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Occupational Requirements of Religious Employers at the European Courts: is the separation of Church and State still effective?

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1 Introduction

The author of this essay intends to analyse and compare the approach of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) towards occupational requirements of religious employers (by this the author means religious communities, churches, etc.) and subject these approaches to a critique.

The first part of the essay will concern the approach of the CJEU. The author will first describe the function of the Directive 2000/78 which deals with the topic of discrimination and the Charter of Fundamental rights of the European Union (the Charter). After that, the author will analyse two key judgements concerning the topic of discrimination based on religion by religious employers that were based on the Directive: *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (the Egenberger judgment) and *IR v JQ*. From this, the author will try to summarise the approach of the CJEU towards the occupational requirements of religious employers.

The second part of the essay will concern the approach of the ECtHR. The author will describe the function of the European Convention of Human Rights (the Convention) whose Articles ensuring several human rights have been invoked before the ECtHR in cases of occupational requirements of religious employers. After that, the author will analyse numerous judgements of the ECtHR concerning this topic that were based on several Articles of the Convention. From this, the author will try to summarise the approach of the ECtHR towards the occupational requirements of religious employers.

The third part of the essay will be a comparative part where the author will describe the relationship between the two European Courts and how their approach towards occupational requirements of religious employers either differs or is similar. She will also subject these approaches to a critique.

The fourth part of the essay will be the conclusion where the author will summarise her findings.

2 The CJEU approach towards religious employers

The approach of the CJEU has been recently criticised due to its reasoning in the *Egenberger* judgement. To understand why this judgement was subject to critique it is important to explain on what the judgement is based and how the CJEU might have reached its conclusion. That is why the author will first focus on the Directive 2000/78 dealing with discrimination and the Charter. After that, the author will analyse the *Egenberger* judgement itself. Then she will analyse the *IR v JQ* judgement which came a few months later and followed the reasoning in *Egenberger*. At the end of this section, the author will summarise the approach of the CJEU towards occupational requirements of religious employers.

2.1 The Charter and the Directive 2000/78

The Charter is a catalogue of human rights that all the citizens of the European Union enjoy. For the purpose of this essay it is important to note Article 21.[1] This Article served as a basis for the *Egenberger* judgement since, according to the CJEU, it lays down one of the general principles of EU law, which is the prohibition of all discrimination on grounds of religion or belief. It also has a horizontal direct effect[2] and therefore can be invoked in disputes between private parties before national courts.

The purpose of the Directive 2000/78 was to lay down a general framework for equal treatment in employment and occupation.[3] According to its Preamble "*discrimination based on religion or belief* (…) *may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons*".[4] Thus, to ensure that this undermining does not take place, the Directive lays down rules on how to identify discrimination and sets a framework for the states on how to combat it.

The Directive distinguishes between direct and indirect discrimination. According to its wording, direct discrimination takes place when "*one person is treated less favourably*

[1] Charter of Fundamental Rights of the European Union, OJL C 364/1, 18. 12. 2000, Article 21

[2] CoJ, 17 April 2018, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, no. C-414/16, ECLI:EU:C:2018:257, par. 76

[3] Directive 2000/78, Article 1

[4] Directive 2000/78, paragraph 11 of the Preamble

than another is, has been or would be treated in a comparable situation",[5] in the case of the topic at hand, on the grounds of religion. Indirect discrimination is described as when "*an apparently neutral provision, criterion or practice would put persons having a particular religion or belief* (…) *at a particular disadvantage compared with other persons*".[6] As to the topic at hand, the action of the religious employer where they either do not hire somebody based on their religion or belief (the *Egenberger* judgment) or when they fire somebody because their behaviour is not in conformity with their belief (*IR v JQ* judgement) might constitute direct discrimination since the employees or potential employees are treated less favourably then they would have been if they subscribed to the same religion or behaviour as their religious employer.

However, Article 4 of the Directive affords religious employers a certain leeway. If a religious employer sets down an occupational requirement which states that the employee or a potential employee has to subscribe to a certain belief or faith then this requirement won't be considered as discriminatory if it is genuine, legitimate and justified, having regard to the ethos of the religious employer. This was at the heart of the issue of the *Egenberger* and *IR v JQ* judgements: when is this occupational requirement genuine, legitimate and justified and how much can the state actually determine this with regard to the autonomy of religious organisations?

2.2 The *Egenberger* judgement

2.2.1. The facts

The judgement concerned a German citizen Vera Egenberger who had applied for a job offered by Evangelisches Werk. The job was preparing a country report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. One of the prerequisites for the job was that the candidate had to be a member of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and had to identify with the diaconal mission. Ms Egenberger made it to the shortlist of candidates, but she was not invited for an interview.

Ms Egenberger then proceeded to bring an action against the Evangelisches Werk because she held the opinion that her application had been rejected because she was of

[5] Directive 2000/78, Article 2, paragraph 2(a)
[6] Directive 2000/78, Article 2, paragraph 2(b)

no denomination. She argued that the condition of having to belong to a church in order to be considered for a job was not compatible with the prohibition of discrimination in the General Law on equal treatment (AGG) if interpreted in accordance with EU law.

Evangelisches Werk argued that the church enjoys a right of self-determination and that this right is consistent with the law of the European Union more specifically with Article 17 of the Treaty on the Functioning of the European Union.[7]

The case made its way to the Federal Labour Court of Germany which then referred the case to the CJEU. The Federal Labour Court of Germany posed three questions concerning the interpretation of Article 4(2) of Directive.

First, whether according to the Directive 2000/78 "*a church or other organisation whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation.*"

Second, "*whether a national court is required, in a dispute between individuals, to disapply a provision of national law which it is not possible to interpret in conformity with Article 4(2) of Directive 2000/78*".

Third, "*what the criteria should be for ascertaining in the particular case whether, having regard to the ethos of the church or organisation in question, religion or belief constitutes, in view of the nature of the activity concerned or the context in which it is carried out, a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78.*"[8]

2.2.2. The reasoning of the CJEU

As to the first question, the CJEU stated that if it was up to the religious organisation itself to determine whether its occupational requirement is genuine, legitimate and justified then the review of this requirement would be deprived of effect. Thus, the review should be conducted by an independent authority such as a national court. According to the CJEU objective of Article 4(2) of the Directive is to balance the right of religious organisations

[7] Article 17 (1) TEU: The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
[8] CoJ, 17 April 2018, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, no. C-414/16, ECLI:EU:C:2018:257, par. 24 - 41

to autonomy on the one hand and the right of workers not to be subject to discrimination based on religion or belief on the other hand. To ensure the balance a balancing exercise must be performed. This balancing exercise needs to be, according to the CJEU, subject to effective judicial review. Therefore, if a religious organisation makes a job offer conditional on the membership in a certain church the national courts may review this occupational requirement to ascertain whether it is genuine, legitimate and justified.[9]

As to the third question, the CJEU focused on the balancing exercise set down in the Directive 2000/78 and how it should be conducted by the national courts. The CJEU first emphasized that the court conducting the judicial review should "*refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate*" by recalling the ECtHR case *Fernández Martínez v. Spain*. However, the reviewing court has to make sure that the employee's right not to be discriminated against was not infringed by the occupational requirement. Thus, when the court is conducting the review, it has to assess the occupational requirement from the point of view of the religious employer. [10]

According to the Directive 2000/78 the occupational requirement has to be genuine, legitimate and justified. But how should we interpret these criteria? The CJEU provided an answer through a teleological analysis. The "genuine" nature of the requirement means that the belief of the worker is necessary due to the importance of the occupational activity for the manifestation of the religious employer's ethos or the exercise of his right to autonomy. The "legitimate" nature of the requirement means that the occupational requirement is not misused for an aim that has no connection to the ethos of the religious employer of his right to autonomy. The "justified" nature of the requirement means that a national court may review the occupational requirement in question and that the religious employer has to prove that without this occupational requirement the manifestation of his ethos and his right to autonomy would be at a probable and substantial risk. Basically, the religious employer has to prove that without the occupational requirement his ethos and his right to autonomy would be harmed.

The CJEU concluded that the occupational requirement has to be proportionate. Thus, the national court reviewing the case has to decide whether the occupational requirement is appropriate and does "*not go beyond what is necessary for attaining the objective*

[9] ibidem, par. 42-59
[10] ibidem, par. 61

pursued". The objective being the protection of the religious employer's ethos or his right to autonomy.[11]

As to the second question, this was focused on the disapplication of national law in a case where this national law is not in conformity with EU law. Since it is not the focus of this paper the author will not analyse the CJEU's findings concerning the second question any further.

The approach of the CJEU has been criticised. The main reason being that it limits the ability of religious organisations to choose their workers and therefore the autonomy of religious organisations. The issue with the *Egenberger* judgement was that the German law which transposed the Directive 2000/78 went further than the directive itself. The German law left the consideration if the occupational requirement is justified to the religious organisations themselves in view of their right to self-determination. Also, based on the case-law of the Federal Constitutional Court in Germany, the judicial review of the occupational requirements under German law is limited to a plausibility review.[12] The approach of the German Constitutional Court was explained in the judgement in this way: *"[E]ven if a church's self-perception meant that all posts were to be filled by reference to religious affiliation, whatever the nature of the posts, that would have to be accepted without more extensive judicial review*."[13] Aurelia Colombi Ciacchiin suggests that *"the Directive sets an objective limit to the justification of a difference in treatment based on religion or belief*" (…) "*the perspective is that of an independent observer*." The approach of the CJEU requires quite a detailed judicial review of the decisions of the religious employer. The German law, however "*adopts a subjective perspective*" (…) "*a religious organisation itself may to a large extent authoritatively determine whether a difference in treatment based on religion or belief made by an entity affiliated with that organisation is justified*."[14] These two very different approaches are the reason why now an academic discussion is being held about the possibility that the German Constitutional Court will find the ruling of the CJEU in the *Egenberger* case *ultra vires*.[15]

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[11] ibidem, par. 62 - 69
[12] M. STANFIELD, „Bonfire of religious liberties", *The Cambridge Law Journal*, 2019, p. 28
[13] CoJ, 17 April 2018, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, no. C-414/16, ECLI:EU:C:2018:257, par. 31.
[14] A. C. CIACCHI, „The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ", *European Constitutional Law Review*, 2019, p. 297
[15] VAN DEN BRINK, M., Is Egenberger next?, *VerfBlog*, 2020 and HEINIG, H. M., Why Egenberger Could Be Next, *VerfBlog*, 2020.

2.3 The *IR v JQ* judgement

2.3.1. The facts

The judgement again concerned a German citizen JQ who was an employee of a non-profit organisation IR, set up under the Catholic church, which, among other things, operates hospitals. JQ was of the Roman Catholic faith and worked as a Head of the Internal Medicine Department of an IR hospital under an employment contract based on Canon law. JQ got divorced and later remarried without having his first marriage annulled. Because JQ has gotten remarried he was dismissed by IR since according to them, JQ breached his employment contract under Canon law.

JQ brought an action against his dismissal and claimed that if he was of Protestant faith or no faith at all he would not have been dismissed. This, according to him, constituted an infringement of the principle of equal treatment. IR argued that by getting remarried JQ infringed his obligations under his employment contract.[16]

The case made its way to the Federal Constitutional Court of Germany and it referred the case to the CJEU for a preliminary ruling. In its first question, the Federal Constitutional Court of Germany asked whether "*the second subparagraph of Article 4(2) of [Directive 2000/78] is to be interpreted as meaning that the [Catholic] Church can decide with binding effect that an organisation such as the defendant in the present proceedings is to differentiate, in connection with the requirement that employees in managerial positions act in good faith and with loyalty, between employees who belong to the same church and those who belong to another faith or to none at all?*"[17]

2.4 The reasoning of the CJEU

The CJEU relied heavily on its reasoning in the *Egenberger* judgement and stated that when a religious employer "*claims, in support of a decision to dismiss one of its employees, that the latter failed to act in good faith and with loyalty to the ethos of that organisation, within the meaning of the second subparagraph of Article 4(2) of the directive*", then this must be subject to an effective judicial review. The occupational requirement should be genuine, legitimate and justified and consistent with the principle of proportionality, "*which means that the national courts must ascertain whether the requirement in question*

[16] CoJ, 11 September 2018, IR vJQ, no. C-68/17, ECLI:EU:C:2018:696, par. 23 - 36
[17] ibidem, par. 37

is appropriate and does not go beyond what is necessary for attaining the objective pursued".[18]

When analysing if the occupational requirement was justified the CJEU found that it did not appear from the facts of the case that adherence to the sacred and indissoluble nature of religious marriage was necessary for the promotion of IR's ethos since JQ provided medical advice and care in a hospital and managed one of the departments in the hospital as its head.[19] Therefore the occupational requirement did not appear genuine which had been corroborated by the fact that, according to IR, similar positions as the one occupied by JQ were entrusted to other employees of IR who were not of the catholic faith and therefore did not have to fulfil the same requirement as JQ – acting in good faith and with loyalty to IR's ethos.[20]

2.5 Summary

How can the approach of the CJEU be summarised? As to the autonomy of religious employers, the national courts shouldn't consider the ethos of the organisation itself. National courts should look at individual cases from the point of view of the religious employer and consider whether these requirements are satisfied under this view. The national courts have to perform a balancing exercise when they are conducting a review of an occupational requirement set down by a religious employer which creates a conflict between the right of the religious employer to self-determination and the right of a worker to equal treatment. The balancing exercise consists of assessing if the occupational requirement meets the following criteria: the belief of the worker is necessary due to the importance of the occupational activity for the manifestation of the religious employer's ethos or the exercise of his right to autonomy (genuineness), the occupational requirement is not misused for an aim that has no connection the ethos of the religious employer of his right to autonomy (legitimacy), a national court may review the occupational requirement in question and the religious employer has to prove that without this occupational requirement the manifestation of his ethos and his right to autonomy would be at a probable and a substantial risk (justification) and the

[18] ibidem, par. 54
[19] ibidem, par. 58
[20] ibidem, par. 59

occupational requirement does not go beyond what is necessary for attaining the religious employer's right to autonomy and to manifest his ethos (proportionality).

3 The approach of the ECtHR

The approach of the ECtHR stems from Article 9 of the Convention which ensures freedom of thought, conscience and religion. This Article encompasses the right of religious organisations to autonomy as has been stated by the ECtHR in various cases.[21] The ECtHR even stated that it is "*at the very heart of the protection which Article 9 of the Convention affords*".[22] However, in certain cases, freedom of religion might be limited and with it the right of religious organisations to autonomy. The limitation must be legal, follow one of the legitimate aims (public safety, protection of public order, health or morals, protection of the rights and freedoms of others) and be necessary in a democratic society.[23]

The case-law of the ECtHR includes numerous judgements concerning religious employers exercising their rights under Article 9 of the Convention which clashed with the rights of other parties (their current or former employees) protected under the Convention, namely the right to a fair trial under Article 6, the right to respect for private and family life under Article 8, the prohibition of discrimination under Article 14, freedom of expression under Article 10, freedom of assembly and association under Article 11 but also with the freedom of religion of another party. In the following text, the author will describe these judgements in order to summarise the approach of the ECtHR towards occupational requirements of religious employers.

3.1 The *Lombardi Vallauri v. Italy* judgement

The case at hand concerned an Italian national who taught legal philosophy at the Faculty of Law of the Catholic University of the Sacred Heart in Milan. His employment contract was renewed once a year. Every year there was a competition for the post of the applicant to which he always applied. One year the Congregation for Catholic Education informed the President of the University 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*". Following this statement, the applicant's application for the teaching post was not examined.

[21] Sindicatul Pastorul Cel Bun v. Romania, par. 136, Fernández Martínez v. Spain, par. 127 and others
[22] ECtHR, 12 June 2014, Fernández Martínez v. Spain, no. 56030/07, par. 127
[23] European Convention on Human Rights, Article 9, par. 2

After the applicant did not succeed in the proceedings on the national level, he brought his case to the ECtHR claiming that his rights under Articles 6, 9, 10, 13 and 14 have been violated. He mainly relied on Articles 10 and 6 claiming that he had been given no reasons for the decision of the university not to examine his application and that the domestic courts failed to rule on the lack of reasoning of the decision which restricted his ability to appeal against that decision and to instigate an adversarial debate.[24]

The ECtHR held that there had been a violation of Articles 6 and 10 of the Convention. It stated that the university did not sufficiently explain its decision and that even though domestic authorities shouldn't 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 applicant had procedural guarantees afforded to him by Article 10 and these could not be impaired by the religious employer. [25]

3.2 The *Obst v. Germany and Schüth v. Germany* judgements

The reason for joining these two judgements together is the fact that they were given on the same day and were very similar as to the facts. Both cases concerned the dismissal of employees of religious employers due to adultery.

In *Obst v. Germany,* the applicant was the European director of the Public Relations Department of the Mormon Church. When he committed adultery, he was dismissed without notice since adultery was one of the breaches named in his employment contract. The applicant brought his case to the ECtHR complaining about a violation of Articles 8 and 9.[26] The ECtHR stated that as to the positive obligations under Article 8, the states enjoyed a wide margin of appreciation since there was no European consensus. It also stated that its role is to ascertain whether or not the national courts balanced the applicants right to private life with the religious employer's freedom of religion and freedom of association.[27] It found that since the applicant grew up within the Mormon Church he was or should have been aware that marital fidelity is important to his employer and that adultery is incompatible with the "*heightened duties of loyalty that he*

[24] Case of *Lombardi Vallauri v. Italy*, ECtHR Registry, Press release, 20. 10. 2009, p. 2
[25] ibidem, p. 3
[26] Council of Europe, „Overview of the Court's case-law on freedom of religion", available at https://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf (last accessed at 19 June 2020), p. 9.
[27] ECtHR, 23 September 2010, Obst v. Germany, no. 425/03, par. 40-45

had contracted towards the Mormon Church".[28] According to the ECtHR it had been adequately established by the national courts that "*the duties of loyalty imposed on the applicant were acceptable in that their aim was to maintain the credibility of the Mormon Church*". This did not mean that a dismissal based on adultery would be acceptable in every case but since the Mormon Church clearly established that adultery constituted a serious breach and since the applicant had a significant position within the Church it was acceptable in this case.[29] The ECtHR found no violation.[30]

In *Schüth v. Germany,* the applicant was an organist and choirmaster at a Catholic church and when he committed adultery he was dismissed with notice.[31] The applicant then complained at the ECtHR under Article 8 of the Convention. In its judgement, the ECtHR relied on its reasoning in *Obst v. Germany* but reached a different conclusion and found a violation of Article 8. This was due to the fact that unlike in the case of the applicant in the *Obst* case, the applicant in this case was an organist and a choirmaster and therefore did not have a such a close connection to the proclamatory mission of the religious employer. According to the ECtHR, the national court failed to examine the question of this connection and therefore the state failed in fulfilling its positive obligations under Article 8.[32] A passage to note in this judgement is in paragraph 69 where the ECtHR stated that under the Convention religious employers might impose special duties of loyalty on their employee. However, their decision to dismiss an employee based on the breach of this loyalty must be subjected to judicial scrutiny. The national courts have to consider the nature of the position of the employee and have to balance the interests involved (right to private life against freedom of religion and freedom of association) in accordance with the principle of proportionality.[33]

3.3 The *Siebenhaar v. Germany* judgement

The *Siebenhaar* case concerned a teacher who worked at a day-care centre run by the Protestant Church. She was also a member of a community called the Universal Church and taught primary lessons there. When the protestant church learned this information, the applicant was dismissed. In Germany, the Protestant Church required loyalty from

[28] ibidem, par. 50
[29] ibidem, par. 51
[30] ibidem
[31] Council of Europe, „Overview of the Court's case-law on freedom of religion", p. 12
[32] ECtHR 23 September 2010, Schüth v. Germany, no. 1620/03, par. 66 - 68
[33] ibidem, par. 69

their employees which meant that they should act in a way that complies with the church's principles. The applicant brought her case to the ECtHR and complained that her rights under Article 9 in conjunction with Article 14 have been violated.

In the judgement, the ECtHR examined whether the rights of the applicant and the rights of the religious employer were properly balanced. The ECtHR noted that the national courts found that it was clear from the employment contract that the applicant couldn't belong to or participate in an organisation whose objectives were in contradiction with the ethos of the Protestant Church. The applicant therefore couldn't guarantee respect for the ideals of her employer. The national courts also remarked that the applicant did not just belong to the Universal Church but also taught classes concerning the Universal Church. Since the applicant taught at a day-care centre as well there was a risk that she could influence the children there which could impair the credibility of the Protestant Church in the eyes of the public and the parents. Due to this reasoning of the national courts, the ECtHR found that they properly balanced the competing interests of the applicant and the religious employer.

The ECtHR also added that the applicant had to have been aware of the fact when signing the employment contract that her membership and activities in the Universal Church would be incompatible with her involvement in the Protestant Church.[34]

3.4 The *Sindicadul Păstorul Cel Bun v. Romania* judgement

The *Sindicadul Păstorul Cel Bun v. Romania* case concerned Orthodox priests who formed a trade union and the State authorities, based on the appeal of the Church, refused to register said union. The reasons were that this was prohibited by the Statute of the Romanian Orthodox Church and the Church had structural and functional autonomy. The applicants complained at the ECtHR that their rights under Article 11 of the Convention have been violated.[35]

In a Chamber judgement, the ECtHR found a violation of Article 11, however, the case was then referred to the Grand Chamber (GC). The GC stated that it is not enough for the religious organisation to claim that the collective activities of its employees might

[34] CHAIB, S. O., "Freedom of religion in conflict: Siebenhaar v. Germany", Strasbourg Observers, 2011, available at: https://strasbourgobservers.com/2011/03/04/freedom-of-religion-in-conflict-siebenhaar-v-germany/ (last accessed 19 June 2020).

[35] Council of Europe, „Overview of the Court's case-law on freedom of religion", p. 13

endanger its autonomy. It must show that this alleged endangerment is real and substantial and that the interference with Article 11 is proportionate and doesn't have any other purpose which would unrelated to the autonomy of the religious organisation. Thus, the national courts have to make sure that these conditions are met by deeply examining the circumstances of the case and by conducting a balancing exercise of the competing interests.[36]

The Romanian Orthodox Church argued that if a trade union would be established this would likely result in a disruption of its traditional hierarchical structure. The GC noted that the State's role is to be a "*neutral and impartial organiser of the practice of religions, faiths and beliefs*"[37] and that it "*should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity*".[38] Thus, it is not the role of the national authorities to act as "*the arbiter between religious communities and the various dissident factions that exist or may emerge within them*".[39] The GC agreed with the national courts that by refusing to register the trade union of the applicants, the State was just fulfilling its role of a neutral and impartial organiser of the practice of religions.[40] Since the national courts thoroughly examined the case and conducted a balancing exercise the GC did not find a violation of Article 11 of the Convention.[41]

3.5 The *Fernández Martínez v. Spain* judgement

The *Fernández Martínez v. Spain* case concerned a teacher of Catholic religion and ethics in a State secondary school whose employment contract was not renewed because a Spanish newspaper published a story about a Movement for Optional Celibacy of priests in which he was mentioned as a married priest and the article contained his photograph as well as his opinions concerning abortion, birth control and the optional celibacy of priests, which were contrary to the doctrine of the Catholic Church. [42] After the national

[36] ECtHR 9 July 2013, Sindicatul Pastorul Cel Bun v. Romania, no. 2330/09, par. 159
[37] ibidem, par. 165
[38] ibidem.
[39] ibidem.
[40] ibidem, par. 166
[41] ibidem, par. 169 - 173
[42] ECtHR 12 June 2014, Fernández Martínez v. Spain, no. 56030/07, par. 12-20

proceedings, he brought his case to the ECtHR claiming that his rights under Article 8 and Article 14 have been violated.

The Chamber of the ECtHR found no violation, but the case was then referred to the GC. The GC first noted that the States have a wide margin of appreciation when the balancing exercise concerns, on one hand, the right of an individual to private life and on the other the right of religious organisations to autonomy.[43] The GC then stated that the fact that "*in order to remain credible, religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers. For this reason, the sole fact that there is no evidence to suggest that the applicant, in his class, taught anything incompatible with the Catholic Church's doctrine does not suffice for it to be concluded that he fulfilled his heightened duty of loyalty*". [44] According to the GC, the applicant was voluntarily a member of the Catholic Church and therefore accepted and must have been aware of a heightened duty of loyalty that religious employers may impose on their employees. Since the applicant publicly took part in movements that criticised the doctrine of the Catholic Church, he acted contrary to his duty towards his religious employer.[45] The GC also took into account the fact that the applicant taught adolescents "*who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion*".[46]

The GC also focused on the severity of the sanction towards the applicant. Citing his previous findings in *Schüth* it noted the importance of the fact that an employee who has been dismissed by an ecclesiastical employer might have a harder time finding another job. The especially applies in cases where the employer has a dominant position in a certain sector and can derogate from the ordinary law "*or where the dismissed employee has specific qualifications that make it difficult, if not impossible, to find a new job outside the employing Church, as was the case for the present applicant*".[47] The GC first noted that the applicant would receive an unemployment benefit but what was more important is that the applicant knowingly placed himself in a situation which would result in breaching

[43] ibidem, par. 123.
[44] ibidem, par. 138
[45] ibidem, par. 141
[46] ibidem, par. 142
[47] ibidem, par. 144

his duty of loyalty and therefore might have consequences for his employment contract. The GC also found that a less severe sanction would not be effective to maintain the credibility of the Church.[48]

3.6 Summary

When deciding on the fact whether an occupational requirement constituted a violation of the rights of a certain applicant the ECtHR looks at the issue from various angles. It is first important to note that, due to the lack of European consensus on these issues, the ECtHR affords the states a wide margin of appreciation when it comes to disputes between religious organisations and their current or former employees. This results in the ECtHR not subjecting the decision-making of national authorities to such strict scrutiny as it would when the margin of appreciation would be narrow.

The cases on the occupational requirements of the religious employers are centred around the necessity of the interference with the rights of a certain employee. The ECtHR balances the right of religious organisations to autonomy with the rights of their employees.

To do this the ECtHR first sets down the scope of the autonomy. According to its case-law, the State should let the religious communities deal on their own and according to their rules with opposing movements within them if these opposing movements present a threat to their cohesion, image or unity. The State should also not decide upon the fact of whether or not a certain religious belief or the way it is expressed is legitimate. The role of the state should be neutral.

The duty of loyalty also plays a role in the reasoning of the ECtHR. Religious employers may demand a certain degree of loyalty from their employees, but this demand has to be subjected to judicial scrutiny. The duty of loyalty is acceptable when its aim is to maintain the credibility of the religious employer. However, the post which a certain employee occupies plays a role. This could be seen in the *Obst* and *Schüth* judgements who both had different outcomes due to the fact that the *Obst* case concerned a European director of the Public Relations Department and the *Schüth* case an organist and a choirmaster who had much less influence on the image of his Church. The ECtHR also considers whether or not the applicant was aware of this duty of loyalty which can be

[48] ibidem, par. 146

demonstrated by different ways such as a clause in a contract or the official stance of the religious employer towards certain issues.

Another aspect the ECtHR considers is when the employee of the religious employer has a job which consists of working with children. The ECtHR then examines whether the employee and his/hers conduct could negatively influence the children in light of the ethos of the religious employer and whether the children are able to distinguish between the opinions of the employee and the religious employer.

An important aspect on which the outcome of the case before the ECtHR relies on the most is whether the religious employer was able to demonstrate that there is an actual or potential threat to its autonomy and that this threat is probable and substantial and that there is no other way to avert that threat then to interfere with the rights of its employee. The role of the national courts is to make sure that these requirements are met. They must do this by examining in-depth the individual circumstances of the case and conduct a thorough balancing exercise between the rights of the religious employer and its employee.[49]

[49] ibidem, par. 132

4 The CJEU's and the ECtHR's approaches compared

4.1 The relationship between the CJEU and the ECtHR

The first question concerning the comparison of approaches of these two courts is why should we compare these approaches? The answer lies in the relationship between these two European Courts which is a topic that has been subject to a never-ending discussion.

According to paragraph 3 of Article 6 of the TEU the EU should accede to the Convention and according to paragraph 4 fundamental rights, as guaranteed by the Convention, constitute general principles of EU law. To this day the EU has not acceded to the Convention. The CJEU issued an *Opinion 2/13* in which it found that the accession of the EU to the Convention would be destructive for the specific characteristics of EU law and its autonomy.[50] CJEU was concerned by the fact that the accession agreement did not include a provision which would afford EU the power to lay down higher standards for the protection of fundamental rights than which are guaranteed by the Convention.[51] It also found that the accession would endanger the principle of mutual trust between the Member States of the EU, thus undermining the autonomy of EU law because the Member States would be required to check that another Member State has observed fundamental rights.[52] The third issue lied in the fact that, under Protocol 16 to the Convention, the highest national courts can request an advisory opinion from the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto. Under EU law these courts are required to submit that same request to the CJEU for a preliminary ruling under Article 267 of the TFEU. According to the CJEU, this could also affect the autonomy and effectiveness of EU law since the highest national courts could circumvent the preliminary ruling procedure in favour of the request for an advisory opinion of the ECtHR.[53] Ever since CJEU issued this opinion the accession of the EU to the Convention has been put on hold and there have been no developments.

However, even though the EU has not acceded to the Convention, the CJEU draws inspiration from the Convention. This has been established by the CJEU's case-law

[50] CoJ 18 December 2014, *Opinion 2/13*, ECLI:EU:C:2014:2454, par. 200
[51] ibidem, par. 189-190
[52] ibidem, par. 194
[53] ibidem, par. 196-199

concerning human rights issues such as *Hauer or Hoechst* judgements[54] but later also by paragraph 3 of Article 6 of the TEU which states that fundamental rights as guaranteed by the Convention form general principles of EU law. The CJEU also draws inspiration from the case-law of the ECtHR[55] as it mentions for example in the *Roquette Frères SA* judgement: "*[f]or the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights*".[56]

From the point of view of the ECtHR, it is important to note the *Bosphorus* judgement. There the ECtHR set down the foundations of the relationship between it and the EU. It found that the EU offers equivalent protection to fundamental rights as the Convention, however, this assumption has to be regularly reviewed due to changes in fundamental rights protection.[57]

On the other hand, the CJEU holds the opinion that EU law guarantees a higher level of protection of fundamental rights then the Convention and the outcome of the cases which are similar to the cases decided by the ECtHR may not always be the same when they are decided by the CJEU. The newest development in this area is the opinion of the Advocate General Pikamäe (the AG) in the case of the accommodation of asylum seekers in the Röszke transit zone at the Hungarian-Serbian border. In his opinion, the AG notes that in the of case *Ilias and Ahmed v. Hungary* the ECtHR found no violation of the right to liberty and security but that the CJEU has the power to interpret the provisions of the Charter independently in a way that results in a higher level of protection than which is guaranteed by the Convention.[58]

When it comes to occupational requirements of religious employers does the CJEU afford a higher level of protection? And if the answer is yes, then to who? The answer can be found by looking at the approaches of both European courts and comparing them.

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[54] GORDILLO, L., *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law*, Hart Publishing, Oxford, 2012 p. 81
[55] ibidem, p. 83
[56] CoJ, 22 October 2002, *Roquette Frères SA*, no. C-94/00, ECLI:EU:C:2002:603, par. 29
[57] JOHANSEN, S. EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia. *EU Law Analysis*, 2016.
[58] Advocate General's Opinion in Joined Cases C-924/19 PPU and C-925/19 PPU, CJEU, Press Release No 50/20, 23 April 2020, p. 2

4.2 The comparison

It must be noted that as can be deduced from the case-law mentioned above, the ECtHR has never dealt with a potential employee. All of the cases concerned already established employment relationships between religious employers and the applicants. Also, regard must be had to the different roles of the ECtHR and the CJEU and at what stage they receive their cases. However, the basic principles on which the approach of the ECtHR towards religious employers is based might be compared to the basic principles on which the approach of the CJEU is based.

As to the autonomy of the religious employers, the CJEU seems to take inspiration from the approach of the ECtHR: the national courts shouldn't consider the ethos of the organisation itself. National courts should look at individual cases from the point of view of the religious employer and consider whether these requirements are satisfied under this view. From this line of reasoning, it can be deduced that the CJEU seems to respect the neutrality principle encompassed in Article 17 of the TFEU[59] and that religious employers enjoy a margin of appreciation in their occupational requirements. However, at the same time, the CJEU goes quite far in determining under which conditions can a religious organisation employ a worker and thus limiting this margin of appreciation.[60]

As to the duty of loyalty, the post that the employee occupies plays a role in the outcome of the case. As could be seen in the ECtHR's *Schüth* case and the CJEU's *IR v. JQ* case, both courts found in favour of the employees since the duty of loyalty was not a legitimate reason for the firing of the employee. The ECtHR did not consider the position of the employee significant enough to put the proclamatory mission of the religious employer at risk and the CJEU focused on the fact that the duty of loyalty was not enforced on other employees holding a similar position who did not subscribe to the same belief as the religious employer.

Both the CJEU and the ECtHR require that the occupational requirement is necessary due to the post that the employee occupies. They also require that the religious employer demonstrates that without the occupational requirement, there is a probable and substantial threat to his ethos of the religious employer and/or to his autonomy and that there is no other way to avert that threat then to interfere with the rights of its employee.

[59] M. STANFIELD, p. 30
[60] D. CUYPERS, Religion, discrimination, the head scarf and labour law, *ERA Forum 19*, 2019, p. 433-434

The principles on which the approaches of both of the courts are based seem to be quite similar. But when it comes to the case-law of the ECtHR religious employers seem to be successful more often than the employees (in 4 out of 6 cases the ECtHR found no violation of the rights of the employees). When it comes to the case-law of the CJEU the employees or potential employees were always successful. One reason might be that the case-law of the CJEU concerning religious employers has just started developing and therefore cases, where the CJEU could find in favour of the religious employers, might come later.

However, a more plausible explanation might lie in the different roles of the courts and the state of the proceedings in which the case finds its way before the respective courts. The role of the CJEU is to harmonise and set a certain standard which every single national court when applicating EU law has to uphold and it deals with the case at hand before the final judgement is given. The role of the ECtHR is to set the minimum threshold of protection[61] under which the states cannot go, and it deals with the case at hand after the national proceedings are over. The ECtHR also affords a margin of appreciation to the states. Thus, even if the principles behind the reasoning of the courts are quite similar the level of scrutiny is different.

It might be interesting to think about how the ECtHR would have dealt with cases like *Egenberger* and *IR v JQ*. Considering the approach of the German Constitutional Court it is not unreasonable to think that the employees in these cases would be unsuccessful before national courts and thus might bring their cases before the ECtHR. When considering these cases the ECtHR would apply the principles it has in its previous case-law and its reasoning might be similar to the reasoning of the CJEU, however, the margin of appreciation plays a significant role here. Because Germany and its Constitutional Court have a certain way of how they approach the autonomy of religious employers, it is possible that the ECtHR would not find a violation. Thus, it is not that the ECtHR would be less strict towards occupational requirements of religious employers it just takes into account the situation in a certain state and makes it one of the deciding factors. We can only guess how a similar case would be decided, as has been mentioned above, a lot of factors may come into play when the ECtHR is deciding on a case. However, it should be highlighted that both European courts base their decisions on the same principles, but the

[61] ibidem, p. 432

ECtHR is just less "activist", therefore the critique of the CJEU does not stem from the approach towards the religious employers themselves but from the approach towards the Member States in general.

The last issue that should be brought up is that both of the European courts retain the position that the national courts shouldn't consider the ethos of the organisation itself which might seem as an assurance that the autonomy of religious organisations will be respected. On the other hand, they subject the occupational requirements of a religious employer to quite a detailed judicial review. This might be problematic. How exactly can a court adopt a view of a religious employer and decide whether the requirements are met? The approach German Constitutional court in form of a plausibility review seems to avoid this issue by leaving it up the religious employers themselves to decide whether occupational requirements are justified. This approach seems to better contribute to the neutrality principle and the principle of autonomy of religious organisation and thus better protects the rights of religious employers. On the other hand, the rights of the employees and potential employees are less protected by this approach. But, what should be taken into account is the fact that the employees and potential employees are aware that the employer is religious and therefore might impose certain obligations on them which are not typical and which in the light of common employment obligations might seem excessive, such as the requirement to subscribe to a certain belief or prohibition of adultery. Although if a religious employer imposes these obligations it should enforce them equally and not selectively as was the case in *IR v JQ*. Also the religious employer should at least provide some reasoning for not employing a certain person or for firing its employee.

Following the separation of Church and State, the point was to leave the religious organisations to their own devices. The Church would not influence the State and the State would not influence the Church. Of course, there have to be certain limits as to what a religious organisation is allowed to do under national law, however, imposing special obligations on its employees seems fairly mild since the employees take on these obligations willingly. For the state to subject these obligations to a detailed judicial review and basically dictate to the religious employers what kind of obligations they can impose seems a bit excessive. One might then question how much can the separation of Church and State be actually effective if the State constantly scrutinizes the conduct of the Church?

5 Conclusion

In this essay, the author focused on the occupational requirements of religious employers and how these are reviewed by the European courts: the CJEU and the ECtHR. The author analysed the case-law of both of these courts on this subject and found out that the principles on which they base their decisions are quite similar. Both courts recognise the principle of autonomy of religious organisations and have established that it is not up to the courts to consider the belief of the organisation itself. Their task is to consider the occupational requirement in question from the point of view of the religious employer. The courts allow that the employee might be subject to a duty of loyalty, however, different posts necessitate different levels of loyalty, there is a difference between firing a highly placed employee who represents the religious employer in public relations and an employee who is a line worker. Also, the religious employer has to enforce this loyalty equally when it comes to similar posts. The courts subject the occupational requirement to a balancing exercise this contains weighing up the interests of the religious employer against the interests of the employee. The religious employer needs to demonstrate that without the occupational requirement its ethos and/or his autonomy would be at a probable and a substantial risk and that he is not misusing this requirement as a way to achieve a different objective than the protection of its ethos and/or autonomy. Even though the principles based on which both of the courts decide are similar, the ECtHR has ruled numerous times that the state did not violate the rights of an employee and thus in favour of the religious employer. The reason for this might lie in the different roles of the CJEU and the ECtHR. The CJEU's purpose is to harmonise and set certain standards which every member state has to uphold. The ECtHR's purpose is to set minimum requirements and if the member state meets them then the ECtHR won't be that strict. In the end, however, both courts subject the occupational requirements of religious employers to a detailed judicial review. This clashes with the idea of separation of Church and State since this way, the State dictates to the Church under which conditions it can set down its occupational requirements. The author recognizes the need for some control over the activities of the Church. But, in the case where the (potential) employee is aware of the obligations stemming from his job and accepts them willingly, then control in the form of a detailed judicial review of these obligations seems a bit excessive. A plausibility review

as used by the Germen Constitutional Court has the potential to better balance the rights of the religious employer and the employees.

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