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Balancing the autonomy of religious institutions with the right to a private and family life?

A commentary on *Fernández Martínez v. Spain*

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On 12 June 2014, the Grand Chamber of the European Court of Human Rights (hereinafter the ECtHR or the Court) delivered its final and long-awaited judgment in *Fernández Martínez v. Spain*. The case concerns the non-renewal of the contract of a religion teacher by the Spanish State, because his personal status, as a married priest, was considered incompatible with the principles of the Catholic Church. Released a few days before another ECtHR judgment on a controversial religion issue, the French burqa ban¹, the present case raises important questions regarding the *balance* between two fundamental rights, the right to autonomy of religious institutions and the right to a private and family life of an individual.

Fernández Martínez has been serving as a priest since 1961. In 1984, he asked for dispensation from celibacy of the Vatican, for which he received no reply at the time. In 1985, he got married and he now has five children. From 1991 and until his dismissal in 1997 he was employed as a teacher of Catholic religion and ethics in a State-run secondary school, in Murcia, Spain. At that period, the Catholic religion teaching in public schools in Spain was regulated by an Agreement on education and cultural affairs signed in 1979 between Spain and the Holy See. Based on this Agreement and the Institutional law no. 1/1990 on the general organization of the education system, the State was the employer of religion teachers who were appointed annually, after having previously been proposed by the Church.

Between 1991 and 1996, Mr Fernández Martínez was teaching Religion in a public school while having a family. However, in 1996, his name appeared in a local newspaper, which made public his situation as a married priest and his participation in the 'Movement for Optional Celibacy'. Following this incident, he was dispensed of celibacy and lost his clerical status. Additionally, the Catholic Church requested his dismissal from the public school and his name was removed from the lists with the suitable candidates, prepared by the Catholic Church based on the 1979 Agreement. The Church has justified the decision by claiming that Mr Fernández Martínez was dismissed 'out of respect for the parents', and arguing, *inter alia* that 'the sacrament of the priesthood is of a nature that surpasses the strictly employment or professional context'.

The applicant challenged the Church's decision before the Spanish Courts and the case was eventually examined by the Constitutional Court which favoured the decision of the Church, noting, that, under the Spanish Constitution, the Court had an obligation to remain neutral towards all religious communities.²

Before the ECtHR, the applicant complained that the non – renewal of his contract constituted a violation of Article 8

¹ ECtHR, *S.A.S. v. France*, Application no. 43835/11, 1 July 2014.

² The Catholic Church in Spain enjoys the same status as the other religious institutions and according to the Spanish Constitution the State has to remain neutral towards all faiths. Article 16(3) of the Spanish Constitution reads as follows: 'No religion shall have the nature of State religion. The public authorities shall take account of all religious beliefs within Spanish society and consequently maintain appropriate relations of cooperation with the Catholic Church and other faiths.'

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(the right to private life) taken together with Article 14 (prohibition of discrimination). Mr Fernández Martínez further complained of violation of Article 9 (freedom of religion) and 10 (freedom of expression). The case was initially heard by the Third Section Chamber, which found, in 6 to 1 votes, no violation of Article 8, while his other claims were not examined.

At the applicant's request, the case was transferred to the Grand Chamber of the ECtHR. Explaining that the principal issue at stake concerned Article 8, the Grand Chamber examined the case in the light of the right to respect for private life, although other issues were also relevant, such as the right to freedom of thought and religion, the freedom of expression and the right to be a member of an organisation with specific views, given the applicants participation in the 'Movement for Optional Celibacy'. In its judgment, the Grand Chamber upheld the right of autonomy of religious institutions³ vis-à-vis the right to respect for private life, finding no violation of the applicant's rights under the Convention. However, it kept palpable distance from the 2012 Chamber's judgment, which refrained from using the balancing approach and endorsed the autonomy of the Church by following a different reasoning.⁴

The balancing approach is a method of conflict resolution introduced by the ECtHR through its case law in order to deal with antinomies between rights protected by the Convention and to find a fair equilibrium between the interests in conflict.⁵ It is distinct from yet easily confused with the proportionality test: the idea of balancing of rights initially aims to an egalitarian treatment of two rights in conflict, while the proportionality test mainly examines the application of a right in light of its limitations⁶, weighing to what extent an interference with a right in a democratic society is proportionate to a legitimate aim.⁷ However, within the Strasbourg jurisprudence, it would be difficult or even unwise to seek to differentiate the balancing approach from the principle of proportionality, as the two methods are largely interlinked in the Court's interpretation of the Convention with regard to rights in conflict.⁸

In the Grand Chamber hearing, the balancing approach was the key point in the *ratio decidendi*, applied together with

³ The autonomy of religious institutions is protected by Article 9 of the European Convention of Human Rights that guarantees the freedom of thought conscience and religion (*forum internum*) and the freedom to manifest one's religion or beliefs (*forum externum*), which is nevertheless subjected to some limitations. The notion of religious autonomy has been strongly supported by the European Court, as it has been considered to be found at the heart of Article 9. See *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, 12 December 2001; *The Holy Synod of the Bulgarian Orthodox Church and Others v. Bulgaria*, Application nos 421/03; 35677/04, 22 May 2007; *Serif v. Greece*, Application no 38178/97, 14 December 1999.

⁴ ECtHR, *Fernández Martínez v. Spain*, Application no. 56030/07, 15 May 2012, para. 84. See Mauro Gatti, *Autonomy of Religious Organisations in the European Convention of Human Rights and European Union Law*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2012).

⁵ See Aagje Ieven, "Privacy Rights in Conflict: In Search of the Theoretical Framework behind the European Court of Human Rights' Balancing of Private Life against Other Rights," in *Conflicts Between Fundamental Rights*, ed. Brems (Intertax Uitgevers N.V, 2008), 39–67.

⁶ Peggy Ducoulombier, *Les Conflits de Droits Fondamentaux Devant La Cour Européenne Des Droits de L'homme* / (Bruxelles: Bruylant, 2011), 534.

⁷ ECtHR, *Otto –Preminger-Institut v. Austria*, Application no. 13470/87, 20 September 1994.

⁸ Example of this overlap between the method of balancing of rights and the proportionality test can be found in *Bowman v. UK*, Application no. 141/1996/760/961, 19 February 1998 or in *H.K. v. Finland*, Application no. 36065/97, 26 September 2006.

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the proportionality test. The Court initially stated that in *Fernández Martínez* were ‘two competing interests at stake’, pointing out the need to *balance* the two rights in conflict. It further held that: ‘*The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued*’.⁹ After finding that the non-renewal of the applicant’s contract constituted an interference with the applicant’s rights under Article 8, the Court dealt with the legitimacy and the proportionality of the interference. The legitimate aim was the need to preserve the autonomy of the Catholic Church and its right to choose the persons who teach its religious doctrine. Regarding the proportionality of the interference, the Grand Chamber examined whether the interference could fall within the scope of the second paragraph of Article 8 that sets some limitations to the right to private life in a democratic society.¹⁰ All elements of the test were fulfilled in *Fernández Martínez*, based on the analysis of the majority. In the light of the right to religious autonomy and the facts of the case, the interference was found necessary and proportionate by the majority of the judges given the unclear personal status of the applicant - a married priest, the publicity of his situation, the obligation of the State to remain neutral vis-à-vis the religious community, the principle of voluntary participation in a religious community, the duty to loyalty and the severity of the sanction.

The guiding principle in the above analysis was the margin of appreciation doctrine.¹¹ The Court explained in the judgment that with regard to balancing equivalent rights, the national authorities are granted a broad margin of appreciation in assessing their obligations under the Convention.¹² The reference to the margin of appreciation doctrine comes here with no surprise, as according to Judge Spielman ‘*the restrictions on the rights provided for by Articles 8 to 11 of the Convention (private and family life, freedom of thought, of conscience and religion, freedom of expression, freedom of association) call “naturally” for the application a margin of appreciation*’.¹³ In order to define how wide or narrow this margin should be, the Court examined the nature of the right, its importance for the individual and the level of the interference itself. The Grand Chamber thus found that the interference was not disproportionate and that Spain enjoyed a wide margin of appreciation in the balancing of those rights.

However, eight European judges sitting in the Grand Chamber did not agree with the analysis of the facts and the way the proportionality test was applied.¹⁴ In the four dissenting opinions found in the judgment, a rather remarkable number, the dissenters criticised the reasoning of the majority and argued that the non-renewal of the applicant’s

⁹ Para 123 of the Grand Chamber Judgment on 12 June 2014.

¹⁰ Sébastien van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme: prendre l’idée simple au sérieux* (Publications Fac St Louis, 2001), 113–114.

¹¹ The margin of appreciation doctrine is a primarily judge-made doctrine which according to President Dean Spielman ‘*imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute*’. *Infra n.g.* In the context of the current reform of the ECtHR, a reference to the doctrine of the margin of appreciation has been embedded in the Preamble of the European Convention on Human Rights by Protocol 15.

¹² Regarding the conflict of fundamental rights, the balancing of rights approach and the margin of appreciation doctrine were primarily introduced in *Chassagnou and others v. France*, 29 April 1999.

¹³ Dean Spielman, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, CELS Working Paper Series (Cambridge: Centre for European Legal Studies, 2012), 6.

¹⁴ See Joint dissenting opinion of Judges Spielmann, Sajò, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz; Joint dissenting opinion of Judges Spielmann, Sajò, Lemmens; Dissenting opinion of Judge Sajò; Dissenting opinion of Judge Dedov.

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contract constituted a violation of Article 8. Finding the Spanish State and not the Catholic Church attributable for the non-renewal of the contract, the dissenters challenged the judgment of the Grand Chamber and argued that an unjustified and disproportionate interference with the applicant's rights has occurred.¹⁵ According to the dissenters, the proportionality test should have been held with greater scrutiny as it involved a decision made by the State and not exclusively by the Catholic Church.¹⁶ A very interesting approach was presented in the dissenting opinion of Judge Dedov who argued that the preserving of the autonomy of the Church could not be considered a legitimate aim. He criticised the obligation of celibacy within the Catholic Church underlying that: *'The Convention protects freedom of religion so that no one can be persecuted for their religious beliefs. But it does not entitle religious organisations, even in the name of autonomy, to persecute their members for exercising their fundamental human rights. If the Convention system is intended to combat totalitarianism, then there is no reason to tolerate the sort of totalitarianism that can be seen in the present case.'*¹⁷

From all of the above it is clear that there is still a lot to be done by the Court when it comes to conflicts between fundamental rights. The great challenge for the Court will be to confront such conflicts in a manner that guarantees that all interests are taken into consideration. Regarding the present case, although the Court found no violation of Article 8, in line with its recent judgment in *Sindicatul "Păstorul cel Bun" v. Romania* on religious autonomy, the trembling majority of the vote explains that there is still a large division among the European judges as to the extent of the autonomy of religious institutions and the justifiable interferences with the rights protected by the Convention. After *Fernández Martínez* the obscure relationship between the autonomy of religious institutions and the right to respect for private life has not yet been crystalised. What is more, and in spite of what the defenders of religious autonomy might have been anticipating, no absolute right to autonomy of religious communities has emerged from the judgment. Built upon some earlier cases where the balancing approach was followed¹⁸, the Court made it clear that when it comes to the involvement of the State and the unclear status of the individual, i.e. a 'secularised priest', the ECtHR does not apply the doctrine of 'ministerial exception'.¹⁹

Fernández Martínez further shows that the test of proportionality undoubtedly has its limits.²⁰ Based mainly on an *ad hoc* weighing of the rights, the proportionality test lacks clarity and stability and its legitimacy is severely contested as it mainly relies on judicial subjectivity.²¹ All this could raise issues on behalf of relevant - religious and non-religious -

¹⁵ Stijn Smet, "Fernández Martínez v. Spain: The Grand Chamber Putting the Brakes on the 'Ministerial Exception' for Europe?" *Strasbourg Observers*, <http://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-brakes-on-the-ministerial-exception-for-europe/>.

¹⁶ See Joint dissenting opinion of Judges Spielmann, Sajò, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz, para. 22.

¹⁷ Dissenting Opinion of Judge Dedov, p. 67.

¹⁸ ECtHR, *Obst v. Germany*, Application no. 425/03, 23 September 2010, *Schüth v. Germany*, Application no. 1620/03, 23 September 2010, *Siebenhaar v. Germany*, Application no. 18136/02, 3 February 2011.

¹⁹ The ministerial exception doctrine is a legal doctrine in the United States that protects the freedom of religion by exempting religious institutions from anti-discrimination laws in hiring employees. See Supreme Court of the United States, *DeMarco v. Holy Cross High School* (1993) and *Hosanna-Tabor v. EEOC* (2012).

²⁰ *Supra* n.6, 666.

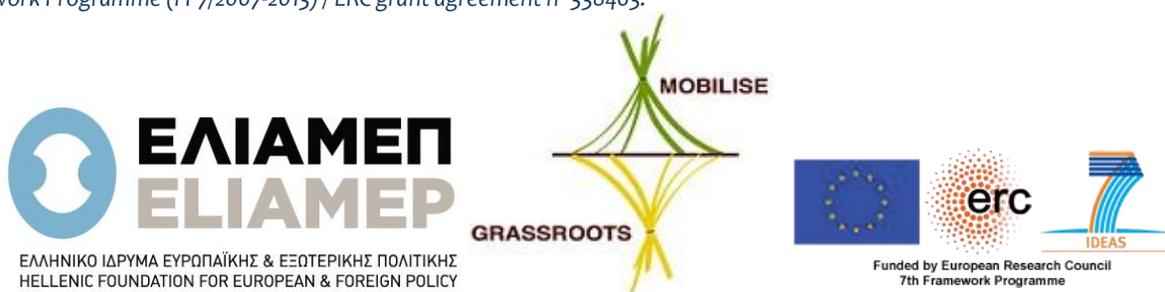
²¹ *Ibid.*

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actors in the future, taking into account the third party interventions already present in this case and some other worth-mentioning mobilisations around religious issues in recent litigations (e.g. *Lautsi v. Italy*, *Sindicatul "Păstorul cel Bun" v. Romania*).²²

The case is thus of great importance for the future of autonomy of religious institutions on the one hand and the serious ethical and political question of conflicts of fundamental human rights on the other. In the aftermath of a number of highly contentious ECtHR judgments on religion issues the present case shows that for the time being there is no clear direction as how the Court will balance these rights in the future.

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²² This is a topic to be examined in the Grassrootsmobilise research programme based at ELIAMEP, <http://grassrootsmobilise.eu>