

Religion and the Public Order of the European Union

Paperback Edition

Foreword

Since the publication of the hardback edition of this book, the relationship between law, politics and religion in Europe has remained in the headlines. It is likely that prefaces to future editions will be able to say the same thing. Debates on the role of religion in contemporary European society defy easy solution and create unusual, and therefore unusually interesting, combinations of allies and enemies. The Left, which has traditionally been both anti-clerical and pro-immigration has struggled to come up with a united response to claims that the limitations on religion's public role inherent in European secularism must be curtailed to accommodate the religiosity of some migrant communities. The Right, traditionally more favorable to religion's role in public life but less favorable to migration, is equally split between those who welcome the questioning of the secular paradigm and those who oppose accommodation of religious demands of migrants as a threat to national identity.

The continuing salience of religion in world affairs and the intensity of debate around the role of religion in public life in Europe remind that, as Mark Lilla showed,¹ separation of religion and politics is not inevitable or natural but rather the outcome of particular historical circumstances. The role of religion in the legal and political order of the EU is based on a very specific European template blending Christianity and secular humanism. While secularism was, in many ways, a child of Christian thinking, it has proved to be a very rebellious child which has imposed much greater limitations on the ability of religious bodies to influence law and politics than many Christian churches would have liked.

European approaches to religion, though the product of a specific past, also have virtues independent of their lineage. The example of theocracies such as Saudi Arabia and Iran show how the restriction of religious influence over law and politics serves important goals and cannot be said to be simply a sham designed

¹ M Lilla, *The Stillborn God: Religion, Politics and the Modern West*, (New York, Knopf, 2007).

to exclude outsiders (even if such limitations are, as in the case of the French Front National, opportunistically embraced by those with such an exclusionary agenda.) Restrictions on religious influence over public life can be legitimate even if they are more difficult to swallow for those with cultural origins beyond Europe. However, the fact that such arrangements may be unfamiliar or difficult for some elements of European society makes it all the more imperative that limitations on religious influence are fairly applied. There has been, as the hardback edition noted,² an uncritical assumption on the part of EU institutions that culturally-entrenched Christian faiths accept the limits on their public role inherent in European approaches to religion, law and state that has not always been warranted.

Furthermore, the cultural context in which culturally-entrenched Christian faiths have exercised formative influences on the national cultural identities of Member States makes the risk of unequal treatment of minority religions all the more acute. If, as Edmund Burke said, society is a contract between those who are dead, those who are dead and those who are to be born, then the public life of societies that desire to have a link to an imagined shared past will inevitably bear some traces of the predominantly Christian nature of that past. The dual national-cultural and religious elements of some national symbols has brought up complex legal issues. The European Court of Human Rights has accordingly been required to consider when a cross may be more or less than a cross. In *Lautsi v Italy*³ the Grand Chamber characterized the display of a crucifix as a decision to ‘perpetuate a particular cultural tradition’.⁴ There is something in this reasoning, the presence of crosses on Scandinavian flags is surely something more than the display of a religious symbol. Yet, it must also be recognized that more national symbols are religiously-specific the more difficult it will be to get newcomers and their descendants from other religious traditions to identify with the national community. A failure to offer an inclusive version of national identity can only

² See Chs 5, 6 and 7.

³*Lautsi v Italy* (Application 30814/06) Judgment of 3 November 2009 (Second Section), Judgment of 18 March 2011 (Grand Chamber).

⁴ *Ibid.*, Grand Chamber judgment, para. 68.

increase demands for special communal arrangements with the consequent undermining of the ideal of common citizenship. As Laborde has rightly suggested,⁵ European states need to be open to critical reexamination of established patterns of dealing with religion in order to ensure that hidden biases and unfairness are not perpetuated. However, European institutions with their limited democratic mandate must necessarily have a secondary role in such a process. The role of the European Court of Human Rights is to ensure that states' approaches to the relationship of religion, law and state remain within broadly liberal democratic parameters, not to ensure that states have ideal or perfectly egalitarian arrangements.

As this book showed, the EU has had to approach the vexed question of the relationship between religion, state and law in a manner that is sensitive to the limitations of the Union's own democratic legitimacy. The Union has sufficient difficulties to deal with without provoking the intense conflict that a European-level attempt to alter the relationship between law, state and religion in a fundamental way would provoke. It has maintained the secularity of its own political and legal institutions while reaching out to religious bodies and managing the continuing religious influence over law in member states by re-characterizing such influence as an element of cultural identity. As I wrote in chapter 7, conceiving of religious influence in this way does privilege culturally-entrenched faiths but also keeps open the channels through which religious minorities can, over time, make their contribution.

Since the publication of the hardback edition of this book there have been a number of significant decisions of European courts in relation to the relationship between religion, state and law. In general they follow the established pan-European template of facilitating religion as an element of personal or cultural identity while restricting its ability to exert direct influence over the legal and political arenas or to compromise the autonomy rights of others.

⁵ C. Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford, Oxford University Press, Oxford Political Theory series, 2008).

Religious Symbols in National Life

The hardback edition of this book noted how that decision of the Second Section of the Court of Human Rights in *Lautsi v Italy*⁶ that the presence of crucifixes in Italian state schools violated the Convention, represented a significantly more restrictive approach on the part of European institutions to the regulation of religious symbols in public life. The decision of the Grand Chamber reversed this decision and restored the more a permissive approach that allows states to reflect, through the use of particular symbols in public contexts, the role of a particular faith in national identity provided that such recognition does not shade into indoctrination. It is notable that, although it overturned the decision of the Second Section of the Court, the Grand Chamber largely followed the reasoning of the original decision insofar as it precluded the state from promoting the truth claims of any faith. The Grand Chamber acknowledged that the crucifix was ‘above all a religious symbol’⁷ but noted the Government’s argument that it had ‘not only a religious connotation but also an identity-linked one [...] which they considered it important to perpetuate’.⁸ On this basis the Court found no violation on the basis that ‘the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent state’.⁹ Thus, the status of the crucifix as an element of national cultural tradition meant that its display in the context of schools did not (in the context of a school system which was found not to engage in religious indoctrination) amount to a breach of the Convention. The recognition of the dual nature of the cross in the Italian cultural context seemed to suggest that there are certain symbols which, though religious, can be expected to be identified with by all members of a national community by virtue of their role in the construction of a national culture. Like the EU’s public order therefore, the Court regarded the Convention as being capable of accommodating religion in the public life of Member States in so far as it could be repackaged as tradition provided that such recognition did not constitute state recognition of religious truth claims and

⁶ n 3 above.

⁷ n 3 above, para 66.

⁸ *Ibid.* para 67

⁹ *Ibid.* para 68

did not amount to indoctrination. This is a difficult balance to maintain. The religiously specific nature of national histories is a reality but the Court itself recognized in the judgment that the crucifix is primarily a religious symbol and the more religiously specific the symbols of the state are the more difficult it will be to win broad identification with the state in from a religiously diverse population.

Religious Freedom and Anti-Discrimination Norms

In early 2013 the Court of Human Rights issued its decision in *Eweida and Others v. the United Kingdom*¹⁰ a challenge by four British nationals who were either prevented from wearing religious symbols at work (Eweida and Chaplin) or disciplined for refusing to abide by their employers' policy that staff refrain from discrimination on grounds of sexual orientation (McFarlane and Ladele). They argued that the failure to accommodate their religiously-motivated requests violated the freedom of religion guaranteed by Article 9 (Eweida, Chaplin and McFarlane) or the right to equal treatment guaranteed by Article 14 when read in conjunction with Article 9 (Ladele). In *Eweida*¹¹ the Strasbourg Court abandoned previous jurisprudence which had held that the right to resign was sufficient protection of the freedom of religion of employees whose religious beliefs or practices came into conflict with workplace arrangements. It held that where there is a restriction of freedom of religion in the workplace 'the better approach would be to weigh [the possibility of resignation] in the overall balance when considering whether the restriction was proportionate'.¹² In the event, three of the four claims were rejected. The Court held that hospital hygiene requirements justified the refusal to permit a nurse (Chaplin) to wear a cross on a chain around her neck while at work and that the refusal of the employers of a civil registrar (Ladele) and a sexual therapist (McFarlane) to allow them to refuse to provide

¹⁰ Application nos. 48420/10, 59842/10, 51671/10 and 36516/10), Judgment of 15 January 2013.

¹¹ For a full account of the judgment see R McCrea, Religion in the Workplace: *Eweida and Others v United Kingdom*, *Modern Law Review*, (forthcoming). See also R. McCrea, 'Strasbourg Judgement in *Eweida and Others v United Kingdom*' UK Const. L. Blog (16th January 2013) (available at <http://ukconstitutionallaw.org>).

¹² n 9 above, para 83.

services to gay and lesbian clients was justified as the refusal 'aimed to secure the rights of others which are also protected under the Convention'¹³ and thus fell within the State's margin of appreciation. Ms. Eweida's claim succeeded as the Court, noting that her employer permitted other religious symbols and had changed its policy to allow the wearing of the cross at work, felt the initial refusal to allow her to wear the cross was disproportionate.

This decision brings the Strasbourg jurisprudence in line with the approach of EU law. Directive 2000/78,¹⁴ by prohibiting indirect discrimination in employment, already prohibits:

any apparently neutral provision, criterion or practice [which] would put persons having a particular religion or belief (...) at a particular disadvantage compared to other persons unless (...) [it] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁵

Thus, workplace arrangements that restricted religious freedom would already have been seen under EU law as needing to satisfy the kind of proportionality test set down in *Eweida*. In addition, just as the Court recognized in the cases of *Ladele* and *McFarlane* that the rights and freedoms of others can form the basis for the legitimate restriction of religious freedom, Article 2(5) of the Directive provides that the Directive is:

without prejudice to measures laid down by national law which in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

¹³ In the cases of *Ladele* and *McFarlane* the ruling also found that any indirectly discriminatory impact of the policy was justified by the goal of protecting the rights of others (paragraphs 105 to 110).

¹⁴ See Ch 5 for detailed discussion of the Directive.

¹⁵ Article 2(2).

The decision of the majority in *Eweida* that measures requiring employees to abide by policies requiring them not to discriminate in the provision of services even in circumstances where others are willing to step in and provide the relevant service, is also in line with the approach of EU law. As the opinion of Advocate General Maduro in *Coleman*¹⁶ noted, EU anti-discrimination law aims to protect the dignity as well as the autonomy of individuals. Accordingly a workplace rule that aims to protect against the moral harm caused by acts of discrimination as well as the substantive harm of service deprivation would seem to be compatible with the equality jurisprudence of both the Strasbourg and Luxembourg Courts.¹⁷ Therefore, while *Eweida* does signal a significant shift in the approach of the Court of Human Rights to Article 9, this shift is unlikely to bring about any conflict with or change to the approach of EU law.

Recent CJEU Jurisprudence

There have been four religion-related cases decided by the CJEU since the text of the hardback edition was finalized. Two dealt with derogations from free movement rights on grounds of public morality, one with EU level regulation of a religiously-sensitive matter and one with the concept of persecution on grounds of religion in relation to asylum.

Morality-Based Derogations from EU Rules

In Case C-447/08 *Sjöberg*¹⁸ the Court scrutinised the compatibility of Swedish restrictions on gambling with free movement rights. It stated that:

a certain number of overriding reasons in the general interest have been recognized by the case-law such as the objectives of consumer protection, and the prevention of fraud and incitement to squander money on gambling, as well as the general need to preserve

¹⁶ Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603, Opinion of Advocate General Maduro.

¹⁷ For a discussion of these issues in relation to the *Ladele* case see R McCrea 'Discriminatory Acts Have Moral Significance' *The Law Society Gazette*, 6 September 2012, <http://www.lawgazette.co.uk/opinion/comment/discriminatory-acts-have-a-moral-significance> (last accessed 7 August 2013).

¹⁸ Judgment of the Court (Fourth Chamber), 8 July 2010.

public order (...) legislation on gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question¹⁹

It went on to state that:

Considerations of a cultural, moral or religious nature can justify restrictions on the freedom of gambling operators to provide services, in particular in so far as it may be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune. According to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of gambling by entrusting it to public or charitable bodies',²⁰

This passage deserves close scrutiny. It could be argued that the phrase 'considerations of a cultural, moral or religious nature can justify restrictions' (emphasis added) implies that a restriction justified on religious grounds alone would be acceptable in EU law. I think that this is to misread the judgment. The Court was not dealing with a case of a restriction justified only on religious grounds. Indeed when the Court cites the objectives previously recognized in the case-law it cites 'consumer protection, prevention of fraud and incitement to squander money on gambling, as well as the general need to preserve public order' and preventing 'private profit from being drawn from the exploitation of a social evil or the weakness of players and their misfortune.' These are all objectives that are independent of any religious condemnation of gambling. It is possible that a religiously-justified restriction could come in under the concept of 'public order' but in the light of the kind of justifications cited by the Court the better approach would be to regard the case as indicating that religious values can play a part as

¹⁹ *Ibid.* paras 36 and 37.

²⁰ *Ibid.* para 43.

an element of a broader public morality constituted by ‘considerations of a cultural, moral or religious nature’ rather than a sufficient ground on their own. To hold otherwise would be inconsistent with the broader balance between religious and humanist influences that characterizes the Union’s approach in other areas such as the Preamble to the Lisbon Treaty, its dialogue with religious bodies and its anti-discrimination law all of which see religion as an factor which may be accommodated as part of a broader set of values but which cannot claim legal authority in its own right.²¹ It is simply inconceivable that a Member State would seek to derogate from EU law duties on the basis legislation that claimed its sole basis in the need to enforce compliance with a divine mandate. This would be markedly in tension with the ruling of the Strasbourg Court in *Refah Partisi v Turkey*²² which, as discussed in Chapter 6, held that separation between religion and law is an indispensable element of European liberal democracy and would go against the clear and consistent policy of the Union in Enlargement that democratic secularism is a condition of membership.

In Case C-165/08 *Commission v Poland*,²³ the Court was faced with a Polish to restrict the movement of genetically modified organisms. Having initially defended the restriction on grounds of potential damage to the environment and human health, the Polish authorities later sought to justify the relevant national measure on the basis of:

a Christian conception of life which is opposed to the manipulation and transformation of living organisms created by God into material objects which are the subject of intellectual property rights; a Christian and Humanist conception of progress and development which urges respect for creation and a quest for harmony between Man and Nature; and, lastly, Christian and Humanist social principles, the reduction of living organisms to the level of products for purely commercial ends being likely, inter alia, to undermine the foundations of society²⁴

²¹ See Chps 3 and 5.

²² (2003) 37 EHRR 1.

²³ [2009] ECR I-06843.

²⁴ *Ibid.* para 31.

This represented the most clear attempt to date to have predominantly religiously-justified norms recognized within EU law. It is noteworthy that, even when seeking to justify a measure that relied on religious justifications, the Polish authorities felt obliged to describe the relevant source as ‘Christian and Humanist values’ or ‘ethical and religious considerations’ (emphasis added). As it has previously done when faced with highly controversial ethical issues,²⁵ the Court chose to sidestep the broader question. It ruled that

‘for the purposes of deciding the present case, it is not necessary to rule on the question whether – and, if so, to what extent and under which possible circumstances – the Member States retain an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which [restrict EU free movement rights].’²⁶

This was because

the Republic of Poland, upon which the burden of proof lies in such a case, has failed, in any event, to establish that the true purpose of the contested national provisions was in fact to pursue the religious and ethical objectives relied upon²⁷

These two cases are therefore, largely consistent with the broader approach of the Union to religion set out in this book under which religious norms can exercise some influence over law insofar as they can be repackaged as national cultural or ethical norms which the Union’s commitment to the autonomy of Member States requires it to facilitate. This facilitation is however, limited by a commitment to the secular nature of the legal and political systems. Indeed, the commitment to the exclusion of religious authority over law and politics is so deeply embedded in the European system that the Court is unlikely to be faced with national legislation that explicitly seeks to give the force of law to a religious norm. Of course, ‘repackaging’ religious norms as part of Member State culture, or as part of a broader public morality that draws on a number of sources, may in the case of a country which has a dominant and politically powerful faith, amount to no more

²⁵ See for example Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

²⁶ n 21 (above) para 51.

²⁷ *Ibid.* para 52.

than disguised legal enforcement of religious truth. It is perhaps for this reason that the Court, in *Poland v Commission*, specifically reserved the issue of ‘whether and if so, to what extent and under which possible circumstances –the Member States retain an option to rely on ethical or religious arguments [to justify measures derogating from EU law].’ In any event, the requirement of repackaging, though not an absolute guarantee against the use of legal authority to enforce religious truth, has valuable effects at national level as it precludes invocation of religious authority as a conclusive factor in debate on a particular matter. This enables religious minorities and those of no faith, even if they lose a particular vote, to continue to participate in public debate and to hold open the possibility of changing the law in ways which are inconsistent with the orthodox teaching of the majority faith.²⁸

Both *Sjöberg* and *Commission v Poland* represented cases where the Court had to address claims by Member States to have moral norms that potentially drew on religious sources, accommodated within EU law. In Case C-34/10 *Brüstle v Greenpeace*²⁹ the Court had to address the question of moral principles laid down by the Union’s own legislature in relation to the religiously-sensitive issue of the patentability of human embryonic cells. In the event, the Court adopted a very broad definition of ‘human embryo’ thus significantly restricting the patentability of inventions arising from stem cell experimentation. This was a result that was a welcome one for many religious groups. It is notable that in reaching this decision referred to the aim of the Union’s legislature to ensure ‘respect for human dignity’ and to ‘questions of an ethical nature’.³⁰ While the religious convictions of individual legislators may have played a role in reaching this decision, neither the relevant legislation nor the judgment of the Court referred to religion or religious values in anyway. Such an approach is consistent with the idea that the Union’s public order is comfortable dealing with religious claims to influence law only insofar as they can be repackaged as elements of individual or national identity and that, even where religious ideas may have strong background influence, the

²⁸ See Chp 7.

²⁹ Judgment of the Court (Grand Chamber) of 18 October 2011.

³⁰ *Ibid.* paras 30 and 34.

Union's own lawmaking bodies will require religious arguments to be translated into secular terms before they can form part of legal norms.

Article 10 of the Charter of Fundamental Rights

Article 10 of the Charter of Fundamental Rights (protection of freedom of conscience and religion) was considered for the first time by the CJEU in joined cases C-71/11 and C-99/11 *Y and Z*.³¹ In these cases the Court 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.³² 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, could public manifestation of a religious faith fall within such a core. The CJEU 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 in 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.³³

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

³¹ Judgment of 5 September 2012 (Grand Chamber).

³² Council Directive 2004/83/EC of 29 April 2004 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 (OJ 2004 L 304, p. 12; addendum OJ 2005 L 204, p. 24)

³³ n 29 above, para 20.

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’³⁴ and that freedom of religion is ‘one of the foundations of a democratic society’, and a ‘basic human right’³⁵ while at the same time noting that it is a right that could be restricted.³⁶ This approach is very much in line with existing Strasbourg caselaw.³⁷ Finally, the Court’s explicit recognition of the importance of including non-religious beliefs and the right not to abstain from religious practice within the protection of Article 10 of the Charter underlines the fact that the Union does not privilege religious over non-religious worldviews and that the freedom to choose one’s religion and beliefs rather than protection of religion per se is the primary goal of Article 10.

EU Guidance on Promotion and Protection of Freedom of Religion or Belief

Finally, I should note the continued evolution of a distinctive Union policy on religious matters that was represented by the publication by the Foreign Affairs Council of the EU of *Guidelines on the Promotion and Protection of Religion or Belief*³⁸ in June 2013. As a document, produced by the Foreign Affairs Council, the Guidelines are intended to guide the Union in its dealings with other countries rather than to establish a common religious policy for internal purposes.

Their content is very much in line with the tone of the judgment in *Y and Z*, and the overall approach of the EU outlined in this book. They note the fundamental nature of the right to freedom of religion and belief but also underlines the Union’s secular nature. The Guidelines explicitly state that the rights of those holding non-theistic or atheistic beliefs as well as the rights of those who leave or change religion must be equally protected and note that ‘international human rights law protects individuals, not Religion or Belief per se’.³⁹ Furthermore, Paragraph 7 of

³⁴ *Ibid.* para 56.

³⁵ *Ibid.* para 57.

³⁶ *Ibid.* paras 58 to 68.

³⁷ See ch 4.

³⁸ Council of the European Union, Foreign Affairs Council Meeting, Luxembourg 24 June 2013,

³⁹ Paragraph 32 (b). COMECE, which represents the Catholic Bishops in the EU, while welcoming the Guidelines, suggested that a future review may consider placing greater emphasis on the “collective dimension of religious freedom” and

the Guidelines underscores the strict religious neutrality that characterizes the Union's own political order⁴⁰ stating that

the EU focuses on the right of individuals to believe or not to believe and, alone or in community with others, to freely manifest their beliefs. The EU does not consider the merits of the different religions or beliefs, or lack thereof but ensures that the right to believe or not to believe is upheld. The EU is impartial and is not aligned with any specific religion or belief.

As well as urging a broad approach to freedom of religion and belief, including a call to ensure that it is not limited to 'to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions',⁴¹ the Guidelines also address the controversial question of the relationship between religious freedom and other rights, particularly freedom from discrimination and freedom of expression.

They frankly acknowledge that 'certain practices associated with the manifestation of a religion or belief, or perceived as such, may constitute violations of international human rights standards'.⁴² They are clear that the EU is 'firmly opposed' to the justification of such violations on the grounds of freedom of religion or belief noting specifically the importance of the rights of women, religious minorities and those discriminated against on grounds of sexual orientation and gender identity.⁴³ Thus, by acknowledging that anti-discrimination norms can provide a limit to religious freedom, the Guidelines do not appear to set the EU against the kind of restrictions on religious liberty upheld by the Strasbourg Court in the cases of *Ladele* and *McFarlane*.

ensure that it is "not simply an individualistic interpretation of this right that is promoted" See COMECE, "Religious Freedom Guidelines: A Welcome Step Forward", Press Release, 25 June 2013. Available at: <http://www.comece.org/site/en/press/pressreleases/newsletter.content/1613.html?SWS=a32df33eb36d0eefc4960e9040663175> (last visited 1 August, 2013).

⁴⁰ See chps 3, 5 and 6.

⁴¹ Para 11.

⁴² Para 26.

⁴³ Paras 26 an 27.

In relation to freedom of expression, which has been equally politically-charged in recent times, the guidelines tread a fine line. The complicated nature of the wording of the relevant section of the Guidelines reflects the politically-sensitive nature of this issue. They begin by setting out the kind of situation under which clashes between religious claims and freedom of expression typically occurs describing the relevant scenario as one ‘when critical comments are expressed about religions or beliefs and such expression is perceived by adherents as being so offensive that it may result in violence towards or by adherents’.⁴⁴ In these circumstances the Guidelines state that

if there is a prima facie case that this constitutes hate speech, ie falls within the strict scope of article 20 paragraph 2 of the ICCPR (which prohibits any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence), the EU will denounce it, and demand that it be investigated and tried by an independent judge.⁴⁵

The EU is therefore in favour of prosecution only where the speech amounts to hate speech, which is defined as incitement to discrimination, hostility or violence. Notably absent from this definition is the prosecution for injury to feelings or to the dignity of a religion (a point reinforced by the statement elsewhere in the Guidelines which state, as noted above, that religion per se is not protected by human rights law). Furthermore, the guidelines go on to say that where expression does not rise to the level of hate speech it is ‘an exercise in free speech [and] the EU will: [...] resist any calls or attempts for the criminalization of such speech’ and will ‘condemn violence committed in reaction to such speech’ and 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’.⁴⁶ Interestingly, though some Member States have blasphemy laws⁴⁷ the Guidelines

⁴⁴ Para 32.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Such laws are rarely enforced due to cultural norms and countervailing legal commitments to free speech. For a discussion of the future of such laws in an increasingly diverse religious environment see R. McCrea “Is Migration Making Europe More Secular?” *Aeon Magazine*, 17 June 2013. Available at:

commit the EU to recommending decriminalization of blasphemy ‘on appropriate occasions’ on the basis that note 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.

The Guidelines relate only to religion as a fundamental right and, as already noted, guide the EU’s external action and do not apply internally. Accordingly, they do not need to take account of the complexities raised by the institutional and cultural role of religion in the Member States.

Nevertheless they bear the some of the hallmarks of the Union’s internal approach to religion most notably in relation to the strict religious neutrality of the EU’s own institutions and a determination to protect and facilitate religion as a form of identity insofar as it does not come into conflict with key liberal democratic norms. Interestingly, despite the considerable deference shown by the Union to Member State arrangements on religious matters, in relation to two of the most high profile clashes between religious and other rights claims in Europe in recent times, namely the clashes in relation to insult or ridicule of religion and the clash between anti-discrimination norms and religious freedom, the Guidelines agreed by Member States appear to show a high degree of consensus that religious claims should not be accorded priority. Indeed, the Guidelines were criticized in *The Economist* on the basis that they present to the world ‘a Union which makes detailed prescriptions to outsiders but carefully avoids imposing a particular religious regime on its own members’.⁴⁸ While there is something to this criticism, it is overstated. The Guidelines do not stray far beyond that standards set out in the ECHR which all Member States must respect.

<http://www.aeonmagazine.com/world-views/ronan-mccrea-secular-europe/>
(last visited 1 August 2013).

⁴⁸ “A Religious Policy by Stealth” Erasmus Blog, *The Economist*, 3 July 2013.

<http://www.economist.com/blogs/erasmus/2013/07/eu-and-faith?fsrc=scn%2Ffb%2Fwl%2Fbl%2Freligouspolicy> (last visited 1 August 2013).

As this book shows, the Union does have a distinctive approach to religious matters. This approach is one that accords significant latitude to Member States, particularly when religious claims can be repackaged as part claims to national cultural autonomy. Nevertheless, it is also one that insists on protection of religious freedom and on the primacy of liberal democracy and the secular political and legal order. Perhaps a more intensively-integrated Union will emerge from the Eurozone crisis and perhaps such a Union will proceed to harmonize European approaches to religious matters but such a process must be unlikely in the light of the politically and culturally sensitive nature of this area. In the interim, the Union's existing approach is perhaps as much as can be expected from an institution with the limited democratic credentials of the EU.

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Ronan McCrea, London 7 August 2013.