SEXUAL ORIENTATION DISCRIMINATION AND AUTONOMY OF RELIGIOUS GROUPS IN THE INTER-AMERICAN CASE LAW

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Abstract: Religious freedom encompasses the right of religious groups to define the tenets of their faith and to organise themselves according to these tenets, without arbitrary State interference. However, the limits of religious groups' autonomy are controversial, especially in those cases where the exercise of religious autonomy seems to be at odds with non-discrimination standards. The Inter-American Court of Human Rights has adopted many decisions on sexual orientation discrimination, but its case law on religious freedom is much scarcer. The two issues converged in the recent decision *Pavez Pavez v Chile*, in which the Court set the limits of the autonomy of religious groups when confronted with non-discrimination standards.

Keywords: Discrimination, sexual orientation, Inter-American Court of Human Rights, autonomy of religious groups, religious freedom.

1. Introduction

Inter-American case law on religious freedom is scarce. Apart from some decisions and reports of the Inter-American Commission on Human Rights, until recently only one judgement of the Inter-American Court of Human Rights had directly dealt with a religious issue (and even in this case the conflict had been decided more on the basis of freedom of expression than on the basis of freedom of religion).[2] On the contrary, the Inter-American Court has adopted many decisions concerning discrimination on sexual orientation grounds.[3]

In 2022, the two issues merged in the *Pavez Pavez v Chile* case. The case concerned a modification in the tasks and responsibilities of a public school teacher of Catholic religion who had lost the support of the Catholic bishop because of her sexual orientation. The Court declared that the decision of the Chilean State, based on the opinion of the Catholic hierarchy, was discriminatory and thus breached Inter-American standards. The

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[2] Inter-American Court of Human Rights (IACtHR), *'The Last Temptation of Christ' (Olmedo Bustos et al.) v Chile*, Series C No. 73, 5 February 2001.

[3] See the case law mentioned in section 3.2.

case stirs up discussion on the relation between the principle of equality and the autonomy of religious groups to select who can speak in their name. It also raises the question of the limits between the public and the private spheres and the scope of anti-discrimination provisions.

The hypothesis underlying this work is that in the *Pavez Pavez* case the Inter-American Court reached a good decision for bad reasons. As it will be explained, the Court rightly declared that the modification in the teacher's tasks and responsibilities was discriminatory (and, consequently, constituted a violation of the Convention). However, the true reason of this illegitimacy was not, as the Court suggested, that religious groups cannot establish any distinction on the basis of sexual orientation. Changes in a labour relationship like those analysed in the *Pavez Pavez* case are illegitimate because they are the consequence of a decision by a public authority (not by a private religious group) and public authorities, unlike private individuals and groups, are bound by a strong version of the non-discrimination principle.

To examine these issues, the main features of the *Pavez Pavez* case will be introduced (section 2). Then, international standards on discrimination on sexual orientation grounds (section 3) and the autonomy of religious groups (section 4) will be outlined. Finally, the solution given in the *Pavez Pavez* case will be analysed under these standards (section 5), to obtain some general conclusions (section 6).

2. The *Pavez Pavez* Case

The *Pavez Pavez* case concerned a Chilean woman who worked as a Catholic religion teacher in a public school.[4] According to Chilean law, public education includes religion courses, imparted as part of the official weekly timetable. Religion courses are offered in public establishments on an optional basis. Religion teachers are hired by the State. To be hired and to maintain their jobs, they must be in possession of a certificate of suitability granted by religious authorities, which is valid as long as it is not revoked.

Sandra Pavez Pavez had been working as a Catholic religion teacher since 1985 and in 1991 she had become a permanent teacher. Although she did not have the status of a civil servant (as her contract was ruled by private law), her salary and the social security fees associated with her contract were paid by the State. In 2007, the Catholic Vicar revoked Ms Pavez's certificate of suitability. The reason given was that she was 'living publicly as a lesbian, in open contradiction with the contents and teachings of the Catholic doctrine,' and thus she was 'not qualified to transmit these teachings to the students.' As a consequence of the withdrawal of the certificate of suitability, Ms Pavez was prevented from teaching Catholic religion classes in any national educational institution and, in particular, in the school where she had been working for more than twenty years.

[4] IACtHR, *Pavez Pavez v Chile*, Series C No. 449, 4 February 2022.

The school administration then offered her a position as acting inspector general. This meant that her employment contract was not terminated, the benefits that she enjoyed as a teacher were maintained, and she even began to receive an additional salary allowance for her new managerial duties.

Ms Pavez, the Homosexual Integration and Liberation Movement, and the Chilean Teachers' Association filed an appeal for protection before Chilean courts, which was dismissed. They complained before the Inter-American Commission on Human Rights, which considered that the decision to prohibit Ms Pavez from teaching Catholic religion was contrary to Inter-American Human Rights standards and sued the Chilean State before the Inter-American Court. The Court found unanimously that the act that disqualified Ms Pavez for the functions of a religion teacher constituted a violation of the principle of equality and non-discrimination (Articles 1.1 and 24 of the American Convention). This is the core of the Court's decision and will be analysed in detail below.

Besides, the Inter-American Court found unanimously that the Chilean State was responsible for the violation of the rights to personal freedom and to privacy (Articles 11.2 and 7.1 of the American Convention). The Court recalled that these rights comprise the capacity to develop one's own personality and aspirations, determine one's identity and define one's personal relationships and that one of the essential components of any life plan is one's gender and sexual identity.[5]

The Inter-American Court decided that the disqualification of Ms Pavez also constituted a violation of the right to work (Article 26 of the American Convention). For the Court, 'the reassignment of duties experienced by Sandra Pavez Pavez undermined her teaching vocation and constituted a form of demotion in her job.'[6] However, the Court concluded that the State was not responsible for the violation of the right to access public service under conditions of equality (Article 23.1.c of the American Convention). Although in previous decisions the Court had said that this provision obliges States to put in practice objective and reasonable procedures for the appointment, promotion, suspension and dismissal of public officials,[7] in the *Pavez* case it found that Ms Pavez had not suffered any deterioration in her employment contract (indeed, her reassignment of functions had taken the form of a promotion, with a higher salary and more responsibilities).[8]

The position of the majority of the Inter-American Court regarding the right to work and the right to equal access to public functions is inconsistent. As the partially

[5] IACtHR, *Pavez Pavez v Chile*, para 57. See also IACtHR, *Gender identity and equality and non-discrimination of same-sex couples*, Advisory Opinion OC-24/17, Series A No. 17, 24 November 2017, paras 87-91. IACtHR, *I.V. v Bolivia*, Series C No. 329, 30 November 2016, para. 150. IACtHR, *Atala Riffo v Chile*, Series C No. 239, 24 February 2012, para. 136. IACtHR, *Vicky Hernández et al. v Honduras*, Series C No. 422, 26 March 2021, para. 116.
[6] IACtHR, *Pavez Pavez v Chile*, para 139.
[7] IACtHR, *Cuya Lavy et al. v Peru*, Series C No. 438, 28 September 2021, para 159. IACtHR, *Moya Solís v Peru*, Series C No. 425, 3 June 2021, para 108.
[8] IACtHR, *Pavez Pavez v Chile*, paras 137-138.

dissenting opinion of judge Sierra Porto demonstrates, the right to work has no direct and autonomous justiciability before the Inter-American jurisdiction.[9] Moreover, should the right to work be autonomously justiciable before the Inter-American Court, it is not possible to say that a person's vocation is protected by that right, that is, that the right to work comprises the right to perform only such activities that fall within one's preferences.[10] The majority of the Court recognises that Ms Pavez's contract was for a teacher position, not for a *Catholic religion* teacher position.[11] Accordingly, and although the majority fails to come to this conclusion, Ms Pavez's vocation as a *religion* teacher fell outside the scope of her labour contract. Consequently, the right to equal access to public functions would have been a much more solid basis to protect Ms Pavez's labour rights.[12] This solution is also more consistent with the true nature of the discrimination suffered by Ms Pavez, who was discriminated against not by the Catholic Church but by the Chilean State (see below).

Finally, the Inter-American Court found unanimously that the Chilean State was responsible for the violation of the rights to judicial guarantees and judicial protection (Articles 8.1 and 25 of the American Convention). For the Court, domestic judicial authorities had not carried out an adequate control of conventionality regarding the action of the school and Ms Pavez had lacked suitable and effective remedies to challenge the effects of the decision to revoke her certificate of suitability to teach Catholic religion classes.[13]

3. Sexual Orientation Discrimination

3.1. The prohibition of discrimination under international treaties

The main international treaties on Human Rights prohibit discrimination, both in the enjoyment of conventional rights[14] and in the enjoyment of rights recognised by domestic law.[15] Of course, the prohibition of discrimination does not mean that every

[9] IACtHR, *Pavez Pavez v Chile*, partially dissenting opinion of judge Sierra Porto, para 2.
[10] IACtHR, *Pavez Pavez v Chile*, partially dissenting opinion of judge Sierra Porto, para 9.
[11] IACtHR, *Pavez Pavez v Chile*, para 139.
[12] IACtHR, *Pavez Pavez v Chile*, partially dissenting opinion of judge Sierra Porto, para 10.
[13] IACtHR, *Pavez Pavez v Chile*, para 159.
[14] Article 2, *Universal Declaration on Human Rights*, United Nations General Assembly Resolution A/RES/217(III). Article 2.1, *International Covenant on Civil and Political Rights*, 999 UNTS 87. Article 14, *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, 213 UNTS 222. Article 21, *Charter of Fundamental Rights of the European Union*, OJ C 326/391. Article II, *American Declaration of the Rights and Duties of Man*. Article 1, *American Convention on Human Rights*, 1144 UNTS 182. Article 2, *African Charter on Human and Peoples' Rights*.
[15] Article 7, *Universal Declaration on Human Rights*. Article 26, *International Covenant on Civil and Political Rights*. Article 14, *Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, ETS 177. Article 21, *Charter of Fundamental Rights of the European Union*. Article II, *American Declaration of the Rights and Duties of Man*. Article 24, *American Convention on Human Rights*. Article 3, *African Charter on Human and Peoples' Rights*.

difference in treatment is unacceptable. The expression *discrimination* refers to unfair, unreasonable, unjustified, or arbitrary distinctions which involve the denial of equal treatment to an individual or a group in relation to other individuals or groups in a similar position, due to a specific attribute of the former.[16]

The concept of discrimination includes three elements (McKean, 1983; Weiwei, 2004; Moeckli, 2010; Farrior, 2015). The first one is a difference in treatment: two people or groups in a similar position are treated differently. The second element is a certain attribute of the discriminated person or group on the basis of which the distinction occurs: people or groups are treated differently because of their race, nationality, sexual orientation, etc. International Human Rights instruments usually establish a list of criteria which are generally considered discriminatory. However, this does not mean that the use of such criteria is *always* discriminatory. It may happen that their use is justified. For example, distinctions based on sex are generally illegitimate, but it is accepted that positive actions in favour of women may be acceptable in some cases. Conversely, many unlisted criteria may be discriminatory if their use is not justified.

Attributes usually included in non-discrimination provisions are race, sex, language, religion, political opinions, national or social origin, property or economic status, and birth. Many of these provisions also incorporate open categories such as 'other status' or 'other social condition.' This has allowed Human Rights bodies to enlarge the list of attributes whose use is *prima facie* discriminatory (including, for example, sexual orientation). Classifications based on one of these attributes are frequently labelled *suspect classifications* and must be subject to strict scrutiny (Strauss, 1991; Saba, 2009; Pollvogt, 2014).

The third element of the definition of discrimination is the absence of sufficient justification for the difference of treatment. Using an individual or group attribute to establish a distinction may be justified or unjustified depending on the purpose of the classification and the adequacy and proportionality of the attribute to that purpose. For example, it would not seem reasonable for pension laws to make distinctions based

[16] United Nations Human Rights Committee (HRC), *General Comment No. 18: Non-discrimination*, HRI/GEN/1/Rev.1(1994), para 7. HRC, *Broeks v The Netherlands*, Communication 172/1984, 9 April 1987, para 13. European Court of Human Rights (ECtHR), *Abdulaziz, Cabales and Balkandali v United Kingdom*, Applications 9214/80, 9473/81 and 9474/81, 28 May 1985, para 72. ECtHR, *Hämäläinen v Finland*, Application 37359/09, Grand Chamber, 16 July 2014, para 108. IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Series A No. 4, 19 January 1984, paras 56-57. Inter-American Commission on Human Rights (IACHR), *María Eugenia Morales de Sierra*, Case 11.625, 19 January 2001, para 31. IACHR, *Trabajadores indocumentados*, Case 12.834, 30 November 2016, para 74. African Commission on Human and Peoples' Rights (ACHPR), *Organisation mondiale contre la torture et al. v Rwanda*, Communications 27/89, 46/90, 49/91 and 99/93, October 1996, para. 23. ACHPR, *Amnesty International v Zambia*, Communication 212/98, 5 May 1999, para 43. ACHPR, *Malawi African Association et al. v Mauritania*, Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, 11 May 2000, para 131.

on people's religion, but it is generally accepted that distinctions based on age are justified. States enjoy a certain margin of appreciation to determine whether, and to what extent, partial differences between otherwise similar situations justify differences in treatment.[17]

International Law prohibits both direct and indirect discrimination. In the first case, a decision or measure contains a distinction which is itself discriminatory. In the second case, discrimination occurs as a consequence of the circumstances of the application of a decision or measure which appears to be neutral but affects a category of individuals or groups disproportionately due to their particular circumstances. Finally, the prohibition of discrimination also entails the duty of States to adopt measures to fight against situations of structural segregation. Indeed, in some cases there is no discriminatory decision or measure and discrimination is a consequence of *de facto* conditions that lead certain groups to find themselves in a structurally disadvantaged position (Lerner, 2003).

Whether and, if so, to what extent the acts of private individuals and groups are subject to the principle of non-discrimination in its various forms is an issue subject to legal, political, and ethical controversy (De Witte, 2009; Lindenbergh, 2010; De Mol, 2011). Apart from the African Charter on Human and Peoples' Rights,[18] international Human Rights instruments do not explicitly refer to this issue. The application of the principle of non-discrimination to private individuals and groups would be a variant of the so-called *horizontal effect* of Human Rights, according to which international Human Rights norms also bind non-State actors.

According to the traditional point of view in legal theory, Human Rights provide protection against State power: private actors are within the remit of internal law and not subject to international obligations. Under this view, international human rights obligations are *vertical*: States owe Human Rights protection to individual and groups. The vertical effect stems from the fact that only States can become party to Human Rights treaties and be the subject of complaints before international Human Rights treaty monitoring bodies and courts. However, this traditional approach is being increasingly contested as non-State actors become more and more powerful and the classic Westphalian State-centred model of international relations is displaced by a more fragmented and globalised system of governance (Reinisch, 2005; Hessbruegge, 2005; D'Aspremont, 2010; D'Aspremont et al., 2015).

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[17] HRC, *General Comment No. 18: Non-discrimination*, para 13. ECtHR, *Karlheinz Schmidt v Germany*, Application 13580/88, 18 July 1994, para 24. ECtHR, *Burden v the United Kingdom*, Application 13378/05, Grand Chamber, 28 April 2008, para 60. IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, paras 56-57. IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Series A No. 17, 28 August 2002, paras 47-48. IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Series A No. 18, 17 September 2003, paras 88-89. IACtHR, *Espinoza Gonzáles v Peru*, Series C No. 289, 20 November 2014, para 219.
[18] Article 28, *African Charter on Human and Peoples' Rights*.

Accepting the *horizontal effect* of the International Law of Human Rights, on the contrary, allows the creation of international Human Rights obligations also for private individuals and groups. Under the *direct horizontal effect* of Human Rights, private actors would have a substantive duty to abide by international norms and their responsibility would be enforceable before international monitoring bodies and courts. Under the *indirect horizontal effect* of Human Rights, States would have a duty to make private actors behave according to international norms: substantive responsibility and procedural standing to be sued before international monitoring bodies and courts would remain a State affair, but States would be interested in make private actors conform to international standards in order to avoid international responsibility (Kanalan, 2016).

Under current International Law, no direct horizontal effect can be afforded to Human Rights norms (Nowak and Januzewski, 2015; Carrillo-Santarelli, 2017). However, it is generally recognised that international Human Rights obligations (including the prohibition of discrimination) do have some kind of indirect horizontal effect. The dominant opinion seems to be that the prohibition of discrimination also binds private individuals and groups, although it cannot be applied with the same intensity as it is applied to public authorities. Private individuals and groups are protected by some fundamental rights (right to private life, freedom of opinion and conscience, etc.) which grant them a wider margin of discretion when deciding their relations with other private individuals and groups.[19]

In other words, some classifications which, if established by public authorities would be clearly discriminatory, might be legitimate if used by private individuals or groups. A decision of a public authority to hire only employees of a certain religion or political convictions would be clearly discriminatory, but it is perfectly legitimate for a private individual to choose his friends according to their religion or political convictions. However, the exact scope of the principle in its application to private individuals and groups remains uncertain. According to one view, measures to prevent discrimination in private relations would generally be possible in the field of market relations, but not in the strictly private sphere (Schokkenbroek, 2004). Similarly, others suggest that the non-discrimination principle would apply in relation to activities related to the enjoyment of goods or services, but not in relation to those related to more intimate relations of affinity or when people associate to spread some shared ideas (Saba, 2011).

[19] In various contexts, the UN HRC, the ECtHR, and the IACtHR have affirmed that there is an obligation on the part of the State to fight against discrimination in private relationships. It is not clear how this obligation impacts on the horizontal effect of the principle of non-discrimination. HRC, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, CCPR/C/21/Rev.1/Add.10 (2000), para 31. HRC, *Nahlik v Austria*, Communication 608/1995, 22 July 1996, para 8.2. ECHR, *Opuz v Turkey*, Application 33401/02, 9 June 2009, paras 184-202. IACtHR, *Velásquez Rodríguez v Honduras*, Series C No. 4, 29 July 1988, para 166. IACtHR, *Displaced Afrodescendant Communities of the Río Cacarica River Basin (Operation Génesis) v Colombia*, Series C No. 270, 20 November 2013, para 224. IACtHR, *López Soto et al. v Venezuela*, Series C No. 362, 26 September 2018, para 147.

3.2. Non-discrimination on sexual orientation grounds

International Human Rights treaties do not explicitly mention sexual orientation as a *prima facie* discriminatory criterion. However, Human Rights bodies have developed an increasingly specific case law indicating when classifications based on sexual orientation must be considered illegitimate. The European Court of Human Rights has played a ground-breaking role in relation to this issue. In 1981, in its famous *Dudgeon* judgement, the Court affirmed that the criminalisation of homosexual relations between consenting adults was illegitimate under the European Convention, though on the basis of the right to privacy and not on discrimination grounds.[20]

In more recent cases, the European Court directly relied on the principle of non-discrimination to judge distinctions based on sexual orientation. For example, it found that establishing different ages of consent for heterosexual and homosexual relations was discriminatory.[21] The Court deepened this approach in later judgements and declared illegitimate the discharge of homosexuals from the army,[22] the legal impossibility to succeed the deceased partner as a tenant of a flat (while this was possible to opposite-sex couples),[23] and the absence of medical insurance in favour of the same-sex partner (while the opposite-sex partner had this right).[24]

However, for the Strasbourg Court, although States must grant some kind of protection to same-sex couples (through civil partnership or other similar instruments),[25] a purely heterosexual regulation of marriage is not discriminatory.[26] Nor are to be considered discriminatory the denial of a paternity leave to a woman living in a civil partnership with another woman, on the occasion of the birth of her partner's child,[27] or the refusal of a reversionary pension to the survivor of a same-sex civil partnership (while heterosexual married couples could benefit from a reversionary pension).[28]

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[20] ECtHR, *Dudgeon v the United Kingdom*, Application 7525/76, 22 October 1981, paras 37-63. See also ECtHR, *Norris v Ireland*, Application 10581/1983, 26 October 1988, paras 35-47.
[21] ECtHR, *L. and V. v Austria*, Applications 39392/98 and 39829/98, 9 June 2003, paras 64-55.
[22] ECtHR, *Lustig-Prean and Beckett v the United Kingdom*, Applications 31417/96 and 32377/96, 27 September 1999, paras 80-105. ECtHR, *Smith and Grady v the United Kingdom*, Applications 33985/96 and 33986/96, 27 September 1999, paras 69-112. ECtHR, *Perkins and R. v. the United Kingdom*, Applications 43208/98 and 44875/98, 22 October 2002, paras. 38-41.
[23] ECtHR, *Karner v Austria*, Application 40016/98, 24 July 2003, paras 39-43.
[24] ECtHR, *P.B. and J.S. v Austria*, Application 18984/02, 22 July 2010, paras 21-50.
[25] ECtHR, *Vallianatos and others v Greece*, Applications 29381/09 and 32684/09, Grand Chamber, 7 November 2013, paras 70-92. ECtHR, *Oliari and others v Italy*, Applications 18766/11 and 36030/11, 21 July 2015, paras 159-188. ECtHR, *Orlandi and others v Italy*, Applications 26431/12, 26742/12, 44057 and 60088/12, 14 December 2017, paras 191-212. ECtHR, *Fedotova and others v Russia*, Applications 40792/10, 30538/14 and 43439/14, 13 July 2021, paras 140-225.
[26] ECtHR, *Schalk and Kopf v Austria*, Application 30141/04, 24 June 2010, paras 87-110. ECtHR, *Chapin and Charpentier v France*, Application 40183/07, 9 June 2016, paras 36-40 and 48-52.
[27] ECtHR, *Hallier and Others v France*, Application 46386/10, 12 December 2017, paras 19-34. See also ECtHR, *Boeckel and Gessner-Boeckel v Germany*, Application 8017/11, 7 May 2013, paras 21-33.
[28] ECtHR, *Manenc v France*, Application 66686/09, 21 September 2010, section on applicable law.

In 1994, more than ten years after the *Dudgeon* judgement, the United Nations Human Rights Committee delivered its *Toonen* decision, in which it found that Australian laws criminalising all kinds of homosexual relations between men were in breach of the non-discrimination provision of the International Covenant on Civil and Political Rights.[29] In more recent decisions, the Committee has recalled that the prohibition of sexual orientation discrimination also applies to other situations. For example, it found discriminatory the exclusion of same-sex partners from pension benefits while heterosexual partners were granted such benefits.[30] However, just as in the European context, not every difference of treatment based on sexual orientation is discriminatory. In relation to same-sex marriage, the United Nations Human Rights Committee shares the opinion of the European Court: States are not obliged to include it in their domestic law.[31]

Also, for the Inter-American Court of Human Rights the prohibition of discrimination includes discrimination on the basis of sexual orientation. In 2012, the Court concluded that the refusal to grant a woman her children's custody because of her sexual orientation was discriminatory.[32] Some years later, the Court declared discriminatory the denial of a reversionary pension to the same-sex partner of the deceased person.[33] And regarding the disciplinary regime of the armed forces, the Inter-American Court affirmed that it was discriminatory to punish with greater severity the fact of having homosexual relationships than heterosexual ones in the workplace.[34]

On the contrary, the African Commission on Human and Peoples' Rights has had an ambiguous position regarding sexual orientation. In some resolutions it has affirmed that the non-discrimination principle ensures equal treatment irrespective of sexual orientation.[35] However, it has also withdrawn the observer status and rejected the application for the observer status of Human Rights organisations dealing with sexual orientation issues. To justify this attitude, the African Commission relied on a decision by the Executive Council of the African Union calling the Commission to take into account 'African values' when granting the observer status.[36]

The position of the Inter-American Court of Human Rights in relation to discrimination based on sexual orientation is stronger than that of its European, African,

[29] HRC, *Toonen v Australia*, Communication 488/1992, 31 March 1994, para. 8.
[30] HRC, *Young v Australia*, Communication 941/2000, 18 September 2003, para. 10. HRC, *X. v Colombia*, Communication 1361/2005, 30 March 2007, para. 7.
[31] HRC, *Joslin v New Zealand*, Communication 902/1999, 30 July 2002, para. 8.
[32] IACtHR, *Atala Riffo v Chile*, paras 77-146.
[33] IACtHR, *Duque v Colombia*, Series C No. 310, 26 February 2016, paras 89-139.
[34] IACtHR, *Flor Freire v Ecuador*, Series C No. 315, 31 August 2016, paras 108-140.
[35] ACHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/2002, 25 May 2006, para 169. ACHPR, *Protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity*, Resolution 275(LV)2014, 12 May 2014.
[36] Human Rights Watch, *Statement on African Commission's Rejection of Observer Status Applications by Three Human Rights Organizations*, 16 December 2022, https://www.hrw.org/news/2022/12/16/statement-african-commissions-rejection-observer-status-applications-three-human

and United Nations counterparts. The Inter-American Court is the only Human Rights' jurisdiction that has explicitly declared that States must grant same-sex couples the same possibilities that opposite-sex couples enjoy in all fields of law, which means that marriage must be open to same-sex couples.[37]

Two conclusions can be drawn from this short revision of international case law. The first one is that international jurisprudence has dealt with discriminatory situations created by State decisions. The State obligation to fight against discrimination in private relations and *de facto* structural discrimination have been addressed only in a general way and mainly by political (not jurisdictional or quasi-jurisdictional) international bodies.[38] The exception to this is again the Inter-American Court, which has acknowledged the structural nature of some cases of discrimination based on sexual orientation and urged States to combat it.[39] And this particular exception leads to the second conclusion: the Inter-American Court has gone further than any other jurisdictional or quasi-jurisdictional Human Rights body when dealing with discrimination based on sexual orientation. The *Pavez Pavez* case, which will be studied in detail in section 5, can be placed along these same lines.

4. Autonomy of Religious Organisations

The main international Human Rights instruments protect religious freedom,[40] which is generally recognised as one of the basis of a democratic and pluralistic society.[41] Religious freedom is an individual right, but it has also a collective dimension:

[37] IACtHR, *Gender identity and equality and non-discrimination of same-sex couples*, paras 172-228.
[38] For example, UN High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Report to the Human Rights Council, 4 May 2015, A/HRC/29/23, paras. 16-17. OAS General Assembly, *Human Rights, Sexual Orientation, and Gender Identity and Expression*, Resolution 2863, 5 June 2014, AG/RES. 2863 (XLIV-O/14). COE Parliamentary Assembly, *Situation of lesbians and gays in Council of Europe member States*, Recommendation 1474, 26 September 2000. COE Parliamentary Assembly, *Discrimination on the basis of sexual orientation and gender identity*, Resolution 1728, 29 April 2010. COE Committee of Ministers, *Measures to combat discrimination on grounds of sexual orientation or gender identity*, Recommendation CM/Rec(2010)5, 31 March 2010. IACHR, *Violencia contra Personas Lesbianas, Gay, Bisexuales, Trans e Intersex en América*, 12 November 2015, OAS/Ser.L/V/II.rev.2.
[39] IACtHR, *Atala Riffo v Chile*, paras 92 and 267. IACtHR, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, para 35. IACtHR, *Azul Rojas Marín et al. v Peru*, 12 March 2020, Series C No. 402, para 90. IACtHR, *Vicky Hernández et al. v Honduras*, para 119.
[40] Article 18, *Universal Declaration on Human Rights*. Article 18, *International Covenant on Civil and Political Rights*. Article 9, *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*. Article 10, *Charter of Fundamental Rights of the European Union*. Article III, *American Declaration of the Rights and Duties of Man*. Article 12, *American Convention on Human Rights*. Article 8, *African Charter on Human and Peoples' Rights*.
[41] ECtHR, *Kokkinakis v Greece*, Application 14307/88, 25 May 1993, para 31. ECtHR, *Leyla Sahin v Turkey*, Application 44774/98, Grand Chamber, 10 November 2005, para 104. IACtHR, *'The Last Temptation of Christ' (Olmedo Bustos et al.) v Chile*, para 79. IACtHR, *Río Negro Massacres v Guatemala*, Series C No. 250, 4 September 2012, para 154.

individuals are free to gather and associate for religious purposes.[42] (On religious freedom in International Law see Arlettaz, 2018; Bielefeldt, Ghanea-Hercock and Wiener, 2016; Murdoch, 2012; Arlettaz, 2012; Arlettaz, 2011; Scolnicov, 2010; Taylor, 2005).

Under the perspective of the International Law of Human Rights, religious groups are private associations based on the consent of the individuals who constitute them. They can define their tenets without arbitrary State interference and organise themselves internally with a certain degree of autonomy. In particular, religious groups are not compelled to organise themselves in a democratic way. This means that individual members do not have a right to force the group to recognise their dissent from the group's official beliefs. However, individuals do have a right to quit the group at any moment.[43]

As a requirement of a democratic society, States must remain neutral vis-à-vis different religious communities.[44] For this, States cannot control the legitimacy of religious beliefs themselves.[45] An assessment of these beliefs would assume that the State is authorised to act in a paternalistic way, protecting citizens from the consequences of their own religious decisions (Arlettaz, 2013). Of course, this aspect of the duty of neutrality does not prevent authorities from determining whether the activities of religious groups are a threat to public order, public health, morals or safety, or the rights and freedoms from others. Besides, religious groups enjoy a certain margin of autonomy to rule their internal affairs and States must abstain from interfering in those affairs. For example, States cannot influence the election of religious leaders[46] or determine the right affiliation for a community group in relation to a wider group.[47]

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[42] ECtHR, *Hassan and Chaush v Bulgaria*, Application 30985/96, Grand Chamber, 16 October 2000, para 62. ECtHR, *Fernández Martínez v Spain* Application 56030/07, Grand Chamber, 12 June 2014, para 127. ECtHR, *Sindicatul 'Pastorul Cel Bun' v Romania*, Application 2330/09, Grand Chamber, 9 July 2013, para 136. IACHR, *Ecuador 1997 – Informe de país*, 24 April 1997, OEA/Ser.L/V/II.96. Doc. 10 rev. 1, chapter IX.

[43] European Commission on Human Rights (ECHR), *Knudsen v Norway*, Application 11045/84, 8 March 1985, section on applicable law. ECHR, *Karlsson v Sweden*, Application 12356/86, 8 September 1988, section on applicable law. ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v Bulgaria*, Applications 412/03 and 35677/04, 22 January 2009, at para. 137.

[44] ECtHR, *Metropolitan Church of Bessarabia and others v Moldova*, Application 45701/99, 13 December 2001, para 116. ECtHR, *Leyla Sahin v Turkey*, para 107. ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and others v Austria*, Application No. 40825/98, 31 July 2008, para 97. ECtHR, *Magyar Keresztény Mennonita Egyház and others v Hungary*, Application 70945/11, 28 June 2016, para 76. ECtHR, *Fernández Martínez v Spain*, para 128.

[45] ECtHR, *Metropolitan Church of Bessarabia and others*, para 123. ECtHR, *Manoussakis and others v Greece*, Application 18748/91, 20 September 1996, para 47. ECtHR, *Hassan and Chaush*, para 78. ECtHR, *Refah Partisi (the Welfare Party) and others v Turkey*, Applications 41340/98, 41342/98, 41343/98 and 41344/98, Grand Chamber, 13 February 2003, para 91. ECtHR, *Leyla Sahin*, para 107. ECtHR, *Dogru v France*, Application 27058/05, 4 December 2008, para 61.

[46] ECtHR, *Hassan and Chaush*, paras 75-89. ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v Bulgaria*, paras 105-160. ECtHR, *Miroļubovs and others v Latvia*, Application 798/05, 15 September 2009, paras 77-96. ECtHR, *Agga v Greece II*, Applications 50776/99 and 52912/99, 17 October 2002, paras 45-61. ECtHR, *Agga v Greece III*, Application 32186/02, 13 July 2006, paras 21-29. ECtHR, *Agga v Greece IV*, Application 33331/02, 13 July 2006, paras 21-29.

[47] ECtHR, *Metropolitan Church of Bessarabia and others*, para 123. ECtHR, *İzzettin Doğan and others v Turkey*, Application 62649/10, Grand Chamber, 26 April 2016, para 121.

According to universal, European and Inter-American case law, religious groups have a right to be recognised as such and to get legal personality under domestic law.[48] States can differentiate between religious groups, granting them different status with differentiated rights and duties, as long as this differentiation is reasonable and proportionate to a legitimate aim.[49] A particularly controversial aspect of the issue of the status of religious groups is that of the State's attitude towards these groups. A wide range of possibilities exist which goes from the absence of any State religion (in the form of liberal abstentionism or republican moral interference) to the existence of a theocratic State where the representatives of a particular religious group play a central political role in the structure of the State. According to international Human Rights bodies, State or official churches may be legitimate, provided that the status of the favoured church does not entail the violation of religious freedom of, or discrimination against, third parties.[50]

States can grant religious groups some public powers (for example, to conclude marriages with civil effect), but this is always the result of a kind of State delegation, not an immanent prerogative of the religious group itself. In any case, however, the delegation of State powers must respect the international obligations of the State concerning Human Rights. For this, for example, the application of religious rules to some issues like family relations and inheritance conflicts is not a violation of international standards, provided that religious rules are not forcibly applied to people who do not belong to that religious group.[51]

5. The Court's Judgement: Which was the Right Standard to be Applied?

In the case before the Inter-American Court, to decide if Ms Pavez was a victim of a discriminatory treatment two issues had to be considered. First, was the allegedly discriminatory act the consequence of a private or a public decision? Second, which was

[48] HRC, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication 1249/2004, 14 February 2004, para 7. ECtHR, *Jehova's Witnesses of Moscow and others v Russia*, Application 302/02, 10 June 2006, para 160. ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and others v Austria*, para 62. ECtHR, *Magyar Keresztény Mennonita Egyház and others v Hungary*, para 90. IACHR, *Informe anual 1979-1980*, 2 October 1980, OEA/Ser.L/V/II.50 doc. 13 rev.1, chapter V: *Paraguay*, para 10.

[49] HRC, *Sergei Malakhovsky and Alexander Pikul v Belarus*, Communication 1207/2003, 23 August 2005, para 7. ECtHR, *Canea Catholic Church v Greece*, Application 25528/94, 16 December 1997, para 47. ECtHR, *Alujer Fernández and Caballero García v Spain*, Application 53072/99, 14 June 2001, section on the applicable law. ECtHR, *Savez Crkava 'Riječ Života' and others v Croatia*, Application 7798/08, 9 December 2010, paras 85-93.

[50] HRC, *General Comment No. 22: The right to freedom of thought, conscience and religion*, CPR/C/21/Rev.1/Add.4 (1993), para 9. ECtHR, *Darby v Sweden*, Application 11581/85, 23 October 1990, paras 28-34. ECtHR, *Ásatrúarfélagið v Iceland*, Application 22897/08, 18 September 2012, paras 26-35. ACHPR, *Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt*, Communication 355/07, 25 February 2016, paras 143-165.

[51] ECtHR, *Refah Partisi (the Welfare Party) and others v Turkey*, paras 117-128. ACHPR, *Amnesty International et al. v Sudan*, Applications 48/90, 50/91, 52/91 and 89/93, 15 November 1999, para 72.

the right standard to be applied to decide if such a public or private act was discriminatory? These questions will be addressed in the following paragraphs.

5.1. Discrimination by public authorities and discrimination by private entities

The first the point to consider is about the public or private nature of the allegedly discriminatory decision concerning Ms Pavez. The argument of the Inter-American Commission was somewhat contradictory. On the one hand, the Commission suggested that the act of disqualification of Ms Pavez as a religion teacher could be directly attributed to the State, because Ms Pavez was a teacher at a public school and the power given to religious authorities to certify the suitability of religion teachers was provided for in the legislation, which delegated this power to religious authorities. On the other hand, however, the Commission said that upon learning of a discriminatory act *by a non-State actor*, the State had a duty to put an end to it and provide full reparation, thus implying that the attribution of responsibility to the State was only indirect (because of its duty to assure non-discrimination in private relations).[52]

The State agents, on the contrary, emphasised that the disqualification act should not be attributed to the State. For them, the certificate of suitability served as a mechanism to guarantee the autonomy of religious entities to pursue their basic activities and thus the decision to terminate Ms Pavez's teaching functions was to be attributed entirely to the Catholic Church. Regarding the State obligation to guarantee that conventional rights are respected even in private relations (like those between a church and the teachers whose suitability this church certifies), the State said that Ms Pavez had not exhausted domestic remedies, which prevented the State from addressing any possible conventional violation.[53]

In spite of some ambiguity,[54] the Court seems to believe that discrimination against Ms Pavez was a consequence of a private action (the decision by the Catholic Vicariate), not of a public one (the decision of the public authority to change Ms Pavez's teaching functions). Indeed, the Court considers that Decree 924 (the domestic law applicable to the case) did not establish any differences in treatment between persons on the basis of their sexual orientation, nor did it constitute a form of indirect discrimination.[55] On the contrary, the Court finds that the Chilean State was indirectly responsible for the violation of Human Rights because the aforementioned decree did not establish any means by which the decision of the religious authorities 'may be subject to subsequent review by the

[52] IACtHR, *Pavez Pavez v Chile*, para 37.
[53] IACtHR, *Pavez Pavez v Chile*, paras 43-45.
[54] The Court recalled its case law according to which States must refrain from taking actions that are directly or indirectly aimed at creating situations of discrimination, but also insisted on the fact that States are required to adopt affirmative measures to change situations of structural discrimination which are detrimental to a specific group of persons and prevent and punish discriminatory actions of private individuals and groups. IACtHR, *Pavez Pavez v Chile*, paras 65-66 and 108.
[55] IACtHR, *Pavez Pavez v Chile*, para 97.

administrative authorities, or to appropriate and effective remedies before the jurisdictional authorities.'[56]

The difference between the acts of public authorities which can trigger *direct* State responsibility and the acts of private individuals or groups which can only trigger *indirect* State responsibility is of great importance in this context. According to general International Law, one of the essential conditions for State international responsibility is that the conduct in question is attributable to the State. In theory, any conduct of individuals or groups linked to the State by nationality, habitual residence or incorporation might be attributed to the State. However, such a broad approach is avoided in International Law with a view to limiting responsibility to conduct which engages the State as an organisation and, consequently, to recognising the autonomy of individuals or groups acting on their own account and not at the instigation of a public authority.[57]

For this, acts of private individuals or groups can trigger State responsibility only if the State fails to prevent or punish those acts when having a duty to do so. In other words, private acts will engage State responsibility only if there is an act or omission, related to those acts, which can be attributable to the State. But, for the State, the content of the duty to do or not to do something by itself may be different from the content of the duty to prevent or punish the acts of private individuals or groups. This was, indeed, the situation in the *Pavez Pavez* case. As it will be explained in the following paragraphs, the content of the State duty not to discriminate is different from the content of the State duty to prevent or punish discrimination by private individuals or groups.

5.2. Strict and flexible non-discrimination standards

The discussion about the public or private nature of the allegedly discriminatory act leads to the second issue: that of the right standard that had to be applied to decide whether that act was discriminatory. The Inter-American Commission indicated that the difference in treatment based on sexual orientation to the detriment of Sandra Pavez did not even satisfied the first step of the proportionality test, namely, the legitimacy of the purpose (which, when referred to suspect classifications, must be assessed strictly in terms of requiring a *compelling reason*).[58] The State, on the contrary, pointed out that the principle of religious freedom protects the right of religious communities to freely choose their teachers.[59]

Given that the Court reached the conclusion that discrimination had arisen from an act of a private entity (a religious organisation), one could have expected it to have

[56] IACtHR, *Pavez Pavez v Chile*, para 97.
[57] *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, text adopted by the International Law Commission at its fifty-third session in 2001 and submitted to the General Assembly (A/56/10), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 38.
[58] IACtHR, *Pavez Pavez v Chile*, para 38.
[59] IACtHR, *Pavez Pavez v Chile*, para 42.

applied a flexible discrimination standard, and not the rigorous one which corresponds to acts of public authorities. However, the Court straightforwardly affirmed that, as sexual orientation is a suspect classification, a strict scrutiny had to be applied. This meant that, to be legitimate, the different treatment had to be necessary to achieve an *imperative* objective recognised by the Convention and the benefits of the different treatment had to *clearly outweigh* the restrictions it imposes on conventional rights.[60] In the case, the Court considered that the costs of the restrictive measure imposed on Ms Pavez did not outweigh the advantages obtained in terms of protecting religious freedom and the right of parents to choose their children's education.[61]

In its argumentation, the Court made two mistakes. First, it considered the discriminatory situation to be the result of a private act, while the change in Ms Pavez's functions had been decided by the State acting as her employer. Second, in spite of having reached that conclusion, the Court applied a rigorous standard, which corresponds to acts of public authorities, not of private individuals or groups. The problem here is that, while the Catholic Church wanted everything (having religion teachers paid by the State and a complete discretion to choose and remove those teachers), the Court gave it nothing (affirming that even private acts by religious organisations are subject to a strict scrutiny on discrimination grounds). The right solution lies in the middle: religion teachers paid by the State are public employees and consequently their election and removal is subject to the strict scrutiny which corresponds to acts of public authorities; religion teachers paid by religious groups can be chosen and removed according to more flexible standards.

Translating this into the language of State responsibility means that direct State responsibility is engaged when an act directly attributable to the State, scrutinised under strict discrimination standards, can be deemed discriminatory. On the other hand, indirect State responsibility can only be triggered if the State fails to prevent or punish an act of a private individual or group which, scrutinised under more flexible discrimination standards, can be deemed discriminatory. If, in the *Pavez Pavez* case, the act in question had truly been a private one, the Court should have analysed whether it had been discriminatory under flexible standards and whether the State had fallen short of its international obligation to prevent or punish that act. As already explained, the Court did not do this: it scrutinised the act under strict discrimination standards, as it had been directly attributable to the State. Fortunately for the solution of the case, the Court was wrong in its first conclusion, because the act was indeed directly attributable to the State.

The Inter-American Court's judgement does not take religious freedom seriously. The Court acknowledged that religious freedom 'constitutes a transcendental element in the protection of the convictions of believers and in their way of life'[62] and that 'religious communities must be free from any arbitrary interference by the State.'[63] This signifies

[60] IACtHR, *Pavez Pavez v Chile*, paras 68 and 141.
[61] IACtHR, *Pavez Pavez v Chile*, para 143.
[62] IACtHR, *Pavez Pavez v Chile*, para 74.
[63] IACtHR, *Pavez Pavez v Chile*, para 118.

that some acts of religious groups may indeed be subject to more flexible standards (called *ministerial exceptions* by the Court); however, for the Court, this flexibility only 'operates in matters related to the functioning of religious communities, such as the determination of the membership of the church, its ministers and its hierarchies.'[64]

Reducing the autonomy of religious groups to those particular areas greatly curtails religious freedom. The European Directive on equality in employment, for example, permits 'churches and other public or private organisations, the ethos of which is based on religion or belief' to require 'individuals working for them to act in good faith and with loyalty to the organisation's ethos.'[65] Also, in relation to sexual orientation and gender identity, the Council of Europe Parliamentary Assembly permits States to grant exemptions to religious organisations when such organisations are 'engaging in religious activities' or when 'legal requirements conflict with tenets of religious belief and doctrine, or would require such [...] organisations to forfeit any portion of their religious autonomy.'[66] Finally, the European Court of Human Rights has recognised that people working for religious organisations have a duty of loyalty towards them and that the more important the person's responsibilities within the organisation, the stronger the duty is.[67]

6. Some Conclusions: The Autonomy of Religious Groups and the Prohibition of Discrimination

Determining which standard is to be applied to decide whether an act is discriminatory under the particular circumstances of a case is generally quite troublesome. However, although opinions on the issue diverge, an assumption commonly accepted is that private individuals and groups enjoy a wider margin of discretion than public authorities when deciding their relations with other individuals or groups. Unlike State institutions, private individuals and groups are entitled to fundamental rights (to privacy, to freedom of religion and opinion, etc.) whose exercise would become impossible if the prohibition of discrimination was always strictly applied.

Among private groups, religious groups are in a particular position. The collective dimension of religious freedom grants them autonomy to organise their internal affairs, decide their relations with other groups, establish the conditions for entering and abandoning the group, and determine who can speak in their name. Of course, religious groups are bound by Human Rights standards. The question is thus how to balance religious autonomy (protected under religious freedom provisions) with third parties'

[64] IACtHR, *Pavez Pavez v Chile*, para 127.
[65] Article 4.2, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*.
[66] COE Parliamentary Assembly, *Discrimination on the basis of sexual orientation and gender identity*, Resolution 1728 (2010), 29 April 2010, point 17.
[67] ECtHR, *Obst v Germany*, Application 425/03, 23 September 2010, paras 39-53. ECtHR, *Schüth v Germany*, Application 1620/03, 23 September 2010, paras 53-75. ECtHR, *Siebenhaar v Germany*, Application 18136/02, 3 February 2011, paras 36-48.

rights (including the rights of members, ministers and employees of the religious group itself protected under non-discrimination provisions).[68]

The argument that has been defended in this article is that the nearer the core of religious convictions, the stronger the capacity of religious groups is to demand loyalty from its members, ministers and employees. As religious education is crucial in maintaining and transmitting a faith, religious groups must enjoy a wide discretion to choose religious teachers. Also, given the comprehensive nature of religions, the loyalty that religious groups can demand to their employees may sometimes entail a strong commitment to religious ideals. However, this wide margin of discretion corresponds to private acts of religious groups themselves, not to acts of public authorities even if they are guided, advised or supported by religious groups.

In 2022, the Inter-American Court of Human Rights decided the *Pavez Pavez* case. In the judgement, the Court persisted in its previous case law and used a strict criteria to analyse discrimination on the basis of sexual orientation. As it has been said, the case concerned a Chilean teacher of Catholic religion in a public school who had been detached from her position because the religious authority considered that her sexual orientation was not in conformity with Catholic doctrine. Simply put, the decision of the Court went like this: discrimination on the basis of sexual orientation is prohibited; consequently, religious groups cannot establish distinctions on the basis of sexual orientation.

As it has been explained, the reasoning of the Inter-American Court was doubly flawed. On the one hand, the Court considered that the change in the teacher's assignment was due to an act of the religious authority, not taking duly into account the fact that Ms Pavez was a professor in a public school whose salary was paid by the State and that the decision to remove her from her original position had been taken by a public authority. On the other hand, the Court made a second mistake which, paradoxically, led it to adopt the right decision: in spite of considering that the removal was a consequence of a private act, the Court applied a strict test of conventionality control, which fits better the control of public decisions than of private ones. Taking the wrong path, the Inter-American Court reached the right decision.

The controversy was not purely technical: the Court examined the margin of autonomy enjoyed by religious groups in their relation to third parties and, in particular, the possibility for religious groups to apply distinction criteria which, in other contexts, would be clearly deemed discriminatory. In similar cases, other Human Rights bodies reached conclusions opposite to that of the Inter-American Court. The United Nations Human Rights Committee accepted the legitimacy of the relocation of a public school religion teacher because the religious authority considered that his ideological positions

[68] See this same argument in a comment on discrimination and religious freedom published some time before the IACtHR's decision on the *Pavez Pavez* case (Capdevielle, 2021).

diverged from Catholic orthodoxy.[69] And the European Court of Human Rights validated the termination of labour contracts because of some circumstances relating to the private life of the teacher which were considered unacceptable by the Catholic hierarchy: in one case, because the teacher had made public that he was a married priest;[70] in another, because he had divorced and remarried without following Catholic rules on the dissolution of marriages.[71]

According to the position presented in this article, both the Human Rights Committee and the European Court delivered bad solutions (the legitimacy of the removal or dismissal of a *public* school teacher because of his *private* convictions or the acts of his *private* life) for bad reasons (the idea that a State decision based on a religious authority's opinions is a *private* and not a *public* act and that, consequently, a wide margin of discretion should be recognised).

The Inter-American Court, on the contrary, reached the right solution (the illegitimacy of the removal or dismissal of a *public* school teacher because of the acts of her *private* life, in particular her sexual orientation), though also for bad reasons. The paradox here is that two contradictory bad reasons led the Court to the right solution. Indeed, the Inter-American Court qualified the dismissal as the result of a private decision (which was wrong), but applied to this act a strong non-discrimination test (which is appropriate for *public* decisions, but not for *private* ones).

The Inter-American decision is bad news for religious freedom. By saying that even *private* acts by *private* religious groups are subject to rigorous non-discrimination standards it curtails the margin of autonomy of religious groups to have their own views on moral issues (however controversial or unpleasant for the majority of society they may be) and to decide who can speak in their name in the public arena.[72] It is also bad news for the separation between churches and State. In applying to private religious groups a standard which corresponds to public authorities, the Court implicitly treats the Catholic Church as a branch of the State.

More broadly, the endorsement of doctrinal religious teaching in public schools, under a system of cooperation between churches and the State which the Court does not question, is also bad news. This system permits students of *public* schools to be

[69] HRC, *William Eduardo Delgado Páez v Colombia*, Communication 195/19859, 23 August 1990, para. 5.
[70] ECtHR, *Fernández Martínez v Spain*, paras 102-153. On the *Fernández Martínez* case see Martínez-Torrón (2017). See also, more generally, Combalía Solís (2013) and González-Varas Ibáñez (2018).
[71] ECtHR, *Travas v Croatia*, Application 75581/13, 4 October 2016, paras 75-115.
[72] The reduced margin of autonomy granted to religious groups has arisen criticism by some commentators (see Navarro Floria, 2022). The true problem in the judgement is not, however, the Court's decision itself (as it has been explained, the Court reached the right decision), but the idea implicit in it that a rigorous non-discrimination standard should be applied to the acts of religious groups themselves, even when they do not entail the intervention or support of public authorities.

indoctrinated in *private* religious beliefs by professors paid with *public* funds but chosen by *private* religious entities. The solution is not only problematic from the point of view of the neutrality of the State concerning religious matters, but also from the point of view of the right to access public service under conditions of equality. In any case, the analysis of the general characteristics of this system falls beyond the scope of this article.

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