

Article 10

Article 10

Right to Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Text of Explanatory Note on Article 10

The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue.

Select Bibliography

There is an extensive literature on the European Convention on Human Rights, but the literature on EU law and religion is more limited.

N Doe, *Law and Religion in Europe* (Oxford and New York, Oxford University Press, 2012).

M C Foblets et al. *Belief Law and Politics: What Future for a Secular Europe?* (Farnham, Ashgate, 2014)

F Foret *Religion and Politics in the European Union: A Secular Canopy* (Cambridge, Cambridge University Press, 2015)

R McCrea, *Religion and the Public Order of the European Union* (Oxford and New York, Oxford University Press, 2013)

R McCrea ‘Singing from the Same Hymnsheet: What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State’ *Oxford Journal of Law and Religion* 5(2) 2016 183-210.

Rivers, Julian, “In Pursuit of Pluralism: the Ecclesiastical Polity of the European Union,” *Ecclesiastical Law Journal* 7, no. 34 (2004): 267–91

G Robbers (ed), *State and Church in the European Union*, 2nd edn (Baden-Baden, Nomos, 2005).

A. Field of Application of Article 10

10.01 Article 10 does not provide the Union with a roaming mandate to ensure the protection of freedom of thought, conscience and religion. As Article 51(2) notes, the Charter ‘does not establish any new power or task for the Community or the Union, or modify the powers and tasks defined by the Treaties.’¹ Of course, this does not mean that the Union’s Fundamental Rights Agency may not concern itself with the protection of freedom of conscience and religion in the Member States, or that violations of religious freedom outside of the field of application of EU law may not be part of a general enquiry into whether a state is in ‘serious and persistent breach’ of fundamental rights for the purposes of having its Treaty rights suspended under Article 7 of the Treaty on European Union.² Indeed, in 2013 Member States unanimously agreed *Guidelines on the Promotion and Protection of Freedom of Religion or Belief*³ that were intended to guide the Union in its external policy meaning that a commitment to religious freedom ought to influence the Union’s external action. Nevertheless, in common with the other provisions of the Charter, Article 10’s function is not to confer additional jurisdiction but to act as a constraint on the Union in the exercise of its powers and functions. Article 10 binds ‘the institutions of the Union’ as well as the Member States ‘only when they are implementing EU law’.⁴

10.02 This means that in matters such as its dealings with the staff of its institutions and in passing legislation, the European Union must ensure adequate respect for rights of thought, conscience and religion. It also means that EU legislation will be interpreted so as to ensure protection of this right, something that is of particular relevance to matters such as anti-discrimination legislation⁵ and provisions regarding working time⁶ and animal slaughter,⁷ all of which can impact on religious practices. In addition, Member States, in implementing EU legislation and carrying out Treaty obligations, will be obliged to respect freedom of conscience and religion. Any derogations by Member States from, for example, the rights of free movement granted by the Treaty’s free movement provisions will have to be exercised so as not to impact unduly on religious freedom.

10.03 While the Union has long been bound to respect religious freedom as part of the ‘general principles of law’⁸ created by the Court of Justice to protect fundamental rights in the pre-Charter era, in the past the religious freedom aspect was rather underplayed in judgments in cases where individuals or organisations sought to exercise free movement rights for religious purposes. Cases such as *Steymann*,⁹ which analysed the free movement of persons in the context of the choice of an individual to move to reside in a religious community, and *Eglise scientologie*,¹⁰ which assessed the compatibility of legislation restricting the financial transactions carried out by the Church of Scientology, were both decided without explicit reference to the right to religious freedom. Now that there is an explicit commitment to protecting religious freedom in the Charter this is no longer the case and the Court of

¹ Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

² *Ibid* Art 51(1).

³ Council of the European Union, EU Guidelines on the promotion and protection of freedom of religion or belief, Foreign Affairs Council Meeting, Luxembourg, 24 June 2013.

⁴ n 1 above, Art 52(1).

⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16–22.

⁶ Council Directive 93/104/EC concerning certain aspects of the organisation of working time [1993] OJ L307/18–24.

⁷ Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing [1993] OJ L340/21–34.

⁸ See Case 36/75 *Rutili v Minstre de l’Interieur* [1975] ECR 1219; Case C-260/89 *ERT* [1991] ECR I-2925.

⁹ Case 196/87 *Steymann v Staatsecretaris van Justitie* [1988] ECR 6159.

¹⁰ Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-5475.

Justice has explicitly referred to the Charter in key rulings on discrimination in employment¹¹ and asylum.¹²

10.04 Importantly, under the caselaw of the ECHR,¹³ the 2013 EU Guidelines¹⁴ and following the longstanding practice of EU institutions¹⁵ the right protected under EU law applies to both religious and non-religious beliefs. While this chapter will refer to ‘religious freedom’ in the interests of brevity, it is important to remember that EU law (unlike the law in many other areas of the world) gives equal non-religious philosophical beliefs. As will be discussed below, the right protected by Article 10 is one that can be restricted in a number of circumstances. Many of the limitations on the right to freedom of thought, conscience and religion that will apply to Article 10 will arise from the jurisprudence of the European Court of Human Rights (ECtHR). The explanatory text provided in relation to Article 10 that is quoted above, makes it clear that it is intended to have ‘the same meaning and scope’ as Article 9 ECHR. The jurisprudence of the Strasbourg Court therefore has a key influence on the development of Article 10 within EU law though in certain areas, most notably the area of discrimination by religious employers to maintain their ethos, EU law is carving out an independent path.

B. Interrelationship of Article 10 with Other Provisions of the Charter

10.05 The rights protected by Article 10 have a complex and at times competitive relationship to other articles of the Charter. Sometimes the right to religious freedom and other fundamental rights are mutually reinforcing. Exercising religious freedom involves actions that trigger the protection of other fundamental rights. Freedom of conscience and religion involves the right to express one’s religious beliefs (freedom of expression, Art 11), the right to associate with other believers and form religious organisations (freedom of association, Art 12), the right to develop a personal religious identity (the right to privacy, Art 7). Freedom of religion may also involve claims to protection from discrimination on grounds of religion (rights to equal treatment and freedom from discrimination, Articles 20 and 21).

10.06 However, this is not always the case and religious freedom can also have a more directly competitive relationship with other fundamental rights than is the case for many of the rights protected by the Charter. Daniel O’Connell, who led the movement for Catholic Emancipation in Ireland in the nineteenth century, is reputed to have said that freedom is not a finite resource, and that increasing the freedom of others enhances rather than depletes one’s own stock.¹⁶ Religious freedom claims can clash with the right to be free of discrimination and the right to respect for private life (Articles 20, 21 and 7). Avoiding restrictions on religious freedom may also involve the imposition of economic costs on employers and thus a potential clash with the freedom to run a business (Art 16 of the Charter). Religious freedom has also been the basis of claims to restrict freedom of expression on occasion. Finally, religious freedom can sometimes be a zero-sum game where protecting the religious freedom of one party is in direct conflict with the right of another to be spared such practices or to follow their own beliefs.

I. Religious Freedom and Free Expression

10.07 The three most prominent examples of rights with which freedom of conscience and religion may clash are the right to freedom of expression (guaranteed by Article 11 of the Charter) and freedom from

¹¹ Case C-157/15 *Achbita*, Case C-188/15 ECLI:EU:C:2017:203, *Bougnanou* ECLI:EU:C:2017:204, Case C-414/16 *Egenberger* ECLI:EU:C:2018:257 and Case C-68/17 *JQ v IR* ECLI:EU:C:2018:696.

¹² Joined Cases C-71/11 and C-99/11 *Y and Z* ECLI:EU:C:2012:518.

¹³ This principle was first stated in *Kokkinakis v Greece* (1993) 17 EHRR 397 and has been consistently repeated by the Court in later cases.

¹⁴ n 3 above.

¹⁵ R McCrea, *Religion and the Public Order of the European Union* (Oxford and New York, Oxford University Press, 2013), Chp. 3.

¹⁶ Senator David Norris, Seanad Éireann, Debates 7 July 2010 <http://debates.oireachtas.ie/seanad/2010/07/07/00007.asp>.

discrimination (Articles 20 and 21) and the freedom to conduct a business Article 16). Under the case law of the European Court of Human Rights (which, as noted above, will have a heavy influence on the meaning given to the Charter by the CJEU), the right to freedom of religion has been relied upon as a reason to restrict freedom of expression. In *Otto Preminger v Austria*,¹⁷ the ECtHR upheld the banning of a film deemed offensive to Christians, on the basis that while believers must tolerate denial and opposition towards the doctrines of their faith:

the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.¹⁸

10.08 The Court went on to hold that the seizure of the film was justified, as:

the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.¹⁹

10.09 This idea that the protection of freedom of religion may justify restriction of speech offensive to religions was followed by the Court in *Wingrove v UK*²⁰ and *IA v Turkey*.²¹ It has been an extremely controversial issue, made more so by the tensions surrounding the publication of cartoons of the Prophet Mohammed in a Danish newspaper in 2006, and other controversies such as the saga surrounding the death sentence pronounced on the author Salman Rushdie.

10.10 In *IA v Turkey*, three of the seven judges voted to abandon the reasoning in *Otto Preminger*, on the grounds that it was based on an excessively timid and limited conception of free expression. In the United Kingdom in *R (Green) v City of Westminster Magistrates' Court*²² two judges of the Administrative Court also cast doubt on the validity of such reasoning in dismissing an application to prosecute the producer of an allegedly blasphemous opera, arguing that 'it does not seem to us that insulting a man's religious beliefs, deeply held though they are likely to be, will normally amount to an infringement of his Article 9 rights since his right to hold to and to practise his religion is generally unaffected by such insults.'²³ The 2013 EU Guidelines on religious freedom state that, provided the threshold for hate speech has not been met, the EU will 'resist any calls for criminalization of offensive criticism of religion', will 'recall [...] that the right to freedom of religion or belief [...] does not include the right to have a religion or belief that is free from criticism or ridicule' and will also recall that 'laws that criminalize blasphemy restrict expression concerning religious or other beliefs; that they are often applied so as to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; and recommend the decriminalisation of such offences.'²⁴ Thus, the political consensus of the Member States would appear to be less favourable than the jurisprudence of the ECtHR to the idea that

¹⁷ *Otto Preminger Institut v Austria* (1994) 19 EHRR 34.

¹⁸ *Ibid* [47].

¹⁹ *Ibid* [56].

²⁰ *Wingrove v United Kingdom* (1996) 24 EHRR 1.

²¹ *IA v Turkey* App no 42571/98 (Judgment of 13 September 2005).

²² *R (Green) v City of Westminster Magistrates' Court* [2007] EWHC 2785 (Admin).

²³ *Ibid* [17].

²⁴ n 14 above, Guideline 32.

religious freedom includes a right to restrict mockery or criticism of religion perhaps reducing the potential for Article to serve as the basis for restrictions on freedom of expression.

II. Discrimination on Grounds of Religion

10.11 A second notable point of conflict between the right of freedom of conscience and religion guaranteed by Article 10 and other Charter rights is in the area of non-discrimination and equal treatment (Articles 20 and 21). In some ways, rights to religious freedom and freedom from discrimination can be mutually reinforcing. As Maduro AG pointed out in *Coleman v Attridge Law* (in an Opinion on the question of discrimination on grounds of disability), anti-discrimination laws are aimed to a significant degree at protecting the dignity and autonomy of individuals with protected characteristics.²⁵ Religion is such a characteristic under EU legislation prohibiting discrimination on grounds of religion in the area of employment (Directive 2000/78).²⁶ This Directive enhances religious freedom by ensuring that individuals will not be disadvantaged on the basis of their faith thus enhancing their ability them to choose their faith for themselves. It prohibits both direct discrimination ('where one person is treated less favourably than another is, has been or would be treated in a comparable situation [on grounds of religion] or belief')²⁷ and indirect discrimination ('where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief ... at a particular disadvantage compared with other persons').²⁸ Indirect discrimination that can be 'objectively justified by a legitimate aim and [where] the means of achieving that aim are appropriate and necessary' is not prohibited.²⁹ By requiring that 'apparently neutral' practices that place individuals of a particular religion or belief at a disadvantage be objectively justified, EU law requires a degree of active facilitation of religious choices. This approach can be seen as embodying the Charter's commitment to freedom of religion and belief as encompassing the commitment of Articles 20 and 21 to non-discrimination.

10.12 It should be noted that there is some tension between the individualistic way in which EU law and ECHR caselaw view religious freedom and the ideas of collective disadvantage inherent in indirect discrimination. For the CJEU and ECtHR religious freedom is primarily a right of individuals to choose their beliefs. This is a right that applies equally to those of with non-religious beliefs. Because courts are ill-equipped to enter into theological disputes and because of the importance of protecting individual autonomy, religious freedom applies equally to individuals with idiosyncratic beliefs that depart from orthodox interpretations of the faith they follow. Therefore, in a religious freedom claim it is irrelevant that someone may be the only one of their faith who wishes to take a particular action or who holds a particular belief. This is not the case in relation to indirect discrimination on grounds of religion because indirect discrimination is concerned with compensating those whose identity means they face 'additional headwinds' in operating in society. Therefore some element of collective disadvantage is necessary. In *Eweida v British Airways* the Court of Appeal of England and Wales rejected the claim of indirect discrimination of a British Airways employee who was banned from wearing a visible crucifix over her uniform. The Court found that indirect discrimination on grounds of religion contrary to Directive 2000/78 had not been established because she was the only Christian at British Airways who had sought to do so and the necessary group disadvantage had not been established.³⁰

²⁵ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, Opinion of Advocate General Maduro.

²⁶ n 5 above.

²⁷ *Ibid* Art 2(2)(a).

²⁸ *Ibid* Art 2(2) (b).

²⁹ *Ibid* Art 2(2)(b)(i).

³⁰ *Eweida v British Airways* EWCA [2010] Civ 80. For discussion of the tension between indirect discrimination and religious freedom see R McCrea 'Singing from the Same Hymnsheet: What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State' *Oxford Journal of Law and Religion* 5(2) 2016 183-210.

10.13 Ms. Eweida went on to win her case on grounds of religious freedom before the Strasbourg Court³¹ which held (contrary to its previous caselaw) that the right of employees to resign is insufficient to protect religious freedom and that Article 9 requires balancing between the right to express one's faith or to follow one's beliefs at work, and the rights and interests of others. As Article 10 of the Charter generally tracks the interpretation given to Article 9 ECHR, Article 10 can be seen as including the right to some facilitation of religious expression at work, though as discussed below, the cases on this issue before the CJEU have focused primarily on the prohibition on discrimination contained in Directive 2000/78. In addition, as is also discussed below, both European Courts have given significant scope to employers to restrict such expression in order to protect the rights of others and principles such as state religious neutrality.

10.14 Importantly, religious organisations and individuals have not simply claimed protection from discrimination, they have, in certain instances, also claimed the right to discriminate in the name of religious freedom. Religious employers have claimed a collective right to religious autonomy that they claim should override the individual religious autonomy of employees in certain circumstances. This has not merely encompassed the right to ensure religious offices are filled by those committed to the faith in question or doctrinally capable of holding such offices (as in the case of the all-male nature of the priesthood of the Roman Catholic Church). Religious organisations claim a broader right of collective autonomy under which they are to be permitted to operate organisations with significant secular functions, such as schools and hospitals, in line with their 'ethos', notwithstanding that such an ethos may require them to discriminate against employees on grounds such as marital status or sexual orientation. The ECtHR has been increasingly accommodating of state rules granting very wide scope for religious organisations to discriminate in order to maintain their religious ethos. In *Fernandez-Martinez v Spain*³² the Strasbourg Court upheld the failure to renew the contract of a laicized priest to teach religion in a public school. The decision not to renew flowed from Spanish legislation under which the consent of the local bishop was required for appointment to such posts. This decision moved away from previous caselaw³³ under which the Court had required balancing of the right of the employer against the right of employees to respect for their private lives, their freedom of religion and their right to be free of discrimination and moved closer to allowing states to provide the 'pastoral exemption' seen in American law under which religious institutions retain absolute autonomy over employment decisions in relation to roles with a religious element.³⁴

10.15 EU law in the form of Directive 2000/78 permits, but does not require, Member States to give limited exemptions for organisations 'the ethos of which is based on religion or belief' allowing them to discriminate on grounds of religion 'where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.'³⁵ Such organisations may also 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.³⁶

10.16 As these exemptions are not mandatory but can be granted by Member States if they so choose, they cannot be seen as representing the consensus view of the extent of collective religious freedom under EU law, but rather reflect the diversity of Member State approaches in this area as well as the Union's commitment to respecting Member State autonomy in these matters. While Article 9 ECHR, and therefore Article 10 of the Charter, do require Member States to respect the internal autonomy of religious bodies,³⁷ the extent to which the right to freedom of belief requires

³¹ *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 [2013] ECHR 37.

³² *Fernández-Martinez v Spain* [2014] ECHR 615.

³³ See *Obst v Germany* [2010] ECHR 425/03 and *Schüth v Germany* [2010] ECHR 1620/03.

³⁴ *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).

³⁵ n 5 above Art 4(2).

³⁶ *Ibid.*

³⁷ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339.

exemptions from generally applicable laws outside of purely religious functions is limited, and Member States have significant leeway in balancing the clashing rights to individual freedom of religion of employees and the right of employees to equal treatment, on the one hand, and the collective religious freedom of religious employers reflected in a claim to be entitled to require employees to follow the teachings of their religious employer.

10.17 However, the Court of Justice has taken a more restrictive approach than the ECtHR to these exemptions. In *Egenberger*³⁸ the Court was faced with a challenge by a non-believer who was not considered for a contract to write a report on racial discrimination on behalf of a body associated with a German Protestant Church. The ad for the relevant post had specified that applicants must be members of the Protestant Church. German legislation provided that the decision of a religious body as to whether a particular role within a religious organization needed to be limited to people of a particular faith was for the religious employer to take with the role of the courts limited to plausibility review, on the basis of the religion's self-conception. The Court of Justice ruled that this approach granted excessive scope to religious employers to discriminate.

Although the employer had cited both the guarantee of freedom of religion or belief (Article 10 of the Charter of Fundamental Rights) and Article 17 of the Treaty on the Functioning of the European Union, which provides that the Union 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States',³⁹ the Court also relied heavily on constitutional principles to bolster its conclusion that excessive leeway had been granted to religious employers by German law.

The Court held that Directive 2000/78 was merely a 'specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter' (which sets out a general ban on discrimination) and the need under Article 47 of the Charter to provide effective judicial protection of EU law rights meant that restricting the ability of the national courts to review the decision of an employer to impose a discriminatory requirement would be contrary to EU law. The Court held that a 'fair balance' had to be struck between the autonomy rights of religious organisations and the right of workers to be free from discrimination and in the event of a dispute it must be possible for the balancing exercise to be reviewed by a national court.⁴⁰ For the Court, fair balancing meant any discrimination on grounds of religion had to be in the words of the Directive 'genuine, legitimate and justified, having regard to [the] ethos [of the religious employer]'. It set out a test under which religious organisations must show an 'objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned.'⁴¹ Thus, in order to meet the Directive's requirements that the difference in treatment on grounds of religion be 'genuine, legitimate and justified' the Court held that:

'To be considered 'genuine': 'professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy.'

To be considered 'legitimate' it found that the national court must
'ensure that the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy.'

And to be considered justified the CJEU set down that

³⁸ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257.

³⁹ Treaty on European Union, Art. 17 OJ 115 , 09/05/2008 P. 0025 – 0026.

⁴⁰ n 38 above, paras. 45-59.

⁴¹ *Ibid.* para. 63.

‘the church or organisation imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary.’

Finally, although a proportionality requirement is not included in the text of Article 4(2) (and is included in other Articles of the Directive), the Court held that as proportionality is a general principle of EU law, the exemption given by Article 4(2) is to be read as being subject to a proportionality requirement.⁴²

In *JQ v IR*⁴³ the Court adopted the same approach in relation to discrimination in relation to employees’ duty of loyalty to their employer’s religious ethos. In this case a Catholic hospital fired its Catholic director of internal medicine following his divorce and remarriage on the basis that, as fellow Catholic he had a higher duty of loyalty to the Catholic ethos of the hospital than non-Catholics would have in a similar role. The ruling of the Court of Justice faulted the same German legislation it had held to have violated Directive 2000/78 in *Egenberger* and reiterated that any discrimination on grounds of religion (this time in relation to the intensity of the loyalty requirement) had to pass a proportionality test and had to be capable of being reviewed by the courts.

The Court of Justice therefore placed significant restrictions on the ability of Member States to permit ethos-based discrimination in religious organisations by requiring that any exemptions from anti-discrimination rules given, must be limited by a proportionality requirement. This is an approach that is notably more protective of the rights of employees to be free of discrimination (and therefore more restrictive of religious freedom) than recent Strasbourg caselaw.⁴⁴ The consistent emphasis placed by the Court on proportionality as the framework within which clashes of rights must be resolved would seem to imply that even were a loyalty to ethos duty to be imposed in a non-discriminatory way, the duty must not have a disproportionate impact on other rights such as the right to freedom of expression or privacy.

III Exemptions from Non-Discrimination Duties for Individuals

10.18 The tension between freedom of religion and belief and anti-discrimination is also seen at an individual level. Religious individuals have claimed that the duty not to discriminate in the provision of services is itself a discriminatory infringement of their right to freedom of religion. This issue has not yet come before the CJEU but it has been before the Strasbourg Court. In *Eweida and others v United Kingdom*,⁴⁵ as noted above, two claimants seeking exemptions from anti-discrimination policies (a Christian registrar disciplined for refusing to register same-sex civil unions, and second involving a sex therapist dismissed for refusing to counsel same-sex couples) lost their challenges to their dismissal before the Strasbourg Court. The applicants in both cases relied on the fact that the relevant service could have been provided by colleagues while their opponents stressed the moral significance of discriminatory acts beyond deprivation of the relevant service. The Court of Justice is unlikely to be any more sympathetic to a claim that religious freedom or the ban on discrimination on grounds of religion provides a basis for opting out of non-discrimination duties. Not only does the Court of Justice usually follow the approach of the ECtHR, Directive 2000/78 specifically envisages the restriction of the duty to facilitate the religious identity of employees on the basis of the protection of the rights and freedoms of others.⁴⁶

⁴² Ibid. paras 60 to 67.

⁴³ n 11 above, *JQ v IR*. See R. McCrea, ‘Discrimination at Work: Can Employees Be Fired for Getting Divorced? EU Law Analysis Blog 12 September 2018, <http://eulawanalysis.blogspot.com> (last visited 12 September 2018).

⁴⁴ Ibid. para. 68.

⁴⁵ n 31 above.

⁴⁶ n 5 above Art 2(5). For broader discussion of the ruling see F. Cranmer, ‘Religion and the Genuine Occupational Requirement: Egenberger – the judgment’ Law & Religion UK Blog, 18 April 2018, <http://www.lawandreligionuk.com/2018/04/18/religion-and-the-genuine-occupational-requirement-egenberger-the-judgment/> and R. McCrea ‘Salvation outside the Church? The ECJ Rules on Discrimination in Employment’ EU Law Analysis Blog, 18 April 2018 <http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html> (both last visited 31 August 2018).

IV Religious Discrimination, Neutrality and the Right to Run a Business

10.19 In addition to anti-discrimination rights, the right of employers to conduct their business is a further element which can be taken into account in order to place limits on facilitation of individual religious freedom in the workplace. Article 16 of the Charter protects the ‘freedom to conduct a business in accordance with Community law and national laws’.⁴⁷ This limitation was recognised in EU anti-discrimination law long before the Charter. In the *Prais* case,⁴⁸ the Court of Justice had found that an employer’s duty to facilitate religion could extend only to a duty to take ‘reasonable steps’ to avoid setting a day for recruitment examinations that clashed with religious obligations. In other areas of anti-discrimination law the Court of Justice has cited the need to avoid placing ‘an intolerable burden on employers’⁴⁹ to limit a duty to justify difference in pay between employees, while ‘justifiable operational reasons’⁵⁰ were invoked to limit the duty to facilitate employees in their taking of parental leave. Thus, as I have written elsewhere, the Court has been willing ‘to circumscribe rights to equal treatment and the facilitation of individual identities in order to protect the ability of enterprises to operate efficiently within a competitive economy’.⁵¹ The clash between the right to run a business and the right to adhere to one’s religion at work featured prominently in the case of *Achbita*,⁵² which was along with the decision in *Bouagnaoui*⁵³ (they were decided on the same day) represented the first major ruling of the CJEU on the issue of discrimination on grounds of religion at work. In *Achbita*, a female Muslim employee was dismissed for insisting on the right to wear a headscarf at work in contravention of a workplace policy banning the wearing at work of visible signs of religious, philosophical or political belief. In assessing the whether this ban pursued a legitimate objective the Court of Justice held that ‘the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality, must be considered legitimate. An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognized in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.’⁵⁴

Recognising the right of an employer to control the appearance of her employees as a right to be balanced against the right not to be discriminated against on grounds of religion is, obviously, controversial but it is the inevitable consequence of the inclusion of such a wide range of rights in the Charter of Fundamental Rights. The focus on the question of whether an employee has a customer-facing role in *Achbita* also raises the question of the permissibility of dress-code restrictions for those without customer-facing duties. The Court was clear that interaction with customers was a factor that increased the scope for an employer to require an employee to obey a general and systematic ban on symbols of religious, political or philosophical belief. It is unclear whether this means that it is impermissible to impose such constraints on employees without customer facing roles. Given the controversial nature of many religious and other beliefs, it is conceivable that employers will aim to preserve workplace harmony between employees by imposing bans on symbols of belief at work. Indeed, in the well-known case of *Ladele*⁵⁵ the objection to accommodating a registrar who refused to carry out same sex civil partnerships came not from any clients but from her fellow employees.

IV Duties of Neutrality as a Limit on Religious Expression at Work

⁴⁷ n 1 above.

⁴⁸ Case 130/75 *Prais v Council* (Judgment of 27 October 1976).

⁴⁹ Case C-17/05 *BF Cadman v Health and Safety Executive* [2006] ECR I-9583 (AGO).

⁵⁰ Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-7643 (AGO).

⁵¹ See R McCrea, *Religion and the Public Order of the European Union* (Oxford and New York, Oxford University Press, 2010) 155.

⁵² n 11 above.

⁵³ *Ibid.*

⁵⁴ *Ibid.* *Achbita*, paras. 37-38.

⁵⁵ n 31 above.

10.20 The issue of neutrality requirements goes far beyond the question of the right to run a business. Debates around the idea of religious neutrality reflect fundamental disagreements about how to best manage religious diversity. One approach sees diversity as best managed by facilitating and protecting people's ability to adhere to and express their faith in as many contexts as possible. The other approach sees diversity as best managed if people hold off expressing their particular religious identity in particular contexts and aims to develop an overarching civic identity shorn of religious specificity. Countries such as the UK have generally followed the former model and countries such as France have taken the latter approach. Given the restrictions on religious expression inherent in the French approach, French rules restricting religious symbols in state contexts such as schools and government employment have regularly been challenged repeatedly before the European Court of Human Rights. The Court has repeatedly turned down challenges to France's system of state secularism. It has consistently stated that secularism is in harmony with the values of the Convention. In *Ebrahimian v France*⁵⁶ Strasbourg judges upheld the application of the restriction on the wearing of religious symbols to virtually all state jobs (in this case a woman working on a temporary contract in a public hospital). It is therefore unlikely that the CJEU would find a violation of the Charter were rules imposing visible religious neutrality on civil servants to come before it.

10.21 Neutrality obligations can weigh more heavily on minority religions as what is thought of as neutral may often reflect dominant cultural norms that have themselves been shaped by the historically dominant religion. The opportunistic embrace of principles such as secularism by those with a wider anti-migrant or xenophobic agenda is a notable feature of contemporary European politics. The Court of Justice has made a contribution in this area. Although in *Achbita* and *Bougnaoui* it was willing to uphold the imposition of a neutrality requirement even in the private sector, the Court made steps to prevent opportunistic exploitation of neutrality requirements. In *Achbita* the Court found that a requirement of visible neutrality amounted to indirect, not direct, discrimination. This was because it referred to visible signs of political, philosophical or religious beliefs and thus 'covers any manifestation of such beliefs without distinction'. The Court therefore concluded that the rule 'must (...) be regarded as treating all workers of the undertaking in the same way, by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs.'⁵⁷ This meant that the ban would be justified if it satisfied a proportionality test. However, the Luxembourg Court also held that national courts needed to verify that bans on religious symbols can be seen as appropriate only when part of a neutrality policy that is 'genuinely pursued in a consistent and systematic manner'.⁵⁸ Where the ban was not systematic but targeted a particular faith (as alleged in the case of *Bougnaoui* where the plaintiff alleged that she was dismissed for failing to comply with a customer desire for 'no veil next time') it would be considered directly discriminatory and could only be accepted under the terms of Directive 2000/78 if justified by a 'genuine and determining occupational requirement'.⁵⁹

The Court of Justice has taken an important step in these cases in this regard. By insisting that bans on religious symbols can be justified only if part of a genuinely systematic and generally applicable prohibition on the display of visible symbols of all kinds of religious, philosophical or political belief, the Court has sought to ensure that the sometimes justifiable desire to curtail expression of controversial beliefs in the workplace cannot be used as a means to selectively target unpopular minorities.⁶⁰

Finally, in relation to the idea of religious neutrality, the jurisprudence of the Strasbourg Court indicates that certain limits on religious influence over law are required by the liberal democratic nature of the Convention. In *Refah Partisi v Turkey* the Court held that the dissolution of a political party that was held to desire to establish a theocracy was consistent with the ECHR on the basis that theocracy was

⁵⁶ *Ebrahimian v France* [2015] ECHR 1041

⁵⁷ n 11 above *Achbita*, para. 30.

⁵⁸ *Ibid.* para. 40.

⁵⁹ *Ibid.*, *Bougnaoui*, para 14 and 30-35.

⁶⁰ See R. McCrean 'Faith at Work: The CJEU's Headscarf Rulings' EU Law Analysis Blog 17 March 2017, <http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeu-headscarf-rulings.html>. For the contrary view see E. Spaventa 'What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case' EU Law Analysis Blog 21 March 2017 <http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html> (both last visited 31 August 2018).

inconsistent with the liberal democratic system of government envisaged by the Convention.⁶¹ Such a limitation is consistent with the wording of Article 9(2) ECHR which notes that religious freedom can be restricted when ‘necessary in a democratic society ... for the protection of public order ... or the rights and freedoms of others’. A similar commitment to some limitation on religious influence over law and politics has been seen in EU law in the Charter’s commitment to liberal democracy and the ECHR,⁶² in the preamble to the Lisbon Treaty which speaks of the ‘cultural, religious and humanist heritage of Europe’ and Directive 2000/78 which largely repeats the limitations on religious freedom set out in Article 9(2) ECHR. The process of accession of new members also reflects this commitment, with applicant states having been required to decriminalise homosexuality,⁶³ to refrain from criminalising adultery⁶⁴ and to accept ‘democratic secularism’.⁶⁵ Therefore, religiously motivated actions that aim at undermining the secular nature of the legal and political systems may be considered fall outside the protection of the Charter.

C. Sources of Article 10 Rights

10.22 Freedom of conscience and religion is well-recognised as a fundamental right and can be found in almost all of the major human rights instruments. Article 18 of the Universal Declaration of Human Rights,⁶⁶ Article 18 of the International Covenant on Civil and Political Rights⁶⁷ and Article 1 of the United National Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁶⁸ all endorse freedom of religion and conscience in remarkably similar terms to Article 10 of the Charter. The Refugee Convention recognises persecution on religious grounds as a basis for asylum (Article 1).⁶⁹

⁶¹ *Refah Partisi v Turkey* (2003) 37 EHRR 1.

⁶² n 1 above, preamble.

⁶³ n 15 above, pp 202–05.

⁶⁴ *Ibid* pp 205–208.

⁶⁵ *Ibid* p 182.

⁶⁶ Art 18 of the Universal Declaration of Human Rights reads: ‘Everyone 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.’

⁶⁷ Art 18 of the International Covenant on Civil and Political Rights reads:

‘1.

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

2.

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3.

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4.

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.’

⁶⁸ Art 1 of the United National Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief reads: ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.’

⁶⁹ Art 1 of the Refugee Convention gives the right to asylum to anyone who, ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

10.23 However, as noted above, by far the greatest source of law for Article 10 of the Charter is Article 9 of the ECHR and the jurisprudence of the ECtHR related to it. The explanatory text that accompanies the Charter, as we have seen, makes it clear that Article 10 is intended to have the same meaning as Article 9. Furthermore, given the importance attached by the CJEU to the ECHR in determining the content of the ‘general principles of law’ which have been a feature of the Court of Justice’s jurisprudence for over 40 years and which continue to constitute an element of EU fundamental rights, the Convention’s approach to freedom of conscience and religion will be a major determinant of the content of Article 10 of the Charter.

10.24 Finally, EU legislation may also be relevant to the rights protected by Article 10 (particularly Directive 2000/78 but also legislation in a range of other areas such as animal welfare⁷⁰). Such legislation does not amend or qualify the text of Article 10 but may provide a background of norms which may inform the meaning attributed to the Article by the Court of Justice. Furthermore, the Court of Justice has held that the duty not to discriminate on grounds of religion in Directive 2000/78 represents a codification of a general principle of law and is accordingly directly effective horizontally as well as vertically.⁷¹

D. Analysis

I. General Remarks

10.25 The fact that the meaning of Article 10 will largely be determined by the jurisprudence of the ECtHR in relation to Article 9 ECHR should not prove problematic for the CJEU, which had a limited pre-existing case law in the area of freedom of conscience to reconcile with the Charter, and whose general principles of law have always relied heavily on Strasbourg case law.⁷² As noted above, in relation to the issue of discrimination by religious employers in order to protect the ethos of religious bodies, the CJEU’s interpretation of Directive 2000/78 has been more restrictive than the Strasbourg Court’s interpretation of Article 9 with the Court of Justice insisting that any such exemptions be limited by a requirement that any discriminatory decision satisfy a proportionality test. Aside from that difference both Luxembourg and Strasbourg courts have seen religious freedom as a largely individual right centred on the freedom to choose one’s beliefs and are committed to equal treatment of religious and non-religious beliefs.

II. Scope of Application

10.26 As its wording makes clear, Article 10 applies to thought, conscience and religion. Non-religious viewpoints are therefore also covered. The Strasbourg institutions have recognised beliefs such as pacifism,⁷³ veganism⁷⁴ and opposition to abortion⁷⁵ as coming within the ambit of Article 9 ECHR, provided that they ‘attain a certain level of cogency seriousness, cohesion and importance.’⁷⁶ This broad approach was confirmed in the CJEU decision in *Y and Z*, which noted the broad definition given to the concept of religion in the Directive regulating asylum⁷⁷ and in the rulings in the discrimination

⁷⁰ See for example Case C-426/16 *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen et al v. Vlaams Gewest*.

⁷¹ n 11 above, *JQ v IR*.

⁷² n 8 above.

⁷³ *Arrowsmith v United Kingdom* App no 7050/75 (1978) 19 DR 5.

⁷⁴ *H v United Kingdom* (1993) 16 EHRR 44.

⁷⁵ *Knudsen v Norway* (1986) 8 EHRR 45.

⁷⁶ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 [36].

⁷⁷ n 12 above.

cases of *Achbita* and *Bougnaoui* which also showed a commitment to treating expressions of religious belief and non-religious belief equally.

10.27 Article 10 also covers acts of manifestation of religion and belief as well as the simple holding of beliefs. In *Y and Z* the CJEU refused to hold that restriction of the manifestation of religious belief was necessarily less severe than interference with the right to hold a belief.⁷⁸ As with all provisions of the Charter, and as already noted, Article 10 binds the institutions of the Union and Member States when they are implementing or derogating from EU law but does not confer new competence on the Union in the area of religious freedom.

III. Specific Provisions

10.28 According to established case law of the ECtHR, the right to freedom of religion and conscience covers two distinct rights: an almost absolute right to protection of a *forum internum*, within which people must be free to choose their own belief, and a limited right to manifest such beliefs and a more qualified right to manifest such religious beliefs.

10.29 Article 10 fits into a growing EU legal presence in religious matters. It may impact on the interpretation of Treaty provisions such as those in Article 17 of the Lisbon Treaty, which provides that the Union ‘respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States’ and which undertakes to maintain a structured dialogue with churches and ‘philosophical and non-confessional organisations’.⁷⁹ As discussed above, it has also featured in key rulings on discrimination law such as *Achbita* and *Egenberger*.

10.30 Beyond anti-discrimination, the Union has also enacted law in areas such as animal welfare (in relation to religious slaughter)⁸⁰ and broadcasting (in relation to restrictions on discriminatory broadcasts and advertising during the broadcast of religious services) that relate to religious activities.

10.31 Finally, Article 10 contains a specific provision relating to the right to conscientious exemption ‘in accordance with national laws’. Although the Court of Justice has been willing to intervene to impose compliance with equality norms in the military context,⁸¹ the Union generally does not have jurisdiction over matters such as national defence so this provision may be of limited impact.

IV. Limitations and Derogations

(a) *Forum Internum and Manifestation*

10.33 Article 10 of the Charter does not contain the equivalent of the limitation clause seen in Article 9(2) ECHR. However, the explanatory text makes it clear that the rights it provides are intended to be subject to the limitations set out in Article 9(2).

10.34 The right to hold a belief has generally been regarded as absolute. This does not mean that adverse consequences may not, in limited circumstances flow from the fact that an individual holds particular beliefs. The CJEU has found⁸² and EU policy guidelines envisage,⁸³ that Member States may make citizenship or residence conditional on migrants satisfying integration tests, and some Member States

⁷⁸ *Ibid.*

⁷⁹ Treaty on the Functioning of the European Union [2008] OJ C115/47, Art 17.

⁸⁰ n 7 above.

⁸¹ Case C-285/98 *Kreil v Germany* [2000] ECR I-69.

⁸² Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

⁸³ n 51 above, ch 6 pp 224–27.

have refused citizenship or residence, on the basis that the individual in question holds beliefs that are inconsistent with values such as gender equality.⁸⁴

10.35 However, although the Charter distinguishes between the right to hold and the right to manifest beliefs, the CJEU has not viewed the right to manifest religious belief as being of lesser importance. In the *Y and Z* decision, the Court of Justice explicitly considered Article 10 for the first time. It was faced with a reference from a German court dealing with the case of Muslims from the Ahmadiyya sect, who claimed they would be persecuted if they publicly followed their faith in Pakistan. The German Court requested an interpretation of the notion of ‘persecution’ in relation to Council Directive 2004/83/EC which, inter alia, sets down minimum standards in relation to asylum.⁸⁵ It asked whether only interference with the ‘core area’ of religious freedom, rather than all acts that would violate Article 9 ECHR, constitutes such persecution and if so, whether public manifestation of a religious faith could fall within such a core. The Court declined to divide freedom of religion into core and non-core areas. This, it said, would be inconsistent with the broad definition of religion given by the Directive, which covered ‘the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief’.⁸⁶ Accordingly, the Court decided that interference with the manifestation of religious freedom, as well as the ‘forum internum’ of private belief could, if appropriately severe, constitute persecution for the purposes of the directive. The Charter did not play a major role in this case, as the Court’s conclusion was driven more by the wording of the relevant directive than Article 10(1). It is however, notable that the judgment explicitly states that Article 10(1) of the Charter ‘corresponds to Article 9 ECHR’⁸⁷ and that freedom of religion is ‘one of the foundations of a democratic society’, a ‘basic human right’; but nevertheless, a right that could be restricted, all of which is very much in line with existing Strasbourg case law.

(b) A Limited Right to Facilitation of Manifestation

10.36 As discussed above, the decision in *X and Y* shows that the CJEU views manifestation as key to religious freedom and cases such as *Achbita* as well as the ECtHR decision in *Eweida* show that restrictions on religious freedom in areas such as the workplace must be shown to be proportionate. Article 10 does therefore potentially require active facilitation of religious freedom to some degree. However, it is also clear that manifestation of religion and belief can be restricted on a number of grounds. Limits on the broader right to manifest (rather than merely to hold) religious beliefs can, under the terms of Article 9(2) ECHR, be limited if the limitations are ‘prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health of morals, or the protection of the rights and freedoms of others’.⁸⁸ These limitations have inspired a growing case law which grants significant latitude to states to restrict manifestation of religious belief in particular contexts. Given that Article 10 of the Charter is intended to mirror the protection given by Article 9 ECHR, it was not surprising that EU law also gives significant scope for the limitation of religious freedom. As discussed above, CJEU caselaw allows a restrictions of the right protected by Article 10 on the basis of the need to protect the rights of others, such as the right of others to be free of discrimination,⁸⁹ the right to run a business.⁹⁰ It has also limited Article 10 rights in the name of the

⁸⁴ Ibid pp 237–53. See also Conseil d’Etat, Decision 286798, *Faiza M*, available at: www.conseil-etat.fr/fr/selection-de-decisions-du-conseil-d-etat/analyse-n286798-mme-m.html.

⁸⁵ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12; addendum [2005] OJ L204/24.

⁸⁶ n 12 above.

⁸⁷ Ibid.

⁸⁸ European Convention on Human Rights, Art 9(2).

⁸⁹ n 11 above, *Egenberger* and *JQ v IR*.

⁹⁰ n 11 above, *Achbita*.

more abstract principles such as idea of the religious neutrality⁹¹ and the need to ensure that any measures taken to accommodate religious freedom are proportionate.⁹²

(c) Generally Applicable Rules and Article 10

10.37 Indeed, overall, the Court of Justice has been reluctant to read exemptions into generally applicable laws on the basis of Article 10. In *Tietosuojavaluutettu v Jehovan todistajat*⁹³ the Court found door-to-door preaching and retention by Jehovah's Witnesses, of notes with information on those preached to, did not fall within the exception for purely personal or household activities provided by EU data protection law. The Court rejected the argument that Article 10 of the Charter meant that because this preaching was a personal religious practice of members of a religious community, an exemption from data protection legislation ought to be given. It accepted that the activity of preaching door to door was protected by Article 10 but found that did not mean that such an activity had to be considered to fall within the exemption. Instead it found that because preaching 'extends beyond the private sphere of a member of a religious community who is a preacher' it cannot be seen as falling within the category of purely personal or household activities.⁹⁴

10.38 The Court of Justice has been reluctant to interfere with rules that are formally neutral and generally applicable, even where the rules in question were either motivated by a reaction to, or have a heavier impact on, a particular faith. Thus, in *Acbhita* the Court was willing to characterize a rule banning all religious, philosophical or political symbols as one which 'must (...) be regarded as treating all workers of the undertaking in the same way, by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs.'⁹⁵ This is an approach that may be hard to avoid given the strong commitment in the ECHR caselaw on Article 9 and in EU law more generally to treat religious and non-religious beliefs equally. Moreover, when there were allegations, as in *Bouganaoui*, that the restriction was not generally applied but targeted a particular faith, the Court was clear that such a restriction was directly discriminatory and could only survive if justified by a genuine and determining occupational requirement.⁹⁶

Similarly in *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen et al v. Vlaams Gewest*⁹⁷ the Court was faced with a reference from a Belgian Court querying the validity of a Regulation 1009/2009, Article 4(4) of which exempted religious slaughter of animals from compliance with animal cruelty laws provided that such slaughter took place in an approved slaughterhouse that met the hygiene requirements set out in a 2004 Regulation. The Flemish government decided to discontinue a previous practice of approving temporary slaughter houses for the period of the Muslim Feast of Sacrifice when there is heavy demand for halal slaughter on the basis that such temporary slaughter houses did not meet hygiene requirements of the 2004 Regulation. A number of mosques challenged the validity of the relevant EU legislation, arguing that it violated the right religious freedom protected by Article 10.

The Court of Justice upheld the validity of the legislation. It noted that the relevant regulation. It accepted that ritual slaughter fell within the bounds of religious freedom but noted that Article 4(4) provided an exemption permitting it to take place. The requirement that such slaughter take place in an approved slaughter house 'applies in a general and neutral manner to any party that organises

⁹¹ Ibid. The Court of Human Rights has also upheld restrictions on religious freedom justified by the need for the state to religiously neutral see *Ebrahimian* n 56 above.

⁹² n 89 above.

⁹³ Case C-25/17 *Tietosuojavaluutettu v Jehovan todistajat*.

⁹⁴ Ibid. para. 50.

⁹⁵ n 57 above.

⁹⁶ n 59 above.

⁹⁷ n 70 above.

slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union'.⁹⁸ Requiring that slaughter take place in an approved slaughterhouse aimed at ensuring both limitation in animal suffering and protection of human health and accordingly no violation of Article 10 had occurred.⁹⁹ The referring Court had noted that the restriction meant that the restriction meant that there was insufficient capacity to meet the demand for ritually slaughtered meat in the Flemish region during the Feast of Sacrifice. However, the Court of Justice held that validity of the Regulation across the entire Union could not be prejudiced by specific local conditions in parts of Flanders.¹⁰⁰ The referring Court had only asked for guidance on the question of the validity of the regulation. It had not asked the Court of Justice for guidance on whether the interpretation of the Regulation in the specific case ought to provide for such an exemption and accordingly the Court of Justice did not discuss that issue.

(d) *Secularism and Limits on Religion in Public Institutions*

10.39 Though it sees religious freedom as one of the most important freedoms,¹⁰¹ the Strasbourg Court has also seen politically ambitious religion as a threat to liberal democracy and has been willing to restrict religious freedom on that basis. In addition to the restrictions on religious dress in state contexts discussed above,¹⁰² in *Refah Partisi v Turkey*,¹⁰³ the Court upheld the dissolution of a political party that was alleged to aim at the introduction of a theocratic regime in Turkey. The Court held that theocracy was incompatible with the Convention, and that states were justified in taking restrictive measures to prevent it. Such an approach is consistent with that of EU institutions which have insisted, in the context of the enlargement process, that limitation on the political and legal influence of religion is a requirement of membership of the Union.¹⁰⁴

V. Remedies

10.40 The question of remedies and Article 10 is most likely to arise in relation to the interpretation of national legislation implementing EU law in areas such as employment discrimination. Member States have long been constrained to respect the fundamental rights reflected in the Union's general principles of law in implementing and derogating from EU law.¹⁰⁵ The Charter reinforces this obligation. There is also the possibility that EU secondary legislation may be found to breach Article 10 and may therefore be void. The most important cases of *Achbita*, *Bougnaoui*, *Egenberger* and *JQ v IR* all came to the Court via references from national courts under Article 267. It is notable that in the first three of those cases the Court of Justice did not content itself with giving broad guidance but gave a strong steer to the national courts as to how they should approach the key issues of distinguishing between indirect and direct discrimination (*Achbita* and *Bougnaoui*) and in relation to the requirements of proportionality (*Egenberger* and *JQ v IR*) in the individual cases. In addition, in *Egenberger* and *JQ v IR*, the Court of Justice held that the principle of non-discrimination contained in Directive 2000/78 was a codification of the self-executing general principle non-discrimination in EU law and was therefore binding

⁹⁸ *Ibid.* para. 61.

⁹⁹ *Ibid.* paras. 66-68.

¹⁰⁰ *Ibid.* paras. 73-78.

¹⁰¹ *Thlimmenos v Greece* (2000) 31 EHRR 411.

¹⁰² n 56 above.

¹⁰³ n 61 above.

¹⁰⁴ n 51 above, ch 6.

¹⁰⁵ See Case C-260/89 *ERT* [1991] ECR I-2925.

horizontally as well as vertically.¹⁰⁶ In the *Liga van Moskeeën* case on the other hand, the Court restricted itself to answering the question posed on the validity of the legislation in question and avoided ruling on whether the legislation as applied by the Flemish Government may have violated the Charter.

E. Evaluation

10.41 Article 10, like Article 9 ECHR, begins with the words ‘Everyone has the right ...’, thus reflecting the fact that the protection of freedom of thought conscience and religion under the Charter oriented towards protecting a largely individual right, albeit that it can be exercised in community with others and by collective institutional means. The grouping of ‘thought, conscience and religion’ together reflect the predominant Western view of religion as a matter of individual belief, rather than a matter of behaviour and following a certain way of life.¹⁰⁷ This is reflected in the commitment seen in *Achbita* to treating religious freedom as primarily a matter of individual choice of beliefs and the consequent commitment to treating religious and non-religious beliefs equally. There is, of course, nothing wrong with the fundamental rights documents of a community of European states reflecting predominant European ideas of religion, and such cultural conceptions of religion may reflect deep moral norms in relation to what it is that is morally valuable about religious freedom. This may, however, mean that religions whose formative cultural influences are non-European, may struggle to fit their claims into the structures of Article 10 to a greater degree.

10.42 Furthermore, Article 10 is linked to a broader network of individual autonomy rights in matters such as privacy (Art 7), freedom of expression (Art 11) and freedom of association (Art 12), all of which reflect the Union’s stated desire to place ‘the individual at the heart of its activities’.¹⁰⁸ Thus the commitment in Article 10 is part of a wider commitment to individual autonomy and which values religious freedom as a means through which individuals can construct their own identity and come to their own conclusions on fundamental matters.¹⁰⁹ This is a very secular view of religion, which, as I have written elsewhere, sees it as worthy of protection only ‘insofar as our commitment to human autonomy compels us to ensure that all items are on the “menu” in the cultural and philosophical restaurant.’¹¹⁰ Such a view is in some ways inconsistent with the collective claims of many religions which, as Delacoura notes, draw strength from ‘socialisation, worship and the existence of taboos’¹¹¹ and which have had a very complex and conflicted relationship to individual autonomy over the centuries.

10.43 This emphasis on religious freedom as an element of individual autonomy is reflected in the fact that the main right protected by Article 9 ECHR and Article 10 of the Charter is one of private, individual autonomy. Religious freedom beyond the personal and private zone is, to a significant degree, a zero-sum game where more freedom for one party results directly in less religious freedom for another. Thus, European fundamental rights norms have been willing to give states a relatively free hand to restrict religious freedom in public contexts in order to balance it against other rights such as freedom from discrimination.

10.44 Though heavily focused on individual autonomy in religious matters, European fundamental rights norms are also underpinned by significant recognition of the cultural importance of religion for

¹⁰⁶ n 11 above, *JQ v IR* and *Egenberger*.

¹⁰⁷ See W Cantwell Smith, *The Meaning and the End of Religion* (New York, Macmillan, 1963) chs 2 and 3, which state that the notion of religion, let alone the primacy of particular beliefs as opposed to a religious way of life, is alien outside traditional European religions.

¹⁰⁸ n 1 above, Preamble.

¹⁰⁹ For liberal defences of religious freedom see R Dworkin, *Taking Rights Seriously* (Cambridge MA, Harvard University Press, 1977) 272–73 and C Laborde *Liberalism’s Religion* (Cambridge MA, Harvard University Press, 2017).

¹¹⁰ n 51 above, p 111.

¹¹¹ K Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations* (London, IB Tauris, 1998) 11.

European states. Particular religious traditions have had formative influences on national identity and national symbols and freedom of religion has not been held to require states to remove religiously specific cultural symbols from public contexts.¹¹² EU anti-discrimination legislation also permits Member States to facilitate the continued role of religious institutions in areas such as education and healthcare by disapplying some anti-discrimination laws to their employment practices, though it has required that any such exemptions satisfy a proportionality test.

F. Conclusion

10.45 The overall picture is of an EU legal order that is reluctant to interfere with substantive Member State choices in relation to the relationship between religion, state and law but which is willing to intervene at the edges to ensure that restrictions on religious freedom are applied in ways that do not target particular faiths and are not disproportionate. Thus, Member States may require employers to allow religious symbols at work or may permit them to impose a neutrality requirement, but they must not allow bans that selectively target the symbols of one faith. Similarly, Member States can grant or refuse exemptions to religious employers from anti-discrimination rules but they must ensure that any exemptions given are proportionate in their impact on the rights of employees.

While some may regret the failure of EU law to take a strong stand either in favour of institutional religious autonomy or against discrimination in the workplace, European institutions, particularly judicial institutions, simply do not have the democratic legitimacy to impose sweeping changes on relationships between state and particular faiths in an area as sensitive as this so a degree of pragmatic compromise and tolerance of divergent approaches amongst Member States is inevitable. Given the political salience of the issues underlying these cases, the fact that the Court of Justice has adopted a cautious approach is not surprising. There is no consensus in Europe about how best to approach the issue of religion's role in public life in the context of religious and demographic change. Various countries have tried different approaches. Some countries, such as the UK, have felt it best to allow religious expression in a wide range of public contexts. Others, such as France, have taken the opposite approach and have pursued a policy that sees coexistence as best served by a degree of reticence in relation to religious expression in non-private contexts. Each approach has its critics. Many French people see the approach adopted in France as overly restrictive, just as many British people argue that cohesion and coexistence have not been well served by the UK's approach. Other states like the Netherlands have switched to some degree from one approach to the other.

The fact that pan-European institutions have not stepped in and imposed what people view as ideal solutions is more of a reflection of a healthy degree of doubt than anything else. Europe is undergoing changes in its religious make up that are without precedent. For centuries, the vast majority of Europeans were Christian. We are moving to a situation where in the space of a few decades the majority of Europeans are likely to be non-religious with a large, intensely religious Muslim minority in many countries. This is a change of such magnitude that it is simply impossible to know how it is going to turn out. Things may work out well or they may not. But it is certain that there will be enormous unanticipated outcomes, positive and negative, and significant issues to deal with along the way. No one has, as yet identified the best way to manage this changing religious situation. Both countries with integrationist approaches and countries with multiculturalist approaches have their problems. It would represent an extraordinary degree of confidence for the ECtHR or the CJEU to think it could identify and impose a single ideal approach for all its states. It is much more sensible to allow Member States

¹¹² *Lautsi v Italy*, Application 30814/06, Grand Chamber, 1M march 2011.

to experiment with different approaches but to ensure that in doing so, the states remain within the bounds of basic liberal democratic, egalitarian norms.

10.46 Although their ambitions must, necessarily be limited, European institutions can still play a valuable role. The Court has ensured that the state power to regulate religious life cannot be used as a means to harass religious minorities. It has also ensured that traditional symbolic arrangements that are actively oppressive cannot stand. In relation to discrimination on grounds of religion at work, EU anti-discrimination law, while giving Member States broad latitude, has also ensured that individual religions cannot be selectively targeted by supposedly 'neutral' rules.