

Reversibility, Proportionality and Conflicting Rights: Fernández Martínez v. Spain

Ian Leigh¹

Introduction

For many years the European Court of Human Rights could be said to be ‘shadow-boxing’ where clashing rights cases involving religion were concerned – feinting and engaging in manoeuvres that were at times either ambiguous or misleading. Following a series of recent decisions involving church employees, culminating in the Grand Chamber decision which is the focus of this chapter, *Fernández Martínez v Spain*,² all that has changed. We can now say, both that the Court has confronted a number of genuine clashing rights cases and, moreover, that it has changed its approach to resolving freedom of religion cases in which rights are said to conflict.

In a line of early cases in which employees invoked Article 9 ECHR, the Court resorted to ‘definitional’ or ‘categorical’ balancing techniques, notably employing the so-called (and now apparently abandoned) ‘specific situation’ rule.³ In effect this amounted to refusal of claims brought by employees of interference with

¹ Professor of Law, Durham University.

I am grateful to Eva Brems, Stijn Smet and Gavin Phillipson for comments and to the participants in the Symposium on Conflicts between Human Rights and the European Court of Human Rights, University of Ghent, 16 October 2014) for comments on an earlier draft and in particular my co-panellists Javier Martinez-Torrón and Judge Inita Ziemele.

² Unless otherwise stated all references are to the Grand Chamber Decision, App no 6030/07, 12 June 2014. References to the ‘Joint Dissenting Opinion’ are to the joint opinion of Judges Spielmann, Sajó, Karakas, Jemmens, Jaderblom, Verhabovic, Dedov and Saiz-Arnaiz.

³ The Court of Human Rights in *Kalaç v. Turkey* (1999) 27 EHRR 552 held that the dismissal of a senior legal adviser in the Turkish air force did not violate Art. 9. He had been dismissed for having adopted ‘unlawful fundamentalist opinions’. The Court held that the complainant had voluntarily accepted limitations on manifestation of his beliefs in embracing a system of military discipline: ‘in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account’ (para. 27). The limitations here on his rights, said the Court, were self-chosen. See also: *Stedman v. United Kingdom* (1997) 23 EHRR CD 168; *Kontinnen v. Finland*, App no 24949/94, 3 December 1996; *Ahmad v. United Kingdom* (1981) 4 EHRR 126; *Karaduman v. Turkey*, App no 16278/90, (1993) 74 DR 93.

their religious liberty, based on freedom of contract or implied waiver grounds.⁴ The reasoning was that, since the claimants voluntarily entered the employment in question (and were free to resign), any adverse consequences for their religious practice - such as inability to attend prayers or to observe holy days - were easily avoided. While it was not surprising that the Court concluded that an employee who accepts certain conditions of employment is not entitled to unilaterally rewrite them to suit his or her religious practices, its reasoning was nonetheless striking. In the relevant decisions, the conclusion was reached not by applying the principle that Article 9(2) permits limits on religious liberty to safeguard the rights and freedom of others (in this instance, the employer) but, rather, by finding that the applicants' freedom of religion was not interfered with in the first place. The petitioners were unable to invoke Article 9 because they had the freedom to make different choices—ones more conducive to their religious practice—*prior* to accepting employment. This resulted in potential clashes of rights being side-stepped so that they were not directly confronted by the ECtHR.

Elsewhere, I have argued that some of the examples most often said to involve clashing rights – especially in relation to ostensible clashes of freedom of expression and religion –turn out to be nothing of the kind when subjected to closer analysis.⁵ By this I mean that it could not be argued convincingly that the Court was presented with a credible choice between two alternative courses, each of which was soundly based on upholding a Convention right (what I term the 'reversibility test').⁶ Rather there has been a regrettable tendency to refer to the 'rights and freedoms of others' in a loose and generalised way.⁷ By contrast, the reversibility test stipulates that the Court should ask itself whether if the state were to give priority to the less favoured right, would another disappointed person have an admissible Convention claim? Put another way, can we identify the 'others' whose rights and freedoms are being protected by the state at the cost of applicants? If the 'other' cannot be identified in this specific

⁴ S. Van Drooghenbroeck, 'Conflict and consent: Does the theory of waiver of fundamental rights offer solutions to settle their conflicts?' (ch. 3 above).

⁵ I. Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 *Res Publica* 55.

⁶ See also I. Leigh and A. Hamblen, 'Religious Symbols, Conscience and the Rights of Others', (2014) 3 *Oxford Journal of Law and Religion* 2-24 (hereafter Leigh and Hamblen, 'Religious Symbols'), arguing that the ECtHR's reasoning in *Ladele v UK* does not satisfy the test.

⁷ Cf. J. Bomhoff, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Fundamental Rights' in Eva Brems (ed.) *Conflicts Between Fundamental Rights* (Antwerp- Oxford: Intersentia, 2008) (hereafter Bomhoff, 'The Rights and Freedoms of Others').

and narrow sense then arguably no legitimate aim for a restriction exists in the first place and there is no need to consider questions to do with the legal quality or proportionality of the restriction. The reversibility test plays an important part in the argument in this Chapter and I will return to it in greater detail to argue that it could have provided a more satisfactory basis for determining what weight was to be given to religious autonomy compared to respect for private and family life – the question faced by the European Court of Human Rights in *Fernández Martínez v Spain*. First, however, I will examine how proportional balancing was employed by the Grand Chamber in that decision and, secondly, whether a definitional balancing approach would have been preferable.

Balancing in the Grand Chamber

As other Chapters in this book elaborate more fully a broad distinction can be drawn between two judicial techniques for resolving conflicts of rights.⁸ On the one hand, ‘definitional’ (or ‘categorical’) approaches focus on careful stipulation of the scope or applicability of the relevant rights to avoid overlap. On the other hand, ‘proportional balancing’ resolves conflicts by acknowledging the applicability of the conflicting rights more broadly but then weighing between them in the particular factual context. In the case of the qualified rights under the ECHR (Articles 8 and 9 in the context of this discussion) the definitional approach directs judicial attention to whether there has been an ‘interference’ with the right to respect for private and family life or the right to thought, conscience and religion- Articles 8(1) and 9(1) respectively. Conversely ‘proportional balancing’ lays stress on the limitations for protecting ‘the rights and freedoms of others’, where this is necessary in the interests of a democratic society, under Articles 8(2) and 9(2). Focus is not so much on whether there has been an interference with the right in question but, rather, on whether the interference is justified.⁹

⁸ See Chapters 1 and 2 above.

⁹ The discussion of the reversibility test below makes clear that this broad distinction, although useful, is a simplification. Definitional techniques can be brought to bear to elucidate the scope of ‘the rights and freedoms of others’ (below described as ‘pure’ reversibility). Equally, however reversibility can take a more qualified form- ascribing greater weight in balancing to ‘rights and freedoms of others’ where the test is satisfied.

These two approaches have differing implications for the role of national courts in conflicting rights cases under the Convention system. A definitional approach leaves relatively little flexibility to national courts to diverge from the Strasbourg interpretation of what constitutes an interference with a qualified right. It is axiomatic that Convention rights cannot have different meanings throughout member states, although the means of protecting them may, of course, differ. A national court that applied a different understanding of the scope of the conflicting rights to that in the Convention jurisprudence would inevitably be characterised as failing to protect one of the right-holders, raising the possibility of a successful application to the European Court. Proportional balancing, however, allows some space for varying protection, under the margin of appreciation, not least because national circumstances form part of the context in which weighing or balancing occurs. This in turn raises questions about the respective roles of domestic institutions and the Strasbourg Court. Placing primary responsibility for balancing rights onto municipal courts in member states may be seen as consistent with the ‘Fourth Instance’ role of the ECtHR but the looser the supervision that the Court exercises, the weaker protection given to rights. If national bodies have too much latitude to balance between conflicting rights there is a serious risk that enjoyment of Convention rights will vary throughout the member states.

The Grand Chamber’s decision *Fernández Martínez* is best understood as a step in a gradual process by which the Court, has moved from definitional to proportional balancing and, overcoming its earlier hesitancy, has confronted clashes between religion and other rights more directly. Early indications of the change appeared in a group of church autonomy cases from Germany in which the Court resorted to ad hoc balancing of rights using the proportionality test.¹⁰ It was, however, unclear from these examples whether this was by conscious choice or merely because the domestic courts in those cases had themselves approached the issue in that way. The Court’s decision in *Eweida and Others v UK* dispelled this doubt and confirmed that

¹⁰ *Siebenhaar v Germany*, App no 18136/02, 3 February 2011 (hereafter *Siebenhaar v Germany*). And see with reference to Art 8: *Obst v Germany*, App no 425/03, 23 September 2010 (hereafter *Obst v Germany*); *Schüth v Germany*, App no 1620/03, 23 September 2010 (hereafter *Schüth v Germany*). See further: I Leigh, ‘Balancing Religious Autonomy and Other Human Rights under the European Convention’ (2012) 1 *Oxford Journal of Law and Religion* 109 (hereafter, Leigh ‘Balancing Religious Autonomy’) and chapter 2 by Stijn Smet in this volume.

proportional balancing is indeed now the preferred method of disposing of religious clash of rights cases at least in an employment context.¹¹ In a passage confirming its change of approach the Court stated:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.¹²

This was a significant development in the approach to Article 9 in clashing rights cases. Following *Eweida* the religious employee's situation no longer acts as a filtering device for Article 9(1) and is instead one of the considerations relevant in weighting the claim under Article 9(2).¹³ The abandonment of definitional balancing will necessarily require the Court to focus more often on applying Article 9(2) and to engage in the more sophisticated process of seeking to reconcile potentially competing rights. Despite that, in other respects *Eweida* itself was a rather under-developed and disappointing example of the balancing approach to clashing rights. In the most difficult of the four joined cases (*Ladele*,¹⁴ the marriage registrar case) the treatment of proportionality was cursory and cryptic and (in characteristic fashion) more reliant on the margin of appreciation than on sustained analysis.¹⁵

By contrast, with the majority and minority judgments of the Grand Chamber in *Fernández Martínez v. Spain* we now have a much more developed example of proportionality analysis in an Article 9 clashing rights case. Unlike *Eweida*, however, Article 9 was not invoked directly by the applicant but, rather, by the Spanish government, which claimed that protecting the religious autonomy of the Catholic church justified limiting his right to respect for private and family life under Article

¹¹ *Eweida and Ors v. United Kingdom* Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10 ECHR 37 (15 January 2013) (hereafter *Eweida v. UK*). This was a group of four joined petitions arising from unsuccessful religious discrimination employment claims.

¹² *Eweida v. UK* (n 11), para. 83.

¹³ *Ibid.*, para. 83. Thus in the *Eweida* group of cases McFarlane's decision to seek a role (in giving sex counselling) which could be reasonably anticipated to conflict with his religious beliefs weighed against him (*Ibid.*, para. 109) whereas the fact that Ladele's employer (in the marriage registrar case) had unilaterally varied the contract of employment to create the situation giving rise to the religious objection counted to an extent in her favour (*Eweida v. UK* (n 11), para. 106).

¹⁴ See further chapters 5 and 4 above by Russell Sandberg and Dolores Morondo Taramundi respectively.

¹⁵ Leigh and Hamblen, 'Religious Symbols' (n 6).

8.2 in the interests of the rights and freedoms of others.¹⁶ Both the majority and the minority accepted that the non-renewal of the applicant's contract to teach religious education was for a legitimate aim within Article 8.2 for plausible reasons connected with religious autonomy. The choice facing the Grand Chamber was over *how much* recognition the Spanish courts should give to autonomy: whether (as Javier Martínez-Torrón argues in his chapter)¹⁷ it should effectively be absolute because of the cumulative effect of the applicant's free choices, or whether a more nuanced approach should apply. In the event all the judges opted for the latter course, although there was disagreement between the majority and minority over whether the combination of factors justified a proportionate restriction on the applicant's right to private and family life.¹⁸

Before analyzing the Grand Chamber's approach in greater detail it is helpful to provide some background on the place of religious autonomy under the Convention. The right to freedom of thought, conscience and religion under Article 9 underpins religious autonomy in two related ways. Firstly, the text of Article 9 itself refers to 'freedom, either alone *or in community with others* and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'. The associative aspect of religion has led the Court to draw a direct link between freedom from interference in the internal affairs of religious groups and the enjoyment of the right by individuals. To force a religious community to accept or keep in membership someone whose views or behaviour is incompatible with the community's religious doctrine can be seen as an interference with religious freedom of other individuals, especially as regards their choices of association. Secondly, religious autonomy is asserted by religious communities *as groups* in which they seek the right to determine

¹⁶ For a more detailed account of the factual background see 000-000 (Martínez-Torrón), above.

¹⁷ 000 above.

¹⁸ More recently the Second Section of the Court has applied the majority's approach to an unsuccessful similar application brought by a Croatian religious education teacher: *Case of Travaš v. Croatia* (Appl. 75581/13), 4 October 2016 (hereafter *Travaš v. Croatia*). The applicant, who was a layman rather than a priest, had been dismissed under similar arrangements for teaching religious education between the Catholic church and the state in Croatia. The applicant's canonical mandate had been withdrawn when he remarried, having obtained a civil divorce, but without seeking or obtaining an annulment of his first marriage by the religious authorities. Following a similar approach to the *Fernández Martínez* case the Court found that there had been an interference with the applicant's private life but that this had been prescribed by law, for the protection of rights and freedoms of others and necessary in a democratic society.

their own structure, personnel, policy, objectives, and so on.¹⁹ It is here that the possibility of conflict between the individual members of the religion or its workers and the religious organization or community can result in clashes between religious autonomy and other human rights. Both these aspects can be seen at work in the Court's pronouncement in *Hasan and Chaush v Bulgaria*:

religious communities traditionally and universally exist in organised structures . . . Participation in the life of a community is . . . a manifestation of one's religion, protected by Article 9 of the Convention. Where the organisation of religious community is at issue, Article 9 must be interpreted in light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.²⁰

As noted above, religious group autonomy requires that there are clear limits to the freedom of individuals. Within the Convention framework there are (at least) four different routes to that outcome, however. These are based on (respectively): competence *ratione personae*; the right to resign a post or exit from a religious community; the fiction of voluntary surrender of rights; and proportional balancing.

Approaching the question from the point of view of admissibility, the ECHR makes a clear distinction between state institutions (which can be liable for human rights violations) and non-state actors. That distinction can be seen in an admissibility decision of the European Commission in which it declared as manifestly ill-founded a complaint that a prohibition concerning the form of liturgy to be used in the Church of

¹⁹ The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 recognizes this, specifying, for instance, the right to 'train, appoint, elect, or designate by succession appropriate leaders' (Article 6(g)).

²⁰ (2002) 34 EHRR 554, para.62. See similarly *Supreme Holy Council of the Muslim Community v Bulgaria*, App no 39023/97, 16 December 2004, para.73.

Sweden (at that time an established church) violated Article 9.²¹ It follows that if religious communities are to be treated at the Strasbourg level as interfering with human rights it must be in the context of state responsibility or positive obligations, with due attention to the impact on their own autonomy, rather than as defendants in their own right. An example would be *Sindicatul Pastorul Cel Bun v Romania* in which the Grand Chamber (by a majority of 11 to 6) found that the refusal of the authorities to register a trade union for clergy and laity of the Romanian Orthodox Church interfered with Article 11 but was for a legitimate aim (protection of the rights and freedoms of the orthodox church), was prescribed by law and proportionate.²²

Secondly, an individual's freedom to leave a religious organization in the event of a dispute can be fatal to bringing a religious liberty claim against it under the Convention. The European Court's longstanding position invokes the right of exit for dissidents:

In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.²³

For example, in *Williamson v UK* a claim by a Church of England priest that the ordination of women breached his Article 9 rights was held by the European Commission to be manifestly ill-founded since he had the option of leaving the ministry or the church and that nothing had been done, strictly speaking, to punish or coerce him.²⁴ To emphasize the right of exit in this way gives practical effect to the principle of voluntariness as an important basis for religious liberty. The combined effect of these two approaches is to leave little if any opportunity for dissident

²¹ *Hautaniemi v Sweden* (1996) 22 EHRR CD155, arising from the prohibition on use of a form of liturgy in the Finnish Evangelical-Lutheran Church (the parish was Finnish-speaking). But see *Holy Monasteries v. Greece* (1995) 20 EHRR 1 in which a Church body was regarded as 'non-governmental' in nature so as to be able to apply at Strasbourg.

²² *Sindicatul Pastorul Cel Bun v Romania* [2013] ECHR 646 (GC) (9 July 2013) (hereafter . *Sindicatul Pastorul Cel Bun v Romania*).

²³ *Sindicatul Pastorul Cel Bun v Romania* (n 22), para. 137.

²⁴ *Williamson v UK*, App no 27008/9. Furthermore, rights under Art 9 were not absolute and in this instance the Church's legislation was plainly 'prescribed by law' and could be said either to be for the 'protection of the rights and freedoms of others' (namely women within the church) or for the 'protection of morals' (in following its view of Scripture). The church's action was also consistent with the elimination of discrimination under Art 14 of the Convention.

individuals or congregations to use Article 9 of the Convention against church episcopal or denominational authorities in doctrinal, liturgical, or disciplinary disputes. In *Fernández Martínez v. Spain* the application was clearly brought against the Spanish authorities because of their own actions in giving effect to ecclesiastical decisions and so neither of these approaches (*ratione personae* and the right of exit) was applicable.

A third approach addresses specifically the position of servants and employees of religious organizations. In some early decisions the Convention organs tended to remove disputes between ministers of religion and their religious denomination from Article 9, on the basis that the individual in effect surrendered his or her individual rights as a condition of service.

A church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under Art. 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters. . . . [The church's servants'] individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings. In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction.²⁵

Closely similar to (if not a sub-category) of the 'specific situation' rule previously applied in other contexts, this was essentially a 'definitional balancing' approach to clashes of individual and collective religious freedom.

As we have seen, however, the European Court has moved steadily away from a definitional limitation approach, notably in a recent group of church autonomy cases from Germany in which it has resorted instead to *ad hoc* balancing using the proportionality test.²⁶ In *Siebenhaar v Germany*²⁷ the Court confronted this question

²⁵ *X v Denmark* (1976) (1976) 5 DR 157, 158.

²⁶ Leigh 'Balancing Religious Autonomy' (n 10); C. Evans and A. Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights', (2012) 1 *Oxford Journal of Law and Religion* 81-107 (hereafter Evans and Hood 'Religious Autonomy and Labour Law').

²⁷ *Siebenhaar v Germany* (n 10)..

in the case of a worker employed at a nursery run by a Protestant parish who was dismissed because her involvement in teaching catechism classes at the Universal Church/Brotherhood of Humanity was deemed incompatible with her duty of loyalty towards the Protestant Church. The Strasbourg Court found that the German Courts, which had ultimately rejected the applicant's employment law challenge, had correctly balanced her right of religious freedom against the Church's. For the domestic courts to give priority to the Church's rights because the implications of the applicant's behaviour for its credibility and public stance did not breach Article 9(2). A similar approach was taken in two parallel cases involving the dismissal of employees of religious organizations for adultery (which raise the question of conflict between the autonomy of religious organizations on the one hand and the right to private life of the employees concerned).²⁸

Against this background the judgments in *Fernández Martínez* show a high measure of agreement between the majority and minority of the Grand Chamber about most of the relevant attributes of religious autonomy under the Article 9 jurisprudence. Firstly, that autonomy is vital not only to the collective right of the religious organisation but also the freedom of religion of individual members (in the sense that they can choose to belong to a religion with these beliefs and practices).²⁹ Secondly, that the State should defer to how religious communities react (in accordance with their own interests or rights) to dissident movements that might pose a threat to the 'cohesion, image or unity' of the organisation.³⁰ Thirdly, that there is no discretion (or only very exceptionally) for the state to determine whether the means of expressing religious beliefs are legitimate.³¹ Fourthly, autonomy prevents the State requiring religious community to admit or exclude an individual or to entrust them with a religious duty.³²

To these agreed principles the minority add the qualifications that courts considering religious autonomy claims have a role in determining that decisions are 'duly reasoned' and 'not arbitrary' and do not produce effects which are a disproportionate interference, in addition to being for a purpose related to autonomy.³³

²⁸ *Obst v Germany* (n 10) and *Schiith v Germany* (n 10).

²⁹ *Fernández Martínez*, para. 127.

³⁰ *Fernández Martínez*, para. 128.

³¹ *Fernández Martínez*, para. 129.

³² *Fernández Martínez*, para. 129.

³³ Joint Dissenting Opinion, para. 21.

In a separate Dissenting Opinion Judge Sajó went further and argued that it was incumbent on the Church authorities to provide a ‘translation’ of the religious reasons underlying their decision since:

‘Adequate judicial supervision cannot be provided unless religious considerations which affect civil or public law can be made legally cognisable for the benefit of the judicial authority. ... This principle does not call into question the veracity of a Church’s positions, but rather concerns their applicability in civil and public relations.’³⁴

It was accepted on both sides that religious communities are entitled to demand ‘a certain degree of loyalty’ from workers or representatives. This factor is contextual and opens the possibility of differing outcomes under the proportionality analysis, depending on the exact role of the person concerned.³⁵ The ‘voluntary acceptance’ by the applicant of a special duty of loyalty was relevant,³⁶ but as a factor with regard to necessity of interference to protect the rights and freedoms of others, rather than as a definitional factor (as it had been under earlier applications of the specific situation principle to workers in religious organisations).

An important difference emerged, however, in the application of the loyalty principle. The majority of the Grand Chamber rejected the applicant’s argument that his duty had not been breached because he had not contradicted Catholic teaching in his religious education classes, since in their view the church was entitled to also consider his way of life and public statements.³⁷ The majority argued that the Church had been entitled to take account of remarks attributed to the applicant because of the very close proximity between the Church’s proclamatory mission and the applicant’s activity.³⁸ The minority, on the other hand, treated this aspect of religious autonomy as less important because of their emphasis on the fact that the applicant had a dual status and was formally employed by the Ministry of Education. It was the Ministry’s decision rather than the bishop’s that was central to their analysis.³⁹ (As Martínez-Torrón explains in his chapter, the applicant’s contract had not been renewed under

³⁴ Dissenting Opinion of Judge Sajó, para. 5. The impact of the theoretical literature about ‘public reason’ on use of the concept of ‘translation’ is clear (Cf J. Habermas, ‘Religion in the Public Sphere’ (2006) 14 *European Journal of Philosophy* 1; J. Rawls, ‘The Idea of Public Reason Revisited’ (1997) *U Chicago Law Review* 765, 783-4).

³⁵ *Fernández Martínez*, para. 131.

³⁶ *Fernández Martínez*, para. 135.

³⁷ *Fernández Martínez*, para. 138.

³⁸ *Fernández Martínez*, para. 140.

³⁹ E.g. paras. 30 and 35 of the Joint Dissenting Opinion.

the terms of the Agreement between Spain and the Holy See because the Ministry of Education followed the bishop's opinion that he was not suitable.)

The applicant claimed that the fact his salary was paid by the state⁴⁰ should result in greater weight being given to his Article 8 right and that this distinguished the case from earlier decisions on religious autonomy with regard to workers.⁴¹ To an extent the majority of the Grand Chamber accepted this argument, holding that the proper approach to the case was not (as the Chamber had followed)⁴² through the state's positive obligations when acting through its courts, but rather the state's involvement in its guise as an employer in giving effect to the bishop's decision.⁴³ This involvement, the majority accepted, set the case somewhat apart from the earlier German religious autonomy cases since private life and religious autonomy were to be weighed by the *state employer* rather than just solely by the courts. Nonetheless there was a wide margin of appreciation because of the variety of constitutional models governing relations between the State and religious denominations.⁴⁴ The majority found that the domestic courts had taken into account all relevant factors related to the proportionality exercise, although the Constitutional Court had deferred to the ecclesiastical authorities on various matters (cf *Obst* and *Siebenhaar* and contrast *Schüth* and *Lombardi Vallauri* on this point).⁴⁵ The domestic courts had, the majority concluded, weighed the relevant aspects in sufficient detail. They pointed to the doctrine of religious neutrality applied by the Constitutional Court under which Spanish courts were not required to defer if the Bishop had acted for reasons other than strictly religious ones, and that the courts had verified that he had not done so.⁴⁶

In contrast the minority judgment treats the relationship under the Agreement between the Ministry of Education and the bishop as constituting a form of 'delegation' by the Spanish State of the powers to appoint teachers to the Church, for which it nonetheless remained responsible. For the minority it was the Ministry of Education's action in giving effect to the bishop's decision which was critical. The

⁴⁰ Indirectly at that time- see *Fernández Martínez*, para. 85.

⁴¹ *Fernández Martínez*, para. 75.

⁴² *Fernández Martínez v Spain*, Application 56030/ 07, (Third Section, 15 May 2012), paras. 78-79.

⁴³ *Fernández Martínez*, para. 115; and see Joint Dissenting Opinion, para. 12.

⁴⁴ *Fernández Martínez*, para. 130.

⁴⁵ The most important question was whether the existence of 'scandal' was a religious matter over which the Bishop had exclusive jurisdiction or an everyday matter of fact. See 000 below.

⁴⁶ *Fernández Martínez*, paras. 150 and 151.

applicant was to be regarded as having a ‘double status’ – an employee of a public education authority and also owing an obligation to the Catholic church.⁴⁷

[W]hatever the consequences under canon law, it was for the Ministry, and later for the domestic courts, to make sure that the secular reaction to the Bishop’s decision was adapted to the applicant’s situation and in particular that it did not interfere disproportionately with his right to respect for his private and family life⁴⁸

Since the Ministry had simply endorsed the bishop’s decision, the dissenting judges found no evidence that it had taken into account the applicant’s right to respect for private life or the effects of the decision on that right.⁴⁹ Nor had it considered whether there were alternative measures available (such as employing the applicant in a different capacity) or whether there was a less restrictive way in which to give effect to the bishop’s decision other than to dismiss the applicant.⁵⁰ Consequently in the minority’s view it had not been demonstrated that the interference with the applicant’s right to respect for private and family life was proportionate.

Having analysed the respective approaches towards proportional balancing in the Grand Chamber’s decision, I will now discuss the question of whether, after all, a definitional approach would have been better.

Comparing balancing approaches

Commentators commonly claim a number of benefits that follow from using proportionality or *ad hoc* reasoning to resolve conflicts of rights.⁵¹ The technique eschews zero sum solutions: it acknowledges the importance and relevance of both rights while determining which takes priority in a particular factual context and acknowledging that minor factual differences could tip the balance in the other direction. This has particular benefits in relation to disputes involving religion, which

⁴⁷ Joint Dissenting Opinion, para. 30.

⁴⁸ Joint Dissenting Opinion, para. 36.

⁴⁹ Joint Dissenting Opinion, para. 26.

⁵⁰ *Joint Dissenting Opinion*, para. 35.

⁵¹ See the helpful discussion in M. Pearson, *Proportionality, Equality Laws and Religion: Religious Objections to Equality Laws in England, Canada, and the US*, (Routledge, 2016), Chapter 5.

in contemporary society are often portrayed and felt by the adversaries to be part of a continuing ‘Culture War’. In this context proportionality reasoning can help to defuse the aura of excessive symbolism and partisanship that often surrounds what in reality are relatively localised disputes that could be amenable to practical solutions in which neither side need lose excessively. By ‘fractioning’, proportionality can help to move away from a winner takes all mentality in which every legal decision is played out against a larger narrative about secularism or religious exceptionalism. This certainly has some relevance to contemporary Spain where the Culture War fault-lines have fallen over the position of the Catholic Church in public life. However, to use an appropriate metaphor: if human rights litigation was like football not every game would be El Clasico.⁵² As Dominic McGoldrick points out, for religions a proportionality approach allows engagement with other rights and values better than claims to total exemption.⁵³

The fact and context-specific nature of proportionality is often said to be one its strongest features. For example, this allows a court to differentiate according to the precise employment or clerical status of a worker who is removed or disciplined for non-adherence to religious norms. As Javier Martínez-Torrón argues, closer adherence to religious doctrine might be expected from a priest (albeit one in a teaching role) than from a church organist or church nursery worker.⁵⁴ Consequently the weight given to religious autonomy might be greater in *Fernández Martínez* than in *Schiith* or *Siebenhaar*. In a more recent case the Court considered the obligation of loyalty owed by a lay Catholic teacher of religious education in Croatia under similar arrangements to those in Spain.⁵⁵ In the event it found his lay status did not absolve him from the obligation of loyalty but this may have been because there were other factors at work that distinguished his situation from *Fernández Martínez*. These included his failure to seek annulment of his first marriage (which had it been successful would have meant that he would not have been not in breach of Canon law), the genuine attempts of the state authorities to find him an alternative teaching role before dismissing him, and the fact that he had received compensation. Although

⁵² The colloquial name for the much-debated fixtures between Barcelona and Real Madrid.

⁵³ D. McGoldrick, ‘Religion and Legal Spaces: In Gods We Trust; In Churches We Trust, But Need To Verify’ (2012) 12 *Human Rights Law Review* 759-86.

⁵⁴ Evans and Hood ‘Religious Autonomy and Labour Law’ (n 26).

⁵⁵ *Travaš v. Croatia* (n 18).

the outcome was the same as in *Fernández Martínez* therefore the process of reasoning by the Court tends to support the claim that proportional balancing is sufficiently flexible to take account of subtle contextual differences.

For some, however, the *ad hoc* balancing process is overly complex since it involves the court in weighing multiple variables which are unique to each factual situation. It is also argued that proportional balancing is unpredictable and that the uncertainty itself fuels further litigation, whereas a definitional approach to conflicting rights assists predictability. In the light of these criticisms, would a definitional approach have been better in *Fernández Martínez*?

The argument gains some force from the somewhat artificial way in which Article 8 was pleaded in Strasbourg, whereas the facts surrounding the ‘scandal’ arising from the publicity given to the applicant’s circumstances perhaps fitted more naturally within the scope of the right of freedom of expression (Article 10) or of association (Article 11).⁵⁶ Neither did the applicant seek to rely on the right to marry and found a family and so did not present a legal challenge to the Roman Catholic church’s celibacy rule as such.⁵⁷ Rather, his case was fundamentally about public acknowledgement of the applicant’s marital and family status, which precipitated the bishop’s action against him. This invites the question whether the conflict of rights could not have been resolved more straightforwardly by a definitional approach – holding either Article 8 or Article 9 to be inapplicable – without the need for the tortured process of balancing.

In fact, all judges of the Grand Chamber agreed that Article 8 was engaged, though in somewhat different ways. The majority took the view that Article 8 covered the applicant’s right *to choose to make known that he was married*, when read in

⁵⁶ It is possible also to imagine situations in which a comparable religious education teacher might lodge a discrimination claim. As regards Article 18 of the ICCPR, see *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990) in which in a complaint was brought by a former state-employed religious education teacher who alleged that he had been discriminated against because his progressive ideas put him at odds with the ecclesiastical authorities, the Human Rights Committee found that ‘a state may allow the Church authorities to decide who may teach religion and in what manner it should be taught’ (para. 5.7) and that a requirement that he teach Catholicism in its tradition form did not violate Article 19 (freedom of expression), *ibid.*, para. 5.9. It found, however, that the state had failed to protect him from threats that he had received.

⁵⁷ Despite the Dissenting Opinion of Judge Dedov who used the occasion for broader remarks on that topic.

conjunction with other Articles (presumably Article 12 in particular) of the Convention.⁵⁸ They declined to take a definitional balancing approach (one, for example, which limited the applicability of Article 8 in the case of priests), arguing that private and professional life overlapped and that the church itself had made the connection between the two by referring to Christian witness as one of the attributes for the appointment of religious education teachers.⁵⁹

The minority, on the other hand, took a still wider view of the applicability of Article 8. They treated the interference with private life as more concerned with his private and family life at large, rather than turning on a specific right to publicize his status.⁶⁰ It also covered the applicant's membership of the Movement for Optional Celibacy and the right to make that known (which the minority describe as a 'manifestation' of the right to respect for private and family life).⁶¹ The obvious rejoinder is that whereas the text of Article 9 refers to a qualified right to manifest one's religious belief no such words appear in Article 8. The point and the difference may, however, be semantic – the approaches of the majority and the minority could perhaps both be subsumed under the notion of 'respect for private and family life' in any event.

The majority depicted the applicant as 'choosing to accept' publicity (either by deliberately posing for the photograph leading to the publicity or, if it was taken without his consent, by not complaining about it) and associating with a protest-oriented meeting that breached his duty of loyalty to the church.⁶² He had 'knowingly placed himself' in a situation that was incompatible with the Church's precepts,⁶³ all the more so since he must have been aware of the likely effect of the publicity, having regard to the period (6 years) during which he had been allowed to continue to teach under tolerance, notwithstanding his married status. The minority argued, however, that was no evidence that the applicant was responsible for the content of the newspaper article referring to him or for the reported statements of others attending

⁵⁸ *Fernández Martínez*, para. 126.

⁵⁹ *Fernández Martínez*, para. 111.

⁶⁰ Joint Dissenting Opinion, para. 11.

⁶¹ para.10 of the Joint Dissenting Opinion. In his separate dissenting opinion Judge Sajó argues more directly (and perhaps less problematically) that the case involved 'the right to live with one's family without the fear of being dismissed for that reason' (Dissenting Opinion of Judge Sajó, para. 1).

⁶² *Fernández Martínez*, para. 136.

⁶³ *Fernández Martínez*, para. 146.

the same meeting.⁶⁴ They treated the interference with private life as more concerned with his private and family life at large, rather than turning on a specific right to publicize his status.⁶⁵

Although there are undoubted difficulties here about formulating with precision the way in which Article 8 was engaged,⁶⁶ it is nonetheless clear that, just as in earlier cases, the Court has ruled out the argument that it is simply out of place where considerations of religious autonomy apply. The applicability of Article 8 was clearly accepted by the Court in *Obst* and *Schüth* – the two parallel German cases involving the dismissal of employees of religious organizations for adultery, which raise the question of conflict between the autonomy of religious organizations on the one hand and the right to private life of the employees concerned, on the other.⁶⁷ If Article 8 applies to pure church employees it should all the more do so where the state employs a person to carry out a church function, as in the facts of *Fernández-Martínez*.

Equally, to argue that Article 8 should not apply where the cumulative free choices of an applicant concerning his personal life and career have resulted in a situation of conflict, would be to seek to reverse the now longstanding trend of Convention jurisprudence. It is now generally accepted that Article 8 protects a realm of personal autonomy that covers family and sexual relationships⁶⁸ and that this does not draw a boundary at the workplace. For example, when the British armed forces policy of discharging homosexuals and lesbians was before the Court in 1999, no one doubted that Article 8 was engaged, despite the greater sexual freedom available to the applicants in civilian life.⁶⁹ This does not mean of course that respect for private and family life automatically prevails over an employer's legitimate interests if they satisfy Article 8.2.

Moreover to argue that balancing is irrelevant wherever a church function is at stake in litigation would seem to require acceptance of the principle that balancing per se is an

⁶⁴ Joint Dissenting Opinion, para. 33.

⁶⁵ Joint Dissenting Opinion, para. 11.

⁶⁶ These did not apply, however, in the similar case of *Travaš v. Croatia* (n 18), where the applicant remarried notwithstanding his omission to apply for annulment by a religious authority of his first marriage.

⁶⁷ *Obst v Germany* (n 10) and *Schüth v Germany* (n 10); see further chapter 2 above by Stijn Smet.

⁶⁸ A leading text describes this as 'beyond doubt', citing jurisprudence from *Dudgeon v. UK* (1981) 4 EHRR 149 onwards: D. Harris, M.O'Boyle, E. Bates, C. Buckley, *Law of the European Convention on Human Rights* (2nd ed., Oxford, 2009), 370.

⁶⁹ *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548.

interference with religious autonomy, as Javier Martinez-Torrón argues.⁷⁰ This would be equivalent to treating religious autonomy as a jurisdictional bar. There is certainly some US authority that regards the First Amendment in this way⁷¹ and in *Fernández-Martínez* the intervention of some US NGOs,⁷² was seemingly aimed at persuading the European Court of Human Rights to follow suit. The US Supreme Court recently affirmed this approach in applying the so-called ‘ministerial exception’ to constitutional rights in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, stating that:

[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.⁷³

It is submitted, however, that an approach of this kind confers excessive protection for the (legitimate) interests of religious organisations. There is nothing to suggest that this is an essential component of religious autonomy the world over, rather than merely the way in which it takes effect under the US Constitution. To the contrary, there are good reasons to take a different approach under the European Convention. Firstly, unlike the First Amendment, Article 9 is a qualified right and therefore contains within Article 9.2 a procedure for reconciling competing rights according to whether limitations are necessary in a democratic society. Secondly, the ministerial exception in the US is partly an outworking of the First Amendment separation of church and state, under which proportional balancing is suspect because it would to some extent entangle the courts as state institutions in religious affairs. But a strict separation of church and state is not the European model. Instead the Convention

⁷⁰ Chapter 10 above.

⁷¹ Justice Brennan explained this position in *Serbian Eastern Orthodox Diocese v Milivojevich* 426 US 696, 713 (1976): ‘For civil courts to analyse whether the ecclesiastical actions of a church judicatory are in that sense “arbitrary” must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.’

⁷² n 93 below.

⁷³ *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al* 565 U.S. - (2012); 132 S. Ct. 694 (2012).

requires that state institutions, courts included, adopt a certain kind of neutrality towards religion, marked by pluralism but not secularism.⁷⁴

Thirdly a jurisdictional bar would violate the right to a fair trial under Article 6 by denying religious employees a right of access to court. This can be seen from a case bearing some similarity to the present one (*Lombardi Vallauri v Italy*)⁷⁵ in which the European Court of Human Rights found a violation of Articles 10 and 6 of the ECHR arising from the refusal to re-employ a lecturer in legal philosophy at a Catholic university in Milan. The applicant had worked on temporary contracts at the university for in excess of 20 years but in 1998/99 the Faculty of Law decided not to examine his application for an advertised vacancy since he did not have the approval of the Congregation for Catholic Education (one of required conditions of the post). The Congregation for Catholic Education, an institution of the Holy See, had written to the President of the University stating that some of the applicant's views were 'in clear opposition to Catholic doctrine' and that 'in the interests of truth and of the well-being of students and the University' the applicant should no longer teach there. The applicant's attempts to challenge the university's decision in the Italian courts failed, culminating in an unsuccessful appeal to the *Consiglio di Stato*. The *Consiglio di Stato* applied existing doctrine holding that requiring teaching appointments at the Catholic University to be subject to Vatican approval was compatible with the constitutional guarantees of freedom of instruction and freedom of religion.⁷⁶ It stated that 'no authority in the Republic may rule on the findings of the ecclesiastical authority'. By a majority of 6 to 1 the European Court found a breach of Article 6 because the lack of reasons impaired the applicant's effective access to a court. While recognition of religious autonomy could justify the university's refusal to employ someone who in its view did not conform to its religious ethos, this could not extend to a point blank refusal to explain the basis for that conclusion.

⁷⁴ For analysis: I. Leigh, 'The European Court of Human Rights and religious neutrality' in G. D'Costa, M. Evans, T. Modood, and J. Rivers (eds.), *Religion in a Liberal State: A cross-disciplinary conversation*, (Cambridge University Press, 2013), pp. 38-66.

⁷⁵ App no 39128/05. The Court also found a violation of Article 10. Although the interference had been prescribed by Italian law and could be said to have had the legitimate aim of protecting the "rights of others" (namely, the University's interest in basing its teaching on Catholic doctrine), it had not been "necessary in a democratic society" and so breached Article 10. The basis for so holding was that, although it was not for the domestic authorities to examine the substance of the Congregation's doctrinal stance, the administrative courts, in the interests of 'the principle of adversarial debate', should have addressed the lack of reasons for the Faculty Board decision. The Court considered that there was no need to examine separately the applicant's complaints under Articles 9, 13 and 14.

⁷⁶ Judgment of 18 June 2005.

It is submitted that although religious autonomy was undoubtedly a relevant factor, it is difficult to treat *Fernández Martínez* as a pure religious autonomy case, as Javier Martinez-Torrón argues.⁷⁷ The Murcia High Court noted it concerned the ‘borderline between the purely ecclesiastical function and a nascent employment relationship’.⁷⁸ This was not an instance where upholding the applicant's claim would result in requiring an unwilling religious organisation to retain a religious leader that it wished to remove. The validity of the dispensation that removed the applicant from ability to perform ministry within the Church was never in question. In fact, by the time of the Grand Chamber decision he had found other employment and then reached retirement in any event, so there was not even the possibility of reinstatement to the religious education post. More importantly, however, the facts stand apart from earlier religious autonomy cases because he was a *state* employee.

Moreover, to treat the question of ‘scandal’ that lay at the heart of the decision not to renew his contract as a pure Canon law matter, which could under no circumstances be inquired into by a secular court, is equally problematic. It will be recalled that the purported basis for the non-renewal of the contract was the bishop's refusal to allow Mr. Fernández Martínez to continue under the Papal ‘rescript’ because the rescript referred to the absence of scandal. However the bishop had long been aware of the priest's marital status, both at the time of first nominating him for the teaching post and when he had repeatedly reappointed him notwithstanding. Additionally, as the Public Prosecutor noted in argument before the Constitutional Court, the bishop was aware also of the applicant's membership of the Organisation for Optional Celibacy. Since the Church had been able to accept his suitability to teach during this period, notwithstanding the widely-known contradiction between his married status and the Church's teaching on celibacy, this could call into doubt the reason for his dismissal or at least narrow the margin of appreciation allowed to the state to give priority to the religious autonomy argument. The second Joint Dissenting Opinion makes precisely this point.⁷⁹

⁷⁷ As advocated by Javier Martinez-Torrón, above 000.

⁷⁸ *Fernandez Martinez*, para. 29.

⁷⁹ See also the Partly Dissenting Opinion of Judge Saiz Arnuz in the Third Section decision: *Fernández Martínez v Spain*, App no 56030/07, 15 May 2012 (Third Section,), para. 2.

If, on the other hand, the publicity were regarded as the source of the scandal rather than these other factors, it *pre*-dated the rescript which in turn sits uncomfortably with the argument that the bishop was acting under power in Canon Law derived from the rescript.⁸⁰ (The sequence of events is highly suggestive in any event since the rescript was only finally issued - thirteen years after the applicant had petitioned the Vatican - after the publicity given to his status and participation in the meeting of the Organisation for Optional Celibacy.) Nothing in the notion of respect for religious autonomy would suggest that it must extend to retroactivity.

Moreover the first Joint Dissenting Opinion points out that whereas the ‘scandal’ resulting from the wider publicity might be a factor for the church, it is harder to see how it could be relevant to his employer: the Ministry of Education. An analogy could perhaps be drawn here with the Court’s reasoning in *Eweida v UK* with regard to a non-religious ethos employer. Ms Eweida brought her claim to the European Court of Human Rights after her dismissal by her employer (British Airways) for wearing a visible cross around her neck contrary to the company’s uniform policy. A breach of Article 9 was found because, in rejecting her claim for religious discrimination, the national courts had given excessive weight to the employer’s interests bearing in mind that British Airways had tolerated a departure from its uniform policy for an extended earlier period with no evidence that its interests had been adversely affected.⁸¹

All these arguments point against treating religious autonomy claims as automatically conclusory. The Grand Chamber has been quite explicit about that in its *Sindicatul ‘Pastorul Cel Bun’* decision:

In the Court’s opinion, it is the domestic courts’ task to ensure that both freedom of association and the autonomy of religious communities can be observed within such communities in accordance with the applicable law, including the Convention. Where interferences with the right to freedom of association are concerned, it follows from Article 9 of the Convention that religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential

⁸⁰ *Fernández Martínez*, para. 35.

⁸¹ *Eweida v. UK* (n 11), paras. 94-95.

threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.⁸²

By citing *Schüth and Siebenhaar* as authority for this approach, the Grand Chamber has also made clear that it considers it to be of general application to instances in which religious autonomy conflicts with other rights, rather than merely confined to Article 11.⁸³

A related point is that the strength of religious autonomy arguments is variable and it would be implausible to treat them all as of equal weight.⁸⁴ Some activities are more obviously central to the practice of the right of freedom of religion protected under Article 9 than others.⁸⁵ If a church engaged in commercial activities, for example running a coffee shop, this could obviously be inspired by its religious convictions and might be undertaken in a way that distinctively reflected them. But a claim that religious autonomy should provide exemption from general health and safety or food hygiene legislation applicable to such businesses instinctively looks weaker than in the case of an activity specifically referred to in Article 9 ('worship, teaching, practice and observance'). The variable weight of autonomy claims is of course a factor that can be taken account of using a proportionality approach, whereas a definitional approach would require a simple boundary, with some activities included and others excluded from protection.

A Different Approach: Reversibility and Clashing Rights

⁸² *Sindicatul Pastoral Cel Bun v Romania* (n 22), para 159.

⁸³ In *Schüth v Germany* (n 10) and *Siebenhaar v Germany* (n 10), the applicants invoked Articles 8 and 9 respectively.

⁸⁴ In the Grand Chamber the Dissenting Opinion of Judge Sajó explores this aspect, arguing that '[t]he duty of the State to respect autonomy is a matter of degree' (Dissenting Opinion of Judge Sajó, para.2).

⁸⁵ See further Stijn Smet (Ch.2 above), discussing core-periphery criteria. Although not relevant here, there is a clear difficulty in judges purporting to discern between 'core' and 'periphery' where religious doctrine is involved: R Ahdar and I Leigh *Religious Freedom in the Liberal State* (2nd ed., Oxford, 2013), 173-175.

In this section I will elaborate how the reversibility test (mentioned in the Introduction) operates, when it applies and how it compares to other explanations of clashing rights. The section following will then apply it to the conflict of rights in *Fernández- Martínez* in order to demonstrate the insight that the test brings.

It is important, first of all, however, not to conflate reversibility with definitional approaches in general. Some useful definitional approaches that can help resolve apparent clashing rights cases do not depend on reversibility. For example, it may help in determining the scope of a right to keep in mind that the more widely it is interpreted the greater of the probability of an interference with a third party's rights. (An obvious example concerns the interface between privacy and freedom of expression.) Cases like this could of course also be resolved by proportional balancing but in a number of them it will be more straightforward to interpret the first right more narrowly because of the risk of impinging on the second.⁸⁶ While this is certainly an argument in favour of clear differentiation between rights and uses an awareness of the effect of an expansive interpretation on another right, it is not reversibility strictly speaking.

The reversibility test is intended as a tool of analysis in relation to application of 'the rights and freedoms of others' limitations under Arts. 8.2, 9.2, 10.2 and 11.2 of the Convention. As Bomhoff has noted, the Strasbourg approach to these limitations is beset by three recurring weaknesses: a lack of clarity over the kind of rights that qualify, frequent vagueness over which precise right is in question and inconsistency over who can qualify as rights-holders.⁸⁷ The text of the Convention itself is unhelpful since it does not specify what is to count as a 'right' or 'freedom' in these limitation clauses. Responding to these concerns, as noted earlier, the reversibility test requires the Court to ask whether another identifiable victim would have an admissible Convention claim if the state were to 'reverse' the outcome by giving priority to the

⁸⁶ For example see: *Karako v Hungary*, App no. 39311/05, 28 Apr 2009 (holding that Art. 8 only protects a right to reputation in limited circumstances, where there is a direct effect on a person's private life, in order to avoid conflict with Article 10); *Gillberg v Sweden*, App no. 41723/06, 3 April 2012, Grand Chamber (holding that court orders requiring the applicant to make information available did not interfere with his rights under Art 10 because to do so would be inconsistent with third parties' rights to information under Article 10).

⁸⁷ Bomhoff, 'The Rights and Freedoms of Others' (n 7).

less favoured right. If such a victim cannot be identified then the test suggests that no legitimate aim for a restriction exists. It follows that there is no need to consider questions to do with the legal quality or proportionality of the restriction. This is what can be termed the ‘pure reversibility’ argument (I will explain below a more qualified version) and it has several advantages.

Before going further I should clarify, however, that there are numerous instances in which the ECtHR has interpreted ‘the rights and freedoms of others’ more broadly than the reversibility test would allow, to refer to municipal Constitutional or legal rights. My argument is that these instances are largely unreflective and cannot be reconciled with the underlying purpose of the European Convention on Human Rights. Instead, and to give the limitation its best interpretation, it should be confined to Convention rights. As Steven Greer has pointed out, the obligation on member states to secure protection of Convention rights and the deliberate omission of other rights from the Convention both imply that those included should be given priority over Constitutional or other legal rights.⁸⁸

The reversibility test can, I contend, cut through vague discussion of rights-conflict and help to explain why some of the Court’s most controversial decisions in the field of religion are problematic. For example, in *Otto-Preminger Institute v Austria*⁸⁹ the majority of the Court held that the seizure and forfeiture of a satirical anti-religious film in the Tyrol did not contravene Article 10 since its purpose was the protection of the rights of others. In a Joint Dissenting Opinion Judges Palm, Pekannen and Makarczyk argued that a right to protection of religious feelings could not be derived from the right of freedom of religion under Article 9 since it included a right to express views critical of the religious opinions of others.⁹⁰ Similarly, in justifying the prohibition in France on women wearing full-face veils in public spaces under Art. 9. 2, the majority of the Grand Chamber in *SAS v France* referred to ‘the *right* of others to live in a space of socialisation that makes living together easier’.⁹¹ In their Joint Partly Dissenting Opinion Judges Nussberger and Jaderblom countered that that the

⁸⁸ S Greer, *The European Court of Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 266.

⁸⁹ (1994) 19 EHRR 34, paras. 47 ff

⁹⁰ Ibid., para. 6.

⁹¹ [2014] ECHR 695. para. 122 (emphasis added).

majority had failed to show which concrete rights of others could be inferred from the abstract principle of living together.⁹² Once it is recognised that there is no Convention right that the state prohibit anti-religious speech that some people find offensive or to look at the face of a by-passer on the street, the Court's 'conflicting rights' jurisprudence on blasphemy and religious dress lies discredited. If – as the reversibility test demonstrates in these cases – there is no legitimate aim that satisfies the Convention, all discussion of balancing rights by proportionality or within the margin of appreciation is seen to be a distracting irrelevance.

The focus on identifying specific potential claimants (or 'others') is important for two reasons. Firstly, individual petitions under the Convention machinery do not otherwise lend themselves to examining the full complexity of conflicting rights since they reduce a complex situation to a one dimensional claim brought by one side against the state party. It is left to the state itself in effect to put the arguments of the absent affected persons, although occasionally the Court may allow participation of representative groups⁹³ and this can help to fill the lacuna. By focusing on whether a conflicting Convention claim could be brought successfully, the reversibility test helps to concretise what is otherwise a hypothetical point. Secondly, identifying a specific potential applicant helps to accord rights their proper place within the Convention scheme, notably by counteracting a tendency to further expand the list of societal interests that can legitimately be used to limit qualified rights.⁹⁴ One consequence would be to debar actions for the benefit of public authorities (such as public sector employers in employment cases) from being treated under 'rights and freedoms of others', since they are unable to petition the Court to defend their rights.⁹⁵

Reversibility also creates symmetry in the interpretation of the Convention by applying the same principles to limitation of rights as to interferences per se. This

⁹² Ibid., Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom, para. 12. For similar criticism see: E. Daly, 'Fraternalism as a Limitation on Religious Freedom: The Case of *SAS v France*' (2016) 11 *Religion and Human Rights* 140, 144.

⁹³ Article 36.2 of the Convention allows for third party interventions with the permission of the President of the Court. In *Fernandez Martinez* third-party comments were received from the Spanish Episcopal Conference, the European Centre for Law and Justice, and the Chair for Law and Religions of the Université catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center (*Fernandez Martinez*, para. 10).

⁹⁴ In the case of Article 8 these are national security, public safety or the economic well-being of the country, the prevention of disorder or crime and the protection of health or morals.

⁹⁵ Under Article 34 of the Convention an organisation must be non- governmental in order to qualify.

allows Convention jurisprudence to be applied in a coherent, consistent and principled way that should also enhance predictability for applicants. As the Grand Chamber noted in *Sindicatul 'Pastorul Cel Bun'* the outcome in a conflicting rights case should not turn on which of the rights-holders brings the application.⁹⁶ Closely related, by eliminating what Eva Brems calls 'fake conflicts' of rights,⁹⁷ a stricter and more disciplined approach can be taken to limitations, which can then be more easily applied in a structured fashion and with less frequent recourse to the margin of appreciation.

The reversibility approach is also more ordered in that it invites the establishment of clearer boundaries between the scope of different articles of the Convention. Eliminating overlap in this definitional way, rather than by proportional balancing, once again enhances consistency: in principle the scope for different outcomes to the same factual disputes under different provisions is minimized. Conversely applicants and their advisers will have less incentive to devise arguments to artificially squeeze facts within the scope of rights that are more generously interpreted. It is not possible of course to entirely eliminate all overlap because of the complexity of factual analyses of real life, but it is clear looking back that the development of Convention jurisprudence has been adversely affected by the historical reluctance to utilise some articles (notably Article 9 until the 1990s)⁹⁸ while because of a more receptive judicial attitude the jurisprudence of others (especially Articles 8 and 10) have put on what can only be described as a growth spurt. The distinction between unqualified and qualified rights under the Convention means that there is an inherent gravitational pull or tactical incentive for applicants to frame their claims as an interference with unqualified rights wherever possible. Nonetheless where overlap between qualified rights is concerned (in particular Articles 8, 9 and 10) the above reasons for attempting to minimise overlap wherever possible are persuasive.

The reversibility argument is particularly useful in helping to order actions that states have taken in defence of another person's legal interests. Here the argument helps to explain why states should not have a free hand to override *Convention* rights by

⁹⁶ *Sindicatul Pastorul Cel Bun v Romania* (n 22), para. 160.

⁹⁷ Chapter 8 above.

⁹⁸ The first detailed examination by the ECtHR of Article 9 was in *Kokkanakis v. Greece* (1993) 17 EHRR 397.

choosing to grant additional (and in Convention terms, optional) legal rights to others. Where recognition of the supplementary rights is not a Convention requirement, logic suggests that the ‘rights and freedoms of others’ limitation should not be available to the state and that the first person’s Convention rights should prevail in the event of conflict. It might seem odd to conclude that state action taken in defence of another individual can be an impermissible interference with human rights. Nonetheless if the distinction between legal rights in general and fundamental rights is not maintained the overall protection of the Convention system is undermined and states will have greater latitude to interfere with rights in general. In such cases to pose the question whether protection of the ostensibly conflicting right is a Convention *requirement* is a useful corrective. It can help guard against judicial endorsement of vague limitations on rights that otherwise are likely to pass scrutiny under the margin of appreciation granted to states to ‘balance’ between the rights of the parties.

Powerful as the reasons in favour of pure reversibility may be, there are, I concede, some hard cases that the test may struggle with. Firstly, it must be recognised that there are some genuinely complex cases involving clashing rights that cannot be resolved using the test. This is not to say that reversibility arguments are wholly irrelevant to such cases but, rather, to recognize that they may take a more qualified form. Secondly, there fields where the trend of Convention jurisprudence is already well-established and it is no longer realistically open to argue that the scope of one of the rights be narrowed by definitional or categorical reasoning. (I would place Martinez-Torrón’s criticisms of the applicability of Article 8 to voluntary choices about a priest choosing to establish a relationship and found a family in this category.⁹⁹) Thirdly, and relatedly, some intellectual inconsistency has been sown by the generous approach to Article 14 taken by the Court in treating some matters as within the ‘ambit’ of substantive rights for the purpose on non-discrimination even where states have a discretion whether or not to fully recognise the right in question.¹⁰⁰ Where the Court has behaved in this fashion to follow a pure reversibility approach is to risk further inconsistency. Fourthly – and this is in my view is the reason most directly relevant to the *Fernández Martínez* decision – the question may

⁹⁹ 000 above.

¹⁰⁰ See Leigh and Hambler, ‘Religious Symbols’ (n 6), discussing inconsistencies in the Court’s treatment of national recognition of same-sex partnerships and arguing that the reversibility test was not fully satisfied in *Ladele v UK*.

not be one of straightforward clashes of rights between private parties that only concern the balance struck in legislation or by the domestic courts, but may also involve more complex state entanglement.

In all these instances reversibility reasoning is still helpful, but in a more qualified way and at a later point in the inquiry (*qualified reversibility*). Thus, in assessing whether a limitation is necessary in a democratic society under Article 8(2), it is nonetheless relevant to consider whether it is mandatory or merely optional under the Convention for the state to defend the actions and interests of both parties on the facts in question. Following this line of argument, it would then be easier for a state to demonstrate the need for a limitation where qualified reversibility is satisfied. Conversely if protection of the conflicting right is not mandatory then it should weigh less heavily and the margin of appreciation would be correspondingly narrower.¹⁰¹

Having set out the advantages of the reversibility test, the final section will apply it to the treatment of religious autonomy in the *Fernández Martínez* case by way of illustration.

Applying the reversibility test in practice

The treatment by both the minority and the majority of Mr. Fernández Martínez's claim perhaps only serves to obscure a crucial question about state-religion relations that the reversibility test lays bare. It is important to keep in mind two points: 1) that Spain has a Concordat with the Roman Catholic Church which, inter alia, allows for the system of ecclesiastical licensing of religious education teachers and 2) that a constitutional duty of religious neutrality applies to the Spanish state.

As to the first point, there is little doubt on the basis of longstanding Convention jurisprudence that the Concordat is within the range of acceptable constitutional arrangements open to a member state, since there is no Convention blueprint for

¹⁰¹ This distinction was applied by the Grand Chamber in *Chassagnou v France* (1999) 29 EHRR 615 in finding a violation of Art. 11 arising from the requirement in French law that the applicants be members of a hunting association, so as to permit hunting on their land. The argument that this requirement could be justified under Art. 11(2) in order to protect the rights and freedoms of others was rejected: the Grand Chamber found the limitation to be disproportionate since hunting rights were not protected under the Convention. The Court concluded: 'In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right' (para. 113).

religion-state relations.¹⁰² There is no difficulty therefore with the conclusion of the majority of the Grand Chamber that insofar as the non-renewal of the applicant's teaching contract was based on the Agreement between Spain and the Holy See it could potentially satisfy the test of being 'in accordance with law' under Article 8.2.¹⁰³

Nonetheless, in the case of such agreements, as with countries that have an established religion, care needs to be taken that the partnership between state and religion does not interfere with individual rights.¹⁰⁴ On the one hand there is no obligation on the state to conclude a particular type of Concordat but, on the other hand, a member state is bound to observe an individual's human rights. The existence of an arrangement between the state and a favoured religion cannot be allowed to override those rights. As the Joint Dissenting Opinion points out: '[T]his is an option freely chosen by the Spanish State. ... the fact that the Ministry was bound by that decision results from the legal framework set up by the Spanish authorities themselves.'¹⁰⁵ The status of the Concordat weakens the argument that a fully reversible Article 9 right was engaged on the facts: true if Mr. Fernández Martínez had been retained in his post religious autonomy *as understood in Spain* would have been interfered with.¹⁰⁶ However this particular form of arrangement with the Spanish state was not one to which the church was *entitled* under the Convention. No credible Convention claim would have lain from the church authorities, therefore, had domestic law granted them no say in the appointment or dismissal of state religious education teachers. There is a distinction between state interference directly in decisions about the leadership, ordination or teaching within a religious body - something that clearly interferes with religious autonomy as interpreted under Article

¹⁰² See especially *Lautsi v Italy* App no 30814/06, 18 March 2011, .Grand Chamber. In two decisions under Article 14 the Court has held that the preferential tax treatment of the Catholic Church in Spain over that of Protestant churches is justified, referring to the former's responsibilities to provide public access to its monuments and artefacts under a concordat with the state: See *Iglesia Bautista "El Salvador" and Ortega Moratilla v Spain*, 72 D & R 256 (1992); *Alujer Fernandez and Caballero Garcia v Spain*, App. no. 53072/99, 14 June 2001.

¹⁰³ *Fernández Martínez*, paras. 117-120.

¹⁰⁴ Cf *Darby v Sweden* (1991) 13 EHRR 774, para. 45 in which the European Commission of Human Rights found that: 'A State Church system cannot in itself be considered to violate Article 9 of the Convention. ... However, a State Church system must, in order to satisfy Article 9, include specific safeguards for the individual's freedom of religion.'

¹⁰⁵ Joint Dissenting Opinion, para. 8.

¹⁰⁶ Cf Javier Martinez-Torron, 000 above.

9 ¹⁰⁷ - and the question of whether or not state institutions must assist in implementing those decisions. The Church was able to decide that the applicant should no longer perform functions as a priest (as it had under the dispensation and as he himself had requested) but whether religious autonomy under Convention jurisprudence requires more than this is contentious.

The reversibility test also has important implications for the argument advanced by Martinez-Torrón that consideration of the rights of others should have extended to the parental right under Article 2 of the Protocol 1 to have their children educated in accordance with their religious and philosophical convictions. Consideration of their interest in having their children taught Catholic doctrine by a teacher whose behaviour was consistent with the Church's teaching and who had not attracted scandal does undoubtedly appear plausible, bearing in mind the rather imprecise way in which the Court often approaches 'the rights and freedoms of others'. However, as with the weight given to the Concordat, on closer examination I would argue that it would be problematic and for similar reasons. The Convention jurisprudence does not support the underlying proposition that devout parents have a right that their children receive confessional religious education in state schools, even where (as in Spain) participation is voluntary.¹⁰⁸ To the contrary, if anything confessional state religious education has a somewhat suspect status in the Court's eyes, which has referred repeatedly to the requirement that state religious education should be critical, objective and pluralistic.¹⁰⁹ Moreover, one could argue that parental interests under the Protocol are adequately protected by the voluntary nature of religious education classes – a parent unhappy with a particular teacher could simply withdraw their child. Dismissal of the teacher in question is not necessary and would be a disproportionate way of protecting parental interests. The reversibility test helps to demonstrate then that the particular arrangements that apply in Spanish law for

¹⁰⁷ *Serif v Greece* (1999) 31 EHRR 561; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy and Ors v Bulgaria)*, Apps. nos. 412/03 & 35677/04, (22 January 2009).

¹⁰⁸ For more detailed analysis see: I. Leigh, 'Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere', in C. Ungureanu and L. Zucca, (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas*, (Cambridge University Press, 2012), chapter 8.

¹⁰⁹ *Folgerø v Norway* (2008) 46 EHRR 47; *Hasan and Zengin v Turkey* (2008) 46 EHRR 44; *Grzelak v Poland* App. no 7710/02, 15 June 2010.

religious education are not sufficient reason to interfere with the Convention rights of a teacher in the position of Mr. Fernández Martínez.

Finally, and for the sake of clarity, I should perhaps spell out what I am *not* arguing. It is not argued that the connections between the Spanish state and Catholic Church under the Concordat or in respect of religious education are intrinsically in violation of the European Convention of Human Rights. The point is simply that the Convention imposes limits on the reliance that the Spanish authorities can place on those arrangements where a teacher's Convention rights are concerned. Were the arrangements different - if religious education teachers were employed by the Church rather than the state, for example - then no objection could be taken to the dismissal of a teacher like Mr. Fernández Martínez who had contradicted the Church's norms and it would clearly constitute an interference with religious autonomy for a domestic or international court to treat the decision as violating the teacher's rights. A case like that could easily be resolved by using a definitional approach along the lines advocated by Martinez-Torrón. But that was not the situation in *Fernández Martínez* and (like the minority of the Grand Chamber) I agree that it is the entanglement of Church and state in Spain that makes the difference.