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Sacred Spheres: Religious Autonomy As An International Human Right

Diana V. Thomson
dthomson@becketlaw.org

Kayla A. Toney
kayla.ann.toney@gmail.com

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Sacred Spheres: Religious Autonomy As An International Human Right

Cover Page Footnote

Diana Verm Thomson is Senior Counsel at the Becket Fund for Religious Liberty. She was co-counsel for the prevailing party in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), one of the Supreme Court cases discussed in this Article. Kayla A. Toney is Associate Counsel at First Liberty Institute, where she litigates First Amendment cases on behalf of clients of all faiths. She specializes in the areas of education and employment. The authors thank Eric Rassbach and Mark Rienzi for their helpful comments. The authors also thank Joseph Graziano and David Rubinstein for their helpful research and assistance. The views expressed in this Article do not necessarily reflect the views of the Becket Fund for Religious Liberty, First Liberty Institute, or their clients.

SACRED SPHERES: RELIGIOUS AUTONOMY AS AN INTERNATIONAL HUMAN RIGHT

Diana Verm Thomson & Kayla A. Toney⁺

How should courts resolve thorny human rights disputes that arise within religious groups? According to an emerging international consensus, they shouldn't. When a case involves sensitive internal decisions by a religious organization, such as choosing who is qualified to teach the faith, courts are increasingly taking a hands-off approach. This global consensus has formed across international treaties, tribunals, and domestic courts in European and American nations. Every major human rights instrument and many international and domestic courts recognize that religious freedom must extend to religious communities, especially houses of worship and schools where believers gather to practice their faith and impart it to the next generation.

This article conducts a comparative analysis of religious autonomy across international human rights instruments, international courts, and a selection of individual countries. We argue that the autonomy of religious institutions is an internationally recognized principle that protects decisions related to internal religious governance, including who teaches the faith to the next generation. To allow secular governments to dictate who teaches the faith and how it is taught in spheres explicitly governed by church leaders would violate that religious autonomy. Instead, we urge international courts to provide clarity and guidance to countries seeking to apply the religious freedom provisions in their own laws by respecting the ability of religious organizations to govern who teaches their doctrines.

The recent case of *Pavez v. Chile* at the Inter-American Court of Human Rights provides a counter-example to the growing consensus. There, the court found Chile liable for discrimination when it respected a local church decision regarding who was qualified to teach Catholicism to students in a devotional setting in a state-run school. Rather than engage with the reasoning of the international law on church autonomy, the Court acknowledged this body of law, but declined to apply it in the case, maintaining that the state should retain authority over the church in who teaches the faith. In so doing, the Court

⁺ Diana Verm Thomson is Senior Counsel at the Becket Fund for Religious Liberty. She was co-counsel for the prevailing party in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), one of the Supreme Court cases discussed in this Article. Kayla A. Toney is Associate Counsel at First Liberty Institute, where she litigates First Amendment cases on behalf of clients of all faiths. She specializes in the areas of education and employment. The authors thank Eric Rassbach and Mark Rienzi for their helpful comments. The authors also thank Joseph Graziano and David Rubinstein for their helpful research and assistance. The views expressed in this Article do not necessarily reflect the views of the Becket Fund for Religious Liberty, First Liberty Institute, or their clients.

attempts to force the separate spheres of church and state to merge, asserting control over the church and its relationship with the government. Without a well-reasoned theory behind this attempt, however, it is unlikely to be repeated in other serious adjudicative bodies.

INTRODUCTION	152
I. DEFINING RELIGIOUS AUTONOMY	154
II. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	155
A. <i>Universal Declaration of Human Rights</i>	155
B. <i>International Covenant on Civil and Political Rights</i>	157
C. <i>European Convention on Human Rights</i>	157
D. <i>American Convention on Human Rights</i>	158
E. <i>Concluding Document of the Vienna Convention</i>	159
III. INTERNATIONAL HUMAN RIGHTS BODIES.....	160
A. <i>U.N. Human Rights Committee</i>	161
B. <i>European Court of Human Rights</i>	162
C. <i>European Union</i>	165
D. <i>Inter-American Court of Human Rights</i>	166
IV. INDIVIDUAL COUNTRIES	169
A. <i>Governments that respect religious autonomy</i>	171
1. <i>United States</i>	171
2. <i>Canada</i>	175
4. <i>Colombia</i>	180
5. <i>European Countries</i>	181
B. <i>Governments seeking to control religious decisions</i>	183
1. <i>China</i>	183
2. <i>Eritrea</i>	185
3. <i>Russia</i>	186
4. <i>Saudi Arabia</i>	187
5. <i>Iran</i>	188
CONCLUSION.....	188

INTRODUCTION

How should courts resolve thorny religious disputes involving fundamental human rights? According to an emerging international consensus, the answer is simple: they shouldn't. When a case involves sensitive internal decisions by a religious organization, such as choosing who is qualified to teach the faith to the next generation, courts are increasingly taking a hands-off approach that allows religious organizations to resolve these important disputes internally. This global consensus has formed across international treaties, tribunals, and domestic courts in European and American nations. Every major human rights instrument and many international and domestic courts have recognized that religious freedom must extend to religious communities, especially houses of

worship and schools where believers gather to practice their faith and impart it to the next generation.

Yet the *Pavez v. Chile* case at the Inter-American Court of Human Rights ignored this growing consensus and downplayed the significance of religious autonomy in a case that raised the question of who has the authority to choose who teaches religion in a religious setting: the church or the state. The first case of its kind at that Court, which adjudicates human rights complaints arising from the member countries of the Organization of American States, *Pavez v. Chile* failed to grapple with important questions concerning whether actions or beliefs contrary to religious doctrine can disqualify teachers. The Inter-American Court's opinion found Chile liable for discrimination when it merely respected a local church decision regarding who was qualified to teach Catholicism to students, and the Court's opinion would force the state to interfere in that internal religious decision. This conclusion departed from the international body of law addressing these questions.

Within that body of law, religious freedom is widely recognized as a universal human right that is key to the flourishing of individual religious believers. The deeper principle that makes individual religious practice possible, however, is that religious freedom necessarily extends from individuals to communities. To that end, religious autonomy in the internal affairs of such organizations is fundamental to the flourishing of individual religious belief and religious communities. Accordingly, all major human rights instruments, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, and the Concluding Document of the Vienna Convention recognize that religious freedom has an inherently communal dimension. Across these international treaties and the laws of individual countries in Europe, Latin America, and the United States, there are important commonalities in protecting the right of religious communities to autonomy in their internal affairs. This article examines one of those commonalities: how governments respect religious communities' right to choose who may teach the faith to the next generation. We propose that Western pluralistic democracies have converged upon a judicial principle of respecting religious autonomy when it comes to choosing teachers of religious faith. By contrast, countries that diverge sharply from that principle tend to also diverge from other democratic norms toward authoritarianism.

Because selecting who provides religious instruction is an extraordinarily sensitive consideration for religious institutions at the core of their identities, the right to choose religious teachers is critical for their health and growth. This right also implicates the interests of governments (and in cases like *Pavez*, international courts) in whether they can or should evaluate the theological and moral judgments that underlie religious organizations' decisions regarding personnel or adjudicate what messages religious communities are allowed to teach about their faith and doctrine. How a government treats these principles

provides a bellwether for its respect for religious rights more generally and for other fundamental human rights as well.

Through a comparative analysis, this article surveys the approach of international tribunals, national courts, and national policies toward sensitive situations that invoke religious autonomy principles. Part I offers a working definition of religious autonomy as recognized in jurisdictions around the world. Part II considers the protection provided for religious autonomy in international treaties and human rights instruments. Part III analyzes the variety of approaches taken by international courts and tribunals and finds that they support a consensus of respecting religious autonomy. Part IV compares court decisions and policies from specific governments that respect religious autonomy with governments that interfere with religious groups' internal religious affairs, finding that the latter tend to be violators of other fundamental human rights. We conclude that courts should allow a certain degree of deference to religious self-governance in matters of doctrine, ministerial personnel, and church structure.

I. DEFINING RELIGIOUS AUTONOMY

A working definition of religious autonomy is needed before analyzing its application in jurisdictions around the world. Religious autonomy deals with the self-governance of religious institutions with regard to their own internal affairs. At bottom, the religious autonomy doctrine prevents civil courts from entangling themselves in religious decisions that are based on matters of faith, doctrine, or church governance.¹ This autonomy covers the selection and control of employees in key religious roles, like chaplains and teachers of religion.

The religious autonomy doctrine has been used to prevent civil authorities from intervening in a broad range of internal church matters. For example, the U.S. Supreme Court has recognized that the First Amendment protects a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government."² The European Court of Human Rights has also applied the doctrine of religious autonomy in key cases including *Obst v. Germany*, *Siebenhaar v. Germany*, *Sindicatul "Păstorul cel Bun" v. Romania*, and *Fernández Martínez v. Spain*.³

Two clarifications are helpful here. First, while U.S. courts often use the term "church autonomy" or "ecclesiastical abstention" to refer to this doctrine, this article uses the term "religious autonomy" because it better encompasses religious institutions of a variety of faith traditions. Second, one aspect of religious autonomy that commonly appears in U.S. law is the ministerial exception, which bars claims that would interfere in the relationship with a

1. See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

2. *Our Lady of Guadalupe*, 140 S. Ct. at 2061; see *infra* Section IV.A.1. and n.126.

3. See *infra* Section III.B.

minister and her ministry. In this way, the ministerial exception protects “autonomy with respect to internal management decisions that are essential to the institution’s central mission” including “the selection of the individuals who play certain key roles” in the ministry.⁴ The ministerial exception applies even if the church does not have a religious reason for the personnel decision, because personnel decisions involving ministers always affect internal church governance.⁵ In other words, the doctrine ensures that “[r]eligious questions are . . . answered by religious bodies.”⁶ As U.S. courts have defined it, the related doctrine of religious autonomy applies to *any* internal religious decision influenced by religious doctrine, regardless of whether a minister is involved.

Most relevant here, religious autonomy bars civil courts from intervening in disputes over whether a person meets a religious organization’s doctrinal qualifications for membership, employment, or ministerial roles.

The principle of religious autonomy finds parallels in both the laws of individual countries and in international human rights treaties. Indeed, all the major international human rights instruments explicitly protect religious freedom and include provisions that recognize religious autonomy, particularly as it relates to education.

II. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The right of religious communities to religious autonomy—that is, the right to exist, perpetuate their beliefs, and carry out their religious practices—has long been enshrined in international human rights law, including in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, and the Concluding Document of the Vienna Convention. Each of those documents, along with other sources of international human rights law, emphasize religious freedom and the autonomy of religious communities as fundamental to human dignity and flourishing. The international legal principles enshrined in these documents can provide guidance to understand the importance of religious autonomy as key to all other rights.

A. *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights defines religious freedom as a basic human right deserving of recognition and unique protection. Article 18 of the Universal Declaration states that the right to “freedom of thought, conscience and religion” includes freedom to manifest religious beliefs not just individually

4. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

5. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 194–195 (2012) (ministerial exception does not only apply “when [a decision] is made for a religious reason,” but “instead ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone”).

6. *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).

but “*in community with others* and in public or private.”⁷ This definition provides not only that individuals can hold their beliefs privately but also that religious communities can practice and teach their beliefs publicly. According to the U.N. Human Rights Committee, the Universal Declaration specifically established that religious communities’ freedom of “teaching” and “practice” enshrined in Article 18 includes the “freedom to choose their religious leaders, priests and teachers.”⁸

This kind of religious self-governance manifests itself in many areas beyond leadership selection, including freedom of speech and employment decisions. According to the U.N.’s Special Rapporteur on Torture, “the human rights to privacy, freedom of expression, religion, assembly and association lie at the very heart of a democratic society.”⁹ Government restraint of religious expression is only justified when the religious expression involves “incitement to hatred or violence or a direct threat to national security or public safety.”¹⁰ Thus, the U.N.’s broad commitment to religious freedom expressed in the Universal Declaration, including the right of religious communities to choose their leaders and teachers, holds a widely recognized place in international law.

The Universal Declaration describes the right to education in Article 26(2), specifying that it “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”¹¹ Article 26(3) protects the rights of parents: “[p]arents have a prior right to choose the kind of education that shall be given to their children.”¹² According to the U.N. Human Rights Committee, that right includes “[t]he liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions.”¹³

Overall, the Universal Declaration presents an image of an international commitment to recognize that a significant degree of autonomy belongs to religious organizations, for the good of both the individual and society. By explicitly recognizing the right to autonomy over religious governance and

7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art 18 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights], <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> [<https://perma.cc/6TED-XACD>] (emphasis added).

8. U.N. CCPR, 48th Sess., Gen. Cmt. 22, para. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf> [<https://perma.cc/RNU6-ACR9>].

9. Universal Declaration of Human Rights, *supra* note 7; Manfred Nowak (Special Rapporteur), Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 65, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006).

10. Manfred Nowak, *supra* note 9, para. 65.

11. Universal Declaration of Human Rights, *supra* note 7, art. 26.

12. *Id.*

13. U.N. CCPR, 48th Sess., Gen. Cmt. 22, para. 6, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf> [<https://perma.cc/RNU6-ACR9>].

education, the Universal Declaration reflects an international consensus that religious autonomy deserves protection as a fundamental human right.

B. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) also protects autonomy for religious groups by way of protecting a collective right to practice religion. With language similar to the Universal Declaration, the ICCPR articulates the fundamental right to freedom of religion or belief in Article 18:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹⁴

Like the Universal Declaration, the ICCPR emphasizes that freedom of religion exists not just for individuals but for religious communities.¹⁵ Both documents also include “teaching” as one of the specific areas where religious communities are free to manifest their beliefs.¹⁶ Thus, religious freedom is not limited to houses of worship but extends into classrooms where students learn the faith. In addition to respecting religious governance in general, the ICCPR specifically protects religious education in Article 18(4), guaranteeing that parents may “ensure the religious and moral education of their children in conformity with their own convictions.”¹⁷ Thus, the ICCPR recognizes religious freedom as not only an individual right but also a collective right, extending to schools and communities so that religious adherents can practice the core tenets of their faiths together and share them with the next generation.

C. European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) was adopted by the Council of Europe’s member states. Much like the Universal Declaration and the ICCPR, the European Convention also protects the full autonomy of all religious institutions. The European Convention includes language that closely resembles the Universal Declaration and the ICCPR, guaranteeing in Article 9 that “[e]veryone has the right to freedom of . . . religion,” which includes “freedom to change his religion or belief and freedom, either alone or in community with

14. International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, S. TREATY DOC. NO. 14668, 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [<https://perma.cc/T5LF-PL64>].

15. *Id.*

16. *Id.*

17. *Id.* art. 18(4).

others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”¹⁸

The European Convention protects religious education in Protocol No. 1, Article 2: “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”¹⁹ According to the Guide on Article 9, this provision means that “the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions was one of the attributes of parental authority[.]”²⁰

The European Convention also provides for the right to “freedom of association with others” in Article 11. The European Court of Human Rights has indicated that Article 9 “must be interpreted in the light of Article 11.”²¹ That interpretation means that religious communities “will be allowed to function peacefully, free from arbitrary State intervention.”²² Together, these commitments to religious freedom, religious education, parental choice, and freedom of association provide a strong framework which the European Court of Human Rights has applied to protect religious autonomy as an international human right.²³

D. American Convention on Human Rights

Protection for the autonomy of religious communities is firmly entrenched in the American Convention on Human Rights.²⁴ This multilateral treaty has been ratified by 25 members of the Organization of American States.²⁵ Article 12 of the Convention states that “[e]veryone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.”²⁶ The right to “profess and disseminate one’s religion . . . together with others, in

18. Eur. Conv. on H.R., § I, art. 9, https://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/VME3-ZDA9>].

19. *Id.* Protocol No. 1, art. 2.

20. Eur. Ct. H.R., Guide on Article 9: Freedom of thought, conscience and religion, § 115 (Aug. 31, 2021), https://www.ecahr.coe.int/Documents/Guide_Art_9_ENG.pdf [<https://perma.cc/N4UE-MLUP>].

21. *Id.* § 199.

22. *Id.* § 205.

23. *See infra* Part III.B.

24. *See* Organization of American States, American Convention on Human Rights, art. 12.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention], http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf [<https://perma.cc/59H2-BD5Y>].

25. *See American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, ORG. OF AM. STATES., https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm [<https://perma.cc/5DXN-YUPM>].

26. American Convention, *supra* note 24, art. 12.1.

public or private” necessarily includes the right of autonomy for religious institutions.²⁷ This right includes broad autonomy protections, especially for a religious community’s relationship with its clergy and those serving in other administrative and teaching roles.²⁸

Regarding education, Article 12.4 of the Convention affirms that “[p]arents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.”²⁹ Thus, the Convention explicitly recognizes the rights of parents and children to receive religious education taught by authentic leaders who follow the doctrines of their faith.

A closely related document, the American Declaration of the Rights and Duties of Man, protects these same freedoms, stating that “[e]very person has the right to freely profess a religious faith, and to manifest and practice it both in public and in private.”³⁰ Together, the Convention and Declaration clearly recognize not just a personal right but a communal right that must be protected for the good of society as a whole.

E. Concluding Document of the Vienna Convention

In the Concluding Document of the Vienna Convention, adopted in 1989, the countries participating in the Organization for Security and Cooperation in Europe (OSCE) agreed to “respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.”³¹ Today, 57 countries are members of the OSCE, including the United States and Canada.³²

In Principle 16 of the Concluding Document, the participating states promised “to ensure the freedom of the individual to profess and practice religion or belief.”³³ This included an agreement to “respect the right of religious communities to . . . organize themselves according to their own hierarchical and institutional structure, [and to] select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State.”³⁴ Thus, OSCE

27. *Id.*

28. *See infra* Part III.

29. *Id.* art. 12(4).

30. American Declaration of the Rights and Duties of Man, art. III, April 30, 1948, Hein’s No. KAV 7225.

31. Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, para. 11, Jan. 17, 1989, [hereinafter Vienna Concluding Document], <https://www.osce.org/files/f/documents/a/7/40881.pdf> [<https://perma.cc/BQ7U-SF6H>].

32. *Participating States*, ORG. FOR SEC. & COOP. IN EUR., <https://www.osce.org/participating-states> [<https://perma.cc/LX6A-A8X5>].

33. Vienna Concluding Document, *supra* note 31, para. 16.

34. *Id.* para. 16(d).

member countries have specifically affirmed the right of religious communities to choose and replace their personnel according to their own requirements.

In these documents, the member countries of the Council of Europe, the European Court of Human Rights, the European Union, and the OSCE have all recognized the principle of religious autonomy, particularly in the context of employment decisions by churches and other religious organizations. The leading human rights instruments around the world not only promote the fundamental right of religious freedom, but they also recognize the autonomy of religious institutions to choose teachers whose lives align with their doctrines, and the right of parents to choose religious education for their children.

III. INTERNATIONAL HUMAN RIGHTS BODIES

As described above, key instruments enshrining international human rights play a major role in protecting religious autonomy by demonstrating consensus and establishing principles for individual countries to follow.³⁵ The critical work of putting these principles into practice belongs first to the courts of individual countries. Once domestic remedies are exhausted, some of the most influential cases are adjudicated by international courts and other human rights bodies. These international courts are established by the international human rights instruments discussed above. For example, the American Convention established the Inter-American Court of Human Rights, and the European Convention established the European Court of Human Rights to apply its provisions and adjudicate certain disputes arising in member countries.³⁶

These international courts often look beyond their enabling treaty to other treaties as persuasive sources of international law. For instance, Article 29 of the American Convention provides that the Convention is interpreted in light of the “exercise of any right or freedom recognized by virtue of . . . another convention to which one of the said states is a party.”³⁷ It also takes into account

35. See *supra* Part II.

36. See, e.g., *Martínez Esquivia v. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 411, paras. 89–93 (Oct. 6, 2020) (granting reparations to Colombia based on several international instruments and rulings such as the “United Nations’ Guidelines on the role of prosecutors[; and] . . . the United Nations Special Rapporteurship”); *Fernández Prieto and Tumbeiro v. Argentina*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 411, paras. 103–04 (Sept. 1, 2020) (concluding that body searches carried out by the Argentina police violated the aggrieved parties’ rights to liberty and privacy and the American Convention); *López Soto v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 362, paras. 173–82 (Sept. 26, 2018) (applying prohibition on sexual slavery from Article 6 of the American Convention to hold Venezuela accountable); *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, paras. 173–77 (Sept. 4, 2012) (considering the “the United Nations Guiding Principles on Internal Displacement . . . to determine the content and scope of Article 22 [Freedom of Movement and Residence] of the American Convention,” for the purpose of resolving the issue of forced displacement of indigenous peoples), https://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf [<https://perma.cc/GXH2-6D8N>].

37. American Convention, *supra* note 24, art. 29.

“other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”³⁸ Thus, the Convention, and the Inter-American Court which primarily applies it, also consider other international human rights instruments as part of a “complete legal framework, within the scope of interpretation permitted under Article 29.”³⁹ The right of religious freedom appears in all the major international human rights instruments because it is universally acknowledged to be of great importance to the community writ large. Thus, international courts and committees have consistently applied the principle of religious autonomy in their clarifying statements and decisions.

A. U.N. Human Rights Committee

The Human Rights Committee plays a significant international role by publishing comments interpreting the ICCPR, responding to countries’ annual reports, and adjudicating individual complaints.⁴⁰ It has consistently interpreted Article 18 of the ICCPR to protect the autonomy of religious organizations, especially when choosing who is qualified to teach the religious group’s beliefs to the next generation. In 1993, for example, the Human Rights Committee explained that “the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as[, inter alia,] the freedom to choose their religious leaders, priests and teachers.”⁴¹

The Human Rights Committee has also specifically upheld this right to choose “leaders, priests and teachers” to protect the autonomy of religious communities in dealing with teachers who do not conform to religious requirements.⁴² For example, in *Delgado Paez v. Colombia*, the claimant served as a teacher of religion at a secondary school in Colombia, but his theological views created conflicts with the local church authorities.⁴³ The Committee held that requiring the claimant to teach the Catholic faith in accordance with church authorities did not violate Delgado’s right to freedom of expression or freedom of religion or

38. *Id.*

39. Loren Laroye Riebe Star v. Mexico, Case 11.610, Inter-Am. Comm’n H.R., Report No. 49/99 OEA/Ser.L/V/II.95, doc. 7 rev. paras. 54–55, 66–67, 71 (1999) (drawing support from the American Convention, the European Commission on Human Rights, the Constitutional Tribunal of Spain, and the Constitutional Court of Columbia and concluding that Mexico violated the aggrieved parties’ right to judicial protection).

40. U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE, FACT SHEET NO. 15, at 2 (2005), <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> [<https://perma.cc/N53N-EJM6>].

41. U.N. CCPR, 48th Sess., Gen. Cmt. 22, para. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf> [<https://perma.cc/RNU6-ACR9>].

42. *Id.*

43. U.N. CCPR, 39th Sess., Comm’n No.195/1985, paras. 1–2.7, U.N. Doc. CCPR/C/39/D/195/1985 (1990), hrlibrary.umn.edu/undocs/session39/195-1985.html.

belief.⁴⁴ Thus, the Catholic Church had the authority to hold its own teacher accountable to the mission and purpose for which it had employed him—to accurately and faithfully teach its beliefs.

The Human Rights Committee has also held that religious instruction from a particular faith perspective in public schools does not violate the guarantee of religious freedom in Article 18 of the ICCPR, as long as the rights of parents and students to be exempt from religious instruction are honored.⁴⁵

B. European Court of Human Rights

The European Court of Human Rights is the multinational body established by the European Convention to interpret that instrument to adjudicate cases brought under its provisions.⁴⁶ According to the Court’s Guide to Article 9 of the Convention, updated in April 2020, not only is religious autonomy important for religious communities, but “[t]he *autonomous existence of religious communities* is indispensable for pluralism in a democratic society.”⁴⁷ The Guide explains that “[w]ere 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[.]”⁴⁸ According to human rights scholars, Article 9 protects the *forum internum*, which is “the absolute freedom to adopt or have a religion or belief of one’s own choice,” and the *forum externum*, the “limitable freedom either alone or in community with others and in public or private to manifest that religion or belief.”⁴⁹

Because the right to religious education is so fundamental, the European Court has held that “[i]n the specific case of religious education teachers, it is not unreasonable for a church or a religious community to expect particular loyalty of them in so far as they may be regarded as its representatives.”⁵⁰ This principle means that religious groups can ask their teachers to respect the doctrines of the faith in public and private choices. As the Guide to Article 9 explains, “in order

44. *Id.* paras. 5.7–5.10.

45. See U.N., Hum. Rts. Comm., Comm’n No. 40/1978, Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Right, at 74, U.N. Doc. CCPR/C/OP/1 (Erkki Hartikainen v. Finland, Apr. 9, 1981 1984); see also *Lerivag v. Norway*, U.N. Doc. CCPR/C/82/D/1155/2003 (2004) (finding that religious instruction program violated Article 18 because partial exemption system was not effective enough).

46. Eur. Conv. on H.R., *supra* note 18, § II, art. 19.

47. Eur. Ct. H.R., *supra* note 20, § 205.

48. *Id.*; see also *Hasan and Chaush v. Bulgaria*, 34 Eur. Ct. H.R. 35, para. 62 (2000) (“[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society. . . . It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members.”).

49. Merilin Kiviorg, *Autonomy of religious communities versus the battle for human rights: two sides of the same coin*, in *LAW, RELIGION AND FREEDOM: CONCEPTUALIZING A COMMON RIGHT* 152 (W. Cole Durham Jr. et al. eds., 2021).

50. Eur. Ct. H.R., *supra* note 20, § 231.

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[.]”⁵¹

The European Court, while recognizing the fundamental right of nondiscrimination, has also recognized that the autonomous existence of religious communities is “indispensable for pluralism in a democratic society” and is “at the very heart of” the religious freedom protection afforded by the European Convention.⁵² A significant aspect of that autonomy is broad protection for a religious community’s relationship with its clergy and those serving in teaching and administrative roles.⁵³ This principle of religious autonomy is in turn rooted in the idea that the “State’s duty of neutrality and impartiality . . . is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.”⁵⁴

For example, in *Obst v. Germany*, the head of public relations for the Church of Jesus Christ of Latter-day Saints in Europe was terminated because he violated church behavioral standards.⁵⁵ Like a religion teacher, Obst had significant responsibilities for representing the church and disseminating its teachings and views.⁵⁶ The European Court held that German courts had appropriately weighed Obst’s privacy rights against the religious autonomy rights of the church and had correctly concluded that the church’s religious autonomy rights must be interpreted in light of their right to association under the European Convention, and that the church’s autonomy was “indispensable to pluralism in a democratic society.”⁵⁷

In some cases, the right to religious autonomy must be weighed against the individual right to religious freedom within the context of a claimant’s role in the church. For example, in *Siebenhaar v. Germany*, the European Court found that the religious autonomy rights of a Protestant church running a nursery outweighed the individual right to religious freedom of one of its teachers who

51. *Id.*

52. *Obst v. Germany*, App. No. 425/03, para. 44 (Sept. 23, 2010) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-100463%22%5D%7D> [<https://perma.cc/LVX5-X2PH>].

53. *See, e.g., id.*; *Serif v. Greece*, App. No. 38178/97 paras. 38, (Dec. 14, 1999), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58518%22%5D%7D> [<https://perma.cc/M4Z5-B2EW>] (finding that criminal penalties of a mufti over his role in teaching and leading his mosque violated Article 9 of the Convention because “while religious freedom is primarily a matter of individual conscience, it also includes, *inter alia*, freedom, in community with others and in public, to manifest one’s religion in worship and teaching”).

54. *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01, para. 113 (Sept. 14, 2007), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-81067%22%5D%7D> [<https://perma.cc/WG5W-ZC6J>].

55. *Obst*, App. No. 425/03, paras. 1, 3, 7, 9.

56. *Id.* paras. 8, 17.

57. *Id.* paras. 44–45.

was promoting the views of a different religion.⁵⁸ The Court found that the church's requirements for a kindergarten teacher were acceptable in part because they were aimed at preserving the credibility of the church in the eyes of the public and the parents of her students.⁵⁹ Similar to the reasons for the Catholic Church's determination that using the term "Catholic" must be determined hierarchically to be legitimate, so too, the Court acknowledged this broader right to self-representation *ad extra* for the religious institutions in general.⁶⁰

Similarly, in *Sindicatul "Păstorul cel Bun" v. Romania*, the European Court considered whether Orthodox priests in Romania could form a trade union that was prohibited by the Romanian Orthodox Church.⁶¹ The Romanian courts had rejected the trade union's petition, but the Third Section of the European Court held that the priests must be allowed to unionize.⁶² The Grand Chamber of the European Court then reviewed the case and overturned the Section's decision, upholding Romania's determination.⁶³ The Grand Chamber held that the right of a religious community to exist without interference from the state influences not just the communities themselves, "but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected . . . all other aspects of the individual's freedom of religion would become vulnerable."⁶⁴ The Grand Chamber also noted that when it comes to the relationship between church and state, "the role of the national decision-making body must be given special importance" particularly given the "wide variety of constitutional models governing relations between the State and religious denominations" in Europe.⁶⁵

In *Fernández Martínez v. Spain*, the European Court considered the application of a Catholic priest who was removed from a position teaching the Catholic religion and ethics in a public school for violating his vows of celibacy.⁶⁶ The Court balanced the applicant's right to respect for his private life with the right of the church to internal religious autonomy.⁶⁷ The Court found that "[i]t is therefore not the task of national authorities to act as the arbiter between religious communities and the various dissident factions that exist or

58. *Siebenhaar v. Germany*, App. No. 18136/02 para. 47 (Feb. 3, 2011), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-103236%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103236%22]}) [<https://perma.cc/A5CJ-EA7P>].

59. *Id.* para. 46.

60. *See also* JOHN PAUL II, EX CORDE ECCLESIAE [ON THE CATHOLIC UNIVERSITY] (1990).

61. *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09, paras. 1–3 (July 9, 2013), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-122763%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122763%22]}) [<https://perma.cc/9TUZ-RECB>].

62. *Id.* paras. 15–16.

63. *Id.* para. 168.

64. *Id.* para. 136.

65. *Id.* para. 138.

66. *Martínez v. Spain*, App. No. 56030/07 (June 12, 2014), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145068%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145068%22]}) [<https://perma.cc/R4RW-GJE5>].

67. *Id.* para. 122.

may emerge within them.”⁶⁸ It further found that “it is not unreasonable for a church or religious community to expect particular loyalty of religious-education teachers in so far as they may be regarded as its representatives.”⁶⁹ The Court credited the church’s understanding of the problem that the applicant “could be understood” to have been advocating a “change in the Church’s rules.”⁷⁰ Based on these conclusions, the Court decided that the Spanish courts had correctly weighed the competing rights and upheld the church’s dismissal of the priest.⁷¹

These cases demonstrate the European Court’s strong commitment to protecting the communal and associational aspects of religious freedom. The European Court has given great weight to claims of religious autonomy in general, has decided in favor of countries protecting religious autonomy, and has consistently upheld the right of churches and other religious organizations to decide who is qualified to teach their faith. And the European Court has rarely overturned a case where the state protected the autonomy of a church to decide who teaches its faith at either a state or private school.⁷²

This principle of religious autonomy extends to any teachers of the faith, including employees and volunteers, ordained and unordained teachers. This means that religious institutions have some degree of control over the employment relationships, and they do not surrender their autonomy when they hire employees. According to the European Court, “[r]eligious communities can demand a certain degree of loyalty from those working for them or representing them,” which often includes “doctrinal standards of behaviour by which their followers must abide in their private lives.”⁷³

C. European Union

The European Union has also “expressed its respect for the autonomy of religious communities.”⁷⁴ Declaration No. 11 of the Final Act of the Treaty of Amsterdam states that “[t]he European Union respects and does not prejudice the status under national law of churches and religious associations or

68. *Id.* para. 127.

69. *Id.* para. 136.

70. *Id.*

71. *Id.* para. 150.

72. *But see* Schuth v. Germany, 2010-V Eur. Ct. H.R. 361 (Fifth Section of the court overturning Germany’s decision in favor of church and finding for divorced organist because employment tribunals had failed to properly balance “[h]is rights to respect for his private life” with the church’s mission).

73. Eur. Ct. H.R., *supra* note 20, § 224.

74. Matthew K. Richards et al., *Religious-Based Employment Practices of Churches: An International Comparison in the Wake of Hosanna-Tabor*, 26.2 *TEMPLE INT’L & COMP. L.J.* 263, 276 n.80 (2012).

communities in the Member States.”⁷⁵ Additionally, EU Council Directive 2000/78/EC, Article 4(2) provides that member states can maintain laws protecting churches’ ability to hire and fire based on religious beliefs:

[I]n the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.⁷⁶

This Directive recognizes not only a church’s ability to hire according to religious beliefs, but also to hold its employees accountable during the course of their employment, thus upholding “the right of churches and other public or private organisations, the ethos of which is based on religion or belief . . . to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”⁷⁷ The Directive is a clear indication that the European Union has recognized religious autonomy as an international human right.

D. *Inter-American Court of Human Rights*

On the other side of the Atlantic, the Inter-American Court of Human Rights, and the Inter-American Commission whose decisions it reviews, have long recognized the importance of collective as well as individual rights to religious freedom.⁷⁸ The Inter-American Court has jurisdiction over twenty countries in the Organization of American States and wields advisory influence as well.⁷⁹

In *Loren Laroye Riebe Star v. Mexico*, the Commission considered the case of three priests who were expelled from Mexico due to their human rights work in the State of Chiapas.⁸⁰ The Commission held that the priests’ rights had been violated under Article 12, in part because their expulsion “cut them off from contact with their parishioners” and violated “the right to associate freely for religious purposes.”⁸¹

75. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 11, 1997, 1997 O.J. (C 340) 1, 133., <https://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf> [<https://perma.cc/U4AW-CMTH>].

76. Council Directive (EC) No 2000/78 of 27 November 2000, art. 4(2), 2000 O.J. (L 303) 16, 19, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078> [<https://perma.cc/4M4B-A8A5>].

77. *Id.*

78. See, e.g., *Loren Laroye Riebe Star v. Mexico*, Case 11.610, Inter-Am. Comm’n H.R., Report No. 49/99 (1999); *Jehovah’s Witnesses v. Argentina*, Case 2137, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978).

79. *What is the I/A Court H.R.?*, INTER-AM. CT. H.R., https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en [<https://perma.cc/W6AS-SDAS>].

80. *Loren Laroye Riebe Star*, paras. 6–9 (1999).

81. *Id.* para. 105.

Similarly, in *Jehovah's Witnesses v. Argentina*, members of the Jehovah's Witnesses community challenged Argentina's sweeping prohibition of "all the activities of the Jehovah's Witnesses, all their literature, and the closing of their Halls of the Kingdom and the district office."⁸² The Commission found that Argentina violated the right to freedom of religion and worship under the American Declaration of the Rights and Duties of Man.⁸³ The Commission also found a violation of the right to association, recognizing the importance of the ability of religious groups to exist and associate together freely.⁸⁴

The Inter-American Court of Human Rights has also recognized the communal aspect of the right of conscience and religion in its decisions. For example, in *Río Negro Massacres v. Guatemala*, the Court addressed the 1980 and 1982 massacres of a Mayan community by Guatemalan forces as part of an armed civil conflict.⁸⁵ In addition to the other significant human rights abuses perpetrated in those incidents, the Court recognized that the Mayan communities suffered the loss of "cultural and religious values and practices."⁸⁶ The Court also found that because the Mayans were not buried according to the religious traditions required by their community, Guatemala had violated Article 12 of the American Convention.⁸⁷ Religious beliefs are a part of Mayans' "cultural identity or integrity,"⁸⁸ and thus are a part of the "fundamental and collect[ive] right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society."⁸⁹

Without the legal recognition that religious communities have institutional autonomy, the individual right of conscience and religious freedom would not be enough to protect the community's religious values. Just as in *Río Negro Massacres*, a loss of "religious values and practices" is tied to the loss of the "social, economic and political institutions" of a community.⁹⁰ Guaranteeing the institutional rights of a community is critical to its identity, authenticity, and expressive integrity.

In May 2021, the Inter-American Court heard a case addressing many of these issues, *Pavez v. Chile*. The petitioner, Sandra Pavez Pavez, taught Catholic religion classes at a public school in San Bernardo, Chile. When, in 2007, she told the local Diocese of San Bernardo that she was in a same-sex relationship

82. *Jehovah's Witnesses* at Background para. 1.

83. *Id.* at Resolution para. 1; American Declaration of the Rights and Duties of Man, *supra* note 30, art. III.

84. *Jehovah's Witnesses* at Resolution para. 1; American Declaration of the Rights and Duties of Man, *supra* note 30, art. XXI.

85. *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, para. 2 (Sept. 4, 2012).

86. *Id.* para. 61.

87. *Id.* paras. 151, 165.

88. *Id.* para. 160.

89. *Id.*

90. *Id.* para. 61.

in direct violation of Catholic teaching, the Diocese revoked her certificate of suitability to teach the Catholic faith.⁹¹ Although the school promoted her to an administrative role, Ms. Pavez filed suit in the Chilean courts claiming employment discrimination. The Supreme Court of Chile ruled that the Diocese had the authority to decide who was qualified to teach its faith to students in a decision that respected the Catholic Church's right to autonomy.⁹² Ms. Pavez filed a complaint with the Inter-American Commission on Human Rights, which ruled in her favor in 2018.⁹³ Chile appealed to the Inter-American Court, arguing that Article 12 of the American Convention protects the freedoms of religious institutions like the Diocese to select who is qualified to teach their faith, as well as the rights of parents to ensure that their children receive a religious education consistent with their convictions.⁹⁴

The Court released its decision in April 2022, ruling for Ms. Pavez and finding Chile liable for discrimination on the basis of sexual orientation.⁹⁵ In a lengthy opinion, the Court failed to grapple with the significant conflict between church and state that its ruling would create or the body of international law recognizing religious autonomy. Even though the State of Chile preferred to stay out of the complex religious dispute which arose when Ms. Pavez told the local Diocese she was in a same-sex relationship, the Court's opinion faulted Chile for not intervening, holding that "States are required to adopt affirmative measures to reverse or change existing discriminatory situations in their societies."⁹⁶ Instead, the Court elevated a "right to identity" that is unenumerated in the American Convention, as well as "the right to privacy" and "the dignity of the individual."⁹⁷

The Court briefly acknowledged that religious freedom is an international human right explicitly protected by Article 12 of the American Convention, Article 18 of the Universal Declaration, Article 18 of the ICCPR, the UN Special

91. Pavez Pavez v. Chile, Case No. 12.997, Inter-Am. Comm'n H.R., Report No. OEA/Ser.L./V/II.170, doc. 170 paras. 25, 27 (2018).

92. *Id.* paras. 30, 32.

93. *See generally id.* (finding that Chile violated Ms. Pavez's rights to private life and autonomy, access to public service, equality under the law, judicial protection, and right to work in the American Convention of Human Rights).

94. Letter of Reply of the State of Chile: To the Comm'n's Rep. No. 148/18 and to the Letter of Requests, Arguments and Evidence of the Representatives of Sandra Pavez Pavez, in Case CDH-26-2019 (Pavez Pavez vs. Chile), followed by the Honourable Inter-Am. Comm'n H.R., Case No. 12.997, Inter-Am. Ct. H.R. (July 10, 2020).

95. Pavez Pavez v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 449 (Feb. 4, 2022). The Court awarded Ms. Pavez \$30,000 in non-pecuniary damages, \$5,000 for psychological treatment, and \$30,000 in costs and expenses paid by the State of Chile; imposed an obligation for Chile to create and implement a "training plan" for those charged with evaluating suitability of teachers in public schools, instructing them not to discriminate based on sexual orientation; and required Chile to hold a ceremony acknowledging international responsibility and publicly apologizing to Ms. Pavez. *Id.* paras. 172, 179, 193, 198, 202.

96. *Id.* para. 67.

97. *Id.* paras. 58, 61.

Rapporteur, the Political Constitution of Chile, and Law No. 19,638 which governs freedom of religion in Chile.⁹⁸ Yet the Court merely listed the existence of these rights and failed to apply them or engage meaningfully with the analysis of international courts interpreting these provisions.⁹⁹

On balance, *Pavez v. Chile* was a missed opportunity to promote protection for religious institutions in countries across the Americas. Instead, the decision will likely increase confusion and political conflict as states may feel obligated to intervene in internal religious decisions about who is qualified to teach the faith to the next generation.

IV. INDIVIDUAL COUNTRIES

Across European and other jurisdictions, while there is variation as to the precise scope of religious autonomy, there is strong convergence when it comes to protecting the autonomy of religious communities to manage interactions with their clergy and those who serve in leadership or religious teaching capacities.¹⁰⁰ In this regard, it is widely held that both teaching and conduct which are contrary to the principles or beliefs of a religion constitute legitimate reasons for withdrawal of *mandatum* (for Catholics) or *vocatio* (for Protestants) or taking other steps resulting in termination.¹⁰¹

Several countries have treaty and contractual obligations to respect the authority of religious communities in determining the content and personnel of religious education for those wishing to receive such education.¹⁰² For example, numerous countries have Concordats with the Holy See that recognize the

98. *Id.* paras. 74, 76, 79–80, 84.

99. The Court cited *Fernandez-Martinez* only once in a footnote, yet refused to acknowledge the directly analogous religious autonomy problem in this case. *Id.* para. 129 n.164. The Court also ignored *Our Lady of Guadalupe* and attempted to cabin *Hosanna-Tabor* as applying only to churches and not in the educational context. *Id.* paras. 128–130.

100. *See, e.g.*, *Obst v. Germany*, App. No. 425/03 (Sept. 23, 2010) (leadership); *Siebenhaar v. Germany*, App. No. 18136/02 (Feb. 3, 2011) (teaching).

101. *See, e.g.*, BAG, 7 AZR 506/87, May 25, 1998 (Ger.), https://www.prinz.law/urteile/BAG_7_AZR_506-87 [<https://perma.cc/P6HN-WE9L>]; Cass., sez. un. 24 febbraio 2003, n. 2803 (It.), <https://www.eius.it/giurisprudenza/2003/014> [<https://perma.cc/LD6M-Q46D>] (teaching authorization certificate can be revoked not only for reasons connected to teaching activity but also for reasons concerning teacher's private life); *Discrimination—private college, right to ask job applicants about their religious views—ILO Convention 111*, RT. 1986, 1250 (Nor.), reprinted in 7 INT'L LABOR L. REPS. ONLINE 1, 201 (1986), <https://brill.com/view/journals/illo/7/1/article-p201.xml> [<https://perma.cc/72HE-8RTR>] (private educational institutions run by religious organizations may require loyalty to institution's religious and moral values in relation to employment).

102. *See, e.g.*, Additional Protocol to the Accordi di Villa Madama, n.5 (1984) (It.) (teachers will be “recognised by the ecclesiastical authority as being qualified thereto”); GRUNDGESETZ [GG] [BASIC LAW] art. VII (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/SK5W-WTLR>] (“Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned.”).

authority and autonomy of the Catholic Church with respect to the appointment and dismissal of teachers of Catholic religion in public schools.¹⁰³ This practice is consistent with Catholic Canon law provisions establishing diocesan authority over Catholic religious teaching.¹⁰⁴ The Code of Canon Law grew out of the ancient Roman legal system and continues to function as the primary legal governance for Catholics. The Catholic Church retains for itself certain authority over its own members and ecclesial institutions, including but not limited to overseeing the formation of schools and ensuring that teachers teach according to Catholic doctrine and discipline.¹⁰⁵ To ensure the proper instruction of doctrines that are central to the faith, the church reserves the right to require statements of faith to grant a teacher permission to teach theology at an institute of higher learning, a permission called the *mandatum*.¹⁰⁶ To ensure that the church is not represented to the outside world contrary to its teachings, the church reserves the authority to grant or withhold permission to use the name and title “Catholic” for any institutions or groups.¹⁰⁷

Many countries around the world have chosen to protect religious communities with commitments to religious freedom enshrined in their constitutions.¹⁰⁸ Whether these commitments are applied to benefit and protect

103. See, e.g., Treaty on the Regulation of Questions Related to the School System, Austria-Holy See, art. I, § 3(2), July 9, 1962, <https://www.uibk.ac.at/praktheol/kirchenrecht/ru-recht/gesetze/vertragsrecht/schulvertrag.html> [<https://perma.cc/2WSF-WM5D>]; Basic Agreement Between the Holy See and Bosnia and Herzegovina, Apr. 19, 2006, art. 16 <http://licodu.cois.it/?p=3235&lang=en> [<https://perma.cc/2QKK-666Y>]; Agreement Between the Holy See and the Republic of Croatia Regarding Collaboration in the Educational and Cultural Field, Vatican-Croat., art. 3, § 2, Dec. 19, 1996, https://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19961219_s-sede-croazia-educativo_it.html [<https://perma.cc/H8ZG-7TU8>]; Agreement Between the Republic of Malta and the Holy See to Better Order Catholic Education and Religious Education in State Schools, Nov. 16, 1989, art. 2, https://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19891116_s-sede-malta-educazione_it.html [<https://perma.cc/BA4B-HSD4>]; Concordat between the Holy See and the Republic of Poland, July 28, 1993, art. 12, para. 3 <http://www.concordatwatch.eu/topic-1331.843> [<https://perma.cc/R8YN-QMDX>]; Concordat with the Holy See and the Portuguese Republic, May 18, 2004, art. 19, paras. 3–4, http://www.concordatwatch.eu/showtopic.php?org_id=1361&kb_header_id=4131 [<https://perma.cc/W7ER-XU4D>]; Agreement Between the Spanish State and the Holy See Concerning Legal Affairs, Jan. 3, 1979, art. 3, <https://original.religlaw.org/content/religlaw/documents/agrsphs1976.html> [<https://perma.cc/XB35-P47E>] (“[Catholic] religious instruction shall be imparted by . . . the academic authority from among those proposed by the diocesan [bishop] . . . [who] shall make known the names of those teachers and persons considered competent for said education.”).

104. See 1983 CODE c.803, §§ 1–3, https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib3-cann793-821_en.html. [<https://perma.cc/HH7Y-Z5D4>].

105. *Id.* Can. 804, §§ 1–2.

106. *Id.* Can. 812.

107. *Id.* Can. 803, § 3.

108. See, e.g., U.S. CONST. amend. I; Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), <https://www.canada.ca/content/dam/pch/documents/services/download-order-charter->

religious institutions, however, depends on how the courts apply those legal protections and how local authorities enforce them. Some governments do not respect religious autonomy or the communal aspects of religious freedom.

A. Governments that respect religious autonomy

1. United States

The United States Constitution explicitly protects religious freedom.¹⁰⁹ The Establishment Clause and the Free Exercise Clause work together to protect religious autonomy as “a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental ‘advancement’ of religion.”¹¹⁰ As the U.S. Supreme Court has held, “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”¹¹¹

The framers of the U.S. Constitution explicitly departed from the British and early colonial practice of state-controlled churches and declined to establish a state-sponsored church, removing the government entirely from decision-making in all religious faiths, including majority and minority churches.¹¹² This decision ensured that the new government “would have no role in filling ecclesiastical offices.”¹¹³

U.S. law draws a distinction between “two separate polities, the secular and the religious . . . acknowledging the prerogatives of each in its own sphere.”¹¹⁴ “[C]ivil authorities have no say over matters of religious governance; and . . . secular judges must defer to ecclesiastical authorities on questions properly within their domain.”¹¹⁵ In other words, “civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them.”¹¹⁶ Because the spheres of church and state are distinct, it would be “wholly inconsistent with the American concept of the relationship between church and state to permit

bill/canadian-charter-rights-freedoms-eng.pdf [https://perma.cc/P4QJ-NP9X]; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19.6, <http://hrlibrary.umn.edu/research/chile-constitution.pdf> [https://perma.cc/6S4FTQDY]; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 19, https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en.

109. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”).

110. Michael W. McConnell, *The Federalist Society National Lawyers Convention—2011: Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 834 (2012).

111. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 184 (2012).

112. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) (citing *Hosanna-Tabor*, 565 U.S. at 183).

113. *Hosanna-Tabor*, 565 U.S. at 184.

114. *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013).

115. *Id.* at 678.

116. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

civil courts to determine ecclesiastical questions.”¹¹⁷ This distinction allows religion to exist in the public square while also protecting the identity and authority of religious institutions.

To respect this concept of separate spheres, the religious autonomy doctrine in the United States bars court interference in the internal affairs of religious organizations. For example, the doctrine bars employment-related claims against churches by any personnel, including non-ministers, when the employment decision “involv[es] matters of faith, doctrine, church governance, and polity” that could affect the church’s practice of the faith.¹¹⁸ The Supreme Court recognized the principles supporting religious autonomy in 1871 and has since upheld the doctrine in cases involving employment, church discipline, doctrine, and church polity.¹¹⁹

Religious autonomy is such an important interest in U.S. jurisprudence that courts do not use a balancing test or proportionality analysis. Instead, a categorical immunity applies under the First Amendment. This is not a “general immunity from secular laws,” but an “independence from secular control or manipulation,” so that religious institutions can “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹²⁰ When the religious autonomy doctrine applies, “there is no balancing of competing interests, public or private,” but it operates as a “complete immunity” and a “strong hands-off principle.”¹²¹ In other words, civil courts lack the authority to punish religious organizations for personnel decisions based on religious doctrine.

As a related doctrine which the Supreme Court has unanimously recognized, the “ministerial exception” bars any claims by “ministerial” employees—a term that refers to religious functionaries broadly, not just ordained clergy—because this would require courts to interfere in religious decision-making and violate

117. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445–46 (1969).

118. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002); *see also* *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 n.4 (10th Cir. 2010).

119. *See, e.g., Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (finding that the Supreme Court lacked authority to decide a religious property dispute between Presbyterians because it is unquestionably their sole right to “create tribunals for the decision of controverted questions of faith within the association, and [thus,] . . . it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed”); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 97–98, 119 (1952) (striking down article of the Religious Corporations Law of New York which transferred administrative authority over Russian Orthodox churches from Moscow to an autonomous metropolitan district, because it “prohibits the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy”); *Milivojevich*, 426 U.S. at 709.

120. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *Kedroff*, 344 U.S. at 116.

121. *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013).

the First Amendment.¹²² As a subset of the religious autonomy doctrine, the ministerial exception specifically shields religious institutions from lawsuits brought by ministers where the challenged decision was made for *any* reason—not just a religious or doctrinal reason. This is because making decisions about *who* teaches the faith and ministers to the faithful is inherently an internal religious matter.

In the 2012 case *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, a religion teacher who also taught secular subjects had her vocation revoked by the defendant Lutheran congregation, because she refused to use the church court system to resolve her local church dispute.¹²³ The teacher claimed it was disability discrimination, and a federal anti-discrimination agency sued on her behalf. The Supreme Court unanimously rejected the government’s arguments that religious freedom did not extend to church employment relationships, calling them “untenable,” “remarkable,” and “extreme.”¹²⁴

The Supreme Court held that the ministerial exception applies to religion teachers and serves two important constitutional interests: (1) protecting the freedom of religious bodies to exercise control over internal matters of governance, and (2) preventing government from second-guessing or entangling itself in religiously significant decisions such as who should teach the faith.¹²⁵ State interference with selecting employees that have ministerial responsibilities would “interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”¹²⁶

Notably, the Supreme Court drew a contrast between “government regulation of . . . outward physical acts” and “government interference with an internal church decision that affects the faith and mission of the church itself.”¹²⁷ Internal church decisions that affect the church’s faith and mission are largely immune to government regulation, while physical acts in the world external to the church can be regulated. This internal-external distinction echoes the distinction between the “*forum internum*” and the “*forum externum*” recognized by legal scholars and marks an important milestone in U.S. constitutional law concerning religious groups.¹²⁸ Just as individuals can make up their own minds about what they believe or do not believe, churches can make up their own minds about their doctrines, teachings, ecclesial structure, and beliefs without government interference. Precisely because the faith and mission of the church is carried out by employees entrusted with those responsibilities, their selection

122. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 188 (2012).

123. *Id.* at 179.

124. *Id.* at 189, 193.

125. *Id.* at 184.

126. *Id.* at 188.

127. *Id.* at 190.

128. Kiviorg, *supra* note 49, at 152.

and governance fall within the range of internal affairs that are protected by both the ministerial exception and religious autonomy. Those employees include those who are entrusted to teach the faith to children, the next generation of believers, in both church and school settings.

In July 2020, the Supreme Court decided another important religious autonomy case involving the ministerial exception, *Our Lady of Guadalupe School v. Morrissey-Berru*. The case arose in two Catholic elementary schools in Los Angeles, California, operated by their local parishes and committed to providing faith-based Catholic education.¹²⁹ Both employees were teachers who were responsible for teaching religion along with other subjects, leading their students in prayer, and participating in worship.¹³⁰ When the schools declined to renew the teachers' contracts due to poor performance, they sued, alleging age and disability discrimination.¹³¹

By a vote of 7-2, the Supreme Court held that the teachers' employment-discrimination claims could not be adjudicated by secular courts, because the teachers' duties were inherently religious, and thus the ministerial exception applied even though the teachers did not have the title of "minister" or formal religious training.¹³² Rejecting a narrow definition of "minister," the Court made clear that the employee's duties matter more than title or training. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."¹³³ The Supreme Court protected the freedom of religious organizations to make employment decisions consistent with their values, ensuring that churches can hold their teachers accountable to uphold the important mission of imparting the faith without facing years of litigation.¹³⁴

The Court recognized Catholic canon law in its decision, considering that "local bishops must satisfy themselves that 'those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.'"¹³⁵ The Court reaffirmed both the ministerial exception and the longstanding principle of religious autonomy "with respect to internal management decisions that are essential to the institution's central mission," finding that "a component of this autonomy is the selection of the individuals who play certain key roles."¹³⁶ Thus, especially for

129. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2056, 2058 (2020).

130. *Id.* at 2057, 2059.

131. *Id.* at 2058–59.

132. *Id.* at 2064.

133. *Id.*

134. *Id.* at 2055.

135. *Id.* at 2065 (quoting Code of Canon Law, Canon 804, § 2 (Eng. transl. 1998)); *see also* 1983 CODE c.803, *supra* note 104, § 2 ("The instruction and education in a Catholic school must be grounded in the principles of Catholic doctrine; teachers are to be outstanding in correct doctrine and integrity of life.").

136. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

teachers entrusted with imparting the Catholic faith to children, their lifestyles and conduct outside the classroom are a significant reflection of their religious witness to the students they teach.

Since *Our Lady of Guadalupe*, U.S. appellate courts have continued to apply the religious autonomy doctrine and the ministerial exception to protect the ability of churches to make decisions regarding their ministers. In *Demkovich v. St. Andrew the Apostle Parish*, the *en banc* Seventh Circuit held that the ministerial exception applies not only to the beginning and end of an employment relationship with a religious institution, but also to bar claims arising *during* employment.¹³⁷ The court also recognized that the ministerial exception “follows naturally from the church autonomy doctrine,” and that both doctrines protect against the harms of “civil intrusion and excessive entanglement” between church and state.¹³⁸ The Texas Supreme Court upheld a similar principle in *In re Diocese of Lubbock*, barring defamation claims brought by a deacon who had been named by the Diocese on a list of clergy credibly accused of sexual abuse.¹³⁹ Because the deacon’s claims “ultimately challenge[d] the result of a church’s internal investigation into its own clergy,” and such investigations are “inherently ecclesiastical,” his defamation claims ran afoul of the religious autonomy doctrine and were thus barred by the First Amendment.¹⁴⁰

Together, the doctrines of religious autonomy and the ministerial exception protect the freedom of religious institutions in the United States to make significant internal decisions without government interference.

2. Canada

Canada has consistently recognized that religious freedom is not only an individual right but a collective right to be exercised in community with others, which extends to both Catholic and Protestant schools. Historically, Canada has a long tradition of “separate schools” which receive state funds but are fully operated by church denominations. Today, religious-state partnerships remain widespread, especially in elementary and secondary education where many provinces provide direct funding to Catholic and other religious schools.

Section 2 of the Canadian Charter of Rights and Freedoms provides that “[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion, (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.”¹⁴¹ The Supreme Court of Canada

137. *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 985 (7th Cir. 2021) (rejecting a hostile work environment claim).

138. *Id.* at 975, 977.

139. *In re Diocese of Lubbock*, 624 S.W.3d 506, 509 (Tex. 2021).

140. *Id.* at 518.

141. Canadian Charter of Rights and Freedoms, *supra* note 108, § 2.

has interpreted Section 2(a) to extend to religious communities, not merely individuals: “Religious freedom under the Charter must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.”¹⁴² The Charter also contains specific protections for denominational schools: “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”¹⁴³

Both the Supreme Court of Canada and the Ontario Court of Appeals have held that Section 29 of the Charter and Section 93 of the Constitution Act work together to protect the religious autonomy of denominational schools.¹⁴⁴ “It is this essential Catholic nature which is preserved and protected by s. 93 of the Constitution Act, 1867 and s. 29 of the Charter.”¹⁴⁵

Canadian courts have respected the right of religious schools to prefer teachers of the same religion when hiring and promoting. This “bona fide occupational qualification,” which has parallels in the United States and the EU Directive mentioned above, extends not only to beliefs but to the conduct of teachers outside the classroom.¹⁴⁶ In *Daly v. Ontario*, the Ontario Court of Appeals upheld Roman Catholic schools’ longstanding right to prefer Roman Catholics in employment decisions.¹⁴⁷ According to the Court, “[r]eligious faith on the part of the teachers is a valid consideration if the aim of the school to create a community of believers with a distinct sense of the Catholic culture is to be achieved.”¹⁴⁸ Thus, a law that “takes away the right to even consider whether a teacher is Catholic or not in making employment decisions in Roman Catholic Separate Schools” infringes rights guaranteed by the Canadian Constitution.¹⁴⁹

In *Caldwell v. Stuart*, the Supreme Court of Canada considered the case of a teacher fired for marrying a divorced man against Catholic teaching, and rejected her discrimination complaint, holding that:

[T]eachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the

142. *Loyola v. Québec*, [2015] 1 S.C.R. 613, para. 60 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14703/index.do> [<https://perma.cc/5N2Z-QPWU>].

143. Canadian Charter of Rights and Freedoms, *supra* note 108, § 29.

144. *In Re: An Act to Amend the Education Act*, [1986] 53 O.R. 2d 513 (Can. Ont. C.A., *affirmed*, *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/228/index.do> [<https://perma.cc/9VT8-FTG7>].

145. *Id.*

146. *See supra* Section III.C.

147. *Daly v. Attorney General of Ontario*, 1999 CanLII 3715 (Can. Ont. C.A.) <https://www.canlii.org/en/on/onca/doc/1999/1999canlii3715/1999canlii3715.html?autocompleteStr=daly%20v&autocompletePos=1> [<https://perma.cc/Z2XU-ZMH5>]; *aff'g* 1997 CanLII 12210 (Can. Ont. Gen. Div.), <https://www.canlii.org/en/on/onsc/doc/1997/1997canlii12210/1997canlii12210.html?resultIndex=2> [<https://perma.cc/F5EQ-SQC5>].

148. *Id.*

149. *Id.*

school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education. Fulfillment of these purposes requires that Catholics observe the Church's rules regarding marriage.¹⁵⁰

Thus, the Supreme Court of Canada recognized that when the Catholic Church is deciding who should teach the faith to students, its authority extends beyond beliefs into important aspects of their teachers' lives, especially marriage.¹⁵¹

Similarly, in *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada held that “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”¹⁵²

In *Highwood Congregation of Jehovah's Witnesses v. Wall*, a member of a close-knit religious community sued after he was disfellowshipped for engaging in what the Congregation viewed as unrepentant sin.¹⁵³ The Supreme Court of Canada held that it lacked jurisdiction over the dispute, holding that “religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.”¹⁵⁴

In *Loyola High School v. Québec*, a private Catholic high school run by the Jesuit Order requested an exemption from Québec's requirement to teach all religions from a neutral perspective, because it contradicted the school's core mission of teaching from a Catholic perspective.¹⁵⁵ The Supreme Court of Canada held that Québec's actions represented “a disproportionate, and

150. *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, 618 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5292/index.do> [<https://perma.cc/4BSV-3UC7>].

151. *See also* *Re Essex County Roman Catholic Separate School Board and Porter et al.*, 1978 CanLII 1323 (Can. Ont. C.A.), <https://www.canlii.org/en/on/onca/doc/1978/1978canlii1323/1978canlii1323.html?autocompleteStr=1978%20CanLII%201323&autocompletePos=1> [<https://perma.cc/8XBZ-J9W7>] (upholding Catholic school board's decision to fire two teachers for entering civil marriages outside of church authority, because “[s]erious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the education process”); *Casagrande v. Hinton Roman Catholic Separate School District No. 155*, 1987 CanLII 3358 (Can. Alta Q.B.), <https://www.canlii.org/en/ab/abqb/doc/1987/1987canlii3358/1987canlii3358.html?autocompleteStr=1987%20CanLII%203358&autocompletePos=1> [<https://perma.cc/6PY5-SNJS>] (upholding Catholic school board's right to terminate employment contract of teacher who had engaged in “conduct prohibited by Catholic teaching and doctrine,” specifically premarital sex resulting in two pregnancies out of wedlock).

152. *Syndicat Northcrest v. Amselem*, [2004] S.C.R. 551, para. 50 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/2161/1/document.do> [<https://perma.cc/MML5-GF6W>].

153. *Highwood Congregation of Jehovah's Witnesses v. Wall*, [2018] 1 S.C.R. 750 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/17101/1/document.do> [<https://perma.cc/8BEA-4E2Q>].

154. *Id.* para. 39.

155. *Loyola High School v. Québec*, [2015] 1 R.C.S. 613, paras. 1–2, 24–25 (Can.).

therefore unreasonable interference with the values underlying freedom of religion of those individuals who seek to offer and who wish to receive a Catholic education at Loyola.”¹⁵⁶ While the government could require Loyola to offer a course explaining other religions, it could not “prescrib[e] to Loyola how it is to explain *Catholicism* to its students.”¹⁵⁷ Because religious freedom belongs not only to individuals but also to religious institutions, the Canadian government was bound to respect “the Charter-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education.”¹⁵⁸ Not only were the school’s rights at stake, but so were the rights of the students and parents who wanted their children to receive a Catholic education.¹⁵⁹

Showing signs of convergence with U.S. law on religious autonomy, Canada has respected the separate spheres of church and government decision-making in its cases: “[A] secular state does not—and cannot—interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.”¹⁶⁰ This understanding of religious freedom exercised in community with others echoes Article 18 of the Universal Declaration, Article 18 of the ICCPR, and Article 9 of the European Convention on Human Rights. The two concurring judges in *Loyola* quoted these instruments, emphasizing that “the freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.”¹⁶¹

3. Chile

Chile’s Constitution protects freedom of conscience and the free exercise of religion. Article 19.6 of the Constitution guarantees to all persons:

Freedom of conscience, manifestation of all creeds and the free exercise of all cults which are not opposed to morals, good customs or public order;

Religious communities may erect and maintain churches and their facilities in accordance with the conditions of safety and hygiene as established by the laws and ordinances.

With respect to assets, the churches and religious communities and institutions representing any cult shall enjoy the rights granted and acknowledged by the laws currently in force. Churches and their

156. *Id.* para. 6.

157. *Id.* (emphasis added).

158. *Id.* para. 34.

159. *Id.* para. 54 (“[P]arents have the right to choose establishments that, according to their own convictions, best respect the rights of their children.”).

160. *Id.* at 43.

161. *Id.* para. 94.

facilities assigned exclusively for religious activities shall be exempt from all taxes[.]¹⁶²

Notably, the Chilean Constitution protects not only religious individuals but also religious communities, specifically recognizing their right to build and maintain facilities, their tax-exempt status, and their rights based on other laws.

Chile also has its own Law of Religion, Law No. 19.638, which explicitly recognizes that religious organizations are free to choose their employees and leaders:

Under the freedom of religion and worship, it is recognized that religious organizations have full autonomy for the development of their own ends and, among others, the following rights to: a) exercise control over their ministry[;] . . . b) establish their own internal organization and hierarchy; and c) train, appoint, elect and designate individuals for positions and offices.¹⁶³

Based on these two provisions, the Catholic Church should retain “full autonomy” to exercise control over who teaches its religious precepts to students in Chilean schools. Notably, Law 19.638 uses the broad language of “autonomy” to acknowledge that the decision-making authority of religious organizations takes place in a separate sphere from decisions by the government or other employers. The law’s application is also broad; instead of singling out priests or religious ministers, a religious organization’s ability to “train, appoint, elect and designate” employees extends to all important offices, including teachers.¹⁶⁴

In its opinion in *Pavez v. Chile*, the Inter-American Court briefly cited these religious freedom provisions in both the Constitution of Chile and Law No. 19.638, yet it failed to apply the robust protections these laws provide for religious autonomy in cases involving religion teachers.¹⁶⁵ Instead, the Court concluded that Chile’s system of teaching religion classes in public schools was a unique feature of its own educational system, “and not a power inherent in or derived from freedom of religion.”¹⁶⁶ For that reason, the Court considered the local diocese’s decision to issue certificates of suitability to be state action subject to judicial review and, in this case, censure. This stilted understanding of Chile’s own religious freedom protections will likely create further confusion rather than clarity, as the church and state continue to grapple over who retains the authority to decide whether a religion teacher is qualified.

162. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, *supra* note 108, art. 19.6.

163. L. 19638 art. 7, 1 Oct. 1999, Diario Oficial [D.O.] (Chile).

164. *Id.*

165. *Pavez v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 449, paras. 16, 18, 25–77 (Feb. 4, 2022).

166. *Id.* para. 115.

4. Colombia

Colombia's Constitution also protects the religious freedom of individuals and communities. Article 19 provides: "Freedom of religion is guaranteed. Every individual has the right to freely profess his/her religion and to disseminate it individually or collectively. All religious faiths and churches are equally free before the law."¹⁶⁷

Colombia has additional laws that promote harmony between the government and religious institutions by specifically protecting the autonomy and freedom of the Catholic Church. In 1973, Colombia entered a Concordat with the Holy See.¹⁶⁸ Officially approving the Concordat, Article 10 of Law 20 "guarantees the Catholic Church the freedom to found, organize and direct, under the dependence of the ecclesiastical authority, educational centers at any level, specialty and branch of education, without prejudice to the right of inspection and surveillance that corresponds to the State."¹⁶⁹

Besides protecting the church's ability to decide and direct who teaches the faith, the law also guarantees that "[t]he Catholic Church will preserve its autonomy to establish, organize and direct faculties, institutes of ecclesiastical sciences, seminaries and houses of formation of religio[n]."¹⁷⁰ The word "autonomy" here is key, because it recognizes the church's sphere of governance, which is separate and free from government interference, especially when it comes to choosing teachers and holding them accountable to faithfully teach and abide by church doctrine.

In 1994, Colombia enacted the Statutory Law of Religious Liberty. Article 2 ensures that "[t]he government would protect individuals in their beliefs, as well as churches and religious groups and facilitate their participation in achieving the common good. Similarly, it will maintain harmonious relations and common understanding with the churches and religious entities existing in Colombian society."¹⁷¹ Thus, Colombia recognizes that religious institutions play an important role in society as they contribute to the common good, and that government cooperation with these religious institutions is especially important as society becomes more diverse. The "unifying factor is in the common purpose of serving the individual and the common good," which is best achieved

167. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], *supra* note 108, art. 19.

168. L. 20, art. 10, diciembre 18, 1974, DIARIO OFICIAL [D.O.] (Colom.), <https://www.dmsjuridica.com/CODIGOS/LEGISLACION/LEYES/LEY%2020%20DE%201974.htm> [<https://perma.cc/WK6B-FNML>].

169. *Id.*

170. *Id.*

171. L. 133, art. 2, mayo 23, 1994, Diario Oficial [D.O.] (Colom.), <https://bibliotecadigital.ccb.org.co/bitstream/handle/11520/14644/Ley%20133%20de%201994.pdf?sequence=1&isAllowed=y> [<https://perma.cc/7YTG-3ERP>].

when the government respects the freedoms and autonomy of religious institutions.¹⁷²

Article 6 of the Statutory Law of Religious Liberty acknowledges the right to teach and be taught in accordance with one's religion, recognizing that these subjects merit "legal autonomy and immunity from coercion."¹⁷³ This law protects the right to "receive and impart religious education and information . . . to whoever wishes to receive it."¹⁷⁴ The law extends not only to teachers, but also to students and parents, protecting their right "to choose for themselves . . . inside and outside the school environment, religious and moral education according to their own convictions."¹⁷⁵

Most relevant here, this law "require[s]" the "certification of suitability issued by the Church or confession of the religion that he attends or teaches," and this requirement extends to "admission, promotion or permanence in chaplaincies or in teaching religious and moral education."¹⁷⁶ Thus, Colombian law protects religious freedom in the specific area of education, and it safeguards the church's autonomy in certifying qualified teachers. As in Chile, churches in Colombia issue certificates of suitability to teachers that they deem qualified to accurately convey the faith through a lifestyle consistent with church teaching. And when it comes to religious education more broadly, churches and religious organizations hold the authority to decide who is qualified to teach in accordance with the church's beliefs.

5. *European Countries*

European countries offer similar protection to religious institutions. According to the European Court of Human Rights, "a significant majority of the Council of Europe Member States provide religious education, both denominational and non-denominational, in State schools. In [many] . . . States making up this majority, the religious authorities concerned have either a co-decision role or an exclusive role in the appointment and dismissal of religious education teachers."¹⁷⁷ This typically includes "the authorisation of the religious community in question."¹⁷⁸

As examples of this dominant approach, Italy and Germany have agreements with religious communities to ensure that the religious community has authority

172. Vicente Prieto, *Law and Religion in Colombia: Legal Recognition of Religious Entities*, 2011 BYU L. REV. 691, 707 (2011), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2603&context=lawreview> [<https://perma.cc/629A-RJYT>].

173. L. 133, *supra* note 171, art. 6.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Fernández Martínez v. Spain*, App. No. 56030/07, para. 66 (12 June 2014), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-145068%22%7D> [<https://perma.cc/R4RW-GJE5>].

178. *Id.*

over teaching its faith in public schools.¹⁷⁹ In Belgium, the relationship between church and state varies regionally, but the Belgian Conseil d'État permanently confirmed the primacy of religious autonomy over other individual rights of religion teachers. The Conseil d'État held on 6 March 1998 that a teacher of Protestant religion might be disciplined at the request of religious authorities on suspicion of sexual abuse, without government review of the religious body's procedure.¹⁸⁰ On 29 November 2007, the Conseil d'État confirmed church autonomy rights as against the privacy rights of a religion teacher whose remarriage violated Catholic doctrine.¹⁸¹

Most European countries have also adopted religious exceptions to anti-discrimination legislation in compliance with a European Union directive.¹⁸² These exceptions allow the relevant religious community to impose occupational requirements when hiring leaders and teachers, such as requiring the teacher to believe and follow church doctrine.¹⁸³ European law does not connect government support for religious education with plenary authority to override the autonomy of religious communities to decide who may teach religion. Governments can reduce or diversify funding, but they may not control teaching roles.

There is thus a broad European consensus respecting religious teachers: churches have latitude to order their relationships with their clergy and to decide who teaches their faiths. European case law typically protects religious autonomy not only with respect to the members of the clergy, but also with respect to schoolteachers, teachers of religious doctrine, and others holding high leadership or representational positions.

179. Additional Protocol to the Accordi di Villa Madama, n.5 (1984) (teachers will be "recognized by the ecclesiastical authority as being qualified thereto") (It.); *Grundgesetz* [GG], Article 7 (The German Constitution recognizes that "[w]ithout prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned.").

180. Bouillon, A.76.629/VIII-656 (Mar. 6, 1998) (Belg.), [https://classic.iclrs.org/content/iclrs/documents/Conseil%20d%E2%80%99Etat%20decision%206%20March%201998%20\(Bouillon\).pdf](https://classic.iclrs.org/content/iclrs/documents/Conseil%20d%E2%80%99Etat%20decision%206%20March%201998%20(Bouillon).pdf) [<https://perma.cc/S45Q-PSLG>].

181. Claes, 177.413, A. 116.828/XII-3457 (Nov. 29, 2007) (Belg.), [https://classic.iclrs.org/content/iclrs/documents/Conseil%20d%E2%80%99Etat%20decision%2029%20November%2009%20\(Claes\).pdf](https://classic.iclrs.org/content/iclrs/documents/Conseil%20d%E2%80%99Etat%20decision%2029%20November%2009%20(Claes).pdf) [<https://perma.cc/TYW4-S82A>].

182. 2000 O.J. (L 303) 303/16, 19.

183. *Id.*; see, e.g., Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie [Belgian Anti-Discrimination Law], B.S., May 30, 2007, art. 13, http://www.iefh-legislation.be/backoffice/_lib/file/docdoc_nl/file_NL_85%20-%20Wet%20van%2010%20mei%202007%20ter%20bestrijding%20van%20bepaalde%20vormen%20van%20discriminatie.pdf [<https://perma.cc/C4QJ-UBUK>]; Arbeidslivets lover [Working Environment Act], § 13-3(1) (2007) (Nor.) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70972/74730/F1974823593/NOR70972.pdf> [<https://perma.cc/B5KY-7UYZ>] ("Discrimination that has a just cause, that does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination pursuant to this Act.").

B. Governments seeking to control religious decisions

Unlike the countries described above, which have recognized the importance of religious freedom and upheld the right of religious communities to select their leaders and teachers, countries which infringe this right by interfering in the selection of religious teachers tend to violate other human rights as well. Every year, the United States Commission on International Religious Freedom (USCIRF) designates the most egregious violators of religious freedom as “countries of particular concern,” a category which garners international notoriety and often leads to sanctions and other diplomatic efforts to hold these nations accountable.¹⁸⁴

In 2020, USCIRF designated the following countries as of particular concern, many of which have been on the list for years: Burma, China, Eritrea, India, Iran, Nigeria, North Korea, Pakistan, Russia, Saudi Arabia, Syria, Tajikistan, Turkmenistan, and Vietnam.¹⁸⁵ Along with other more severe violations of human rights, these countries tend to exercise control over the selection of religious leaders and teachers.

1. China

Religious autonomy has no place in China, one of the countries designated as of particular concern. As one of the world’s foremost violators of human rights, China exercises a unique level of government control over the selection, teaching, and lives of religious leaders. USCIRF has long designated China a Tier 1 “country of particular concern” under the United States’ International Religious Freedom Act for its ongoing repression of religious freedom.¹⁸⁶

China’s stringent control over religious leaders harms adherents of multiple faiths. A recent Communist Party Sinicization campaign has attempted to bring all religious groups in China into greater compliance with party ideology, putting intense pressure on all groups of religious leaders.¹⁸⁷ This pressure is not a new approach, but has historically been part of the Chinese government’s efforts to exercise authority over religious leaders. Tibetan Buddhists, for example, were subject to Chinese government attempts to control the next reincarnation of His

184. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 2020 11 (2020) [hereinafter USCIRF Report (2020)], https://www.uscirtf.gov/sites/default/files/USCIRF%202020%20Annual%20Report_Final_42920.pdf.

185. *Id.*

186. *Id.*

187. U.S. DEP’T OF STATE, CHINA 2019 INT’L RELIGIOUS FREEDOM REPORT 60 (2019), <https://www.state.gov/wp-content/uploads/2020/06/CHINA-INCLUDES-TIBET-XINJIANG-HONG-KONG-AND-MACAU-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [<https://perma.cc/7CTJ-PNPG>].

Holiness the Dalai Lama, as well as the forced disappearance of the Panchen Lama for over 25 years.¹⁸⁸

In 1949, the Chinese Communist Party coopted a Protestant religious movement known as the Three-Self Movement, turning it into a state-run program that imposes restrictions on teachers and churches outside the movement.¹⁸⁹ Even within state-approved churches, intense government oversight is prevalent.¹⁹⁰ Three-Self pastors can only preach where assigned, their sermon content is closely monitored by the Communist Party, they can be “severely punished” if preaching strays from party requirements, and Bible publishing and distribution is severely restricted.¹⁹¹ Additionally, Three-Self pastors and members cannot evangelize outside church, and they are pressured to sing Communist Party songs during worship.¹⁹² Their activities and preaching must align with Chinese political values,¹⁹³ and certain topics such as critiquing government actions are taboo, because in the words of President Xi, Three-Self churches must “uphold the leadership of the Chinese Communist Party.”¹⁹⁴

In China, registration to become state-approved is an arduous process that involves turning over lists of participants to government officials and giving up the right to make decisions about leaders, doctrine, and sacramental practices.¹⁹⁵ To avoid this intense government control of leaders and doctrines, an estimated 60 to 80 million Chinese Christians gather secretly in underground “house churches.”¹⁹⁶ Nonetheless, choosing not to register with the government results in debilitating fines and confiscated assets, and when their secret gatherings are

188. USCIRF Report (2020), *supra* note 184, at 14; *see also* Hannah Beech, *China Says It Will Decide Who the Dalai Lama Shall Be Reincarnated As*, TIME (Mar. 13, 2015), <https://time.com/3743742/dalai-lama-china-reincarnation-tibet-buddhism/> [https://perma.cc/WG3Q-M69H].

189. CONG. EXEC. COMM. ON CHINA, 114TH CONG., ANNUAL REPORT 2016, at 6 (2016), <https://www.congress.gov/114/chr/CHRG-114hrg21471/CHRG-114hrg21471.pdf>.

190. U.S. DEP'T OF STATE, *supra* note 187.

191. *Id.* at 33–35.

192. CONG. EXEC. COMM. ON CHINA, 116TH CONG., ANNUAL REPORT 2020, at 116 (2020), <https://www.cecc.gov/sites/chinacommission.house.gov/files/2020%20ANNUAL%20REPORT%20FINAL%201223.pdf> [https://perma.cc/KZ5K-U4GP].

193. *Religious Freedom in China: Hearing Before the Cong. Exec. Comm. on China*, 108th Cong. (2004) (statement of Hon. James A. Leach, Chairman, U.S. Rep. Iowa).

194. Kuei-min Chang, *New Wine in Old Bottles: Sinicisation and State Regulation of Religion in China*, 2018/1-2 CHINA PERSPECTIVES 37, 41 (2018), <https://journals.openedition.org/chinaperspectives/7636> [https://perma.cc/FWQ6-4YZR].

195. Laney Zhang, *China: Revised Regulations on Religious Affairs*, LIBR. OF CONG. (Nov. 9, 2017), <https://www.loc.gov/item/global-legal-monitor/2017-11-09/china-revised-regulations-on-religious-affairs/>.

196. Wael Taji, *Inside the House Church Movement in China*, PALLADIUM MAGAZINE (Aug. 19, 2019), <https://palladiummag.com/2019/08/19/inside-the-house-church-movement-in-china/> (reporting that about two-thirds of China's estimated 100 million Christians worship in house churches).

raided by government officials, these believers face detention, imprisonment, and death in many cases.¹⁹⁷

By extending government oversight over the process of choosing religious leaders, China's regulations violate international principles of religious freedom.¹⁹⁸ China has also violated international norms by restricting employment rights of religious groups.¹⁹⁹ China's 2018 Revised Regulations on Religious Affairs specify that in order to "engage in professional religious activities," religious professionals must report "to the religious affairs department of a people's government at the county level or above to be filed for the record;" only after reporting are these professionals "protected by law."²⁰⁰ Thus, leaders of official religious groups who have not been vetted by government officials lack legal protection.²⁰¹

China is notorious for other human rights abuses which have garnered international condemnation, including the systematic detention and abuse of Uighurs.²⁰² Notably, as China's restrictions on religion have grown more stringent over the last several decades, support for LGBTQ rights has also declined.²⁰³ While this correlation does not necessarily suggest causation, it is not unique to China.²⁰⁴

2. Eritrea

Eritrea has a highly repressive government whose ruling party brutally represses any group viewed as a potential threat, especially religious groups.²⁰⁵ Under the dictatorial rule of President Isaias Afwerki since 1993, the

197. U.S. DEP'T OF STATE, *supra* note 187, at 8, 12.

198. See, e.g., Yeshe Choesang, *Despite Wide Criticism, Hundreds More Expelled from Larung Gar, Tibet*, TIBET POST INT'L (Jan. 4, 2017), <https://www.thetibetpost.com/en/news/tibet/5352-despite-wide-criticism-hundreds-more-expelled-from-larung-gar-tibet> [<https://perma.cc/Y7ZM-DPGQ>] (U.N. Human Rights Committee leaders holding China accountable for its violations of human rights in Tibet because they are inconsistent with the Universal Declaration and its own Constitution).

199. U.S. Comm'n on Int'l Religious Freedom, Annual Report 2019 34 (2020), <https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf>; Zhang, *supra* note 195.

200. Zhang, *supra* note 195.

201. *Id.*

202. *Uighurs: Western countries sanction China over rights abuses*, BBC NEWS (Mar. 22, 2021), <https://www.bbc.com/news/world-europe-56487162> [<https://perma.cc/UR4C-UDV5>]; see also U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 2019 34 (2019), <https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf>; Zhang, *supra* note 195.

203. Brian Grim, *Religious Freedom and LGBT Rights: Do they have common ground?*, RELIGIOUS FREEDOM & BUS. FOUND. 7 (2019), <https://religiousfreedomandbusiness.org/wp-content/uploads/2020/11/COMMON-GROUND-LGBT-Rights-and-Religious-Freedom.pdf>.

204. Zhang, *supra* note 195.

205. U.S. DEP'T OF STATE, ERITREA 2017 HUMAN RIGHTS REPORT 1 (2017), <https://www.state.gov/wp-content/uploads/2019/01/Eritrea.pdf> [<https://perma.cc/2C5Z-F2S4>].

government has consistently tried to scrub Eritrea of religious influence as a perceived threat to national unity.²⁰⁶

The Eritrean government recognizes only four religious groups: Sunni Islam, the Roman Catholic Church, the Eritrean Orthodox Church, and the Lutheran Church of Eritrea.²⁰⁷ Even these groups do not have religious autonomy, as “[a]uthorities closely monitor the activities of the officially recognized groups, and also appoint leaders to key religious positions.”²⁰⁸ This extensive control has harmed religious schools in particular. In 2019, the Eritrean government “forcibly took over and closed multiple faith-based schools as well as 22 additional Catholic Church-run health centers.”²⁰⁹

Eritrea’s control extends directly to religious leaders. For example, the Eritrean government has imprisoned the Patriarch of the Eritrean Orthodox Church, Abune Antonios, since 2006.²¹⁰ In 2019, the government coerced the church’s Holy Synod into excommunicating him on the grounds of heresy.²¹¹ While the ostensible reason for his incarceration was heresy, Patriarch Antonios was actually imprisoned because he resisted a government mandate to excommunicate 3,000 of his own church members—and many Orthodox Eritrean monks who still view him as the lawful leader of the church have also been imprisoned.²¹²

All unrecognized religious groups and activities are illegal, and the Eritrean government has not recognized any new groups since 2002, although many have applied for formal recognition.²¹³ This refusal to register groups such as Jehovah’s Witnesses and Pentecostals “means unregistered religious communities lack a legal basis on which to practice their faiths, including holding public and private services or other religious ceremonies,” and “leaders and members of unregistered communities who continue to practice their faith are punished with imprisonment and fines.”²¹⁴

3. *Russia*

Russia recognizes four “traditional” religions and broadly bans “extremism” and “religious discord,” which it has used as justification to target and harass

206. *Id.*

207. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 1, 38 (2018) [hereinafter USCIRF Report (2018)].

208. USCIRF Report (2020), *supra* note 184, at 1, 19.

209. *Id.* at 18.

210. *Patriarch Abune Antonios*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, <https://www.uscifr.gov/patriarch-abune-antonios> [<https://perma.cc/KC2K-6KFG>] (last visited Nov. 23, 2022).

211. USCIRF Report (2020), *supra* note 184.

212. *Id.*; *Patriarch Abune Antonios*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, <https://www.uscifr.gov/patriarch-abune-antonios> [<https://perma.cc/KC2K-6KFG>] (last visited Nov. 23, 2022).

213. USCIRF Report (2020), *supra* note 184.

214. USCIRF Report (2018), *supra* note 203, at 1, 38.

minority groups, especially Jehovah's Witnesses and certain Muslims.²¹⁵ Styled as an anti-terrorism effort, Russia's anti-extremism laws give police broad powers to disrupt worship services, detain congregants and leaders, and ban preaching without prior approval.²¹⁶ In 2016, president Vladimir Putin signed anti-missionary laws that restrict worship and evangelism to officially registered buildings and outlaw "unauthorized missionary activity."²¹⁷

Russia's registration system involves intense government oversight; churches must provide lists of their leaders including addresses and passport information, a description of their doctrines and attitudes toward marriage and education, and disclosure of their funding sources and all of their activities.²¹⁸ The Russian Orthodox Church in particular is closely monitored by the Russian government. Because officially registered churches face such intense scrutiny, many groups including Baptists and Pentecostals choose not to register but face additional harassment as a result, as well as fines and convictions for evangelizing without government approval.²¹⁹ In 2019, 159 religious individuals and groups were prosecuted for sharing their faith as a violation of Russia's anti-missionary laws.²²⁰

4. Saudi Arabia

Secular governments are not the only violators of religious freedom and autonomy. Theocracies, or governments that claim direct religious authority for their actions, often extend even more control over religious activities and suppress dissent from minority groups.

For example, Saudi Arabia is officially an Islamic state, meaning that no dissent or other religions are allowed.²²¹ Because the judicial system is "governed by a Saudi interpretation of Shari'a" law, peaceful dissent and blasphemy against Islam are all punishable by death.²²² As an example of government interference with religious leaders, Sheikh Mohammed Habib was arrested in 2016 and sentenced to twelve years in prison "after delivering

215. U.S. DEP'T OF STATE, RUSSIA 2020 INTERNATIONAL RELIGIOUS FREEDOM REPORT 1, 3 (2020), <https://www.state.gov/wp-content/uploads/2021/05/240282-RUSSIA-2020-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [https://perma.cc/3F3W-LL9P].

216. *Id.* at 5.

217. U.S. DEP'T OF STATE, RUSSIA 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 1 (2019), <https://www.state.gov/wp-content/uploads/2020/05/RUSSIA-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [https://perma.cc/2K2A-9V7T].

218. *Id.* at 6.

219. *Id.* at 18.

220. Kate Shellnutt, *Russian Evangelicals Penalized Most Under Anti-Evangelism Law*, CHRISTIANITY TODAY (May 7, 2019), <https://www.christianitytoday.com/news/2019/may/russian-evangelicals-anti-missionary-fined-yarovaya-law.html> [https://perma.cc/QJ23-Z9XC].

221. USCIRF Report (2020), *supra* note 184, at 1, 37.

222. *Id.*

sermons critical of the government and in support of his close associate . . . whom Saudi Arabia executed in 2016.”²²³

5. Iran

The Islamic Republic of Iran is also an Islamic theocracy, and the Iranian government uses its official religious authority to wield extensive control over Muslim leaders and ban any other forms of religion.²²⁴ This control extends even to state-recognized Muslim religious leaders. For example, the Iranian government “interfered in the selection of a successor to the leader of the Nematollahi Gonbadi Sufi community,” a group that has faced consistent harassment from government officials because they believe in separation of church and state.²²⁵ That leader died in 2019 “following medical mistreatment and months under house arrest.”²²⁶ Christian pastors also face intense persecution, especially if they converted from Islam.²²⁷

By extending government control over religious leadership selection and by quashing dissent, these countries are flagrant violators of religious freedom that have drawn international criticism with diplomatic and economic consequences. These countries stand in stark contrast to countries that have recognized and protected religious autonomy for churches and organizations. A case such as *Pavez v. Chile* presents a unique opportunity to set precedent that values religious freedom, specifically religious autonomy, instead of aligning with autocratic regimes that control religious leadership and violate other human rights as well. Because of the global influence of international decisions, cases like *Pavez v. Chile* have implications for countries that currently exercise control over religious leaders and teachers. By affirming the right of religious autonomy in any given case, international courts can extend a positive influence over those countries.

CONCLUSION

Disputes over internal church governance occur on both sides of the Atlantic and around the globe. The cases illustrated in this article demonstrate that this conflict is not unique to any particular legal system but occurs in all pluralistic democratic societies. As courts have encountered those disputes at the national level and at the international human rights level, they confront the same fundamental question: Who decides who will teach the faith? It will be either

223. *Id.*

224. *Id.* at 25.

225. *Id.* at 24; Golnaz Esfandiari, *Clashes Highlight Tensions between Dervishes and Iran's Establishment*, RADIO FREE EUR. RADIO LIBERTY (Feb. 20, 2018), <https://www.rferl.org/a/iran-dervishes-sufi-explainer-tabandeh/29051140.html> [<https://perma.cc/7F28-A4BH>].

226. USCIRF Report (2020), *supra* note 184, at 24.

227. *Id.* (recounting that Iran “twice delayed a sentencing hearing for Assyrian pastor Victor Bet Tamraz, his wife Shamiram Isavi, and three Christian converts from Islam. Pastor Bet Tamraz was charged in 2015 with ‘conducting evangelism’ and ‘illegal house church activities.’”).

the church or the state. As Europe, the United States, Canada, and other jurisdictions grapple with that question, they have recognized that the internal affairs of religious communities should not be the province of the government, no matter the polity of the relationship between church and state. These countries have recognized that it would be unreasonable to force a religious community to select and maintain its teachers based on the criteria and values of the government rather than those of the church. How should courts resolve difficult conflicts between government regulation and internal church governance? By leaving purely religious matters entirely to religious bodies. In contrast to the approach taken by countries that violate human rights, the consensus among international and domestic courts provides a simple and elegant solution.

In Europe, that solution is reflected in the European Court of Human Rights respecting church autonomy in key cases, and in European Union directives requiring governments to respect religious organizations' rights to choose employees who are loyal to their religious beliefs. Of course, some European countries are involved in clergy selection through a formally established church, and such establishments are not prohibited by human rights instruments. But to subject a church or religious school to government control over matters of internal governance is inconsistent with the communal element of religious freedom, which extends beyond individuals to institutions. Churches and other religious institutions must have the authority to select and guide the message of those who personify their faith and carry out their missions.

As the European Convention on Human Rights makes clear, confessional teaching of religion in schools is not only understood as legally required government cooperation with churches; it reflects legal requirements that the government respect and facilitate the religious choices of parents and children. Parents who choose Catholic education rely on Catholic authorities to provide teachers that are qualified to teach the Catholic faith to their children. Ignoring religious autonomy rights would mean ignoring the choices of parents who want their children to receive traditional religious instruction that aligns with the doctrines of their faith community.

In the United States, the Supreme Court has rejected the premise that courts must engage in the process of weighing the relative value of religious freedom against other values (such as those underlying employment discrimination laws) and then strike an uncertain balance. Instead, the Supreme Court's hands-off approach in *Our Lady of Guadalupe* and *Hosanna-Tabor* leaves what it conceives as a private matter—who has the authority to teach a particular set of religious beliefs—to the relevant ecclesiastical authorities. There is no more need for courts to decide how a church organizes itself to carry out its religious mission than there is for courts to decide which political or social beliefs a nongovernmental organization should espouse.

This hands-off approach also allows judges to be truly neutral in a pluralistic society that has increasing religious diversity and an increasing number of legal

disputes. A judge cannot hope to determine the qualifications to teach every religion. That is one of the primary lessons of *Our Lady of Guadalupe*, and it may put to rest some international concerns as courts struggle to reconcile increasing religious diversity in Europe and the Americas with traditional understandings of free exercise rights. And for minority faiths that must rely on non-adherents to fill key roles, religious autonomy is especially important because they must be allowed to decide who they can trust to support their missions faithfully.

The American example illustrates that insisting on an overly particularized balancing of factors is hazardous in the religious autonomy setting. If difficult personnel decisions are subject to constant judicial second-guessing, the risks of liability and the financial and moral costs of litigation are enough to erode autonomy rights substantially. The mere threat of litigation may thus be sufficient to chill exercise of legitimate autonomy rights. Clear standards that adequately protect autonomy rights are therefore imperative. And as the Supreme Court of Canada has also recognized in *Wall* and *Loyola*, even where courts must balance multiple human rights considerations, this need not come at the expense of religious autonomy.

In a case like *Pavez v. Chile*, petitioners rely on rights of respect for private life, protection against arbitrary intervention, and freedom to work. These principles are similar to the “general fairness” principles that the plaintiff in *Wall* invoked, but they do not constitute a legal dispute. Thus, like the Supreme Court of Canada in *Wall*, the San Miguel Court of Appeals and the Supreme Court of Chile correctly respected the internal decision of a religious community about whether Ms. Pavez was qualified to teach its particular faith. And just as *Loyola*’s doctrinal decision about how it would teach Catholicism to its students was an internal decision free from government interference, the Archdiocese’s decision that Ms. Pavez should be transferred to teach courses other than religion was an internal theological decision based on Catholic doctrine. Furthermore, Chile correctly recognized that it should stay out of that internal decision. Yet the Inter-American Court’s opinion not only faulted Chile for failing to intervene, but attempted to affirmatively obligate governments to entangle themselves in inherently religious disputes.²²⁸

As the concurring judge in *Pavez* recognized, Ms. Pavez did not lose her job but was actually promoted to a different, higher-paid role where she would not teach Catholicism.²²⁹ Thus, the stakes were much lower for her than for the discharged teachers in *Our Lady of Guadalupe*. Because her only role was teaching religion, she is even more clearly a “minister” than the employees in *Our Lady of Guadalupe*, who taught multiple subjects. Thus, were her case to

228. *Pavez Pavez v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 449, paras. 66–67 (Feb. 4, 2022).

229. *Id.* para. 6 (Porto, J., concurring) (rejecting Court’s conclusion that Ms. Pavez’s right to work was violated, because, *inter alia*, she received a pay increase rather than a negative consequence).

be decided under the U.S. Constitution, her situation would certainly fall under the ministerial exception or the broader principle of religious autonomy, because both doctrines extend to situations where employment decisions are based on the religious beliefs of the church.

In countries such as Chile that provide religious instruction in state-sponsored schools, the principle of autonomy should apply in a similar way. The Chilean court in *Pavez* did balance the key human rights considerations at stake, recognizing that to interfere with the church's employment decision would hamper its ability to decide who can carry out the central role of teaching its own doctrine. Ms. Pavez was fully aware that her behavior was not consistent with the beliefs of the Catholic Church and that her employment was conditioned upon the church's approval. She was aware that the church requires its teachers to model and practice the faith so as to teach its students a consistent religious ethic. The church's withdrawal of her authorization to teach religion was thus based on reasonable and foreseeable religious considerations which the Inter-American Court failed to consider.

Based on the international consensus we have explored above, and the counterexamples of China, Eritrea, Russia, Saudi Arabia, and Iran, we conclude that courts and governments best respect fundamental human rights when they allow a certain degree of deference to religious self-governance in matters of doctrine, ministerial personnel, and church structure. We caution that allowing secular governments to dictate who teaches the faith in religious spheres explicitly governed by church leaders violates the internationally recognized principle of religious autonomy. As examples from the United States, Canada, Chile, Colombia, and Western Europe demonstrate, many countries have constitutions and other laws that specifically protect the freedom and autonomy of religious communities. International courts contribute to this consensus by upholding those rights when addressing difficult cases. These outcomes in turn should provide guidance and clarity to the jurisdictions influenced by international courts as they seek to apply the religious freedom provisions in their own laws and constitutions. When these reinforcing systems properly respect religious autonomy, they contribute to the flourishing of religious communities and societies with healthy relationships between church and state.

