RELIGIOUS-BASED EMPLOYMENT PRACTICES OF CHURCHES: AN INTERNATIONAL COMPARISON IN THE WAKE OF *HOSANNA-TABOR*

Matthew K. Richards, Scott E. Isaacson, David A. Peterson, Victor van Vuuren[*]

I. PREFACE

Recent focus on the "ministerial exception" to employment anti-discrimination laws, highlighted by *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[1] raises questions about the autonomy afforded to churches in their personnel matters. Comparing United States and international law norms, this Article highlights that skepticism regarding religious-based employment standards of churches is not legally well-founded. Generally, a narrow focus on labor laws alone fails to take into account the broader protections afforded to religious groups in light of norms that call for more sensitive treatment of such issues in the religious domain.

This Article focuses on the importance of religious-based standards of employees to religious organizations. The Article first outlines the international legal norms supporting these employment practices, and provides examples of how these norms are applied in jurisdictions worldwide, including Europe, Canada, South Africa, Asia, and Latin America. Next, the Article compares the international law norms to the recent Supreme Court decision in *Hosanna-Tabor*, and discusses the limitations on religious autonomy recognized by both. Finally, the Article lists the practical theories through which the norms are most commonly applied: the duty of loyalty; protecting the ethos of the religious organization; avoiding risk; bona fide occupational qualifications; breach of contract; maintaining order and discipline in the work place; the duties of an agent to his or her principal; and freedom of the religious employer to express religion in the workplace. The Article concludes that there is ample support internationally, as in the United States, for religious institutions to enforce religious-based standards of conduct for their personnel.

---

* Mr. Richards and Mr. Isaacson are shareholders in the Salt Lake City office of the law firm of Kirton McConkie and international fellows of the International Center for Law and Religion Studies at Brigham Young University. Mr. Peterson is the former United States representative to the International Labor Organization and currently resides in Brussels. Mr. van Vuuren is the South Africa representative to the ILO and a member of its governing body; he is Director of the International Labour Organisation, Southern Africa, based in Pretoria. The opinions expressed are our own and do not necessarily reflect the views of any organization with which we are affiliated. We thank Prof. W. Cole Durham Jr., Prof. Dr. José Maria Sanchez, Michael Jensen, and Carly Williams, for their invaluable insights and comments through various drafts.

1. 132 S. Ct. 694 (2012).

II. INTRODUCTION: *HOSANNA-TABOR* AND THE ISSUE OF RELIGIOUS EMPLOYMENT

On January 11, 2012, a unanimous United States Supreme Court issued a landmark decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[2] Even before the decision was issued, anticipation was high. As Professor Rick Garnett commented, the case promised to be "the most important religious-freedom case in [twenty] years."[3] Nearly 100 amici, representing most religions in the United States, filed briefs in support of the petitioner; dozens more filed briefs in support of the respondent.[4] More routine church-state cases have considered such matters as prayer at football games,[5] memorial crosses,[6] manger scenes,[7] or Ten Commandments monuments.[8] *Hosanna-Tabor*, by contrast, questioned the fundamental balance of church-state relations under the First Amendment: can the secular government second-guess the decisions of religious communities and institutions about who should be their ministers, leaders and teachers?[9]

The specific issue in *Hosanna-Tabor* was whether anti-discrimination laws, like the Americans with Disabilities Act, could allow courts to review the hiring and firing decisions of churches regarding employees performing religious functions.[10] Adopting a rule at odds with the majority of other U.S. circuit courts of appeals,[11] the Sixth Circuit had held that a parochial-school teacher who taught

---

2. *Id.*

3. Rick Garnett, *Here We Go! The Court Grants Cert. in the Ministerial-Exception Case,* MIRROR OF JUSTICE BLOG (Mar. 28, 2011, 11:33 AM), http://mirrorofjustice.blogs.com/mirrorofjustice/2011/03/here-we-go-the-court-grants-cert-in-the-ministerial-exception-case.html.

4. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, SCOTUS BLOG (Sept. 11, 2012), http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/.

5. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding student-led prayer prior to public school football games violated the Establishment Clause).

6. *See generally* Am. Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010) (concluding display of large monument crosses on a public highway violated the Establishment Clause).

7. *See generally* ACLU v. Birmingham, 791 F.2d 1561 (6th Cir. 1986) (holding display of a manger scene during Christmas on the lawn of city hall violated the Establishment Clause).

8. *See generally* Van Orden v. Perry, 545 U.S. 677 (2005) (concluding display of a monument inscribed with the Ten Commandments on the property of the Texas State Capitol did not violate the Establishment Clause).

9. *See generally* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*,* 132 S. Ct. 694 (2012) (exploring whether the decisions made within religious organizations regarding appointment of certain employees are impervious to secular intervention).

10. *Id.* at 695.

11. *Cf.* Alcazar v. Corp. of the Catholic Archbishop, 598 F.3d 668, 675–76 (9th Cir. 2010), *reh'g granted en banc*, 617 F.3d 1101 (9th Cir. 2010) (acknowledging that secular duties are important to the ministry, applying the ministerial exception for an employee who was hired based on religious criteria and who also performed secular work); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243–44 (10th Cir. 2010) (applying the ministerial exception to an employee who performed administrative duties because it was integral to the mission of the church); Rweyemanu v. Cote, 520 F.3d 198, 205–10 (2d Cir. 2008) (recognizing that the ministerial exception applies to religious employees who may perform secular duties); Schleicher

primarily secular subjects was not a ministerial employee—therefore not covered by the First Amendment's "ministerial exception" to antidiscrimination laws[12]—even though she infused secular subjects with faith; taught religion for part of the day; was a commissioned minister; led students in prayer and worship; and was held out to students as a role model of Christian living.[13] Even more extreme, the EEOC advocated to the Supreme Court that there should be no ministerial exception at all.[14]

The Supreme Court rejected both the Sixth Circuit's "primary duties" test[15] and the EEOC's "remarkable view that the Religion Clauses [of the First Amendment] have nothing to say about a religious organization's freedom to select its own ministers."[16] Instead, the Court unequivocally endorsed the ministerial exception and set forth factors to be considered in determining whether an employee is a "minister" for purposes of the exception.[17] The Court reasoned:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the

---

v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008) (applying the ministerial exception to a store employee who performed secular duties); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1302–04 (11th Cir. 2000) (explaining that many district courts have adopted the ministerial exception to employees hired by religious organizations); Starkman v. Evans, 198 F.3d 173, 176–77 (5th Cir. 1999) (holding that the ministerial exception applied to a choir director); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991) (stating that the secular duties of the chaplain did not diminish the chaplain's importance to the religious organization); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) (concluding that the ministerial exception applied in a case involving a property dispute between a cleric and a church).

12. The ministerial exception is a First Amendment doctrine long recognized by the circuit courts that exempts religious organizations from employment discrimination claims made by employees performing religious functions, which, all the circuits agree, include more than just clergy. *See, e.g.*, Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (applying to organist and musical director); Shalihsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–11 (4th Cir. 2004) (involving staff of Jewish nursing home); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 703–04 (7th Cir. 2003) (regarding a press secretary).

13. EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 597 F.3d 769, 778–80 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694.

14. Brief for Federal Respondents at 12, Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) *available at* http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_federalrespondents.authcheckdam.pdf.

15. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) ("[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.").

16. *Id.* at 706.

17. *Id.* at 713–14.

> church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[18]

The Court further stated:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[19]

This holding is significant because it confirms more than a century of Supreme Court and circuit court precedent affirming the right of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," including the right to select their own religious functionaries.[20] Indeed, "[t]he relationship between an organized church and its ministers is its lifeblood," and allowing the State to interfere in that relationship would produce "the very opposite of that separation of church and State contemplated by the First Amendment."[21] This is particularly true since the line between religious and secular "is hardly a bright one."[22] "[T]he very process of inquiry" by courts into so nuanced a question would inevitably entangle courts in religious questions and "impinge on rights guaranteed by the Religion Clauses."[23] As the Court previously stated, government interference in matters of "church polity and church administration" poses a great risk of "implicating secular interests in matters of purely ecclesiastical concern."[24]

The Supreme Court's holding in *Hosanna-Tabor* is also significant, as noted

---

18. *Id.* at 706.

19. *Id.* at 710.

20. Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 116 (1952); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929); Watson v. Jones, 80 U.S. 679, 728–29 (1871); s*ee also* Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696, 724–25 (1976) (holding that religious organizations under the First and Fourteenth Amendments may create their own guidelines and rules for the organization's operations). The Supreme Court discussed *Kedroff, Serbian, Watson* and the history underlying the Religious Clauses of the First Amendment in Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*,* 132 S. Ct. 694, 704–06, 713 (2012).

21. McClure v. Salvation Army, 460 F.2d 553, 558, 560 (5th Cir. 1972).

22. Corp. for the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987).

23. NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979); *see also* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (forbidding courts from deciding "controversies over religious doctrine").

24. *Serbian E. Orthodox*, 426 U.S. at 710.

in Justice Alito's concurrence,[25] because it comports with international law norms, including human rights instruments and treaties to which most developed countries are signatories.

The question posed by *Hosanna-Tabor* is just as pregnant internationally as it was in the United States prior to the Supreme Court's decision. Indeed, a pair of recent cases before the European Court of Human Rights tested the same issue. *Obst v. Germany*[26] and *Schüth v. Germany*,[27] issued the same day, reaffirmed the right of institutional autonomy for religious organizations as an essential aspect of the right to freedom of religion or belief, and grappled with how that right should be balanced against competing interests. Like the U.S. Supreme Court, though often with different reasoning, international law norms recognize to a significant degree the right of autonomy of churches in their internal affairs.[28]

This Article focuses on how the concepts discussed in *Hosanna-Tabor* are applied in other well-developed jurisdictions worldwide. As background, this Article first discusses the importance to religious organizations of religious-based standards of conduct for employees. Next, this Article will outline the international law norms bearing on such employment practices and provide specific examples of how these norms are manifested in the legislation and judicial decisions of selected jurisdictions. This Article discusses how these norms are similar to, or different from, the U.S. Supreme Court's decision in *Hosanna-Tabor*. Finally, this Article discusses the ways in which the norms typically find expression in labor cases, as well as the norms' limitations. This Article concludes that there is ample support internationally, as well as in the United States, for religious institutions to enforce religious-based standards of conduct for personnel with religious duties.

III. THE IMPORTANCE TO CHURCHES OF RELIGIOUS-BASED EMPLOYMENT STANDARDS

Most governments worldwide have adopted employment anti-discrimination statutes and other labor regulations that proscribe the ability of employers to take employment action on the basis of criteria that are not essential to the employee's job performance.[29] The laudable goal is to protect employees from bias or abuse,

25. *See Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) ("the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws").

26. App. No. 425/03, Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100463.

27. App. No. 1620-1603, Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469.

28. *See, e.g.*, *id* ¶¶ 34–37 (stating that the Basic Law of the Weimar Constitution proclaims that [r]eligious societies shall regulate and administer their affairs independently); Obst v. Germany, App. No. 425/03, ¶¶ 26–27, Eur. Ct. H.R. (2010).

29. *See*, *e.g.*, 42 U.S.C. § 2000e-2 (2012) (citing United States Code Annotated, Unlawful employment practices); Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 13, Oct. 2, 1997, 1997 O.J. (C 340) 1.

particularly when employment action is based on certain suspect classifications. To many in cultures with strong equality, workers' rights ethics, or cultural commitments to non-discrimination, it seems unthinkable to condition employment on an employee's private beliefs or personal behavior, even if the employer is a church.[30] Moreover, many labor laws lack clear exemptions for religious employers, leading to ambiguity.[31]

However, skepticism regarding religious-based standards for employment by religious organizations is not legally well-founded. Generally, such a view reflects a narrow focus on the labor or anti-discrimination law alone, and fails to take into account the broader protections afforded religious groups in light of constitutional and international law norms that call for more sensitive treatment of such issues in the religious domain.[32]

Because the "lifeblood" of a church is its ministers,[33] dictating or constraining whom the church can select as its ministers, teachers, or other religious functionaries has significant practical and theological consequences. State interference in the staffing of a religious organization impacts the development and interpretation of doctrine; what is taught at the pulpit and in classrooms; the manner in which those messages are conveyed; how the institution interacts with the wider world; its credibility and reputation; its vivacity; and ultimately its long-term sustainability.[34] Religious institutions have a right "to express religious beliefs, profess matters of faith, and communicate [their] religious message" to their faithful as well as to the world at large; yet, to do so with integrity and authenticity, the institution "must retain the corollary right to select its voice."[35] Indeed, religious employees are the "chief instrument by which [the religious institution] seeks to fulfill its purpose."[36]

As Justice Alito stated with regard to teachers in religious schools:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and the credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on

30. *See, e.g.*, *Employment Discrimination*, JUSTIA.COM, http://www.justia.com/employment/employment-discrimination/docs/religious-discrimination.html.

31. *See, e.g.*, 42 U.S.C. § 2000e-2 (2012); Americans with Disabilities Act, 42 U.S.C. §12101 (1990). These statutes do not explicitly provide exemptions for religious employers.

32. *See generally* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 704–05 (2012) (explaining that religious organizations are free to make internal governing decisions without government interference) (citation omitted).

33. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

34. *See Hosanna-Tabor*, 132 S. Ct. at 706.

35. Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); s*ee also* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) (emphasizing "a church's 'essential' right to choose the people who will preach its values, teach its message, and interpret its doctrines, both to its own membership and to the world at large, free from the interference of civil employment laws").

36. *McClure*, 460 F.2d at 559.

> someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.[37]

Recognizing this fact, religious organizations routinely require their employees to affirm a personal conviction of the faith, to comply with the faith's teachings, and to adhere to religious-based standards of personal behavior. These religious-based standards of behavior may include obeying the faith's dietary laws;[38] abstaining from alcohol or illicit drugs;[39] maintaining sexual chastity[40] (e.g., avoiding sexual relations outside of marriage); exemplifying personal honesty; regularly attending worship services;[41] and contributing tithes or other offerings.

Moreover, religious organizations apply these religious-based behavior standards throughout the entire employment lifecycle. First, prospective employees may be required to agree to adhere to the standard as a condition of employment, and an employment contract may be written to reflect that agreement.[42] Thereafter, the religious employer may discipline or terminate the employment of any employee who fails to comply with these conditions during the term of employment.[43] Thus, if an employee becomes disaffected with the church's teachings, is dishonest, engages in conduct contrary to the teachings and standards of the faith, or otherwise fails to meet religious-based personal behavior standards, then the religious employer may terminate that employee and consider the termination to be for cause.[44] This is true even if the employee's conduct arguably occurs on the employee's private time outside of work or does not necessarily

---

37. *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring) (citations omitted).

38. *See, e.g.*, Kashrut, *available at* http://www.jewishvirtuallibrary.org/jsource/Judaism/kashrut.html, (restricting Jewish clerics to a Kosher diet); Code of Cannon Law, Cann. 1250–51 (providing a specific diet for Good Friday and Ash Wednesday), *available at* http://www.vatican.va/archive/ENG1104/_INDEX.HTM.

39. *See, e.g.*, Qur'an, 5:90–91, (involving Islamic teachings prohibiting intoxicants), *available at* http://quran.com/5/90.

40. *See, e.g.*, Code of Cannon Law, *supra* note 38, at 1395 § 1 (prohibiting a Catholic cleric from committing adultery), *available at* http://www.vatican.va/archive/ENG1104/__P56.HTM.

41. *See, e.g.*, *id.* at Cann. 1247–48 (requiring the attendance of Mass).

42. *See, e.g.*, *Guidelines for Rabbinical-Congregational Relationships*, CENTRAL CONFERENCE OF AMERICAN RABBIS (providing a continuing contract between the rabbi and the congregation which reviews benefits and salary periodically), *available at* http://www.ccarnet.org/media/filer_public/2011/12/19/guidelines_rabbinicalcongregationrel.pdf.

43. *See, e.g.*, Code of Canon Law, *supra* note 38, at Can. 1392 ("[c]lerics or religious who exercise a trade or business contrary to the prescripts of the canons are to be punished according to the gravity of the delict").

44. *Id.* at Can. 194 § 1.

affect the employee's technical ability to perform his or her seemingly secular labors.[45]

Finally, some religious employers seek to apply these standards to personnel at all levels of the religious organization. In most jurisdictions, there is little question that at least *some* religious functionaries are exempt from labor or anti-discrimination laws, particularly members of the clergy—leaders at the top of the religious hierarchy (e.g., those who are understood as having the mantle of religious authority and leadership in the community, such as bishops, priests, pastors, ministers and the like).[46] However, religious organizations often view a range of employees as vital to the church's religious ministry.[47] Such employees may include clergy but also non-clergy staff who support the clergy; teach doctrine; communicate directives; give religious counsel; ensure consistency of practices; produce doctrinal and instructional materials; receive sacred confidences; carry out ecclesiastical assignments; acquire, design, and maintain worship facilities that express a religious message; and the like. The need to apply religious standards to a range of employees is particularly pronounced for faiths without a professional clergy or who eschew any hierarchy or formal ordination. Some faiths have no ordained clergy whatsoever (e.g., Islam); others consider all or large percentage of members to be "ministers" (e.g., Jehovah's Witnesses).[48]

The following are specific examples of employees, other than ordained clergy, for whom various religious organizations seek to apply religious-based standards of behavior.

As in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[49] many churches operate primary or secondary schools or colleges.[50] Employees who administer or teach in these parochial schools are directly involved in imparting religious doctrines and inculcating faith.[51] They help to determine the

45. *See id.* at Can. 1394 § 1 (removing a cleric who attempted marriage, even if only civilly).

46. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*,* 132 S. Ct. 694, 705 (2012) (recognizing that the Courts of Appeals have uniformly applied the ministerial exception to preclude government involvement in ecclesiastical employment decisions).

47. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop, 598 F.3d 668, 675 (9th Cir. 2010) (involving seminarian who performed maintenance duties around the church); Schleicher v. Salvation Army, 518 F.3d 472, 477 (7th Cir. 2008) (involving administrator of Salvation Army thrift shop); Shalihsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–11 (4th Cir. 2004) (involving nursing home staff).

48. *Hosanna-Tabor,* 132 S. Ct. at 713–14.

49. 132 S. Ct. 694 (2012).

50. *See generally*, THE ASSOCIATION OF CLASSICAL & CHRISTIAN SCHOOLS, http://www.accsedu.org/Mission_Statement.ihtml?id=36663 (promoting, establishing, and equipping schools "committed to a classical approach to education in the light of a Christian worldview grounded in the Old and New Testament Scriptures").

51. *See* Brief of *Amicus Curiae* American Association of Christian Schools in Support of Petitioner, at 15, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (stating ministry leaders determine the religious expression and exercise of their organizations); Brief of the Council for Christian Colleges and Universities as Amicus Curiae Supporting Petitioners, at 4, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (discussing the role of employees in parochial schools).

subjects to be taught and the texts and teaching methods to be used. Even if they also teach secular subjects, their teaching is still infused with religion.[52] They may lead prayer and devotionals, and stand as role models to the students with whom they interact. They wield substantial influence over their students.[53] Thus, they are an integral part of a church's mission to inculcate beliefs and practices in children and youth, by helping to ensure the continuance and growth of the church into future generations.[54]

Churches often employ spokespeople and regulatory or governmental affairs specialists to represent the church to the broader public. These employees are the face of the church to the media, government officials, and other opinion leaders.[55] They may have significant discretion as to the substance and tenor of statements and in formulating strategies. They often speak extemporaneously. Moreover, they convey their message by example and demeanor as well as by word. A representative who violates church standards in his or her personal life would undermine the message he or she is employed to convey.[56]

Managers or other employees conduct the church's business affairs.[57] These seemingly secular employees have important religious duties. They speak for the church in commercial transactions, make strategic decisions that bind the church, and advise clergy to ensure consistency of operations.[58] Like spokespeople, they come to embody the church, and ethical lapses or graft can weaken both message and credulity.[59] Clergy heavily rely on these employees for their institutional knowledge and resources, particularly if the clergy rotate, and any failure by these employees to adhere to the standards of the church undermines their reliability to clergy.[60]

Accountants and analysts handling the church's funds help fulfill the same aspect of the church's ministry as the clergy whose reports and records they receive and review. Many churches desire to maintain the confidentiality of their financial records.[61] To those churches, the care and expenditure of donated funds is

---

52. *See* Brief of American Association of Christian Schools, *supra* note 51, at 15 (stating that ministry leaders determine the religious expression and exercise of their organizations).

53. *Id.*

54. *Id.*

55. *See* Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 703–04 (7th Cir. 2003) (explaining that the press secretary is the spokesperson for the church and plays an integral role in conveying the church's message to the public).

56. *See, e.g.*, *id.* (applying ministerial exception to press secretary).

57. *See also* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972). (explaining that Salvation Army is a religious organization that hires employees to conduct business transactions).

58. *See generally* Brief of American Association of Christian Schools, *supra* note 51.

59. *Id*.

60. *Id*.

61. *See, e.g.*, Job Description for Bookkeeper/Accountant for Belmont Heights United Methodist Church, http://www.csulb.edu/colleges/cba/accountancy/jobs/documents/belmont-heights-bookkeeper.pdf (seeking applicants with the ability to work in a confidential work

a sacred trust; these are God's funds and can be handled only as he directs. Often, employees with financial expertise advise senior clergy in highly confidential decisions.[62] Many churches believe that such employees must demonstrate their personal integrity and loyalty through their commitment to their church's teachings and standards.

Office, operations and maintenance staff are the foot soldiers who implement directives and provide day-to-day support.[63] They routinely interact with the church membership and general public, whether receiving guests at places of worship or offices, or maintaining the grounds of church buildings.[64] Many have access to religiously sensitive information and facilities. For example, a trusted secretary or a janitor cleaning a vacant church building may have access to clergy files. The best way to minimize breaches is to employ personnel who demonstrate integrity and loyalty to the church and its teachings. Moreover, employment by the church gives these employees notoriety in a tight-knit religious community. Church members, whose donations pay their wages, expect employees to live according to their church's teachings.[65]

No matter their particular job position, any number of these types of employees can contribute to the religious organization's image and vision. They serve alongside and support ordained clergy, and must be conversant in church doctrine and practices. They generally cultivate an atmosphere of spirituality and consecration that energizes the ministry through all programs and activities. Indeed, church offices are pervasively religious environments where frequent prayer, devotional meetings, religious art, and a dress code all invite a spiritual solidarity around a common ideology.

These employees also represent the church and exemplify its tenets to contractors, government officials, church members, and the general public. Many churches invite all people to hear and accept their message, as reflected not only in the church's doctrine and teachings, but also in the personal examples of those who represent the church. This ministry can be fulfilled only when those involved in its operations and activities live in harmony with its teachings and institutional mission. To the religious institution, only employees whose lives reflect church teachings can be entrusted with the institutional approval that others naturally

---

environment with sensitive information); CHURCH ADMINISTRATION HANDBOOK 70 (3d ed. 2008) (providing information on the quality of congregational life, nature of leadership, and responsibility for ministry of all believers).

62. *See generally* CHURCH ADMINISTRATION HANDBOOK, *supra* note 61.

63. *Id*.

64. *Id*.

65. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop, 598 F.3d 668, 676 (9th Cir. 2010), (involving seminarian who performed maintenance duties around the church); Schleicher v. Salvation Army, 518 F.3d 472, 477 (7th Cir. 2008) (involving administrator of Salvation Army thrift shop); Shalihsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–11 (4th Cir. 2004) (involving nursing home staff). As the *Schleicher* court recognized: "[S]alvation through work is a religious tenet of the Salvation Army. The sale of the goods in the thrift shop is a commercial activity, on which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers." *Schleicher*, 518 F.3d at 477.

impute to them.

Indeed, an employee whose expressions or conduct contravenes church standards undermines the church's religious ministry and message, as well as its public reputation. If credibility is lost, then the sensitive interrelationships that bind church members to each other and to the church are jeopardized, and the church's essential nature is compromised. Clergy cannot effectively lead, church doctrine and practices are cheapened, and individual members lose the ability to express their faith through a collective whole if employees and leaders are allowed to flout teachings. Furthermore, churches are typically funded by tithing or donations paid in a spirit of sacrifice by church members, who are entitled to expect exemplary behavior from those whose employment they fund and who are their ambassadors. The requirement that employees must support the church and follow its teachings helps ensure that they are loyal to the church's ministry and message.

Many churches take the position, or desire to take the position, that any termination of employment for failure to maintain basic adherence to the church's standards of belief and conduct is a termination *for cause* under the applicable labor laws.[66] In many religious organizations, each employee is instructed at the time of hire that he or she is expected to uphold the church's standards to remain eligible for church employment. The church then concludes that an employee who refuses to correct behavior (after a grace period, if appropriate) has chosen not to meet the expectations under which he or she was hired, and may treat the refusal as a resignation or breach of contract. Church members are, of course, free to leave the church or choose a lesser standard of conduct, but a church employee who is disaffected or otherwise abandons the religious-based standards of conduct or the beliefs of his or her church cannot continue to participate in the day-to-day ministry of the church without exposing the church to risk (from allegations of hypocrisy to legal or fiscal liability for financial crimes or child sex abuse), sowing discord, and tarnishing the church's message.

IV. INTERNATIONAL LAW NORMS SUPPORTING EMPLOYMENT BY RELIGIOUS INSTITUTIONS ON A RELIGIOUS BASIS

A. The Right of Churches to Autonomy in Internal Affairs, Including Employment Practices

Labor laws cannot be interpreted in isolation from fundamental rights guaranteed at the constitutional level and in international human rights treaties. In particular, laws governing employment in religious settings must take into account the fundamental right of freedom of religion or belief, including the institutional and collective dimensions of that right.[67] The norms enshrining this right are

66. *See* CONSTITUTION OF THE UKIAH BIBLE CHURCH, www.ukiahbiblechurch.org/ubcconstitution.pdf ("failure to cooperate in both attitude and execution with the purpose of this church as set forth is grounds for termination").

67. *Institutional rights* to freedom of religion are rights vested in the institution as such and

binding (or at very least persuasive) authority in nearly all countries.[68]

Nearly all countries with well-developed legal systems recognize the freedom of religion or belief, and consequently, the right of religious organizations to autonomy in their internal affairs. By the time international human rights were codified in the aftermath of World War II, the freedom of religion or belief had emerged as an axiomatic feature of the international human rights regime.[69] The right is memorialized in Article 18 of the Universal Declaration of Human Rights (UDHR),[70] Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[71] in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[72] and in a variety of other international instruments.[73] Moreover, most modern constitutions have provisions affirming the right to freedom of religion or belief. The right is recognized in the overwhelming majority of the world's constitutions,[74] including

---

can only be exercised by the group entity, while *collective group rights* adhere to individual members, which they exercise collectively. *See* Johan D. van der Vyver, *Freedom of Religion or Belief and Other Human Rights*, *in* FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK (Tore Linholm et al. eds., 2004) 90–112 (stating that these conceptually distinct rights often blend together in practice, since the religious community functions as the protector of the collective rights and the instrument through which the community chooses to exercise its rights).

68. Many countries have legal systems in which international treaties are automatically incorporated into domestic law. If international norms are not self-executing in a particular jurisdiction, the precise status of the norms needs to be determined.

69. *See generally* W. Cole Durham, Jr., Matthew K. Richards & Donlu D. Thayer, *The Status of and Threats to International Law on Freedom of Religion or Belief, in* THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES (forthcoming 2012) (manuscript at 43–46) (on file with authors).

70. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (stating that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

71. *See* G.A. Res. 2200 (XXI) A, at art. 18, U.N. Doc. A/RES/2200(XXI) (Mar. 23, 1976); *see also* Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) (providing an authoritative interpretation by the U.N. Human Rights Committee of Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"), the key article on freedom of religion or belief).

72. *See* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, at 171, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

73. *See, e.g.*, Organization of American States, Charter of the Organization of American States, Apr. 30, 1948, O.A.S.T.S. Nos. 1-C & 61, 119 U.N.T.S. 3; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Helsinki Final Act, at Section VII, Aug. 1, 1975, *available at* http://www.osce.org/mc/39501?download=true; 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, Jan. 17, 1989, *available at* http://www.osce.org/mc/16262.

74. *See* Durham, Richards &Thayer, *supra* note 69, at 53–58 (providing a list of constitutions protecting the freedom of religion or belief).

virtually every European constitution and the constitution of nearly every country in the Western Hemisphere. While there are disputes about the universality of human rights norms, freedom of religion or belief has come to be recognized virtually everywhere as a principle that has universal validity.[75]

The right of freedom of religion or belief inevitably includes the right of religious organizations to autonomy in their internal affairs.[76] The right of religious autonomy is widely accepted and is also called "sphere sovereignty," "the self-determination of religious communities," or "the non-intervention of the state in religious affairs." [77] It refers to the principle that religious organizations should have authority free from government intrusion to organize themselves and operate internally as dictated by their faith and is based on the understanding that religious organizations play an important role as mediating institutions between the state and the individual and make it possible for religious belief to flourish.

The European Court of Human Rights has anchored the right of autonomy in both institutional and collective aspects of the freedom of religion or belief,[78] as well as the right to freedom of association. As the Court stated, "the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention."[79] Further, "[t]he

---

75. A treaty such as the ICCPR is clearly binding under international law. As of April 2012, 167 countries including the United States are parties to the ICCPR and an additional 7 countries have signed but not ratified the treaty. The status of the treaty in terms of the number of countries that have signed, acceded to, or succeeded to the treaty is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. Further, United Nations resolutions, such as the Universal Declaration of Human Rights ("UDHR") and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, are not legally binding in themselves, but the norms they articulate are legally effective because (1) they have direct corollaries in binding treaty language or help clarify the meaning of binding treaty language, and (2) they have acquired the status of customary international law. *See* Durham, Richards, Thayer, *supra* note 69, at 46–53, for an in depth discussion of the universal vitality of these instruments.

76. In some systems, such as in Germany, autonomy is seen as a protection distinct from the general religious freedom norm. *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, art. 140 (Ger.) (incorporating Article 137 of the Weimar Republic Constitution, which states in relevant part: "Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community."); *see generally* Axel Freiherr von Campenhausen, *Church Autonomy in Germany, in* CHURCH AUTONOMY: A COMPARATIVE STUDY, 77 (Gerhard Robbers ed., 2001).

77. *See, e.g.*, LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY (Hildegard Warmink ed., 2001); von Campenhausen, CHURCH AUTONOMY, *supra* note 76; Roland Minnerath, *The Right to Autonomy in Religious Affairs*, *in* FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK, 291 (Tore Lindholm et al. eds., 2004).

78. *See supra* note 67 for a discussion of institutional and collective right of freedom of religion or belief.

79. Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, ¶ 118 (stating right to reasonable access to legal entity status); *see also* Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117 (stating right to determine own religious leadership); Svyato-

autonomy of religious entities . . . presents a direct interest not only in the community as such but for the effective enjoyment of the right to religious liberty for active members of said community."[80]

Necessarily, among many other applications, the right of religious autonomy includes the ability to determine doctrine and carry out a ministry.[81] Specifically, it includes the right of churches to employ on a religious basis.[82] Therefore, any interpretation of local labor or anti-discrimination laws that overlooks the right of autonomy as an aspect of religious freedom is incomplete.

One of the major commitments made by states belonging to the Organization for Security and Cooperation in Europe, for example, is the following:

> [I]n order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia* . . . respect the right of religious communities to . . . organize themselves according to their own hierarchical and institutional structure, [and] . . . select, appoint and replace their personnel in accordance with their respective requirements and standards . . . .[83]

Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01, Eur. Ct. H.R. (2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067.

80. Serif v. Greece, 1999-IX Eur. Ct. H.R. 73 [translation by authors]. The European Union has specifically expressed its respect for the autonomy of religious communities as provided for in Member State's law. This has been done in the Declaration No. 11 attached to the Final Act of the Treaty of Amsterdam. *See* 1997 O.J. (C 340) 1, 133, by which the European Union respects and does not prejudice the status under national law of churches and religious associations or communities as well as of philosophical and non-confessional organizations in the Member States. This has been repeated and intensified by the Consolidated Version of the Treaty on the Functioning of the European Union. *See* 2008 O.J. (C 115) 1, 55.

81. The scope of religious autonomy is broad, touching on an array of issues. Autonomy includes the ability to determine: (1) fundamental beliefs, including basic notions of doctrine, dogma, and teachings; the structure of the religious polity of the community; and the principles of its governance, whether in the form of canon-law or some other, informal form; (2) the core ministry of the community, including matters of worship, ritual and liturgy; establishing places of worship; confidential counseling and confession; teaching the faith to members, clergy, and to non-members; and humanitarian care for members and others; (3) the selection, supervision, discipline, and termination of the clergy and non-clergy personnel who shape, represent, and in a very real sense constitute the religious community as it structures itself internally and as it relates to the world; (4) the church membership, including the requirements for entrance into, participation in, and withdrawal or expulsion from the community; (5) the nature, governance and territorial arrangements of substructures, linkages to other religious communities, and so forth; and (6) matters of finance, and the methods of acquiring, using, and disposing of funds and other church property. W. Cole Durham, Jr., Keynote Address Presented at the Second ICLARS Conference Santiago, Chile: Religion and the World's Constitutions (Sept. 8–10, 2011) at 9–10. In addition, religious autonomy includes the right to acquire legal entity status. Religious communities need status sufficient to carry out their full range of religious activities, including in spheres where they typically encounter state regulation (cultural, educational, humanitarian aid, health care, and the like), and should be able to attain such without undo barriers. Autonomy also includes the right to create sub-entities and to have them recognized as decided by the religious community. And religious communities should have broad latitude and strong cooperation with respect to access to the military, hospitals, prisons, and chaplaincies. *Id.*

82. Durham, *supra* note 81.

83. Concluding Document of the Vienna Meeting 1986 of Representatives of the

A recent set of cases from the European Court of Human Rights has explicitly recognized the right of religious institutions to independence in their employment decisions. These cases proclaim broad authority for religious communities to terminate employees serving in representative or teaching capacities. *Obst v. Germany*[84] sustained the termination of a non-clergy spokesman for The Church of Jesus Christ of Latter-day Saints in Europe for adultery, a clear violation of Church policy guidelines known to him. *Siebenhaar v. Germany*,[85] like *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[86] involved a teacher (and later manager) at a Protestant school. The Court upheld her termination as a violation of her contractual duty of loyalty to the church, because she became affiliated with another, obscure religious group whose views contradicted the church's mandate.[87]

As summarized by the European Court:

> [T]he right to freedom of religion for the purposes of the [European] Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel a community or part of it to place itself, against its will, under [particular] leadership, would also constitute an infringement of the freedom of religion . . . . [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[88]

How religious organizations are structured and how they operate, including employment issues, are themselves matters of religious belief. Not allowing a group to communally structure itself or its organizations according to its beliefs violates religious freedom.[89] For religious organizations with a professional clergy, the right to hire ordained ministers is indisputably protected, but the right extends beyond that narrow application to enable religious organizations to hire other, "non-clergy" employees based on religious criteria. While the exact scope of religious employers' rights varies from country to country, and may require balancing against other interests, as discussed more fully below,[90] it is generally

---

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, art. 16 (1986), *available at* http://www.osce.org/mc/16262.

84. *See* App. No. 425/03, Eur. Ct. H.R. (2010).

85. App. No. 18136/02, Eur. Ct. H.R. (2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103236.

86. 132 S. Ct. 694 (2012).

87. *Siebenhaar*, App. No. 18136/02.

88. *See* Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, ¶¶ 117–18.

89. For a more extensive analysis of this concept of limited self-definition of religion, see W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 3 (James A. Serritella et al. eds., 2006).

90. *See* Schüth v. Germany, App. No. 1620/03, Eur. Ct. H.R., discussed *infra* at note 241

settled that employment decisions based on religious criteria are an extension of the autonomy right to internal ordering.

B. Regulations and Judgments in Specific Jurisdictions Relating to Employment by Churches Based on Religious Criteria

The following legislation and judgments from a variety of selected jurisdictions illustrate the breadth and depth to which principles of religious autonomy have been adopted with respect to the employment practices of religious organizations.

1. European Union

In 2000, the European Union adopted Council Directive 2000/78/EC as a "general framework for equal treatment in employment and occupation."[91] While broadly prohibiting employment discrimination, this Framework Directive expressly recognizes the principle of church autonomy, as enshrined by the national legislation or historical practices of Member States, with regard to employment.[92] Article 4(2) provides:

> Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations, 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 organization's ethos.* This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
>
> *Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos.*[93]

There is a strong tradition of autonomy for churches in most European nations. Many have explicit constitutional protections for churches and some do not apply employment laws to churches at all, such as the Czech Republic, Estonia,

---

and accompanying text.

91. Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment and Occupation, 2000 O.J. L 303 [hereinafter Equal Treatment Directive].

92. *Id.*

93. *Id*. art. 4, at 2 (emphasis added).

and Lithuania.[94] These norms are adopted in the European Union's governing treaty—the Treaty on the Functioning of the European Union—at the European constitutional law level.[95] Thus, the norms govern the form of the legislation enacted by both the European Union and particular Member States, and will no doubt color subsequent interpretation.[96] Particular examples include:

a. Germany

Germany is a leading jurisdiction in protecting the autonomy of religious employers.[97] Churches have the right to set their own criteria for employees, which is not viewed as an exemption to labor law, but rather a core part of church autonomy.[98] "It is fundamental to recognise that the interpretation of protective labour legislation is not a matter of making exceptions in favour of the church . . . . Instead, the basis for decision is systematically the churches' right to self-determination."[99] The fact that autonomy is usually seen as a constitutional-level protection ensures that even statutes that facially provide no distinctive treatment for religious employers should still be interpreted to allow religious employers to hire on the basis of religion.[100]

The leading case in Germany is the Federal Constitutional Court decision on June 4, 1985, upholding the dismissal of two employees—a doctor at a Catholic hospital who publicly advocated abortion and an accountant at a Catholic youth center who left the church for breach of the duty of loyalty.[101] The court affirmed the constitutional right to self-determination, holding that churches are free to require employees to observe the fundamental principles of the religious dogma,

---

94. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 17.1, May 9, 2008, 2008 O.J. (C 115) 47 ("The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.").

95. *Id.*

96. *See* Dr. José María Sanchez, *El Respeto al Credo de las Confesiones Religiosas y Sus Consecuencias en el Ordenamiento Laboral Español: En Particular, la Extinción del Contrato de Trabajo por Motivos de Naturaleza Religiosa o Moral* (June 2008) (on file with author) [hereinafter Sanchez Memorandum] ("Constitutional protections for churches will likely govern even if a country fails explicitly to adopt Article 4(2) and even if the general trend among labor court decisions appears to favor employee rights.").

97. *See* Die Verfassung des Deutschen Reichs [Weimar Constitution] Aug. 11, 1919, art. 137 (Ger.) ("Every religious community administrates its own affairs without interference of state or community."); s*ee also* von Campenhausen, CHURCH AUTONOMY, *supra* note 76, at 81 (citing BVerfGE 70, 138 (165ff) (German Const. Ct)).

98. von Campenhausen, CHURCH AUTONOMY, *supra* note 76, at 81 (citing BVerfGE 70, 138 (165ff) (German Const. Ct)).

99. Cf. Axel von Campenhausen, *The Churches and Employment Regulations in the Federal Republic of Germany*, 111, *in* CHURCHES AND LABOUR LAW IN THE EC COUNTRIES (Milano: Dott. A. Giuffre, 1993).

100. *Id*.

101. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 4, 1985, 1703 Entscheidungen Des Bundesverfassungsgerichts [BVERWGE] 83, 1985 (Ger.).

even in their private lives.[102] Importantly, the court held that churches alone—not labor courts—should determine which religious obligations are important, at any level or class of employment.[103]

The German Federal Labor Court has applied this constitutional rule in a number of cases in which The Church of Jesus Christ of Latter-day Saints (LDS Church) prevailed against employees who claimed that they were terminated without just cause after being denied LDS temple recommends (a certification by the employee's local church authorities that the employee is observing basic church teachings).[104] One court summarized the common rationale:

> The loss of a temple recommend constitutes a violation of admissibly drawn-up loyalty obligations. The constitutional guarantee of a church's right of self-determination allows churches to decide on their own which basic church obligations will become significant as the subject matter of an employment contract . . . . If a loyalty obligation consists of being temple worthy—and the plaintiff is bound by this—it has been violated as soon as the plaintiff no longer has a temple recommend.[105]

The European Court of Human Rights reviewed and affirmed another LDS Church case in *Obst v. Germany*.[106] In *Obst*, the court reiterated that the autonomy of religious communities was protected against undue interference by the State under Article 9 (freedom of religion), read in light of Article 11 (freedom of assembly and association) of the European Convention on Human Rights.[107]

Germany has implemented the E.U. Framework Directive.[108] Under the implementing legislation, as under preexisting provisions, a religious employer determines what constitutes a justified occupational requirement, and may demand an employee's loyalty and adherence to the church's own standards of good behavior without violating anti-discrimination laws.[109]

Finally, as an additional example of protections afforded religious autonomy in Germany, the Roman Catholic Church and the established Protestant churches in

---

102. *Id.*

103. *Id.*

104. *See, e.g.*, Bundesarbeitsgericht [BAG] [Federal Labor Court] Apr. 24, 1997, 2 AZR 268/96, Entscheidungen Des Bundesarbeitsgerichts [BAGE], 1997 (Ger.); *aff'd on appeal by European Court of Human Rights sub nom.* Obst v. Germany, App. No. 425/03, Eur. Ct. H.R. (2010); Schmidt v. Church of Jesus Christ of Latter-day Saints, Frankfurt am Main – 11 Ca 4615/99; Frankfurt am Main Labor Court, Mar. 6, 2000, 15 Ca 6900/99 [hereafter "Fecher"].

105. Fecher, *supra* note 104, at 4.

106. 425/03 Eur. Ct. H.R. (2010).

107. *Id.* The European Convention (also known as the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms) is binding upon all forty-seven Member States of the Council of Europe, including the twenty-seven European Union Member States.

108. *See generally* Allgemeines Gleichbehandlungsgesetz [General Equal Treatment Act], Aug. 14, 2006, BGBL. 1 at 1897, promulgated Feb. 5, 2009, BGBL. 1 at 160 (Ger.).

109. *Id.* §§ 9.1, 9.2; *see also* Dr. Matthias Mahlmann, *Report on Measures to Combat Discrimination*, *Country Report/Update Germany,* (2006), *available at* http://www.non-discrimination.net/content/media/2010-DE-Country%20Report%20LN_FINAL_0.pdf (discussing the German Employment Protection Act).

Germany have religious objections to some forms of mandatory collective bargaining.[110] Their right to autonomy has been held to exempt them from statutes requiring employers to engage in mandatory collective bargaining.[111]

b. The United Kingdom

Religious organizations in the United Kingdom other than the Church of England "generally are considered to be unincorporated associations or clubs and are free to regulate themselves by their own constitutions," and "[t]he courts have shown a marked reluctance to interfere with the internal management and administration of churches."[112] For example, ministers and others who perform pastoral roles are presumed not to be employees for purposes of employment regulations.[113] Moreover, the United Kingdom has implemented Article 4(2) of the E.U. Framework Directive in two separate regulations that aggressively protect church autonomy: the Employment Equality (Sexual Orientation) Regulations (SOR) and the Employment Equality (Religion or Belief) Regulations.[114] The SOR (permitting churches to impose employment requirements related to sexual orientation, among other reasons to avoid offending the sensibilities of followers) were particularly controversial, but have been upheld by the High Court as applied to organized religion.[115] Under both sets of regulations, a church can exercise its autonomy to discriminate in employment on otherwise protected bases if required by the church's religious doctrine.[116] Further, tribunals should defer to the church's tenets rather than community standards when deciding what constitutes justifiable discrimination.[117]

c. Spain

Article 6(1) of Ley Organica De Libertad Religiosa (Spain's Religious

---

110. *See generally* Kathleen Brady, *Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL L. REV. 77–167 (2004).

111. Cf. von Campenhausen, *The Churches and Employment Regulations*, *supra* note 99, at 112 (describing a case in which the German Federal Constitutional Court held that church institutions need not provide access for union officials).

112. Mark Hill, *Church Autonomy in the United Kingdom*, *in* CHURCH AUTONOMY 271, 272 (Gerhard Robbers ed., 2001).

113. *Id.* at 277 (citing Santokh v. Guru Nanak Gurdwara, ICR 309 [1990]; Guru Nanak Temple v. Sharry, EAT 21/12/90 (145/90) [1990] (holding that Sikh priests are presumed not to be employees)).

114. *See generally* R (Amicus) v. Secretary of State for Trade and Industry and others, [2004] EWHC 860 (Admin) (Eng.).

115. *Id.*

116. *Id.*

117. *See generally* Neary and Neary v. The Dean of Westminister, 5 Ecc LJ 303 (1999) (upholding summary dismissal of employees whose conduct undermined trust and confidence); Employment Equality Act 1998 (Act. No. 21/1998), *available at* http://www.irishstatutebook.ie/1998/en/act/pub/0021/print.html (transposing Article 4(2) in broad terms into Irish law).

Freedom Act) grants the right of autonomy of religious organizations in their internal affairs by allowing religious entities to lay down their own organizational rules, and internal and staff bylaws.[118] The Act is empowered by Article 16 of Spain's Constitution, which guarantees religious freedom for individuals and communities.[119] Such rules, and those governing the institutions they create to accomplish their purposes, may include clauses safeguarding "their religious identity and character, and with due respect for their beliefs."[120]

The Spanish Constitutional Court has upheld this right in various cases involving the termination of employees who failed to maintain standards or took actions that caused friction with their employer's ideology (e.g., private religious schools).[121] Indeed, the Constitutional Court has stated generally that an ideological employer's right to terminate an employee on religious or moral grounds, which is an expression of the institutional and collective freedom of religion, prevails over the individual rights of the worker.[122] As summarized by Prof. Dr. José María Sanchez, "requiring a belief in keeping with the ideological employer's own religious faith, or a general duty of loyalty and respect to this creed within ideological organizations or companies, does not constitute discrimination . . . ."[123] Particularly in light of Article 4(2) of the E.U. Directive, the constitutional right of religious freedom and institutional autonomy is interpreted broadly against competing claims of individual employees.[124] Employees are required to respect the religious nature of the employer, and the employer has the right to determine job qualifications that reflect its ideological ethos.[125]

2. Canada

The Supreme Court of Canada has interpreted the Canadian Charter of Rights and Freedoms to extend institutional and collective rights of religious freedom to religious organizations.[126] In a case challenging the denial of accreditation of a religious college with an anti-homosexual ethos, the court (referring to the United

118. Ley Organica De Libertad Religiosa [Spanish Religious Freedom Act] art. 6(1) (Spain).

119. Constitución de España [Constitution] Dec. 27, 1978 art. 16 (Spain).

120. Spanish Religious Freedom Act, *supra* note 118.

121. S.T.C., Feb. 15, 2001 (No. 46/2001) (Spain).

122. *See* S.T.C., Feb. 15, 2007 (No. 38/2007) (Spain) (holding that diocese, in dismissal of teacher of Catholicism at state school who was terminated after losing the endorsement of the diocese, had the right to select or approve teachers of the faith by treaty with the Vatican); *see also* S.T.C., June 4, 2007 (No. 128/2007) (Spain) (same); S.T.C., Feb. 13, 1981 (No. 5/1981) (Spain) (holding that academic freedom of teachers at parochial school was limited by right of ideological institution to express its vision).

123. Sanchez Memorandum, *supra* note 96.

124. *Id.*

125. *See* S.T.C., Feb. 15, 1990 (No. 20/1990) (Spain) (holding that broad rights enshrined in Art. 16 of Spanish Constitution should be liberally construed against challenges based on competing interests).

126. British Columbia College of Teachers v. Trinity Western University, [2001] 1 S.C.R. 772 (Can.).

Kingdom's SOR) held that a right of nondiscrimination on the basis of sexual orientation must be balanced against the religious institution's, and its students' or members', right of freedom of religion.[127] The court reasoned that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[128] Given these protections, federal and provincial anti-discrimination enactments generally do not apply to churches.[129]

3. South Africa

The majority of South Africans suffered discrimination of all forms during the Apartheid era; therefore, the advent of democracy in 1994 brought a plethora of laws to eliminate unfair discrimination, including discrimination affecting freedom of religion, belief and opinion, and labor rights. The South African Bill of Rights presumes that any state or private discrimination on the basis of religion (or other suspect classifications) is unconstitutional "unless it is established that the discrimination is fair."[130] The Equality Court has stated in dicta that an employee in a position of spiritual leadership can be terminated by a church for conduct in conflict with church doctrine, even if the grounds for termination is another protected classification.[131] As summarized in an influential treatise:

> If a court were to hold that churches could not deem sexual orientation, or any other enumerated ground in the equality clause, a disqualifying factor for priesthood, the effect for many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leader. Where appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination.[132]

4. Latin America

Many Latin American countries also provide constitutional-level protection of church autonomy. In Mexico, Article 130(b) of Mexico's Constitution and the Law of Religious Associations prohibit government authorities from intervening in the

---

127. *Id.*

128. *Id.* at 812.

129. *See, e.g.*, Krall v. Vedic Hindu Cultural Society, 2005 BCHRT 556 (Can.).

130. S. AFR. CONST., 1996; *see also* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.) (implementing the anti-discrimination provisions as to private employers).

131. In The Equality Court of South Africa Case no. 26926/05 in the matter between John Daniel Strydom and Nederduitse Gereformeerde Gemeente Moreleta Park. *See infra* note 242 for discussion of Strydom case.

132. *Id.*

internal life and structure of religious associations, including in their systems of operation and the selection and training of ministers.[133] In Colombia, Law 133 recognizes churches' institutional right to religious freedom, and accords "total autonomy and freedom" in establishing "their own norms of organization, internal regime and dispositions for their members."[134] Indeed, the Colombian Labor Code permits terminating employees who breach "special obligations or prohibitions" (or "individual contracts") imposed by religious employers.[135] Similarly, the Law of Religion in Chile provides:

> 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.[136]

More generally, in Latin America, as in Spain and elsewhere, all ideological employers are entitled to insist on employees who espouse their views; otherwise, those views will be diluted. As summarized by Professor Fernando Valdés Dal-Ré, ideological organizations exist to defend and transmit their ideologies, and employees' efforts are central to that mission. An employee who fails to uphold the employer's ideology undermines its credibility and ultimately frustrates its purpose. Further, when an employee undertakes duties related to the spread of the employer's ideology, the obligation to promote the ideology is an indivisible part of the employment agreement.[137]

In addition, labor codes throughout the region impose a duty of loyalty on employees. Synonyms of loyalty ("*lealtad*") that are commonly used in the Spanish-language Labor Codes include "*buena fe*," "*fidelidad*," "*probidad*," "*honradez*," "*honorabilidad*" and "*confianza*," which reflect concepts of good faith, allegiance, probity, discretion, reliability, integrity, and honor. Indeed, courts and commentators in Latin America and Spain have noted the synonymous nature of these terms, in part due to their common Latin etymology. For instance, the Colombia Supreme Court held that legislation imposing a duty of "*fidelidad*" should be interpreted as having the same meaning as "*probidad*, *lealtad*, *honradez* [and] *buena fe*."[138] Dr. José Lastra of the National Autonomous University of

---

133. Constitucion Politica de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federacion [DO], 5 de Febrero de 1917 (Mex.); Ley de Asociaciones Religiosas [Law of Religious Associations], art. 9, Diario Oficial de la Federacion [DO], 15 de Julio de 1992 (Mex.).

134. L. 133, mayo 23, 1994, DIARIO OFICIAL [D.O.] art. 13 (Colom.).

135. C.S.T. (Labor Code) art. 62(a)(6) (Colom.).

136. Law No. 19638, art. 7, Octubre 1, 1999, DIARIO OFICIAL [D.O.] (Chile).

137. *See* Fernando Valdés Dal-Ré, *Los derechos fundamentales de la persona del trabajador in* XVII CONGRESO MUNDIAL DE DERECHOS DEL TRABAJADOR Y DE LA SEGURIDAD SOCIAL, LIBRO DE INFORMES GENERALES (Sept. 2003, Montevideo, Uruguay), 127–28 (stating that spreading an ideology becomes a "necessary condition" of the contract).

138. Sentencia del 21 de septiembre de 1982, radicación 8650. Likewise, the Supreme Judicial Tribunal of Spain held that the term "*buena fe*" (good faith) as used in the labor code translates into directives equivalent to "*lealtad*, *honorabilidad*, *probidad*, *y confianza*." Supreme

Mexico emphasizes that the terms "*probo*" and "*probidad*" relate to "*buena fe*," because the rootword "*probus*" means "*excelente*, *bueno*, *honrado*, *integro*, *leal*."[139]

The following labor codes, which are merely an illustrative list, permit terminating an employee "for cause" based on a violation of some form of this duty of loyalty: Belize— "misconduct, whether in the course of his duties or not, inconsistent with the fulfillment of the express or implied conditions of his contract of service";[140] Brazil—"insubordination" and "lack of integrity";[141] Chile—"lack of integrity [*probidad*]";[142] Colombia—"all vices (faults) that perturb the discipline of the establishment";[143] Costa Rica—"outside of the work place and not within working hours, recurs to insult, calumny or takes action against his employer";[144] Dominican Republic—"lack of integrity [*probidad*] or honor [*honradez*]";[145] Ecuador—"lack of discipline, or disobedience to the legally adopted internal regulations . . . lack of integrity or immoral conduct";[146] El Salvador—"the employee committing acts that gravely disturb the order in the company, altering the normal completion of the work . . . [and] failure or violation by employee, gravely, any of the obligations or prohibitions . . . established in the internal regulations [or] customs and practices of the business";[147] Honduras—"any material breach" of collective or individual contracts or internal regulations";[148] Mexico—"lack of integrity [*probidad*] and honor [*honradez*]";[149] Nicaragua—"grave lack of integrity [*probidad*] . . . any violation of obligations imposed in the individual contract or internal regulation that causes grave injury to employer";[150] Paraguay—"the lack of compliance by the worker, in obvious and repeated ways, with prejudice to the employer, with the norms that the employer clearly establishes for the efficient rendering of the work."[151] Also affirming the obligation of the employee "to serve the employer with loyalty, avoiding all rivalries prejudicial to the same";[152] Venezuela—"lack of integrity [*probidad*] or

---

Judicial Tribunal ruling 1991, Mar. 4.

139. JOSÉ MANUEL LASTRA LASTRA, *La buena fe en el trabajo: Un principio que se difumina?*, REVISTA DE INVESTIGACIONES JURÍDICO-POLÍTICAS TLAMELAUA, abril 2003, 189, 190.

140. CÓD. TRAB. (Labor Code) art. 46(2)(a) (Belize).

141. Decreto No. 5.542, de 43 de Maio de 1943, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 10.11.1943 (Braz.).

142. CÓD. TRAB. (Labor Code) art. 160(1) (Chile).

143. C.S.T. (Labor Code) art. 62(a)(11) (Colom.).

144. CÓD. TRAB. (Labor Code) art. 81(c) (Costa Rica).

145. CÓD. TRAB. (Labor Code) art. 88(3), (5) (Dom. Rep.).

146. CODIFICACION DEL CÓD. DEL TRAB. (Labor Code) art. 172(2), (3) (Ecuador).

147. CÓD. TRAB. (Labor Code) art. 24(b), (c); 50(8), (20) (El Sal.).

148. CÓD. TRAB. Y SUS REFORMAS (Labor Code) art. 112(l) (Hond.).

149. LFT (Labor Code), 1 de Abril de 1970 (Mex.).

150. CÓD. TRAB. (Labor Code) art. 48(d) (Nicar.).

151. CÓD. TRAB. (Labor Code) art. 81(ll) (Para.).

152. CÓD. TRAB. (Labor Code) art. 65(l) (Para.).

immoral conduct on the job . . . material breach of obligations imposed in the work relationship."[153]

Both of these concepts—the unique character of religious organizations as ideological employers and the general duty of loyalty owed by employees—clearly relate to the principle of autonomy for churches. Accordingly, for example, at least one church in Peru has revised the employment contract for all its employees in that country both to reference the church's status as an ideological employer and to impose an obligation of good faith commensurate with that status.[154] The contract refines the meaning of "good faith" for purposes of labor laws that approve termination for cause based on a breach of good faith.[155]

5. Asia

As in Latin America, laws and traditions in Asia support the right of autonomy of religious institutions. The Hong Kong Constitution, for instance, protects religious organizations against interference in their internal affairs.[156] This provision has been interpreted to apply to the selection of ministerial employees; it was the basis for allowing the Vatican to appoint a bishop to preside over the Catholic diocese in Hong Kong.[157] Moreover, the Hong Kong sex discrimination law expressly exempts churches, except for discrimination based on pregnancy.[158]

In summary, the foregoing examples are representative of many countries whose written norms or established practices affirm the autonomy of religious organizations in their internal affairs such as employment. In other countries, such as in the South Pacific, autonomy is assumed but untested, and would likely prevail in a challenge. Even where legislative enactments appear unfriendly on their face, many constitutional courts would sustain autonomy against a challenge to a church's right to select its employees who perform a ministerial function.[159] Few jurisdictions would take a hostile view that churches cannot select, and if needed terminate without liability, at least certain classes of employees. This is often true even in jurisdictions with strong established churches because the teachings of those religious traditions themselves often support the autonomy of religion in relevant respects.[160]

---

153. LEY ORGÁNICA DEL TRABAJO (Labor Code) art. 102(a), (i) (Venez.).

154. This example is a contract created by the Authors for the use of a current client. For more information, the contract is on file with the Authors.

155. *Id.*

156. *See* Xianggang Jiben Fa art. 141 (H.K.) ("The Government of Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region.").

157. U.S. Dep't of State Bureau of Democracy, Human Rights, & Labor, *China: International Religious Freedom Report 2007*, *available at* http://www.state.gov/j/drl/rls/irf/2007/90133.htm.

158. Hong Kong Sex Discrimination Ordinance, No. 480 (1995) 1 O.H.K., § 22(1).

159. Sanchez Memorandum, *supra* note 96.

160. *See, e.g.*, Pope Paul VI, *Decl. on Religious Freedom: Dignitatis Humanae*, adopted by the Second Vatican Council and proclaimed by His Holiness, Pope Paul VI on 7 December 1965

V. COMPARISON OF *HOSANNA-TABOR* TO INTERNATIONAL LAW NORMS

The international law norms discussed above and manifested in large swaths of the world square in large measure with the result of the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[161] The fact that ministerial personnel play a vital, even formative role in the life of religious communities is clearly understood, and laws are fashioned to take this into account.

The primary difference between United States and international jurisprudence is in the path of reasoning through which rule-making and interpretive bodies arrive at the conclusion that the autonomy of religious communities must be protected. Religious autonomy jurisprudence in the United States is dictated by the Religion Clauses in the First Amendment of the United States Constitution, including and perhaps primarily, the Establishment Clause, which compels a wall of separation between church and state. Thus, the Supreme Court in *Hosanna-Tabor* held that "[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."[162]

However, only about a third of constitutions in the world have provisions effectively calling for separation of religious and state institutions, either in the form of a non-establishment clause, as in the United States, or by insisting on the secularity of the state. In separationist regimes, religious autonomy might be a jurisdictional issue—an issue beyond the competence of the state to address, in an absolute, jurisdictional sense. In contrast, where the issue of religious autonomy is approached through a regime that protects religious freedom without a separation clause, it is more natural to see religious autonomy as an extension of individual religious freedom rights, and to use various balancing or proportionality techniques to weigh autonomy claims against other regulatory interests of the state. The religious autonomy doctrine in the European Court of Human Rights follows the latter course, and as noted, derives from rights to freedom of religion and freedom of association, read in light of each other.[163] This inevitably leads to differences in analysis.

Despite these differences in pedigree and analysis, the similarity of rules emerging from the U.S. Supreme Court, the European Court of Human Rights, and

("Provided the just demands of public order are observed, religious communities rightfully claim freedom in order that they may govern themselves according to their own norms."). *Cf.* Asma Afsaruddin, *Making the Case for Religious Freedom Within the Islamic Tradition*, 6 REVIEW OF FAITH & INT'L AFFAIRS 57 (2008) (citing Qur'anic verses 2:256: "There is no compulsion in religion" . . . [and] 7:107-108: "Had God willed, they would not be idolators; but We have not appointed you [addressing Muhammad] a watcher over them, nor are you their guardian. Do not abuse to whom they pray, apart from God, or they will abuse God in retaliation without knowledge").

161. 132 S. Ct. 694 (2012).

162. *Id.* at 703.

163. Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117.

other norm-creating or interpretive bodies is striking. Virtually all societies broadly recognize a right of religious communities to autonomy with respect to personnel matters.

Specifically comparing *Hosanna-Tabor* with the European Court of Human Rights cases addressing the issue, the decisions are again remarkably alike in their result, despite different rationales. *Hosanna-Tabor*, *Obst*, and *Siebenhaar* all unequivocally endorse the right of churches, as part of their religious autonomy, to terminate employees who violate religious-based employment standards; thus, the core of what is covered by the United States ministerial exception is recognized elsewhere.[164]

Given the potency of the fundamental norms of religious autonomy, there is really no doubt as to the core cases: heads of congregations; those officiating in worship, ritual, or liturgy; teachers; spokespeople; and others involved directly in a church's ministerial endeavors indisputably can be hired or fired on the basis of religious criteria in nearly all countries. The less obvious cases are where there appears some question about an employee's role in the religious mission, and on that, too, there is notable commonality. Both the U.S. Supreme Court and the European Court of Human Rights recognize limits on the berth given to churches in their employment practices, and those limits remain somewhat uncertain. While emphasizing that the ministerial exception applies to more than just heads of congregations,[165] *Hosanna-Tabor* rejected the view that courts should defer entirely to the religious organization's good-faith understanding of who qualifies as a "minister."[166] Instead, the Court listed general considerations for lower courts to weigh in determining whether an employee with mixed religious and secular duties qualifies, indicating it would address close questions later.[167]

Likewise, the same day the European Court of Human Rights decided *Obst*,[168] it handed down its decision in *Schüth v. Germany*.[169] *Schüth*, which also involved a termination for adultery, qualified the right to autonomy in personnel matters by insisting on both a careful balancing of other competing interests, as well as state supervision where the credibility of a religious community and its teaching mission

164. *See e.g.*, Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694 (2012); Obst v. Germany, App. No. 425/03, Eur. Ct. H.R. (2010); Siebenhaar v. Germany, App. No. 18136/02, Eur. Ct. H.R. (2011).

165. *Hosanna-Tabor*, 132 S. Ct. at 707.

166. *Cf. Hosanna-Tabor*, 132 S. Ct at 710 (Thomas, J., concurring) (holding ministerial exception should apply and courts should defer to a religious organization's good-faith understanding).

167. *Id.* at 707–09.

168. *See Obst*, App. 425/03 (handing down its decision on September 23, 2010, which is the same day the court decided *Schüth*).

169. Schüth v. Germany, App. No. 1620/03, Eur. Ct. H.R. Mr. Schüth was an organist and choirmaster in a Catholic parish, a position that, according to the court, did not require dismissal for serious misconduct, as compared with those working in counseling, catechesis, or in a leading position. While he signed an employment contract implying a duty of loyalty, his signature on the contract could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce from this wife. Thus, more consideration was required of his privacy and family rights.

is less clearly at stake.[170] The European Court held that the German courts, which considered the case, had not adequately balanced all the interests at stake.[171]

Three points are clear from both lines of cases: first, the underlying right to religious autonomy in employment matters has deep footing; second, the closer the nexus of an employee to the expressive identity and mission of the religious organization, the more confidently the religious organization can exercise the right and enforce religious-based standards of employment; and third, it is incumbent on religious organizations to articulate, and courts expressly to consider, that nexus. Ultimately, courts retain a degree of discretion in the close cases—the cases in which, of course, rights are always most vulnerable.

VI. PRACTICAL LEGAL THEORIES THROUGH WHICH THE NORMS TYPICALLY ARE APPLIED TO RELIGIOUS COMMUNITIES' STANDARDS FOR EMPLOYMENT

The discussion above amply demonstrates the near universality of the right of religious communities to autonomy in personnel matters. It is guarded by treaties and constitutions, recognized in international customary law, and applied in the judicial decisions and legislation of many countries.[172] So entrenched is the right, that it often arises, or finds expression, in legal theories or arguments that may not even reference the underlying norms. Thus, for example, the Latin American legislation discussed above references a general "duty to loyalty," and permits terminating disloyal employees "for cause," without expressly articulating the special needs of religious organizations for autonomy in their personnel decisions.[173]

These theories and arguments have the practical advantage of being more approachable and less esoteric than the underlying norms. As a result, they appeal to advocates and tribunals that are reluctant or jurisdictionally barred from confronting the constitutional-level issues. Indeed, many labor tribunals lack competence to consider constitutional arguments, which are reserved for designated constitutional courts.[174] Even where courts have competence to consider constitutional arguments, they are often reluctant to do so when a case can

---

170. *Id.*

171. *Id.* ¶¶ 65–74.

172. *See, e.g.*, Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117; U.S. Const. amend. I; XIANGGANG JIBEN FA art. 141 (H.K.); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de septiembre de 2004 (Mex.); Ley de Asociaciones Religiosas y Culto Público art. 9 (1992).

173. Sentencia del 21 de septiembre de 1982, radicación 8650. Likewise, the Supreme Judicial Tribunal of Spain held that the term "*buena fe*" (good faith) as used in the labor code translates into directives equivalent to "*lealtad*, *honorabilidad*, *probidad*, *y confianza*." Supreme Judicial Tribunal ruling 1991, March 4.; *see also* Latin American Labor Codes, citations *supra* notes 140–53.

174. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, & SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1st ed. 1990); MALCOLM D. EVANS, RELIGIOUS LIBERTY & INTERNATIONAL LAW IN EUROPE (1st ed.1997) (stating that tribunals could lack the jurisdiction to consider constitutional questions).

be decided on sub-constitutional grounds.[175] This reluctance is particularly wise in religious employment cases because a judge who undertakes to assess what is "religious" versus "secular" or to balance competing interests wades deep into murky waters of religious dogma. As the U.S. Supreme Court has noted, the line between the "religious" and "secular" "is hardly a bright one" and "a judge [may] not understand [the religious organization's unique] tenets and sense of mission."[176]

Further, as noted above, countervailing interests, or a failure to articulate a sufficient nexus between the employee and the core ministerial functions of the church, can undermine the right to religious autonomy in close cases.[177] Many close cases are decided based on provisions in local labor laws or other more mundane doctrines. It is incumbent on religious organizations to articulate the connection of employees to their religious missions, and to do so in a way that is relevant and comprehensible in the light of labor laws, for example by reference to employment contracts.[178] As Professor Valdés dal Ré has emphasized, it is essential to provide adequate context by explaining: (1) the importance of the religious-based behavior standards to the religious organization; (2) the employee's prior knowledge of the standard; and (3) his or her role in the church's ministry.[179]

For all these reasons, the Article next discusses eight practical theories that emanate from the right of religious organization to autonomy with regard to personnel matters. These theories may not expressly rely on constitutional or human rights instruments, but concepts of autonomy and freedom of religion necessarily underlie and buttress all of them. They include the employee's duty of loyalty to an ideological employer; the employee's obligation to protect the ethos of the employer and the employer's reputation and good name; religion as a bona fide occupational requirement; the employee's responsibility to uphold the employers' mission and principles as agent for the corporation; the freedom of contract, assuming the religious requirements are incorporated into the employee's contract; and the employer's responsibility to avoid potential claims of harassment or discriminatory pressure that might arise if they hired or retained employees who are not aligned with the religious standards and mission of the employer.

---

175. *Cf.* Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam) (stating the Court will not decide a constitutional question if it can dispose of the case on another ground).

176. Corp. for the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987).

177. *See* Schüth v. Germany, App. No. 1620/03, Eur. Ct. H.R. (stating that the German courts had not adequately balanced all the interests at stake).

178. The practical arguments are best presented in conjunction with the more fundamental arguments as twin pillars supporting an overarching theme that religious institutions (alone and on behalf of their members) enjoy freedom of religion and thus the institutional autonomy to direct their internal affairs as mandated by their faith, free from government intrusion.

179. dal Ré, *supra* note 137, at 128.

A. The Duty of Loyalty

Employees owe a duty of loyalty to the church as their employer.[180] The essence of a religious organization is its theological mission. If the religious commitments are the *raison d'être* of the organization, it stands to reason that employees' duty of loyalty can include the requirement that they exhibit loyalty through believing and living the teachings of the religious organization.[181] All ideologically based organizations share this need. It would be reasonable for an environmental group, political party, or pro-abortion or anti-abortion group to require employees to be committed and loyal to the organization's views. Similarly, a religious organization must be able to require employees to have a high level of commitment to its policies and doctrines.

The duty of loyalty is often a feature of labor laws. As illustrated above with respect to Latin America, numerous labor codes identify violation of some form of the duty of loyalty or good faith as a legitimate basis of "just cause" termination. [182] Likewise, the European Union's Framework Directive acknowledges the right of churches "to require individuals working for them to act in good faith and with loyalty to the organization's ethos."[183] In Germany, this principle is expressed in the concept of "serving community" (*Dienstgemeinschaft*).[184] The term "expresses the fact that all church staff are committed to the church's mission. The preambles and basic provisions of the relevant church regulations contain brief theological explanations of this kind. The theological statements also make a legal requirement of the fundamental unity of all duties performed in the church's name."[185]

The Constitutional Court in Spain has repeatedly held that employees of ideological institutions have a duty of good faith and loyalty to their employers' creed.[186] Even employees not directly involved in spreading employer's beliefs

---

180. Council Directive 2000/78, art. 4.2, 2000 O.J. (L 303) 16, 19.

181. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop, 598 F.3d 668, 675 (9th Cir. 2010) (involving seminarian who performed maintenance duties around the church); Schleicher v. Salvation Army, 518 F.3d 472, 477 (7th Cir. 2008) (involving administrator of Salvation Army thrift shop); Shalihsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–11 (4th Cir. 2004) (involving nursing home staff).

182. *See supra* Part III.B.4.

183. Council Directive 2000/78, art. 4.2, 2000 O.J. (L 303) 16, 19.

184. *See Draft Report of the Eurodiaconia Social Service Group Meeting*, (June 30–July 1, 2009), *available at* http://www.eurodiaconia.org/files/Working%20Groups/Draft%20Report%20SSWG%20June%202009.pdf (defining Dienstgemeinschaft).

185. *Id*. at 109.

186. *See* Sentencia del 21 de septiembre de 1982, radicación 8650. Likewise, the Supreme Judicial Tribunal of Spain held that the term "*buena fe*" (good faith) as used in the labor code translates into directives equivalent to "*lealtad*, *honorabilidad*, *probidad*, *y confianza*." Supreme Judicial Tribunal ruling 1991, March 4.

cannot act in a way that causes friction with those beliefs.[187] Moreover, the duty extends beyond the workplace into the employee's private life, because of the employee's potential notoriety and the impact on the employer as a result of the employee's failure to respect the employer's creed.[188]

This duty of loyalty was central to the judgment of the European Court of Human Rights in *Obst v. Germany*, which addressed the dismissal of a church employee on grounds of conduct (adultery) falling within the sphere of his private life. Balancing the employee's right of privacy against the impact of his conduct on the church's credibility, the Court affirmed the German Court's assessment that the employee's duty of loyalty to the teachings of the church trumped other considerations.[189]

B. Protecting the Ethos of the Religious Organization

A related argument is that religious-based personal conduct requirements are critical to protect the ethos of the church. Without a common religious identity reinforced by all employees, a religious organization's meetinghouses and headquarters lose their character and common vision. It betrays the faith reposed in them by members and often demanded by doctrine. Religious organizations, like other ideological organizations, depend on employees' motivation and satisfaction from working together with people who share their ideals and values for a common purpose.

Religious organizations exist to proclaim their doctrine and beliefs to the world; inspire and perfect their members; assist the less fortunate; and provide sacred ordinances or sacraments. Religious organizations' efforts typically center on these objectives—from constructing and maintaining places of worship, to assisting the destitute, to ensuring the wise use of resources. Ecclesiastical leaders normally encourage high standards of personal moral conduct for *all* church members. Employees also represent the church. An employee whose expressions or conduct contravenes church standards undermines the church's ministry as a canker in the core. Preventing the church from terminating an employee who refuses to uphold the basic standards of belief and conduct of the church forces the church to send a message to its members that is inconsistent with its beliefs, particularly when the employee is paid with sacred donated funds.

The German Labor Court upheld the termination of an LDS Church employee on precisely this basis:

The credibility of the defendant itself and of its message will be shaken

---

187. *See* S.T.C., Feb. 15, 2001 (B.O.E., No. 46, p. 83) (Spain) (stating that religious entities may establish internal rules for their staff and safe harbor provisions of their religious identity and character, as well as respecting their beliefs).

188. *See* C.E., B.O.E. n. 5, Feb. 13, 1981 (Spain) (discussing the possible notoriety of teachers in parochial schools); *see also* C.E., B.O.E. n. 38, Feb. 15, 2007 (Spain) (stating that religious groups can consider a person's conduct in determining whether this person qualifies to teach their respective creeds); Sanchez Memorandum, *supra* note 96.

189. *See* Obst, App. No. 425/03, Eur. Ct. H.R. (affirming the German Court's assessment that the employee's duty of loyalty to the teachings of the church trumped other considerations).

> if on the one hand it requires its members to fulfill high moral and other demands, *e.g.* requiring so-called temple worthiness for the participation in ordinances of the temple which it considers to be sacred, and if, on the other hand, it is represented towards outsiders, church members that are not church employees, and employees or volunteers by persons who cannot prove, by owning a temple recommend, that they fulfill their church obligations properly and live up to the church's self-image that they represent.[190]

Diversity is important in many institutions, but requiring diversity of belief in a religious organization is like requiring diversity of political affiliation in a political party—by definition, the requirement is not compatible with the objectives or ethos of the organization. For this reason, many anti-discrimination rules, such as the European Union Framework Directive, exempt churches and other ideological employers to enable them to preserve their ethos.[191] As summarized by the European Court of Human Rights:

> [T]he right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under [particular] leadership, would also constitute an infringement of the freedom of religion. . . . [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] affords.[192]

This stance echoes what Justice Brennan stated in *Amos*:

> [A religious] community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.[193]

---

190. *Fecher*, *supra* note 104, at 5; *see also Obst,* App. 425/03 (affirming the German Court's assessment that the employee's duty of loyalty to the teachings of the church trumped other considerations).

191. Notably, the autonomy of religious organizations is based on the freedom of religion and thus is even stronger than general ideological or political autonomy. *See supra* Part III.A.

192. Metropolitan Church of Bessarabia v. Moldova, App. No. 45701/99, 13 Eur. Ct. H.R. ¶¶ 117–18 (2001).

193. Corp. for the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

C. Protecting the Religious Employer's Reputation and Avoiding Risk

A related argument is that religious qualifications protect the reputation of the religious employer and help avoid risk.[194] If an employee of a religious organization is known not to live the standards of the religious organization or not to believe in its tenets, then this could adversely affect the organization's public reputation and good name. Institutional integrity and authenticity require that all members are committed to the same standards as the religious organization. A religious organization's authenticity and reputation can be lost by having non-members or non-faithful members as employees.[195]

Moreover, relaxing the standard of belief and conduct for employees would open the religious organization to risk. Enforcing a personal religious-based worthiness standard is an effective way of preventing the types of misconduct that have led to the liability and sometimes disgrace of various denominations in recent years, for example, in sex abuse scandals or fraud schemes.[196]

D. Bona Fide Occupational Qualifications

Religious qualifications for employment by religious organizations are bona fide occupational qualifications.[197] This is clearly the case for those teaching in a church's educational system, those who represent the church to governments or the media, or those with other obviously sensitive jobs.[198] But the argument can be made for less notable employees as well. Secretaries and clerks, for example, must be able to maintain confidentiality and have the complete trust and confidence of the ecclesiastical leaders with whom they work. This level of trust, particularly when sensitive ecclesiastical policies or issues are involved, is impossible without

---

194. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (stating that requiring a church to accept an unwanted minister interferes with the internal governance of the church thus depriving the church of control over the selection of those who will personify its beliefs).

195. von Campenhausen, *The Churches and Employment Regulations*, *supra* note 99, at 110 (1993) ("[Churches reasonably can] assume that everybody working for a church institution represents the denominational character of the place. Anyone entering such an institution must be able to assume that all the staff form a community of helpful and healing service from their particular perspective").

196. *See* THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *Missionary Preparation Student Manual*, Ch. 2 (Sept. 15, 2012), *available at* http://institute.lds.org/manuals/missionary-preparation-student-manual/miss-1-2.asp (stating that personal worthiness is necessary to accomplish missionary work).

197. *See* 42 U.S.C. § 2000e-2(c)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."); *see also* Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986); Rasul v. District of Columbia, 680 F.Supp. 436 (D.C. Cir. 1988).

198. *See Pime*, 803 F.2d at 351.

the secretary or clerk being a member in good standing. Translators must be able to understand the spirit and the letter of the texts they translate; being a member in good standing ensures that they continue to remain in harmony with church doctrines, policies, and practices. The same is true for all those who advise or counsel clergy; supervise or work alongside missionaries; prepare manuals; construct or maintain sacred spaces; or interact with the public, even informally.

Again, the most significant elements of any religious organization are its religious beliefs and practices. The requirement of *all* employees to model their behavior, regardless of their particular occupation, is an important way that the church accomplishes its mission and retains its identity. The need for employers, particularly ideological employers, to impose reasonable occupational requirements is well established. The International Labour Organization (ILO), the U.N. agency whose primary aim is to promote rights at work, has stated: "Consideration should also be given to appropriate measures to eliminate all forms of intolerance. It should be recognized that in certain cases religion could constitute a qualification that could be required in good faith for a particular job or occupation."[199] ILO Convention No. 111, Article 1(2) provides: "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."[200]

The European Union Framework Directive recognizes the need in two separate provisions, both providing that employers can impose occupational requirements required by job activities or "the context in which they are carried out." Article 4(2), quoted above, specifically allows churches to impose religious-based requirements when they are "genuine, legitimate and justified . . . having regard to the [organization's] ethos."[201] Article 4(1) allows any other occupational requirements that are "genuine and determining," provided the objective is legitimate and the requirement is proportionate.[202]

In cases involving LDS Church employees terminated for loss of a temple recommend in Germany, the labor courts uniformly upheld the temple recommend worthiness requirement as a bona fide occupational requirement for each of the terminated employees: a secretary,[203] a mid-level manager in a microfilm order center,[204] and a public affairs director.[205] Moreover, the LDS Church's legitimate

199. Int'l Labor Org. [ILO], *Equality in Employment and Occupation: Scope of the Instruments as Regards Individuals, Definition and Grounds of Discrimination*, ¶ 42 (1996).

200. ILO, *Convention Concerning Discrimination in Respect of Employment and Occupation*, art. 1.2 (1958).

201. Council Directive 2000/78, art. 4.2, 2000 O.J. (L 303) 16, 19.

202. *Compare* Council Directive 2000/78, art. 4.1, 2000 O.J. (L 303) 16, 19 (stating that, in application to church members, a relationship between the occupational requirement and the job itself need only be "determining") *with* Council Directive 2000/78, art. 4.2, 2000 O.J. (L 303) 16, 19 (stating that, in application to church members, a relationship between the occupational requirement and the job itself need only be "justified").

203. *See, e.g.*, discussion in *supra* note 104.

204. *Id.*

205. Obst v. Germany, App. No. 425/03, Eur. Ct. H.R.

need for the temple recommend worthiness standard functioned as a counterweight to the employees' individual rights, allowing the church's institutional rights to prevail.[206]

E. Breach of Contract

If the religious requirements are incorporated in a contract, then another argument is the concept of freedom of contract.[207] In France, the Court of Cassation upheld the firing of a teacher at a Catholic school due to her marital status, which was not in conformity with Catholic teaching, based on the her employment contract.[208] The court held that:

> [O]n the signing of the contract between the Association Sainte-Marthe and Dame Roy, the religious convictions of the latter had been taken into consideration, and this element of the agreement, which is usually left out of employment relations, had in this case been willingly integrated into the contract, of which it had become an essential and determining part.[209]

Later, in a similar dismissal case in 1986, the Court of Cassation went even further and held that the employee, having been hired "for a task that *implied* that she [was] in communion of thought and faith with her employer, [failed] to acknowledge the obligations resulting from this commitment."[210]

Courts and labor codes worldwide provide that parties may decide, based on the freedom of contract, to make religious belief legally relevant to the employment relationship.[211] Breach of contract was a primary factor in the German cases discussed above, among other cases in which the court upheld dismissals of LDS Church employees for loss of temple recommend.[212] Indeed, in *Obst v. Germany*, the European Court of Human Rights emphasized that the employment contract imposed a heightened duty of loyalty and evidenced that the employee had

---

206. Fecher, *supra* note 104, at 5; *Obst*, App. 425/03 at §§ 49–51.

207. *See* Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 8, 2011, 2 AZR 543/10 (Ger.) (upholding a contract which required worker to accept and maintain the basic principles embodied in the religious and moral doctrines of the church); *see also* Johan D. van der Vyver, *State Interference in the Internal Affairs of Religious Institutions*, 26 EMORY INT'L L. REV. 1 (2012) (discussing Bundesarbeitsgericht and noting an "obligation of loyalty" of the applicant towards the basic doctrines and principles of the church).

208. Francis Messner, *The Autonomy of Religious Confessions in France*, in LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY 111, 119 (2001) (citing *Dame Roy*, Cass. Ass. Plen 19 mai 1978: D. 1978, conl. Schmelk, R., note Ardant, Ph.).

209. *Id.*

210. Cass. Soc., 20 November 1986, Delle Fischer c/Unacerf: JPCG 1987, II, 220798, note Revet, T. (emphasis added). France has since held that the court should look at the nature of duties the employee performs and whether the employee has direct contact with the followers of the organization. *See* Messner, *supra* note 208, at 119 (noting that in the case of Church employees, the answer is clearly yes, because employees have regular contact with both the Church's general membership as well as the priesthood leaders whose work they carry out).

211. dal Ré, *supra* note 137, at 128–29.

212. *See, e.g.*, Obst v. Church of Jesus Christ of Latter-day Saints, 2 AZR 268/96 (Federal Labor Court), remanded to state labor court, Hesse, 7 Sa 1300/97; Fecher, *supra* note 104, at 5.

sufficient notice of what was required of him.[213] In Latin America, labor laws in Argentina,[214] Bolivia,[215] Chile,[216] Colombia,[217] El Salvador,[218] Guatemala,[219] Nicaragua,[220] Paraguay,[221] and Venezuela[222] expressly permit termination for cause based on the employee's breach of the employment contract.

Furthermore, courts and labor codes commonly imply a duty of good faith in employment contracts. As explained above, this duty of good faith relates linguistically and substantively to the employees' duty of loyalty to the employer.[223] Thus, since a duty of good faith is implied, apart from the express provisions of an employment contract obligating the employee to maintain a religious-based standard of belief and conduct, disloyalty by the employee in failing to uphold the standard may constitute an additional form of breach of contract. Labor codes in Argentina,[224] Columbia,[225] Costa Rica,[226] Dominican Republic,[227] Guatemala,[228] Mexico,[229] Panama,[230] and Paraguay[231] (among other countries) each imply a covenant of good faith into the employment contract. In common law countries, the courts imply a duty of good faith.[232]

---

213. Obst v. Germany, App. No. 425/03, Eur. Ct. H.R.; *see also* van der Vyver, *supra* note 207, at 1–2 (discussing how employment contracts can impose a duty of loyalty to basic principles embodied in religious and moral doctrines).

214. Law No. 20744, May 13, 1976, B.O. 390 art. 242 (Arg.).

215. Ley General del Trabajo, art. 16(e) (Bol.).

216. CÓD. TRAB. (Labor Code) art. 160.7 (Chile).

217. C.S.T. (Labor Code) art. 62.6, 62.10 (Colom.).

218. CÓD. TRAB. (Labor Code) art. 24, 50.20 (El Sal.).

219. CÓD. TRAB. (Labor Code) art. 77(k) (Guat.).

220. Ley No. 185, 5 Sept. 1996, CÓD. TRAB. (Labor Code) tit. II, ch. VI, art. 48(d), LA GACETA, DIARIO OFICIAL [L.G.], 30 Oct. 1996 (Nicar.).

221. CÓD. TRAB. (Labor Code) art. 81(v) (Para.).

222. Ley Orgánica del Trabajo art. 102(i) (Venez.).

223. *See* discussion *supra* Part III.B.3 (stating that labor codes throughout the Latin American region impose a duty of loyalty on employees and that synonyms of loyalty ("*lealtad*") that are commonly used in the Spanish-language Labor Codes include "*buena fe*", reflecting a concept of good faith).

224. Law No. 20744, May 13, 1976, B.O. 390 art. 63, 85 (Arg.).

225. C.S.T. (Labor Code) art. 56 (Colom.).

226. CÓD. TRAB. (Labor Code) art. 19 (Costa Rica).

227. CÓD. TRAB. (Labor Code) princ. VI, art. 36 (Dom. Rep.).

228. CÓD. TRAB. (Labor Code) art. 20(b) (Guat.).

229. Ley Federal del Trabajo [LFT] [Federal Labor Law], *as amended*, art. 31, Diario Oficial de la Federación [DO], 1 de Abril de 1970 (Mex.) ("Los contratos y las relaciones de trabajo obligan a lo expresamente pactado y a las consecuencias que sean conformes a las normas de trabajo, a la buena fe y a la equidad"). This duty of good faith is mutual so that it also imposes an obligation on the employer. The employer should not act arbitrarily or capriciously, but should give clear notice of its standards and enforce them consistently.

230. CÓD. TRAB. (Labor Code) art. 70 (Pan.).

231. CÓD. TRAB. (Labor Code) art. 61 (Para.).

232. *See*, *e.g.*, Brandt v. Lockheed Missiles & Space Co., Inc., 201 Cal. Rptr. 746, 749 (1st Dist. 1984) (stating that there can be no doubt that "the implied-in-law covenant of good faith and

In South Africa, an employee's termination is considered "fair" when an employee contravenes a rule or standard that regulates conduct in the workplace if: that standard is valid; the employee was aware of it; the standard has been consistently applied by the employer; and dismissal was an appropriate response to the employees conduct.[233] These conditions for fair termination are clearly satisfied when the employment contract includes a religious-based worthiness requirement and the church fairly and consistently applies the standard to its employees. The contract language reinforces the ethos of the religious organization and contains a commitment by the employee to so live.

F. Maintaining Order and Discipline in the Workplace

An additional argument is the employer's obligation to maintain order and discipline in the workplace. In Hong Kong, an employer can terminate an employee without notice or severance payment if the employee willfully disobeys a reasonable order, or if his or her conduct is inconsistent with the due and faithful discharge of duties.[234] Labor laws in the Philippines are similar. Generally, "failure to comply with work standards" is just cause to dismiss an employee.[235] Because a church's "work standards" include a personal religious worthiness requirement, an employee's refusal to adhere to these standards, particularly after a grace period, arguably constitutes willful disobedience.

G. The Duties of an Agent to His or Her Principal

An argument that intersects with several of the preceding arguments is the concept that the employee functions as an agent of the employer; thus, as part of representing the employer, the employee must respect the core principles of the employer. The German Federal Labor Court, for example, has held that:

> [W]hoever works for the church has to be aware of the incompatibility of occupying a leading position in a church institution while seriously contravening church regulations. The body in charge of a church institution must be able to insist that the persons acting on its behalf respect the principles it represents and is supposed to proclaim through its example.[236]

---

fair dealing [is] inherent in every [employment] contract"); Blank v. Chelmsford OB/GYN, P.C., 420 Mass. 404, 407 (1995) (noting that there is an implied covenant of good faith and fair dealing between parties to a contract).

233. Labour Relations Act No. 66 of 1995 sched. 8.7 (S. Afr.).

234. Employment Ordinance (2000) 57 O.H.K., § 9(1) (H.K.); *see, e.g.*, Law Ngai Ming v. Kowloon Club, Ltd., [2004] 1 H.K.L.R.D. A18 (C.F.I.) (upholding dismissal of kitchen assistant for minor incidents of disobedience, such as taking unauthorized breaks because an employer has a right to discipline as it wishes and dismissal is justified where an employee shows no intentions of obeying rules).

235. LABOR CODE, PD 442, art.282, as amended (Phil.); Philippine Long Distance Tel. Co. v. Nat'l Labor Relations Comm'n, G.R. No. 80609 (S.C., Aug. 23, 1988) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1988/aug1988/gr_80609_1988.html.

236. LABOR CODE, PD 442, art.282, as amended (Phil.); *See* Philippine Long Distance Tel. Co. v. Nat'l Labor Relations Comm'n, G.R. No. 80609 (S.C., Aug. 23, 1988) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1988/aug1988/gr_80609_1988.html (ruling that an employee

Further, an employee who violates trust in personal matters is more likely to abuse trust in his or her professional position, which exposes a church to risk.[237] Particularly, in common law countries, where theories of *respondeat superior* and vicarious liability may make a principal answerable for the actions of agents, a church may be liable civilly or criminally for the actions of its employees who act as its agents.[238]

H. Freedom of the Religious Employer to Express Religion in the Workplace

Finally, religious requirements for employees allow the religious employer to express religion in the workplace consistent with its tenets. If a religious employer has an employee who is not religious or does not accept the beliefs and practices espoused by the employer, then it forces the employer, as well as fellow employees, to the make the impossible choice of either stifling their own religious expression or offending the non-religious employee. Indeed, it opens the religious organization to potential claims of religious harassment or discriminatory pressure. For example, a non-religious employee could allege charges of religious harassment or discrimination if: a religious organization requires attendance by employees at devotionals or worship services; invokes divine guidance through prayer in planning meetings; encourages religious discussions; cites scripture; displays religious art; inquires about employees' religious experiences; or otherwise cultivates an atmosphere of spirituality among its employees. To avoid lawsuits, the only option left for the religious organization would be to silence both its own religious expression and the religious expressions of other employees. A few less-enthusiastic employees can not only change the ethos and *esprit de corps* of an organization, but they can also prevent a church from carrying out its central religious mission.

VII. LIMITATIONS ON THE RIGHT OF RELIGIOUS COMMUNITIES TO AUTONOMY IN PERSONNEL MATTERS

Again, the rights and concepts discussed above are not without limitations. They can be circumscribed in two ways. First, many legal systems employ balancing tests, which grant higher protections to religious employers when firing

---

that is rightfully dismissed, for a serious failure to comply to work standards, is not entitled to separation pay).

237. *Cf.* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 791 (1993) (discussing how dishonest people are more likely to lie in any given situation than honest people).

238. *See, e.g.*, Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 70 (D. Conn. 1995) (stating that the doctrine of respondeat superior rests on common law agency principles of vicarious liability, that the master (employer) is responsible for the acts of his or her servant (employee) because the master controls the servant's actions); Birkner v. Salt Lake County, 771 P.2d 1053, 1056–57 (Utah 1989) (requiring for respondeat superior an employee's conduct to be of the general kind the employee is employed to perform, to occur within the hours of the employee's work and the ordinary spatial boundaries of the employment, and to be motivated, at least in part, by the purpose of serving the employer's interest).

clergy for religious grounds than when firing the proverbial janitor for the same grounds. Generally, tribunals look at the employee's position or duties and the theological basis for requirement. The position an employee holds affects his or her level of obligation to follow their employer's mission.

The closer the employee is to the teaching and mission of his or her employer the more he is obliged to follow the doctrine. The farther away an employee's professional function is from the central doctrinal positions, the obligation to follow the doctrine would lessen accordingly.[239]

Schüth is an example of this balancing test.[240] Together, the judgments in *Obst* and *Schüth* suggest a variety of factors to be considered, including: (1) the voluntary assumption of obligations of loyalty to the hiring institution; (2) the range of alternative employment available to the dismissed employee; (3) the importance attached to the conduct in question by the religious community; (4) the nature of the employment and its place in carrying out the mission of the organization; (5) the effect of continued employment on the credibility of the religious community in affirming and living its teachings; (6) whether less drastic measures might suffice; (7) the rights of a religious community to autonomy in its own affairs; and (8) the family and privacy rights of the discharged individual.[241]

A similar example is the *Strydom* case in South Africa, in which the Equality Court upheld Strydom's discrimination claim because the church failed to demonstrate the spiritual significance of Strydom's role in the ministry.[242] Yet, the Equality Court affirmed the notion that dismissing an employee for conduct inconsistent with church doctrine, in that case homosexuality, can be regarded as "fair."[243] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[244] is yet another example.

It is incumbent on religious employers to articulate how, in their respective religious organizations, each employee helps fulfill a church's religious ministry.[245] An employment contract containing express provisions, to explain the

239. Gerhard Robbers, *Church Autonomy in Germany Including an Attachment on Relevant European Union Law*, *in* LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY 121, 125 (2001).

240. Schüth v. Germany, App. No. 1620/03, Eur. Ct. H.R.

241. *Id.* ¶¶ 61–63, 65, 70. Given the European Court's emphasis on the fact that Schüth's work was integrally involved in the celebration of the Eucharist, that a religious organization may require its employees to respect certain principles, and that it is the role of national courts to make the relevant factual findings in such matters, it is conceivable that the European Court would sustain termination of an employee by a religious organization where an employment contract conditions continued employment on conformity with religious teachings, where the job description explicitly links responsibilities to the expressive dimension of the community's activities, and where a national court adequately considers the kinds of factors described above. That is, a national court reviewing *Schüth*, after considering all of the factors, might reasonably conclude that autonomy considerations justify termination.

242. *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park 2*008 ZAEQC 1 case no. 26926/05 (Equal. Ct.) (S. Afr.).

243. *Id.* ¶¶ 7, 26.

244. 132 S. Ct. 694.

245. The ILO Governing Body provided the following guidance in its Decision in the Case

importance of the employee's function to the religious mission and to require the employee's assent to a reasonably specific duty of loyalty, can be critical evidence in the balancing effort.

Second, limits on religious employers' rights arise from the clash of religious freedom claims with other legal norms. If the religious basis for employment decisions is seen as a pretext for other illegitimate bases, such as gender or race, then courts may be willing to second-guess religious decisions. This scenario is particularly problematic for the religious employer if the religious decision itself incorporates indirectly other norms (such as a termination of a woman who is pregnant out of wedlock which indirectly could be interpreted as gender discrimination). If there is a reasonable religious basis for the decision, courts in most well-developed systems have relied on this basis and have not examined whether it is itself pretextual. Similarly, in some cases, courts and statutes may disregard the religious basis for the employment decision when more than one norm is at stake, not because the religious basis was pretextual, but because the other norm is more highly valued.

Notwithstanding these limitations, the norms and practical theories presented above have been applied in numerous jurisdictions and have often prevailed when the court was provided adequate context—i.e., an explanation of (1) the importance of the requirement to the particular religious institution; (2) the employee's prior knowledge of the standard; and (3) his or her role within the institution's religious mission—and where the religious organization acts consistently for all employees.[246]

VIII. CONCLUSION

The right of institutional autonomy of religious organizations has deep roots internationally as well as in the United States, and includes a right to autonomy in personnel matters. The right is enshrined as a fundamental human right, and has

---

of Norway (1983) (assessing a statute that allowed an employer to question job applicants about "political, religious or cultural views if such information is required owing to the nature of the situation or where the activity of the employer has as an objective the advancement of specific political, religious or cultural views and the position is of significance for the accomplishment of the objective"): "[R]egard must be had to the actual duties of the job in question and when necessary, to the direct bearing of these duties on the employing institution's objectives. Naturally, the fact that an organization has a particular ideology will be reason for it to require that certain posts should be held by persons of that same ideology. In order to maintain consistency with the Convention, however, the responsibilities of such posts must be related directly to the pursuance or furtherance of the institution's objective. As a corollary, the Committee would suggest that in certain organizations, a consideration of the 'inherent requirements of the job' may involve such questions as whether there would be a risk that the pursuit of the institution's objectives would be frustrated, undermined or harmed by employing someone in a particular post who did not share the ideological views of the organization."

246. Consistency of approach, documented notice to employees of the consequences of violating religious-based employment standards, and an explanation of the religious context (more than any other factors) are critical evidence for the religious institution to defeat assertions of arbitrariness or pretext.

been applied within the specific context of religious-based employment practices in a host of jurisdictions. It finds expression not only in the erudite halls of the United Nations but also in familiar, workaday theories of advocates and tribunals, and in local labor and contract laws. There are limitations on the right, to be sure, but those limitations are most likely to be overcome in employment disputes when the religious institution, relying on the norms and theories discussed herein, adequately articulates the importance of the employee's role to the institution's religious mission, and the employee has previously assented to the religious-based employment standard.