21. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d. 198 (2d Cir. 2008). In *Rweyemamu*, an African-American Catholic priest filed a race discrimination claim against the bishop and diocese. *Id.* at 200. The Court of Appeals held that the ministerial exception barred the priest's discrimination claim and that the anti-discrimination provisions were unconstitutional as applied to the case. *Id.* at 209. In this particular case, the ministerial exception was drawn more narrowly than usual. *See* Carolyn Evans & Anna Hood, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, 1 OXFORD J.L. & RELIGION 81, 93 (2012).

22. Ashe, *supra* note 6, at 215.

23. *Hosanna-Tabor*, 565 U.S. at 171.

24. *Id.* at 179.

25. *Id.* at 180.

26. *Id.*

the ministerial exception grounded in the U.S. Constitution,[27] holding that the ministerial exception is rooted in the First Amendment's Free Exercise and Establishment Clauses. These clauses are meant to protect the rights of religious groups to define the precepts of their faith and mission through their appointments[28] and are understood to bar government involvement in church decisions.[29] According to the Court, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[30]

With this decision, the Court created a blanket exception to generally applicable anti-discrimination laws.[31] The Court emphasized that "[t]he purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. . . . The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[32] Thus, in the United States, religious communities have an absolute right to select and fire their ministers as they see fit—even if those decisions involve blatant discrimination based on a protected category such as sex, pregnancy, age, race, or disability, and even if the discrimination is wholly unrelated to the employer's religious beliefs or practices.[33]

In the last paragraph of its decision in *Hosanna-Tabor*, however, the Court does acknowledge the tension between the ministerial exception and equal protection:

> 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

27. *Id.* at 190–91. The Court took into account the following factors in deciding that the plaintiff should be considered a "minister:" (i) the church had given her the title of "minister," with a role distinct from that of most of its members; (ii) her position "reflected a significant degree of religious training followed by a formal process of commissioning;" (iii) she "held herself out as a minister of the Church" and claimed certain tax benefits; (iv) her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 191–92. However, the Court indicated: "We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2052 (2020), the Court explained that "our recognition of the significance of those factors . . . did not mean that they must be met—or even that they are necessarily important—in all other cases."

28. *Hosanna-Tabor*, 565 U.S. at 188–89.

29. *Id.*

30. *Id.*

31. Ashe, *supra* note 6, at 199–200.

32. *Hosanna-Tabor*, 565 U.S. at 194–95.

33. Ashe, *supra* note 6, at 199–200.

> 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.[34]

Thus, the Court refused to weigh conflicting interests,[35] opting instead for an "absolutist approach": the First Amendment bars any interference with churches' decisions regarding their ministers even when generally applicable anti-discrimination laws are infringed.[36]

B. The European Standard: A "Balancing Approach"[37]

The European Convention on Human Rights (ECHR) recognizes the right to religious freedom in Article 9, employing language that explicitly acknowledges the limitations to which this right may be subject in order to protect the rights and freedoms of others. In fact, the second paragraph of Article 9 provides that:

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34. *Hosanna-Tabor*, 565 U.S. at 196.

35. The U.S. Supreme Court adopted a different approach in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Boy Scouts of America*, an assistant scoutmaster was expelled after publicly declaring he was gay. The scouting organization argued that homosexuality ran counter to the values it seeks to instill in young people. *Id.* at 644. The Court highlighted that freedom of expressive association is not absolute and could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)). In *Hosanna-Tabor*, the Court distinguished that case from those covered by freedom of association:

> [The plaintiffs] see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves. We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the [the plaintiffs'] view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers. *Hosanna-Tabor*, 565 U.S. at 189 (citation omitted).

36. Ashe, *supra* note 6, at 199–200. The Court seems to have gone beyond what is necessary to protect religious freedom. As Leslie C. Griffin has pointed out, many of the disputes between "ministers" and their religious institutions are purely secular and could be analyzed by the courts without getting involved in any theological issue. *Hosanna-Tabor* is a clear example, since the dismissal of the plaintiff had nothing to do with the "faith and mission" of the church, and the plaintiff had sought only monetary compensation, which, if granted, would not have interfered with the church's choice of minister. *See* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 993, 998 (2013). *But see* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 40–41 (2011).

37. In order to simplify the presentation, we have decided to focus exclusively on the decisions of the European Court of Human Rights (ECtHR). Only a few references are made to the directives of the Council of the European Union (*see, e.g.*, Council Directive 2000/43, 2000 O.J. (L 180) (EC) and Council Directive 2000/78, 2000 O.J. (L 303) (EC)). For an analysis of these directives, see Emma Svensson, *Religious Ethos, Bond of Loyalty, and Proportionality—Translating the "Ministerial Exception" into "European,"* 4 OXFORD J.L. & RELIGION 224, 226 (2015) ("[L]abour law and non-discrimination are regulated at the European level, and whereas there are several exemptions for religious organization in present legislation, these exemptions are narrowly interpreted.").

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[38]

Perhaps the text of Article 9 partly explains why the ECtHR has dealt with the tension between religious freedom and equality by adopting a "balancing approach" that weighs conflicting interests.[39]

There are at least two cases similar to *Pavez Pavez* that illustrate the ECtHR's "balancing approach": *Fernández Martínez v. Spain*,[40] decided by the Grand Chamber in 2014; and *Travaš v. Croatia*,[41] decided by the Second Section in 2016. In *Fernández Martínez*, a public school Catholic religion teacher's employment contract was not renewed after the diocese deemed him unsuitable for the position.[42] As in *Pavez Pavez*, although his salary was paid by the government, his suitability was determined by the religious authorities. By way of background, Fernández Martínez was a priest who married, had children, and joined a movement promoting voluntary, not obligatory celibacy for the priesthood.[43] The church had never taken any action to remove him from his position as a religion teacher.[44] Fernández Martínez had officially requested a waiver of his celibacy years earlier without receiving a response.[45] The diocese only deemed him unsuitable for the position after a newspaper published an article linking him to the

38. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5. [hereinafter ECHR]. The reference to what is "necessary in a democratic society" (the necessity clause) has been linked to the necessity test: to the fact that the ECtHR must assess whether there are no alternative means that are less restrictive of the other rights. *See* Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11 INT'L J. CONST. L. 466, 466–68, 481–82 (2013); Jud Mathews & Alec Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 146–49 (2008). The necessity clause appears in several articles of the ECHR; *see, e.g.*, ECHR, *supra*, art. 8, ¶ 2, art. 9, ¶ 2, art. 10, ¶ 2, art. 11, ¶ 2.

39. Ashe, *supra* note 6, at 199 (indicating that while the U.S. Supreme Court adopted an "absolutist approach," the ECtHR seems closer to a "balancing approach") (internal quotation marks omitted); Svensson, *supra* note 37, at 225 ("The US Supreme Court, in its recent *Hosanna-Tabor* decision (2012), was absolutist in categorically defending the privilege of 'religious autonomy.' The European approach is markedly different with its focus on balancing competing rights."). Note that there is an almost identical provision in Article 12.3 of the ACHR. As we will explain later, the IACtHR has also rejected the U.S. "absolutist approach." *See* ACHR, *supra* note 1, art. 12, ¶ 3 ("Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."); *see also id.*, art. 16, ¶ 2.

40. Fernández Martínez v. Spain, App. No. 56030/07 (June 12, 2014), https://hudoc.echr.coe.int/eng?i=001-145068.

41. Travaš v. Croatia, App. No. 75581/13 (Oct. 4, 2016), https://hudoc.echr.coe.int/eng?i=001-166942.

42. *Fernández Martínez*, ¶¶ 17–18.

43. *Id.* ¶ 12.

44. *Id.* ¶¶ 12–13.

45. *Id.* ¶ 15.

movement for optional celibacy.[46] For the diocese, this publication was a "scandal"[47] that justified his removal.

In *Travaš*, a Catholic religion teacher at a public school was fired after the archdiocese revoked his authorization to teach religion.[48] Here again, the teacher's salary was paid by the state and his suitability was determined by religious authorities. The archdiocese decided to withdraw Travaš' authorization after it became known that the teacher[49] had not asked the church for an annulment of his first marriage before marrying a second time in a civil ceremony.[50] Unlike Fernández Martínez, Travaš was not a priest or involved in any movement that could be considered contrary to the doctrine he taught. Nevertheless, Travaš' behavior was considered incompatible with Catholic doctrine, which provides that "[e]ach religious education teacher must demonstrate that he is 'outstanding in true doctrine and the witness of a Christian life' (Canon 804 § 2)."[51]

In both *Fernández Martínez* and *Travaš*, the ECtHR ruled that the dismissals of the religion teachers did not violate the ECHR. In both judgments, the "balancing approach" is evident: the court referred to the need to weigh conflicting interests—mainly the autonomy of religious communities on the one hand—and, on the other, the right to private and family life. In *Fernández Martínez*, for example, the ECtHR stated that when it "is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weigh up the interests at stake."[52]

In order to "weigh up the interests at stake," the ECtHR considered, among other factors, (i) the teacher's consent, (ii) her duty of loyalty to the church, (iii) the extent to which the church's decision was justified by its religious doctrine, and (iv) the efforts (by the state or the religious community) to find another suitable position for the dismissed teacher.[53] Regarding the teacher's consent, the court affirmed that the teachers had voluntarily accepted the terms of their employment and knew in advance that their behavior would have to comply with Catholic norms. The ECtHR emphasized that the teachers should have foreseen the consequences of their actions.[54] In *Fernández Martínez*, the ECtHR explained this aspect as follows:

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46. *Id.* ¶¶ 14–16.

47. According to the *Catechism of the Catholic Church*, "scandal" is an attitude or behavior which leads another to do evil. *See* POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH 551, §§ 2284–87 (2d ed. 1997).

48. *Travaš*, ¶¶ 13–15.

49. *Id.* ¶¶ 12–13.

50. *Id.* ¶ 95.

51. *Id.* ¶ 12.

52. *Fernández Martínez*, ¶ 122.

53. *See, e.g.*, *id.* ¶¶ 57, 110, 134, 140, 144; *Travaš*, ¶¶ 45, 91–93, 102–03.

54. For the ECtHR, consent implies giving up the right to dissent within the religious community. *See Fernández Martínez*, ¶ 127.

> [T]he Court takes the view that, by signing his successive employment contracts, the applicant knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations are permissible under the Convention where they are freely accepted.[55]

Although the ECtHR has put limits on the scope of prior consent in other decisions,[56] none were brought up in these two cases. It is notable that, in these cases, consent is linked to the duty of loyalty—a concept that the ECtHR refers to on several occasions to justify the employer's interference in the teacher's private life. For example, in *Travaš*, the ECtHR asserted that: "In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity."[57]

The ECtHR also attached importance to the employer's attempt to offer the employee alternative employment in order to reconcile the various interests at stake. In *Travaš*, for example, the ECtHR expressed:

> [T]he State was required to ensure that the impugned interference with the applicant's rights did not go beyond what was necessary to eliminate any risk for the Church's autonomy and did not serve any other purpose unrelated to the exercise of that autonomy. . . . In this context, the Court attaches particular importance to the fact that the applicant was not dismissed directly following the withdrawal of his canonical mandate. . . . [T]he schools terminated his contract of employment only after examining the possibility of finding him another suitable post . . . .[58]

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55. *Id.* ¶¶ 134, 140; *see also Travaš*, ¶¶ 92–93; Obst v. Germany, App. No. 425/03, ¶ 50 (Sept. 23, 2010), https://hudoc.echr.coe.int/eng?i=001-100463; Siebenhaar v. Germany, App. No. 18136/02, ¶ 46 (Feb. 3, 2011), https://hudoc.echr.coe.int/eng?i=001-103236. In *Obst*, the director of public relations for the Mormon church was fired after it was discovered that he was having an extramarital affair. *Obst*, ¶ 9. In *Siebenhaar*, a teacher at a nursery run by a Protestant church was fired after it was discovered that she followed a different cult. *Siebenhaar*, ¶¶ 12–13.

56. *See*, *e.g.*, Schüth v. Germany, App. No. 1620/03, ¶ 71 (Sept. 23, 2010), https://hudoc.echr.coe.int/eng?i=001-100469. In *Schüth*, an organist and choirmaster in a Catholic church was dismissed after it was discovered that he was going to have a child with a woman who was not his first wife. *Schüth*, ¶¶ 12–13. Other limits have been noted by Slotte and Årsheim when referring to the case of *Eweida v. United Kingdom*, in which the ECtHR held that the rights of a flight attendant whose employer prohibited her from wearing a crucifix had been violated. Eweida v. United Kingdom, Apps. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (Jan. 15, 2013), https://hudoc.echr.coe.int/eng?i=001-115881; *see* Slotte & Årsheim, *supra* note 4, at 182.

57. *Travaš*, ¶ 98.

58. *Id.* ¶¶ 102, 103. In this case, the attempt to provide work alternatives relates to the necessity test: it is assessed whether there are no alternative means that are less restrictive of other rights. Something similar is found in Section 35 of the first joint dissenting opinion of *Fernández Martínez*

Lastly, the ECtHR recognized the particular form of vulnerability that religion teachers suffer because of the limited interest of their expertise to most potential employers.[59]

In contrast to U.S. jurisprudence, the ECtHR actually considered whether the dismissal was justified by church doctrine in both cases.[60] In *Fernández Martínez*, for example, the ECtHR looked to canon law before accepting that the appointment of a professor of Catholic religion must be decided not only by evaluating the candidate's knowledge on the subject but also by her personal commitment to the Catholic faith.[61] The court's examination did not involve any evaluation or judgment on the merits of the doctrine but only on whether the doctrine supports the decision.[62]

The normative differences between actions that take place in public spaces and those that take place in intimacy warrant attention. The ECtHR refers to these differences, yet holds that their relevance is limited. In *Travaš*, the ECtHR states: "[T]he Court considers that the fact that no publicity was given to the applicant's conduct and lifestyle, seen by the Church as being contrary to the precepts of its teachings and doctrine, is not a decisive element . . . ."[63] Finally, it is unclear whether public and private schools should be treated differently under the court's jurisprudence. The ECtHR seems to recognize that they should, but it does not explain in any detail the implications of those differences.[64]

Clearly, although the ECtHR accepts that religious communities are to

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(compare it with the opinion of the majority in ¶ 144). *Fernández Martínez*, ¶¶ 35, 144.

59. *See Schüth*, ¶ 73; *Travaš*, ¶ 105.

60. This examination appears consistent with Council Directive 2000/78, art. 4, ¶ 1, 2000 O.J. (L 303) (EC):

> Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [i.e., religion or belief, disability, age or sexual orientation] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

61. *Fernández Martínez*, ¶ 118 (citing canon law to emphasize the obligation of celibacy); *Travaš*, ¶ 91 (citing canon law to emphasize the indissolubility of marriage).

62. *See, e.g.*, *Fernández Martínez*, ¶ 147; *see also* Lombardi Vallauri v. Italy, App. No. 39128/05, ¶ 46 (Oct. 20, 2009), https://hudoc.echr.coe.int/eng?i=001-95150.

63. *See Travaš*, ¶ 99; *Siebenhaar*, ¶ 46; *Obst*, ¶ 51. The distinction between public and intimate spaces does sometimes seem to matter to the ECtHR. *See, e.g.*, *Schüth*, ¶ 72 (suggesting that some consideration should be given to the fact that the impugned conduct went to the heart of the applicant's private life and did not consist of a public statement against the moral position of his employing church; however, it is unclear what weight should be given to this consideration).

64. For example, in paragraph seventy-five of *Fernández Martínez*, the ECtHR argues that *Obst*, *Schüth*, and *Siebenhaar* differ from *Fernández Martínez* because the dismissals did not occur in public schools. *Fernández Martínez*, ¶ 75. However, the court does not explain the implications of this difference—assuming such implications exist. In paragraph one hundred of *Travaš*, the ECtHR wrote that these implications are insignificant. *Travaš*, ¶ 100. This position differs from that defended in Section 4 of Judge Sajó's dissent in *Fernández Martínez*. *Fernández Martínez*, § 4 (Sajó, J., dissenting).

be granted the power to choose who will be responsible for teaching their doctrine in public schools, the ECtHR does not recognize an *absolute* right that exempts religious communities from compliance with general non-discrimination laws.

Another interesting question is whether the ECtHR would have ruled differently if the teachers in *Fernández Martínez* and *Travaš* were fired because of their sexual orientation.[65] We do not know. In some cases of discrimination based on sexual orientation, the ECtHR does appear to invoke something akin to a more "stringent scrutiny."[66] This is the case, for example, in *Aldeguer Tomás v. Spain*, which was decided by the Third Section in 2016.[67] In *Aldeguer*, a man was denied access to a survivor's pension because of his sexual orientation (at the time, same-sex couples could not marry).[68] The ECtHR noted that "[t]he Court has repeatedly held that, just

65. In *Fernández Martínez* and *Travaš*, few references are made to the discrimination that the two professors could have suffered (because of their political opinions or because of their private lives). *See, e.g.*, *Fernández Martínez*, ¶¶ 153–54; *Travaš*, ¶¶ 119–21. No attempt was made to frame the discrimination that the teachers may have suffered in some of the categories protected by Article 14 of the ECHR (i.e., discrimination based on their "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"). ECHR, *supra* note 38, art. 14.

66. This scrutiny was not as stringent as that generally applied by the IACtHR in similar cases. *See* Laura Clérico, *Discriminación por orientación sexual y derechos de la seguridad social en la jurisprudencia de la Corte Interamericana de Derechos Humanos (Corte IDH) y del Tribunal Europeo de Derechos Humanos (TEDH). ¿Una historia de divergencias?*, 47 REVISTA DE LA FACULTAD DE DERECHO 1, 5–6 (2019); Aldeguer Tomás v. Spain, App. No. 35214/09, ¶ 79 (June 14, 2016), https://hudoc.echr.coe.int/eng?i=001-163660 (mentioning, among other things, the "margin of appreciation" enjoyed by states "in assessing whether and to what extent differences in otherwise similar situations justify different treatment"); *Fernández Martínez*, ¶ 131 (adopting a scrutiny that is a little closer to that of the IACtHR because it introduces the necessity test mentioned in footnote 38). There are other cases in which the ECtHR applied a "weak scrutiny." *See, e.g.*, Salgueiro Da Silva Mouta v. Portugal, App. No. 33290/96, ¶¶ 29, 36 (Dec. 21, 1999), https://hudoc.echr.coe.int/eng?i=001-58404 (employing a scrutiny very similar to *Aldeguer Tomás's* where a father was denied parental responsibility because of his sexual orientation). In that case, it could be argued that it was not necessary to resort to a more stringent scrutiny, since the application of "weak scrutiny" sufficiently justified the conclusion that the state had violated the ECHR. *Id.*; *see also* Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, n.144 (Feb. 24, 2012) (describing various ECtHR cases in which the respondent bore the burden of proving that the measure was not discriminatory, a feature often associated with a more stringent scrutiny).

67. *Aldeguer Tomás*, ¶ 81.

68. *Adeguer Tomás* differs from *Fernández Martínez* and *Travaš* in at least two major ways: (i) there is no conflict found between the rights of the person who is being discriminated against and those of another agent (i.e., a religious community seeking to preserve its autonomy), and (ii) the ECtHR decision more directly impacts the public budget since pensions are paid from public funds. *Id.* ¶ 82; *cf.* Fernández Martínez v. Spain, App. No. 56030/07 (June 12, 2014), https://hudoc.echr.coe.int/eng?i=001-145068; Travaš v. Croatia, App. No. 75581/13 (Oct. 4, 2016), https://hudoc.echr.coe.int/eng?i=001-166942. In paragraph eighty-two of *Aldeguer*, the ECtHR stated that "a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general economic or social measures, which are closely linked to the State's financial resources." *Aldeguer Tomás*, ¶ 82. It is unclear how this rule—which establishes a wide margin of appreciation when the decision has budgetary implications—interacts (or is compatible) with the rule which, as we will see later, establishes that the margin of appreciation must be narrower when the differences of treatment are based on sexual orientation.

like differences based on sex, differences based on sexual orientation require 'particularly convincing and weighty reasons' by way of justification," that "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention," and that "[w]here a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow."[69]

It is important to note that, in Europe, the level of scrutiny is modulated by at least two factors: (i) the margin of appreciation doctrine; and (ii) the degree of consensus that exists on the issue in the rest of the European States.[70] The ECtHR regularly considers both elements to justify more (or less) deference to the positions of the respondent member states.[71] However, it is difficult to establish the extent to which these two factors influence the level of scrutiny applied.[72] The degree of consensus among the European States appears to affect the extent of the margin of appreciation to be recognized, which in turn could affect the level of scrutiny the court deems appropriate.[73] The lower the degree of consensus, the wider the margin of appreciation and, therefore, the less stringent the scrutiny should be. Conversely, the higher the consensus among member states, the narrower the margin of appreciation, and, therefore, more stringent scrutiny

69. *Aldeguer Tomás*, ¶ 81. Something similar can be found in *Abdulaziz v. United Kingdom*, Apps. Nos. 9214/80, 9473/81, and 9474/81, ¶ 78 (May 28, 1985), https://hudoc.echr.coe.int/eng?i=001-57416 ("[V]ery weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."); see also *Oliari v. Italy*, Apps. Nos. 18766/11 and 36030/11, ¶ 162 (July 21, 2015), https://hudoc.echr.coe.int/eng?i=001-156265.

> A number of factors must be taken into account when determining the breadth of that margin [of appreciation]. In the context of "private life," the court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted. . . . Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.

In this case, the plaintiffs complained that they were not allowed to marry or enter into any other type of civil union because of their sexual orientation. *Oliari*, ¶ 162.

70. *See, e.g.*, *Fernández Martínez*, ¶¶ 113, 122, 124, 151; *Travaš*, ¶ 114.

71. *See, e.g.*, *Fernández Martínez*, ¶ 129.

72. Proportionality is already a complex, and sometimes problematic, method of interpretation. *See, e.g.*, Başak Çalı, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 29 HUM. RTS. Q. 251, 252–55 (2007). *See generally* Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, 8 INT'L J. CONST. L. 298 (2010) (criticizing Tsakyrakis' position on proportionality); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 487 (2009) (arguing that "[t]he balancing approach, in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudication"). The introduction of the margin of appreciation doctrine and the degree of consensus seems to make it even more complex.

73. Laura Clérico, *El argumento de la falta de consenso regional en derechos humanos. Divergencia entre el TEDH y la Corte IDH*, 46 REVISTA DERECHO DEL ESTADO 57, 68 (2020); *see also* Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495, 499–500 (2018).

should be applied.[74] In addition, other factors play into the determination of the margin of appreciation. For example, we have already seen that "[w]here a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow."[75]

Thus, how the decisions would have been read were if the teachers had been dismissed because of their sexual orientation remains an open question because it is unclear how the narrower margin of appreciation the court applies to these cases would interact with the overall degree of consensus currently existing among the European states. Indeed, discrimination based on sexual orientation leads to a narrow margin of appreciation, but a low degree of consensus among member states leads to the opposite. While in the end, the ECtHR resorts to a "balancing approach," it is unclear how this approach would have been applied if Fernández Martínez and Travaš had been dismissed because of their sexual orientation.

III. THE INTER-AMERICAN STANDARD: A THIRD WAY

The Inter-American system for human rights protection is a latecomer to the discussions on religious freedom. Before 2022, the IACtHR issued only one judgment interpreting the right to religious freedom, a decision regarding a film that was banned because of its alleged interference with religious freedom.[76] However, the IACtHR had already laid down a strong jurisprudential commitment to equality and, more specifically, to protection against any form of discrimination based on sexual orientation.[77] The IACtHR has held that sexual orientation is a category protected by Article 1.1 of the American Convention on Human Rights (ACHR)[78] and that, in all cases where this category is in question, strict scrutiny should be applied.

The application of strict scrutiny requires that particularly demanding considerations be analyzed: (i) the objective of the measure that introduces

74. *See Obst*, ¶ 42; *Schüth*, ¶ 58; *Siebenhaar*, ¶ 39.

75. *Aldeguer Tomás*, ¶ 81; *see Obst*, ¶ 44 (affirming that the role of the national decision-maker is of particular importance in cases involving the relationship between the state and religion). It is unclear how this criterion interacts (or is compatible) with the rule that "differences based on sex, differences based on sexual orientation require 'particularly convincing and weighty reasons' by way of justification." *Aldeguer Tomás*, ¶ 81.

76. *See* Olmedo Bustos v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 3 (Feb. 5, 2001).

77. With respect to equality in the area of sexual orientation, see generally *Atala Riffo*; *Duque v. Colombia*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016); *Flor Freire v. Ecuador*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 315 (Aug. 31, 2016); and *Ramírez Escobar v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 315 (Mar. 9, 2018) among others.

78. *See Pavez Pavez*, ¶¶ 66–67; *see also* Azul Rojas Marín v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 402, ¶ 90 (Mar. 12, 2020); *Atala Riffo*, ¶ 78.

a difference in treatment must not only be legitimate, but also conventionally compelling; (ii) the chosen measure must not only be adequate and effective in achieving the objective, but also necessary—i.e., any less harmful alternative must be preferred; and, in addition, (iii) the court is to apply a proportionality test to determine whether the benefits of adopting the differentiating measure clearly outweigh the restrictions it imposes on the conventional principles it affects.[79] In *Pavez Pavez v. Chile*, the IACtHR proposed application of strict scrutiny for the first time in a case involving the right to religious freedom.

The following sections review the court's decision and analyze its approach to the tension between religious freedom and non-discrimination. In the analysis, we will compare the IACtHR decision with U.S. and European jurisprudence. We will conclude that the IACtHR's approach is more "egalitarian" than either the United States' or Europe's approach.

A. The Case of Pavez Pavez v. Chile

In *Pavez Pavez v. Chile*, the IACtHR analyzed for the first time the relationship between religious freedom and non-discrimination. Sandra Cecilia Pavez Pavez had taught religion in a public school in San Bernardo, Chile, for more than twenty years.[80] To teach religion in Chile, a professor must obtain a certificate of suitability issued by the religious authority of the faith being taught.[81] Pavez Pavez had received the certificate and renewed it several times over the years.[82] But in 2007, rumors of her sexual orientation reached church officials and the diocese asked her to end her "homosexual life" and undergo psychiatric therapy, which Pavez Pavez refused to do.[83] Shortly thereafter, Pavez Pavez was informed by the Vicar of Education of the Diocese of San Bernardo that her certificate of suitability had been revoked as a consequence of "living publicly as a lesbian person, in open contradiction with the contents and teachings of the Catholic doctrine that

79. *See Pavez Pavez*, ¶¶ 69, 142; *see also Rojas Marín*, ¶ 90; *Atala Riffo*, ¶ 78. The ICtHR has also indicated that there is a presumption in these cases that the measure is contrary to the ACHR and therefore that the respondent bears the burden of proving otherwise. *See, e.g.*, *Atala Riffo*, ¶ 124. Strict scrutiny can be interpreted as favoring non-discrimination over religious freedom. However, strict scrutiny may do no more than emphasize that only some very specific situations can justify discrimination; and those very specific situations may well involve the protection of other rights, such as religious freedom. Strict scrutiny may still tend to protect the right to non-discrimination, but it is mainly a procedural protection (i.e., in case of doubt, non-discrimination should prevail).

80. *Pavez Pavez*, ¶ 20.

81. *See* Decreto Supremo No. 924 del Ministerio de Educación Pública de Chile art. 9 (Supreme Decree No. 924 of the Ministry of Public Education of Chile), Sept. 12, 1983, which regulates the teaching of religion in educational establishments.

82. *Pavez Pavez*, ¶ 22.

83. *Id.* ¶ 23.

she was called upon to teach."[84] According to the Vicar, a person who lives in public contradiction with essential aspects of Catholic doctrine and morals is not qualified to transmit these teachings to students.[85] After receiving the Vicar's communication, the civil authorities decided to transfer Pavez Pavez to the position of "Inspector General," which represented "a promotion, with a higher salary and more responsibilities."[86] The promotion was provisional until 2011, when it became definitive.[87] Her employment contract was never interrupted, the benefits she enjoyed as a teacher were maintained, and her salary was increased to compensate for her managerial duties.[88]

Pavez Pavez appealed the decision to revoke her certificate of suitability in civil court, arguing that it was arbitrary, unlawful, and a violation of her constitutional rights.[89] The Court of Appeals dismissed her case with an argument similar to the ministerial exception doctrine. It held that Chilean law empowers the church to grant and revoke authorizations to teach religion in accordance with its religious, moral, and philosophical principles and that the State had no authority to interfere.[90] The Supreme Court of Chile affirmed the Court of Appeals' decision.[91]

After exhausting all available domestic remedies, Pavez Pavez filed a petition before the Inter-American Commission on Human Rights (IACHR) in October 2008.[92] In July 2015, the IACHR declared the case admissible, and in December 2018, it issued a report on the merits.[93] The IACHR concluded that the State had violated Pavez Pavez's rights and recommended that Chile reinstate her as a religion professor, provide her with economic compensation, and establish non-repetition mechanisms.[94] When the Chilean government did not comply with these recommendations, the IACHR decided to submit the case to the IACtHR in September 2019.[95]

The IACtHR focused its ruling on striking the proper balance between the rights of religious freedom and non-discrimination. For the court, "the central issue [was] determining whether the selection by a religious

84. *Id.* ¶ 26.
85. *Id.*
86. *Pavez Pavez*, ¶ 138.
87. *Id.* ¶ 28.
88. *Id.*
89. *Id.* ¶ 30.
90. Corte de Apelaciones de San Miguel [C. Apel. San Miguel] [Courts of Appeals of San Miguel], 27 noviembre 2007, "S.C.P.P. y otros c. René Aguilera Colinier," Rol de la causa: 238-2007, CI08, Sala Primera (Chile).
91. *Pavez Pavez*, ¶ 32.
92. *Id.* ¶ 2.
93. *Id.*
94. *Id.* ¶ 1.
95. *Id.* ¶ 3.

authority . . . of the persons in charge of teaching religious education classes in a public educational establishment is included within the sphere of the autonomy inherent to the right to religious freedom."[96]

First, the court analyzed Decree No. 924, which establishes that a certificate of suitability is required in order to teach religion in public schools.[97] The court recalled that the right to religious freedom has both an individual and a collective dimension which includes several guarantees, one being the right of parents to obtain religious and moral education for their children in accordance with their convictions.[98] For the court, "one of the various ways of incorporating the provisions of [the said article] into domestic law" is to allow religious authorities to select the religion professors who will teach their doctrine.[99] Since this authorization could be exercised through the issuance of certificates of suitability, the court concluded that Decree No. 924 was not *per se* contrary to the ACHR.[100]

Second, the IACtHR referred to the ministerial exception invoked by the lawyers representing Chile. The court recognized that the ministerial exception applied to the internal functioning of the religious communities, including their decisions on membership and hierarchies.[101] Yet it held that, outside this internal sphere, the exception becomes weaker and, furthermore, does not apply to public schools.[102] The court reasoned that the principles and values of tolerance, full respect for human rights, fundamental freedoms, and non-discrimination must take priority in public schools.[103]

For the IACtHR, Chilean legislation grants religious organizations "a certain margin of autonomy," in accordance with religious freedom, but this autonomy cannot be absolute.[104] Catholic religion classes that are part of the public education curriculum—classes taught in public schools and paid for with public funds—"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 organizational life of the

96. *Pavez Pavez*, ¶ 119.

97. Decreto Supremo No. 924 del Ministerio de Educación Pública de Chile art. 9 (Supreme Decree No. 924 of the Ministry of Public Education of Chile), Sept. 12, 1983.

98. ACHR, *supra* note 1, art. 12.4 ("Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.").

99. *Pavez Pavez*, ¶ 97.

100. *Id.* ¶ 97. In Argentina, its Supreme Court has held that holding religion classes in public schools during school hours violates constitutional rights. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/12/2017, "Castillo, Carina Viviana y otros c. Provincia de Salta," CSJ 1870/2014/CS1 (Arg.).

101. *Pavez Pavez*, ¶ 128.

102. *Id.* ¶¶ 128, 131.

103. *Id.* ¶ 128.

104. *Id.* ¶ 129.

communities."[105] Therefore, although Chilean religious authorities have "broad autonomy" when it comes to granting certificates of suitability to teach religion classes, since it is a subject that is "part of the education program for children, these powers . . . must be adapted to the other rights and obligations [that protect] equality and non-discrimination."[106]

Third, the IACtHR considered whether Pavez Pavez's rights had been infringed.[107] It found that Pavez Pavez's rights to personal freedom and private life had indeed been restricted by the Vicar's decision. In particular, it found that the decision to withdraw her certificate of suitability affected Pavez Pavez's right to intimacy relating to her sexual orientation[108] and that the Vicar had interfered with her sexual life by urging her to put an end to her "homosexual relationship."[109] With regard to the right to work, the IACtHR held that Pavez Pavez's transfer to Inspector General—despite the higher rank and pay of the administrative position—had undermined her vocation to teach and therefore should be considered a reduction in working conditions on the basis of her sexual orientation.[110]

Fourth, the court expressed its intent to carry out a proportionality test.[111] The IACtHR later concluded that the costs of the restrictive measure to the detriment of Pavez Pavez did exceed the advantages obtained in terms of the protection of religious freedom and of the right of parents to choose the education of their children.[112] The court emphasized that at no time was the impact of annulling Pavez Pavez's certificate of suitability on her life taken into account.[113] Moreover, it was not "clear that there [was] an actual or potential infringement of the autonomy of the religious community, or of the right[s] . . . of parents or guardians . . . to have their children . . . receive religious education that is in accordance with their beliefs."[114] To support this statement, the court noted that 700 families had signed a petition requesting that Pavez Pavez be reinstated as a religion teacher at their school.[115] With regard to Chile's argument that coherence between the content of the religion classes and the teacher's personal life was required to

105. *Id.* In this passage, the IACtHR argues that religious education is not clearly related to religious beliefs. To many, this assertion may sound false. For a possible interpretation of it, see *infra* note 160.

106. *Pavez Pavez*, ¶ 130.

107. *Id.* ¶ 131.

108. *Id.* ¶ 134.

109. *Id.* ¶ 135.

110. *Id.* ¶ 140. There was only one concurring opinion and no dissenting opinions. In his concurrence, Judge Humberto Antonio Sierra Porto disagreed with the majority as to whether there was a violation of the right to work.

111. *Pavez Pavez*, ¶ 141. For a discussion of whether the court carried out a proportionality test see *infra* Section C.

112. *Id.* ¶ 144; *see infra* note 123.

113. *Id.* ¶ 144.

114. *Id.*

115. *Id.*

serve as a religion teacher, the IACtHR noted that such a requirement could not justify discriminatory treatment in public education.[116] The court thus held that the decision to transfer Pavez Pavez after her certificate of suitability was rescinded did not pass strict scrutiny and violated equality and non-discrimination principles.[117]

Fifth, regarding the rights to judicial guarantees and protection, the IACtHR held that the authority of religious communities to issue and revoke certificates of suitability does not supersede the state's duty to provide an administrative or judicial channel for reviewing those decisions in order to protect the rights of individuals against discriminatory or arbitrary acts.[118] The absence of such channels had constituted a violation of Pavez Pavez's rights to judicial guarantees and protection.[119] As a result, such decisions affecting teachers' rights should be subject to judicial or administrative review.

The IACtHR concluded that Pavez Pavez's rights had been violated: specifically, the right to equality and non-discrimination, the right to personal freedom, the right to personal life and work, and the rights to judicial guarantees and protection.[120] In terms of reparations, the IACtHR ordered, among other actions, the creation and implementation of "a training plan for the persons responsible for evaluating the suitability of teachers in public schools on the scope and content of the right to equality and non-discrimination, including the prohibition of discrimination based on sexual orientation."[121] The IACtHR also ordered Chile to compensate Pavez Pavez but did not order her reinstatement—which both the IACHR and Pavez Pavez had requested.[122]

Likely as a result of trying to find compromise among divergent positions, important passages in the decision ended up quite vague.[123] Namely, the IACtHR did not discuss how religious freedom and non-discrimination interact in different contexts, how exactly the right to education affects this interaction, and how far the ministerial exception

116. *Pavez Pavez*, ¶ 144.

117. *Id.* ¶ 145.

118. *Id.* ¶ 99.

119. *Id.* ¶ 160.

120. *Id.* ¶ 209.

121. *Id.* ¶ 179. Although this training plan could be interpreted as a violation of religious freedom, we do not believe this is necessarily the case. The design and purpose of the training plan appears to be providing information on human rights law—not compelling the religious community to adopt different beliefs.

122. *Id.* ¶¶ 185, 188.

123. For example, the IACtHR initially seemed to suggest that the ministerial exception became weaker in public schools and, later, affirmed that the ministerial exception does not apply to public schools. *Id.* ¶¶ 128, 131. Moreover, the decision contains a few obvious errors, such as the declaration that "the costs of the restrictive measure to the detriment of Sandra Pavez Pavez *do not outweigh* the advantages obtained in terms of protecting religious freedom" instead of saying that these costs *do exceed* the benefits. *Id.* ¶ 144 (emphasis added).

extends. In the following sections, we will reconstruct the standard proposed by the court and offer possible answers to these questions. Section B will address the degree to which the IACtHR has adopted the ministerial exception as understood by the U.S. Supreme Court. Section C will assess the degree to which the IACtHR balanced the various interests at stake following the practice of the ECtHR.

B. Rejection of the United States' "Absolutist Approach"

In defending its case before the IACtHR, Chile explicitly invoked the ministerial exception, "according to which the right to non-discrimination in employment applies differently to religious communities by virtue of the separation between the churches and the State" and argued that the exception applied to Pavez Pavez's case.[124] The Chilean Constitution guarantees the free exercise of all religions and establishes the separation between church and state.[125] According to Chile, the revocation of Pavez Pavez's certificate of suitability was based on religious principles concerning the Catholic conception of the coherence of life and only had ecclesiastical effects, since Pavez Pavez would be allowed to continue teaching other subjects.[126] With regard to the right to equality and non-discrimination, Chile argued that it was obliged to recognize, without question, the decision taken by the religious community; otherwise, the state would be interfering in religious matters—violating the church's autonomy and the separation between church and state.[127]

At first glance, the IACtHR seems to have partially accepted this argument, but it limited the scope of the ministerial exception to the internal sphere of the religious community. The court recognized religious freedom as protecting the autonomy of the church with respect to its internal functioning, membership, and hierarchy.[128] The court went on to argue that, outside of this internal sphere, the ministerial exception weakens to the point of becoming inapplicable in the context of public education.[129] Based on the distinctions made by the IACtHR, we can draw three categories: (i) the internal sphere of the religious community, which covers its internal functioning, membership, and hierarchy; (ii) religion classes that are part of the public education curriculum; and (iii) intermediate cases where a "weaker ministerial exception" applies.

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124. *Id.* ¶ 50.

125. KEVIN BOYLE & JULIET SHEEN, FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 112 (1997).

126. *See* Corte Interamericana de Derechos Humanos, *Audiencia Publica. Caso* Pavez Pavez Vs. Chile. *Parte 2*, YOUTUBE (May 13, 2021), https://youtu.be/e81ivRFW3uI, at 1:40:27, 1:43:11, 1:45:25.

127. *Pavez Pavez*, ¶ 118.

128. *Id.* ¶ 128.

129. *Id.*

1. The Internal Sphere of the Religious Community

In the first category, the IACtHR appears to have recognized a ministerial exception that protects the autonomy of churches from state interference in their internal affairs with regard to their "ministers."[130] The court seems ready to grant religious communities a privileged position by precluding secular interference with religious decisions on such matters. Assuming the transplant of the U.S. ministerial exception into the IACtHR jurisprudence was successful, church autonomy would receive absolute protection in these cases, just as it does in U.S. Supreme Court doctrine.[131]

However, the transplant of the ministerial exception may not be fully compatible with the Inter-American system's approach to equality. Unlike the U.S. Constitution, the ACHR recognizes a right to equality and non-discrimination and, furthermore, the state's obligation to protect and guarantee such rights is also extended to the actions of private parties.[132] Indeed, the IACtHR has repeatedly held that "the notion of equality . . . is linked to the essential dignity of the individual" so that any situation which considers a person "inferior and treat[s] [them] with hostility or otherwise subjects [them] to discrimination in the enjoyment of rights" is inadmissible.[133] In *Pavez Pavez*, the court emphasized that:

> [B]y virtue of the obligation not to discriminate, States are required . . . to adopt affirmative measures to revert or change discriminatory situations existing in their societies. . . . This entails the special duty of protection that the State must exercise with

130. *Id.* Similarly, Argentina's Supreme Court recently recognized the autonomy of the Catholic Church in its internal sphere in a case where a trans woman requested that Catholic Church records (such as baptismal records) be changed to reflect her gender. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/4/2023, "Rueda, Alba c. Arzobispado de Salta s/ habeas data," CIV 61637/2018/CS1 (Arg.).

131. It is important to note that the IACtHR has never defined what is meant by the term "minister." The lack of a proper specification could lead to an overly broad understanding of the term, as is pointed out in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2076 (2020) (Sotomayor, J., dissenting) ("[T]he Court's apparent deference here threatens to make nearly anyone whom the schools might hire 'ministers' unprotected from discrimination in the hiring process. That cannot be right."). From the standpoint of liberal egalitarianism, something analogous to the ministerial exception should also apply to other non-religious associations with deep ethical commitments. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 376 (2011); CÉCILE LABORDE, LIBERALISM'S RELIGION 177 (2017). We want to make clear that we find the ministerial exception problematic. Sometimes this type of exception may need to be severely limited on both religious and non-religious associations when the affected person is an employee, as employees can find themselves in a vulnerable situation to consent (for their livelihood is at stake). These limits should also be stronger in cases where children are involved.

132. *See* ACHR, *supra* note 1, art. 1; *Pavez Pavez* ¶ 67.

133. *Atala Riffo*, ¶ 79; *see also* Espinoza Gonzáles v. Peru, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶ 216 (Nov. 20, 2014); *Flor Freire*, ¶ 109; Norín Catrimán v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 279, ¶ 197 (May 29, 2014); Olivera Fuentes v. Peru, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 484 ¶ 85 (Feb. 4, 2023).

> respect to the actions and practices of third parties who, with its acquiescence or tolerance, create, maintain or promote discriminatory situations.[134]

The impact of the recognition of the right to equality and non-discrimination on the *Pavez Pavez* decision can be seen in two places. First, in analyzing whether Chilean norms had violated the right to equality, the court noted that no procedure was established by the legal framework for reviewing churches' decisions for the sake of protecting individuals against discrimination. The IACtHR held that "in a State governed by the rule of law, there cannot be decisions that affect human rights that are outside the legal control of the State authorities."[135] Therefore, if judicial review is applied to the internal decisions of the church in order to make sure churches respect the individual rights of its members,[136] then the IACtHR has in mind something quite distinct from the ministerial exception as understood by the U.S. Supreme Court. Judicial review in the United States is limited to whether the plaintiff qualifies as a "minister."[137] If she does, then the First Amendment prohibits any government interference with the church's decision. The standard adopted by the IACtHR, however, appears to be closer to ECtHR jurisprudence, which requires broad judicial review of church decisions to ensure that procedural guarantees are met and that the rights of the church are balanced against the rights of the plaintiff.[138]

Secondly, regarding the church's decision in itself, it is unclear whether discriminatory treatment within the internal sphere would pass the IACtHR strict scrutiny test that it normally applies to protected categories such as gender, race, or sexual orientation. However, it would be reasonable to interpret the "Inter-American ministerial exception" as allowing religious communities to justify decisions regarding their "ministers"[139] on theological or doctrinal grounds, as the European jurisprudence does.[140]

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134. *Pavez Pavez*, ¶ 67.

135. *Id.* ¶ 100. Note that this assertion is general and would apply to cases other than those that involve public schools.

136. *Id.* ¶ 99 ("[T]he Court observes that the aforementioned decree does not expressly establish any means by which the decision of the religious authorities to grant or not a certificate of suitability may be subject to subsequent review by the administrative authorities, or to appropriate and effective remedies before the jurisdictional authorities to protect the rights of persons against discriminatory or arbitrary acts contrary to the Convention.").

137. *Hosanna-Tabor*, 565 U.S. at 194–95.

138. *See, e.g.*, *Schüth*, ¶¶ 66–67, 69.

139. As noted above, the IACtHR does not define the term "minister," although it does suggest that catechists might fall into this category. *See Pavez Pavez*, ¶ 121.

140. This interpretation stands to reason because the court (i) recognizes a ministerial exception that applies to the internal sphere of religious communities, but also (ii) holds that "in a State governed by the rule of law, there cannot be decisions that affect human rights that are outside the legal control of the State authorities," and (iii) considers that the difference in treatment should be examined through strict scrutiny. *See Pavez Pavez*, ¶¶ 69, 100, 128. One possible way to reconcile the three affirmations is to interpret them to mean that the state's control of church decisions must focus on whether the

Under this interpretation, the Catholic Church might be able to justify excluding women from Catholic seminaries—since that decision is based on theological grounds—but would be liable for excluding a candidate on the basis of race—since that decision is not supported by Catholic doctrine.[141] However, if the "Inter-American ministerial exception" only goes as far as protecting churches from discriminating against their "ministers" based on theological grounds, the use of the term "ministerial exception" would be extremely confusing, since the IACtHR's position differs markedly from U.S. Supreme Court jurisprudence.

2. Religion Classes in Public Schools

At the other extreme lies the second category, where the IACtHR outright rejects the application of the ministerial exception to public education. The court quoted the testimony of one expert witness to highlight the difference between the internal sphere of the church—where the autonomy of the religious community can prevail—and the public sphere, "which must be strictly governed by human rights obligations."[142] In applying this distinction to *Pavez Pavez*, the IACtHR's reasoning relied heavily on the right to education. Citing various human rights instruments, the court emphasized that the purposes of education include strengthening respect for human rights and fundamental freedoms, and promoting understanding, tolerance, and friendship among all nations, racial groups, or religious groups.[143] According to the court, an education that denies human rights impedes the attainment of these objectives and indeed runs contrary to them, violating the right to education.[144] The court thus concluded that, when religion is part of the required curriculum for children, religious communities must respect the right to equality and non-discrimination when selecting teachers to instruct those classes.[145]

Grafting U.S. jurisprudence onto *Pavez Pavez* is anything but straightforward, since in the United States, the strong separation of church and state prohibits almost all religious practice in public schools.[146]

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difference in treatment with regards to its "ministers" is justified on doctrinal or theological grounds. We recognize that this interpretation is stronger when religious communities are made up only of adults who have voluntarily chosen to participate in these spaces, and that it is more difficult to support when these communities also include children, as is usually the case.

141. Evans & Hood, *supra* note 21, at 81, 93; LABORDE, *supra* note 131, at 178–80.

142. *Pavez Pavez*, ¶ 120.

143. *Id.* ¶ 123. These arguments would apparently apply to private schools as well.

144. *Id.* ¶ 124. These arguments would also apparently apply to private schools.

145. *Id.* ¶ 130.

146. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding that the First Amendment prevents public schools from sponsoring religious rites, even if individual students would be excused from performing them). In a recent decision, however, the U.S. Supreme Court held that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual who engages in personal religious observance in public education from government retaliation. *See* Kennedy v.

Moreover, in rejecting religious precepts as acceptable justifications for church decisions, the IACtHR goes even further than the European jurisprudence in *Fernández Martínez* and *Travaš*. Indeed, the IACtHR clearly stated that, in the context of public education, discordance of the teachers' lifestyle with the creed of the religion they teach cannot justify discrimination based on a protected category.[147] As mentioned above, lifestyle coherence with religious precepts is a requirement of canon law, according to which religion teachers must instruct by example by following the true doctrine of revelation as witnesses of their Christian faith.[148] The ECtHR accepted this canonical requirement as a justification for the dismissal of religion teachers in *Fernández Martínez* and *Travaš*; although, as noted above, these discrimination cases were not based on sexual orientation.[149]

3. Intermediate Cases

The third category may be the most obscure. The IACtHR decision refers to a "weaker ministerial exception" that operates outside the context of the internal functioning of the religious community, but without reaching the level of public involvement that is present in public education.[150] What the "weaker ministerial exception" actually is, and to which cases it may apply, remains unclear.

A possible example of an intermediate case might involve discrimination against a teacher working for a private Catholic school. Private schools may constitute intermediate cases because they seem to fall outside the context of the internal functioning of the religious community—since the education of children is of public interest, and there are usually numerous public regulations with which private schools must still comply. At the same time, the level of public involvement is less than it is in public education. Should a teacher be considered a "minister" in this context? Does it matter what subject she teaches? We do not know how the IACtHR would decide this case, but we will return to this point in the last part of Section C.

This is not the only kind of case that would fall under this "weaker ministerial exception." For instance, in *Lombardi Vallauri v. Italy*, a professor of philosophy of law was dismissed from a Catholic university because his positions were allegedly contrary to Catholic doctrine.[151] As in the previous example, it is dubious whether Lombardi Vallauri could be considered a

Bremerton Sch. Dist., 597 U.S. 507 (2022).

147. *Pavez Pavez*, ¶ 144.

148. *See* 1983 CODE C.804, § 2.

149. *Fernández Martínez*, ¶ 110; *Travaš*, ¶ 54.

150 *Pavez Pavez*, ¶ 128.

151. *Lombardi Vallauri*, ¶ 4–11.

"minister,"[152] but we can still recognize the relevance of applying some sort of balancing exercise in this case, which seems to be the point of the "weaker ministerial exception."[153] In *Lombardi Vallauri*, no children were involved—only adults who voluntarily chose to attend a Catholic university, and, therefore, balancing between rights might play out differently than it did in *Pavez Pavez*.

Finally, how other employment cases would be resolved is also unclear. Perhaps a weaker version should also apply to employees who are relevant to the internal functioning of the religious community but cannot be considered "ministers." Religious communities hire employees for a variety of functions that are to greater or lesser degree related to their faith. Take, for example, an organist or choirmaster in a Catholic church, the director of public relations for the Mormon church, a teacher in a daycare center run by a Protestant church, or a doctor in a Catholic hospital.[154] Do these cases fall into the intermediate category? Probably, but should a uniform "weaker ministerial exception" be applied to resolve them? Can any of these workers be considered "ministers"? Following the incremental criteria adopted by the IACtHR in *Pavez Pavez*, it could be argued that, when the employee's role primarily involves the expression of faith or the values of the religious community—i.e., when it might not involve ministering the faith but still falls close to the internal sphere of religious authority because of the expressive function of the position—then religious freedom should have more salience. If a clear connection to religious purpose is missing, however, then equality would be the guiding criterion.[155] In any case, a "weaker ministerial exception" would seem to require balancing the rights at stake, which is something that U.S. courts have ruled out when applying the "ministerial exception" since its inception.

152. In *Our Lady of Guadalupe School v. Morrissey Berru*, 140 S.Ct. 2049, 2064 (2020), the U.S. Supreme Court indicated that a variety of factors may be important in determining whether a particular position falls within the ministerial exception ("What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

153. It may sound strange to argue that religious communities can benefit from a "weaker *ministerial* exception" even if the employee is not a "minister." But, as we said, it seems to be that some sort of balance must be struck when employees perform multiple roles. It is also possible to argue that if the employee in question is not a "minister," an "absolutist approach" in favor of non-discrimination should apply.

154. All these examples refer to cases brought before the ECtHR and the European Commission of Human Rights and are cited throughout this Article.

155. *See Schüth*, ¶¶ 69, 71. A similar standard is suggested in HERNÁN V. GULLCO, LIBERTAD RELIGIOSA 229 (2016); see also *Rweyemamu v. Cote*, 520 F.3d. 198, 208 (2d Cir. 2008) ("The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes.").

4. Ruling Out the U.S. Ministerial Exception

In sum, the IACtHR has at this point largely rejected the "ministerial exception" as a ground for barring judicial or administrative review of church decisions regarding who their "ministers" will be. In the public education system for children, religious freedom arguments do not protect discriminatory acts even when genuinely based on religious doctrine. It remains unclear whether this principle, however, extends to religion teachers in private schools,[156] to university professors, or to other church employees.[157] Within the internal sphere of the church, the court seems to propose a more deferential approach, under which religious communities could justify decisions regarding their "ministers" on theological or doctrinal grounds, but such decisions are still subject, ultimately, to broad judicial review. This approach differs substantially from the U.S. "ministerial exception" doctrine and provides a broader protection to ministers and members of the church. This is why we sustain that the IACtHR has rejected the United States' "absolutist approach" in favor of a more "egalitarian approach" because not even in the internal sphere of the church has the IACtHR adopted U.S. Supreme Court legal doctrine.

C. Rejection of the European "Balancing Approach"

Although the IACtHR's reasoning shares similarities with that of the ECtHR,[158] we argue that it did not genuinely apply the ECtHR's "balancing approach" in deciding *Pavez Pavez*. Rather, the IACtHR sidestepped the need for balancing by asserting that the rights of parents and religious communities were not at stake. A "balancing approach" presupposes a conflict between two or more rights or interests[159] and, in *Pavez Pavez*, the IACtHR did not find such a conflict.

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156. Yet if we follow the court's reasoning with respect to the right to education, it may be difficult to argue that discrimination is prohibited in public education but permitted in private education. *See Pavez Pavez*, ¶ 129. The IACtHR seems to suggest that religious communities ought to have more autonomy in private schools that they run, which leaves open the question of whether or how the rights to education and non-discrimination should be balanced against the right to autonomy in the sphere of private education.

157. *Pavez Pavez*, ¶ 159. The preparatory work for the ACHR does not seem to offer a clear interpretive criterion for resolving the issues discussed in this Article. The ACHR has been signed by very secular countries (e.g., Mexico and Uruguay) and less secular countries (e.g., Chile). *See* Organization of American States, *Conferencia Especializada Interamericana Sobre Derechos Humanos*, OEA/Ser.K/XVI/1 (Nov. 7–22, 1969).

158. Unlike the ECtHR, the IACtHR held in *Pavez Pavez* that strict scrutiny needs to be applied. This level of scrutiny shows *some* similarities to that applied by the ECtHR. *See, e.g.*, *Fernández Martínez*, ¶ 131; *Travaš*, ¶ 102. Note that in neither *Fernández Martínez* nor *Travaš* was the difference in treatment based on sexual orientation.

159. FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 4–5, 18, 106, 118 (2017).

1. Some Possible Interpretations of the IACtHR Argument

The IACtHR held that it was not "clear that there is an actual or potential infringement of the autonomy of the religious community, or of the right[s] . . . of parents or guardians to have their children . . . receive the religious education that is in accordance with their beliefs."[160] The court did not explain in detail how it reached this conclusion. As evidence, it cited the 700 students and parents who signed a petition opposing Pavez Pavez's reassignment.[161] While this petition may demonstrate community support for Pavez Pavez, however, it says little about the autonomy of the church—at best, 700 students and parents represent an insignificant fraction of the members of the Chilean Catholic community.[162] Additionally, this majoritarian argument may obscure the rights of those parents whose children attend the same public school and abstained from signing the petition.

One possible interpretation is that the court sought to convey that—as a matter of principle and regardless of the evidence of the case—a ban on discrimination in public schools *never* compromises the autonomy of the religious community and the rights of parents.[163] Evidence—like the petition signed by 700 students and parents—becomes irrelevant. Even if all of the school's students and parents believed that the ban on discrimination was unjust and that Pavez Pavez should be reassigned, for instance, the absolute standard prohibiting discrimination in public schools would still prevail.

This interpretation is consistent with key passages in the judgment. For example, after referencing the petition, the IACtHR explicitly asserted that

160. *Pavez Pavez*, ¶ 144; *see id.* ¶ 129 (noting that religion classes at public schools "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 organizational life of the communities"). One possible interpretation of the excerpt of ¶ 129 is that the court acknowledges that religion classes in public schools are not equivalent to religious activities that take place within the religious community—for example, catechism in churches designed to prepare students to participate in certain religious rites or ceremonies.

161. *Id.* ¶ 144.

162. *See Fernández Martínez*, ¶ 150 ("Even though the parents of children who attended the applicant's classes showed their support after the publicity given to his situation, the Court is of the view that the Diocese's argument was not unreasonable, since it sought to protect the integrity of the teaching.").

163. This does not rule out the possibility that state actions in the public sphere may be illegitimate and wrongfully harmful to church autonomy. Take, for example, when a religious community is forced to teach religion in public schools. Likewise, some state interferences in the internal sphere might be perfectly legitimate, for example, imposing ordinances or other measures to prevent crimes committed within the internal sphere. This is why the IACtHR's affirmation that religion classes in public schools are "not within the scope of religious freedom that should be free from any interference by the State, since they are not clearly related to religious beliefs or to the organizational life of the communities" may be confusing. *Pavez Pavez*, ¶ 129. Legitimate grounds for interference in both the public and private spheres exist.

the search for "coherence between the content of the religion classes and the conformity of the lifestyle of the person who teaches those classes with the religious creed . . . *cannot* . . . justify or legitimize different treatment that is discriminatory" in public schools.[164] This assertion is also consistent with the distinction between the internal sphere of the church and the public sphere of the State;[165] and with the paramount importance that the Inter-American system has given to safeguarding non-discrimination in the formal education imparted to children.[166] According to this interpretation, the mention of the petition can be understood as a factor of very limited relevance: the petition only makes clear that, in this specific case, there seems to be less of a dispute since no parent or student came forward claiming that banning discrimination would be harmful to them (so perhaps something similar to an *a fortiori* argument is operative here).[167]

An alternative understanding of this reference would start with a counterfactual scenario, for example, if 700 students and parents had signed a petition claiming that a ban on discrimination would harm them. In that scenario, a conflict between rights would have arisen and a balancing or proportionality test would have been required. Since no such evidence of harm was presented in this case, there was no conflict and thus no need for balancing. However, this alternative reading may lie in tension with the court's explicit statement that, in public schools, religious doctrine *cannot* justify or legitimize discrimination.[168] It may also lie in tension with certain principles to which the court refers, such as the right to an education free of discrimination.

The IACtHR concluded that religious freedom was not compromised

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164. *See Pavez Pavez*, ¶ 144 (emphasis added); *id.* ¶¶ 124, 130 (noting, for example, that since religion instruction is "part of the education program for children, these powers [of issuing certificates of suitability] . . . must be adapted to the other rights and obligations in force in the area of equality and non-discrimination").

165. *Id.* ¶ 120.

166. *See, e.g.*, *id.* ¶ 124; *see also Olivera Fuentes*, ¶ 88 ("[N]o norm, decision or practice of domestic law, whether by state authorities or by individuals, may in any way diminish or restrict the rights of any person on the basis of sexual orientation, gender identity and/or gender expression."); *Atala Riffo*, ¶ 91; Vicky Hernández v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶ 123 (Mar. 26, 2021). *See generally Atala Riffo*, ¶ 79 ("It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.").

167. As we will explain later, under Article 13.4 of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), parents have the right to choose the type of education their children receive, *provided that it strengthens respect for human rights*. At the time of the court's decision, Chile had not yet ratified this additional protocol. *See Pavez Pavez*, n.117; *infra* note 193. Thus, the reference to the 700 students and parents who signed the petition could also have been used to implicitly argue that although Chile had not ratified this additional protocol, the rights of parents were not violated because none of them favored the relocation. We have already said that the argument based on the 700 students and parents who signed the petition is flawed.

168. Nevertheless, the result of this balancing may be that the ban on discrimination must prevail—although a case-by-case balancing should probably still be carried out.

in this case and that, consequently, no conflict between two or more rights or interests occurred.[169] The evidence for this assertion—the petition signed by 700 students and parents—is rather weak, which leads us to believe that the IACtHR's main arguments lie elsewhere, which is why we go one step further to argue that a ban on discrimination in public schools *cannot*, as a matter of principle, interfere with the autonomy of the religious community or the rights of parents.

This approach differs significantly from that of the ECtHR. Recall that in *Fernández Martínez*, the ECtHR held that when "called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weigh up the interests at stake."[170] This contrasts with the language of *Pavez Pavez*, in which no conflict is mentioned. Is the lack of mention due to a lack of conflict between rights (thus, that no balancing is required)?[171] Or is this absence of conflict a consequence of having previously balanced them in some way? Perhaps it is. But a reading of the relevant paragraphs might suggest otherwise: the IACtHR seems to have rejected the possibility that religious freedom was affected in the first place, and—as we have maintained—balancing presupposes a conflict between two or more rights or interests.[172]

In any case, the crucial point is that one plausible interpretation of the *Pavez Pavez* decision holds that the IACtHR adopted an "absolutist" standard, according to which the prohibition of discrimination in public schools always prevails and is never dependent on evidence or on the results of a case-by-case balancing.[173] In contrast, the ECtHR seems to have adopted a more casuistic exam in which various factors are weighed on a case-by-case basis—which would comprise the "balancing approach."

2. Implicit Balancing?

As just suggested, perhaps the absence of a conflict between rights was a consequence of having already somehow balanced them. This interpretation sounds feasible, yet it necessarily implies some sort of implicit balancing. For example, one might balance two rights (e.g., religious freedom and non-discrimination) and conclude that in certain scenarios (e.g., public schools) one of these rights (e.g., non-discrimination) should always prevail. Thus, this implicit balancing might have led the court to

169. *Pavez Pavez*, ¶¶ 129, 144.

170. *Fernández Martínez*, ¶ 122.

171. While we can accept that there was no balancing, we can still argue that strict scrutiny was applied. Strict scrutiny may play a role in the rules of evidence. For example, strict scrutiny may lead us to accept the existence of a conflict of rights only when the conflict is obvious.

172. *See Pavez Pavez*, ¶¶ 128–29, 144.

173. Note that this last assertion seems independent of whether the absence of a conflict between rights was a consequence of having previously balanced them in some way.

adopt the "absolutist" standard for public schools that we refer to in the previous section. Our point is that this implicit balancing would be quite different from the test the ECtHR performed.

There are other signs that indicate some implicit balancing took place. The argument could be made that the court *did* recognize a conflict between the autonomy of the religious community and the right not to be discriminated against and then implicitly balanced these rights by not ordering Pavez Pavez's reinstatement as a Catholic religion teacher. Reinstatement on these grounds could have represented an illegitimate interference with the autonomy of the religious community to choose its "ministers," by imposing someone who does not live in accordance with the teachings of its faith.[174] Instead, by limiting its ruling to monetary compensation and measures to ensure non-repetition, the court struck a balance between religious freedom and non-discrimination. While plausible, this reading also has certain limitations, since Pavez Pavez admitted at the public hearing that she no longer considered herself a Catholic because of what she had been put through and, more importantly, that she had already announced her plan to retire because of her age.[175]

3. Was There Really No Conflict Between Rights?

Other possible arguments for the existence of a conflict between religious freedom and non-discrimination might have justified the use of a "balancing approach" in this case. One such argument involves the certificate of suitability. As mentioned above, Chilean legislation allows religious communities to participate in the selection process of religion teachers by requiring potential teachers to obtain a certificate of suitability from them. This certificate can be interpreted in *multiple* ways. For example, a plausible interpretation might see it as an attempt to guarantee parents that their children will receive a religious education in accordance with their beliefs.[176] According to this interpretation, the religious community would only be expressing its opinion—from the outside and as a kind of epistemic authority—on whether a teacher is sufficiently versed in their religious views.[177] This would be especially useful when no "official training

174. Following the court's reasoning regarding the right to education, reinstatement may be, in some cases, the only (or perhaps the most effective) means available to ensure the children's right not to be exposed to acts of discrimination. It may sound strange to say that religious communities *can* discriminate, provided they pay reparations.

175. *See* Corte Interamericana de Derechos Humanos, *Audiencia Pública. Caso* Pavez Pavez Vs. Chile. *Parte 1*, YOUTUBE, *supra* note 10; *Pavez Pavez*, ¶ 28; *see also Flor Freire*, ¶¶ 213, 221; Grijalva Bueno v. Ecuador, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 426, ¶ 172 (June 3, 2021) (explaining that reinstatement is the general rule).

176. We acknowledge that the very requirement of a "certificate of suitability" suggests that "religious education" might go beyond teaching religion from a purely historical perspective.

177. This first interpretation may not be in harmony with 1983 CODE C.804, § 2, which establishes

program" for teaching a particular religion is available.

Alternatively, the certificate of suitability could be interpreted as the manifestation by the school of its disposition to lending space to the church for religious education of children whose parents desire it (in a way that might be likened to catechism or Sunday school). Chile's arguments seem based on something closer to this second interpretation: Chile claimed that the certificate of suitability was a mechanism to guarantee the autonomy of the religious communities to develop fundamental activities, which include the selection of their teachers.[178] For Chile, religion teachers were representatives of their religious community, and the certificate of suitability was therefore meant to guarantee that they would teach religion in accordance with the requirements of the faith.[179] This interpretation is found in other Latin American countries and seems in line with the interpretation of the ECtHR in the *Fernández Martínez* and *Travaš* cases.[180]

Whichever characterization of the certificate of suitability we adopt (as well as the content of what is taught) *may* eventually become relevant in determining whether interference with the autonomy of the religious community has occurred. For example, if we interpret the certificate of suitability in the first sense, it may become more difficult to argue that the autonomy of the religious community has been compromised in any way. Alternatively, if we choose the second interpretation, it may become easier to accept that the autonomy of the religious community has been restricted.

Nevertheless, even if interference with church autonomy is found, it may still be legitimate if its purpose is to protect the rights of others, i.e., the employee (who has the right not to be discriminated against) and the children (who have the right not to be exposed to acts of discrimination in their schools). This line of reasoning might lead us back to the need for some balance among the rights at stake, which would imply recognizing a conflict (or, at least, a presumptive conflict) between two or more rights or interests. Such balancing is not necessarily incompatible with an "absolutist approach" in favor of non-discrimination in public schools: we can still argue (although additional arguments will probably be needed) that this "absolutist approach" offers the correct answer even while acknowledging a conflict of rights.

Another possibility is understanding the interference as one *consented to* by the religious community. That is, by focusing on the voluntary agreement

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that coherence of life is a requirement of canon law, according to which religious professors should lead exemplary lives reflecting the true doctrine of revelation and as witnesses of their Christian beliefs. However, this interpretation may be the one that best reflects how the right to religious freedom should interact with the rights to education and non-discrimination.

178. *See Pavez Pavez*, ¶ 45.

179. *Id.*

180. *See Fernández Martínez*, ¶ 134; *Travaš*, ¶ 91.

of the religious community to participate in the public sphere. The religious community could have, after all, voluntarily chosen not to participate in the public education system—or, more generally, in the formal education of children.[181] If we follow this line of reasoning, how we understand the certificate of suitability becomes irrelevant. No conflict arises between the two rights, and no balancing would be necessary because the interference would be legitimate—since the religious community consented to the arrangement and is free to opt out of it. This reading would make the certification requirement compatible with an "absolutist approach" in favor of non-discrimination (maybe even in private schools).

Again, the point we want to emphasize is that the conception of the certificate of suitability that we adopt *may* have some bearing on the extent to which the autonomy of the religious community is perceived as compromised—or not, in this case (and, consequently, that no balancing test was required, implicit or otherwise).[182]

4. Other Relevant Factors Had a "Balancing Approach" Been Adopted

Comparing the ECtHR jurisprudence with the IACtHR decision in *Pavez Pavez*, a number of factors emerge that might have been considered (or considered differently) if the "balancing approach" had been adopted to resolve the case.

First of all, unlike the ECtHR, the IACtHR did not take up the possibility that the decision to deny the certificate of suitability might not have been based on religious doctrine (perhaps because it was obviously so).[183] Nor did the IACtHR take into account Pavez Pavez's consent to

181. Individual members (especially if they are also employees) might find it much more difficult to exercise exit rights than religious communities. In the case of religion teachers, the difficulties are likely to be even greater: they suffer from a particular form of vulnerability because their knowledge is of interest to very few employers. *See Schüth*, ¶ 73; *Travaš*, ¶ 105. If the religious community opted out, Pavez Pavez could lose her job. Would that constitute discriminatory behavior? Even though religious communities can legitimately opt out of the public system, doing so could mean that Pavez Pavez is entitled to compensation.

182. How the right to autonomy of religious communities interacts with the rights of parents (the rights of those parents who seek Catholic religious education for their children) is an open question. For example, we might accept that the autonomy of the religious community was not compromised by allowing Pavez Pavez to keep her teaching position, but still argue that it represented an illegitimate interference with the rights of parents. We might also argue that the rights of parents were not compromised, but that an illegitimate interference with the autonomy of the religious community did occur. Additionally, it is important to remember that parents are not obliged to send their children to these religion classes. Something similar can be said about the interaction between the rights to non-discrimination and to education.

183. Similarly, the IACtHR did not determine whether the decision to deny the certificate of suitability was genuinely based on a *central*, rather than peripheral, tenet of the religious doctrine. The ECtHR did not analyze this aspect either, but we understand that during a proportionality test (or balancing, in the IACtHR formulation) such a consideration is proper. *See* LABORDE, *supra* note 131, at 186; *see also* Rommelfanger v. Germany, App. No. 12242/86, 62 Eur. Comm'n H.R. 151, 160 (1989) ("The Commission is satisfied that German law, as interpreted by the Federal Constitutional Court,

accept a position for which perhaps one of the requirements was leading a life coherent with religious principles that she fully understood, as the ECtHR had done in *Fernández Martínez* and *Travaš*.[184] It could be argued that acts of discrimination that take place in public schools are inadmissible (in absolute terms), regardless of their relation to religious doctrine or the victim's prior consent to them. These are all circumstances that may instead be relevant (to certain extent) in the internal sphere of the given religious community. Although the IACtHR did not make these claims explicit, we have already noted that this may be a plausible interpretation of its decision. Had a balancing exercise been performed, these elements might have been taken into account—but that did not happen.

In contrast to the ECtHR, the IACtHR found Chile's efforts to find Pavez Pavez an alternative position irrelevant (although the efforts may have had some implicit impact on the assessment of compensation owed or denial of reinstatement). Chile argued that Pavez Pavez's working conditions had not only remained the same but had actually improved, as she had been promoted to Inspector General and her salary increased to compensate for her new managerial duties.[185] But the IACtHR held that Pavez Pavez's transfer had undermined her vocation as a teacher and should therefore be considered a degradation of her working conditions on the basis of her sexual orientation.[186] However, in most legal systems, employers are allowed to transfer employees within certain limits, and it would be difficult to argue that respect for the employee's calling is one such valid limit. Instead, the unlawfulness of Pavez Pavez's relocation should be found in the fact that it was an act of discrimination which, according to the IACtHR, cannot be justified as a protection of the right to religious freedom since that right was not at stake.[187]

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takes account of the necessity to secure an employee's freedom of expression against unreasonable demands of his employer, even if they should result from a valid employment contract. . . . If, as in the present case, the employer is an organisation based on certain convictions and value judgments which it considers as *essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer.") (emphasis added). In this case, a physician who worked in a hospital run by a Roman Catholic foundation was fired after making public statements in favor of the German law allowing abortion when pregnancy endangers the mother's mental or physical health. *Rommelfanger v. Germany*, App. No. 12242/86. Another aspect that could have been considered is whether the "central" tenet of the religious doctrine was sufficiently clear and public (if it was not, we might not be able to accept that there was consent).

184. This last absence was not necessarily wrong for other reasons. According to general principles of labor law, the worker's consent could be considered insufficient to shield an employer who violates worker's rights. Moreover, consent might have little relevance if the intention was not to ensure that children are not exposed to acts of discrimination in formal education.

185. *Pavez Pavez*, ¶ 48.

186. *Id.* ¶ 140.

187. *See id.* ¶ 88. Even if we accept that the act of discrimination allowed the religious community to preserve its autonomy, it could still be said that the benefits of revoking the certificate of suitability do not outweigh (or justify) the restrictions imposed on the principle of equality and the right to

That these factors were not pondered by the court reinforces the hypothesis that the IACtHR did not adopt the European "balancing approach," opting instead for a form of "absolutist approach" favoring equality and non-discrimination in the field of public education.

5. A More "Egalitarian" Approach

In sum, the court avoided the ECtHR's "balancing approach" by suggesting that no conflict occurred between two or more rights or interests. In this regard, the IACtHR seems to have adopted an "absolutist approach:" in public education, acts of discrimination are always impermissible regardless of the evidence available, how we interpret the certificate of suitability, whether the act of discrimination was based on religious doctrine, whether the teacher had given prior consent to the terms of employment, whether efforts were made to find an alternative position so the teacher would not lose employment, or whether the teacher's working conditions improved or deteriorated. As the previous sections recount, no reference is made to the margin of appreciation as occurs in European jurisprudence. Public schools must be strictly governed by human rights obligations and, in particular, by the principle of non-discrimination. As we have said, this position is supported by, among other factors, the paramount importance the Inter-American system has placed on ensuring non-discrimination in children's formal education.[188] As a consequence, this "absolutist approach" would not be subject to the ECtHR's case-by-case balancing.

Is this "absolutist approach" favoring equality only applicable to public schools? In its judgment, the IACtHR emphasizes that the autonomy of the religious community should be respected within its internal sphere and, as we mentioned, church autonomy could also be a factor in intermediate cases. Faced with a case taking place in the internal or the intermediate sphere, the court would probably use some kind of balancing. However, there is at least one clear difference with the ECtHC's balancing approach: the IACtHR would also have to apply strict scrutiny in its decision.[189] Thus, even in those cases taking place within the internal sphere of the church or in intermediate scenarios, the IACtHR would probably reject the "balancing approach" as the ECtHR has used it so far (i.e., in cases not involving discrimination based on sexual orientation).

It remains unclear how the IACtHR would deal with a case of

education—all considerations that should form part of the proportionality test. The court did not make this argument because it did not consider that the discriminatory act was relevant to the protection of the autonomy of the religious community.

188. *See supra* notes 164, 166.

189. It is true that the meaning of this kind of scrutiny is not entirely clear. We can surmise that this scrutiny would be more stringent than the level applied by the ECtHR, even in cases of discrimination based on sexual orientation. *See* Clérico, *supra* note 66, at 10–12.

discrimination taking place in a private school.[190] If we follow the court's reasoning on the right to education, it would be difficult to argue that discrimination is prohibited in public education but permitted in private education.[191] One plausible interpretation of the ruling is that the principles of equality and non-discrimination must always prevail in the context of children's formal education. This interpretation would be consistent with Article 13.4 of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"),[192] which states that parents have the right to choose the type of education to be given to their children, provided that: (i) it strengthens respect for human rights, ideological pluralism, fundamental freedoms, justice, and peace, and (ii) it promotes understanding, tolerance, and friendship among all nations and all racial, ethnic, or religious groups.[193] Perhaps the IACtHR should also take an "absolutist approach" in favor of equality in these cases.[194]

In any case, the "absolutist approach" in favor of equality and non-discrimination in public education, combined with a stricter level of scrutiny for cases that take place in the internal church or intermediate spheres, results in a more "egalitarian approach" that limits religious freedom in order to protect equality and non-discrimination principles.

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190. In Argentina, a provincial judge awarded damages to a science teacher who was fired from an Evangelical Christian school because of his sexual orientation. The teacher did not seek reinstatement. *See* Juzgado Laboral No. 1 de Oberá [Labor Court No. 1 of Oberá], 2/6/2022, "Bjorklund, Raúl Julián c. Instituto Privado Emanuel y otro/a," 116452/2018 (Arg.).

191. *See, e.g.*, *Pavez Pavez*, ¶¶ 124, 130 (noting, for example, that since religion instruction is "part of the education program for children, these powers [of issuing certificates of suitability] . . . must be adapted to the other rights and obligations in force in the area of equality and non-discrimination").

192. At the time of the court's decision, Chile had not yet ratified this additional protocol. *See id.* n.117.

193. Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights art. 13.4 ("Protocol of San Salvador") ("In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above."). Article 13.1 of the Additional Protocol states that "education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. . . . They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace." *Id.* art. 13.1.

194. *See supra* note 156. In that note, we intimate that the IACtHR suggested that religious communities should have more autonomy in private schools. In these cases, should the rights to education and non-discrimination be balanced against the right to autonomy? *See Pavez Pavez*, ¶ 129; *see also* AMY GUTMANN, DEMOCRATIC EDUCATION 123 (1999) ("A conflict between an educational practice and the religious beliefs of some citizens is not a good reason for forbidding schools to institute that practice, whereas a conflict between a religious practice and the principles of nondiscrimination or nonrepression is. . . . The fact that a practice derives from the religious beliefs of only some citizens is not a good reason for excluding it from schools, whereas the fact that a religious practice makes it harder for the school to develop a common deliberative morality among students is a good reason.").

IV. CONCLUSION

The Inter-American human rights system was a latecomer to the discussion of the content and scope of the right to religious freedom. It was therefore perhaps natural that its first decision on the subject would be influenced in some way by the jurisprudence of U.S. Supreme Court and the ECtHR. In the end, however, the IACtHR did not resort to the United States' ministerial exception or to the European balancing test to resolve *Pavez Pavez*. In contrast to the U.S. and European models, the IACtHR opted for an "absolutist approach" that restrains religious freedom and, above all, prioritizes its strong tradition of protecting equality and non-discrimination.

The court held that discrimination in public education *cannot* be justified, even if it is genuinely based on religious doctrine. This "absolutist approach" in favor of non-discrimination decisively rejects the United States' ministerial exception. The court also rejects the ECtHR's balancing of the rights of the petitioner and those of the religious community as the ECtHR has done, by announcing that religious freedom was not truly at stake. In this respect, *Pavez Pavez* represents a unique approach that gives a more prominent role to equality and non-discrimination.[195]

For cases that take place outside the sphere of public education, the IACtHR may abandon its "absolutist approach," but we argue that the court would still adopt a more "egalitarian approach" than the United States and ECtHR. Indeed, while the court did recognize the right to autonomy of the religious community within the internal sphere of the church, it did not create a ministerial exception as the term is understood in U.S. jurisprudence. The internal decisions of the religious community would likely be subject to an extensive judicial review, including not only whether the plaintiff qualifies as a "minister," but also whether the decision is consistent with their theological or doctrinal rationale and whether procedural rights are adequately guaranteed. At the same time, the European "balancing approach" could instead be applied to these cases but would require a key difference: application of strict scrutiny in favor of non-discrimination.

195. One point we have not addressed is whether religious education in schools is permissible in cases where the religious doctrine is discriminatory. From this perspective, the problem may be broader: the right to education and non-discrimination may be violated when this religious doctrine is taught in schools. Moreover, under Inter-American human rights law, states have an obligation to take positive measures to reverse or modify existing patterns of discrimination in their societies, and some scholars have argued that this obligation may be incompatible with allowing religious communities that engage in discriminatory practices (and have a discriminatory discourse) to use public spaces, such as public schools. *See* Laura Saldivia Menajovsky, Amicus curiae *de Saldivia-Red de Litigantes LGBT*, *in* LÍMITES A LA POTESTAD DE LA RELIGIÓN CATÓLICA PARA DISCRIMINAR. SOBRE EL CASO PAVEZ PAVEZ Y LOS *AMICI CURIAE* EN FAVOR DE SU PRETENSIÓN 169–70 (2021).

As for intermediate cases, the exact implications of the IACtHR's "weaker ministerial exception" are unclear, as are the cases to which it would apply. However, the court has shown its willingness to adopt a more "egalitarian approach" in which religious freedom is likely to be given greater weight the closer the cases are to the internal sphere of church; whereas in cases where no clear connection to faith and religious beliefs is found, equality would be taken as the guiding criterion. We do not know whether the "absolutist approach" in favor of equality would apply in private schools. Yet, as we noted, we recognize arguments in favor of its application in these cases (some of which seem implicit in the reasoning of the IACtHR).

Future cases will show the actual reach of the IACtHR's more "egalitarian approach," but its decision in *Pavez Pavez* already shows a strong commitment to equality in the public sphere, coupled with the application of strict scrutiny to cases in the private sphere. In this respect, the IACtHR has been more progressive than the U.S. ministerial exception and the "balancing approach" of Europe.