

Recent Developments and Overall Trends
in the Relationship between Religion, Law and State in Europe Ronan McCrea
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Introduction

There are two main issues where European law affects religion: the relationship between religious freedom and antidiscrimination laws and the role of religious symbols in public life and what influence European norms are having in these areas. There is also an overall trend that I think is having a significant impact on approaches to those issues in Europe.

Anti-discrimination laws and exemptions

Religion has a particularly complicated relationship to non-discrimination as religious bodies and institutions make two very distinct and in some ways conflicting demands of the law in this area.

On the one hand, religious individuals claim legal protection from discrimination. That is why the law prohibits discrimination on grounds of religion in areas such as employment. For religious freedom to be properly protected, individuals should, for example, not be fired from their jobs because their employer disapproves of their religious choices.

On the other hand, religious institutions and individuals sometimes seek the right to discriminate, normally by refusing to employ someone in order to protect the ethos of a religiously-owned institution or by refusing to provide goods or services to a person, usually in order to avoid condoning or facilitating sinful conduct.

European law plays a major role in this area.

EU legislation (Directive 2000/78) prohibits direct and indirect discrimination in employment on grounds of religion (and also others including gender and sexual orientation, which can be problematic for religions). This legislation has not been tested or interpreted by the Court of Justice of the European Union (CJEU) as yet. The major developments in this area last year have related to the European Convention on Human Rights and the unsuccessful claims that freedom of conscience and religion protected by Article 9 required exemptions to be given to religious individuals from norms requiring them not to discriminate on grounds of sexual orientation.

In *Eweida and Others v UK*, the Strasbourg court (ECtHR) ruled, inter alia, that there was no violation of Article 9 in the case of a civil registrar fired for her

religiously motivated refusal to register same-sex civil partnerships. The Court held that any restriction of her freedom of conscience and religion and any indirectly

discriminatory impact upon her were justified by the need to protect the rights of others.

The UK Supreme Court unanimously reached the same conclusion in relation to two hoteliers who refused to give a double bed to a civilly-partnered gay couple in the case of *Preddy and Hall*. Any EU law challenge is also unlikely to succeed as the CJEU has made it clear on many occasions that, on human rights issues, it will generally follow the rulings of the Strasbourg Court.

The upshot of these cases is that the attempt to use European legal norms to obtain exemptions for religious individuals from anti-discrimination norms has failed. There is still scope for political action on this front as the Courts have merely ruled that states are entitled not to give such exemptions, not that they must not give them. However, the real difficulty that one faces in seeking to obtain such opt-outs is that it is very difficult to grant them without undermining antidiscrimination norms altogether. Simple appeals to 'free conscience' cannot work as all antidiscrimination laws exist to coerce conscience. There would be no need for them if there were not people who sincerely believed that they should not give women with young children jobs or that people should not marry those of a different race. It is very difficult politically to claim that the law should not coerce the conscience of religious individuals but it should coerce the conscience of those who hold equally strong beliefs on other bases. To do so leaves religious groups in the unenviable position of seeming to claim that their conscience is more important than the conscience of others. Furthermore, such a claim is legally difficult given that the European Court of Human Rights has repeatedly said that Article 9 protects equally non-religious philosophies and forms of conscience. The difficulty is to find a principled way to claim exemptions from antidiscrimination laws in a way that does not destroy such laws all together but which avoids appearing to claim that the conscience of religious individuals is more important than that of others, and I think there is some work to be done in that regard.

Up to this point I have been talking about individual conscience. And the story in terms of European law has not been overly favourable to religious claims. However, in relation to the rights of religious institutions, EU law does give significant exemptions from antidiscrimination norms. Employers with a religious ethos are, under Directive 2000/78, allowed to discriminate in order to protect their ethos provided that this can be justified as proportionate.

This has not been tested in Court. There is some scope for test cases here as

the European Commission has issued Reasoned Opinions (a document setting out why it believes a member-state is in breach of EU law) in respect of Irish and UK employment law, noting that exemptions provided to religious institutions were not

subject to explicit proportionality tests and therefore violated EU legislation. But the Commission decided not to bring these cases to Court.

There have also been rulings of the ECtHR in *Obst and Schuth v Germany*, in which it was ruled that the dismissal of a married church organist who had been revealed to be having a child with a new partner was disproportionate. The Court indicated that dismissal was disproportionate given a number of factors including his distance from the proclamatory mission of the church, the fact that he had not willingly revealed his conduct to his employer and the difficulty he would face finding alternative employment.

The overall picture is therefore, of a legal landscape that is unfavourable to claims for individual exemptions from antidiscrimination norms but is favourable, to a degree, to exemptions for religious institutions, although there is potential conflict about the boundaries of such exemptions.

Religion in public life

The second major area where European legal norms may impact on religion is in relation to the symbolic role of religions in national life.

This is an area where the EU has no competence but where the Court of Human Rights has played a prominent role. In the very well-known *Lautsi v Italy* decision, the Grand Chamber of the Court overruled a judgment that found the presence of the crucifix in Italian state schools to be a violation of the rights of non-religious parents to respect for their philosophical and religious convictions in the education system.

Many religious groups welcomed this ruling. There are a couple of points I think it is worth making about it. First, while the Court has repeatedly said that the Convention presupposes a democratic and secular political order and that theocracy is contrary to the ECHR, it made it clear in *Lautsi* that this does not require strict symbolic separation of religion and state or removal of religiously-specific symbols from public life.

Indeed, absolute religious neutrality is simply impossible given Christianity's historical role in the cultures of most European states. In *Lautsi* the court made it clear that countries can 'perpetuate a cultural tradition' as long as this does not become oppressive. It found that, in the broader context of the

Italian educational system, the passive symbol of the crucifix was not sufficiently oppressive to trigger European intervention.

On the other hand, there are limits to the acceptability of religiously specific national traditions in public life. In a case from San Marino (*Buscarini v San Marino*), it held

that the traditional oath for legislators that required them to say 'I swear on the holy gospel' was sufficiently oppressive to violate religious freedom.

There are dangers for religion in the Lausti reasoning. The Court has distinguished between religion as a truth claim and religion as part of national cultural traditions. The latter role can be reflected in public life as long as it is not so specific or indoctrinating as to be oppressive. Thus, insofar as religious symbols can be repackaged as national culture they are acceptable. Sometimes this is clearly acceptable. Scandinavian and UK flags, though religiously specific in their symbolism, have clearly developed meanings independent of their religious origins. Other symbols, such as crosses in schools, are more complex. However, it does seem that the cost of the presence of a religious symbol in a state context is a degree of abandonment of its status as a religious symbol, or at least one that represents a religious truth.

There is a broader tension here. Religions wish to play a part in the symbolic life of the nation but they can only do so if they abandon what makes them most distinctive and valuable. If a religious symbol is truly religious and relates to the truth claim of the faithful the worry is that it cannot be a shared symbol in a religiously diverse society and that it may be oppressive for the state to give its backing to such a claim. However, if the truth claim element is abandoned, potentially sacred symbols become treated as mere cultural artefacts.

Two broader structural trends

I would like to finish by briefly mentioning two broader structural trends that I think are underpinning developments both in relation to religious symbols and anti-discrimination norms in Europe.

Migration

Migration is having a significant impact on the relationship between religion, law and state in Europe. Although recent data suggest that the rise of non-religion in developed countries is a long-term structural trend, Europe is very much in the vanguard in that it has exceptionally high levels of non-belief but

also very low levels of religious influence over law and politics.

Many Europeans believed that separation of religion and politics and low levels of religious influence over political life were universal conditions. In fact in many areas of the world, particularly the Muslim world, but also some mainly Christian parts of Africa, religion is a much more muscular affair. The sociologist Grace Davie has written about the damaging misunderstandings that have arisen from the belief held by many in Europe that all religions have a 'live and let live' approach. Actually, in

many parts of the world, the idea that the law should be used to enforce compliance with religious teaching is alive and well.

Migration on a large scale has meant that there are significant numbers of people in Europe whose religious traditions have not been moulded by the secularising influences of European history. The result of this has been the entry into public life of a more muscular version of religiosity seen in the Salman Rushdie Affair, the Mohammed Cartoons affair and the attempt to close down the play *Bezhti* and Jerry Springer: the Opera.

Migration is affecting norms in relation to religion, law and state in two ways.

First, most obviously, religious diversity increases. Once nationality is no longer synonymous with a particular religious denomination, the symbols of that religion lose their much of their ability to act as uncontroversial national cultural symbols.

Second, with the populations of European states becoming more religiously diverse, the ability of a particular faith to act as part of a shared national identity is diminishing. In part this is because there are many ethnic communities who do not share Christian cultural loyalties, but it is also because numbers of self-declared atheists and agnostics are rising rapidly at the same time. This is causing a surge in non-religion. The UK census of 2011 showed a surge in the percentage of people who said they had no religion from 15 per cent to 25 per cent. Previously, many of those who are not particularly religious were content to describe themselves as Christian on cultural grounds: in Europe, numbers of such nominal Christians have long exceeded those who profess belief in the core tenets of the Christian faith. But as religion and national identity have gradually begun to separate, religious identity becomes more a question of ideology and belief than membership of a national community. This has encouraged those who are not true believers to move from a nominal Christian identity to a more clearly non-religious one.

Secular backlash

I suspect that another reason for the major rise in non-religion is that the more muscular religiosity of some migrant communities is causing something of a secular backlash. This is the second trend.

In the past, religion in Europe has played a role somewhat like that of the modern British monarchy. On paper, the British monarch is both a national symbol and the holder of key political and legal powers. However, the powers theoretically held by the monarch — such as the right to nominate a prime minister and refuse to sign legislation — are subject to shared understandings that they will not be used in normal circumstances. Imagine if there were a substantial minority population in the UK who believed that the monarch ought to exercise significant political power. This

would create pressure to remove those symbolic, largely unused powers. This is exactly what is happening to the residual influence and presence of religion in the European political and legal sphere.

Olivier Roy, a well-known scholar of European Islam, has noted how suspicion and fear has been eating into the allegiance of communities of believers who do not feel bound by the compromises laboriously developed over the past centuries by the religious and the secular.

Moves to restrict the wearing of religious symbols in state contexts, to require migrants to sign up to religiously controversial principles such as separation of religion and politics, gender equality and tolerance of homosexuality have been seen in a number of European states. They may be partly motivated by anti-immigrant sentiment but they have been accompanied by other moves such as the abolition of the blasphemy law in the UK which saw previously implicit limits on religious influence (for blasphemy an expectation that the law would not be used other than in extremis) replaced by more black and white legal principles.

Either way, what we see is a general process under which greater religious diversity is making it difficult for religion in Europe to retain the residual political and symbolic roles that it has had until now. These roles relied on religion being seen as a national cultural symbol, and on implicit understandings that churches would largely steer clear of politics and would not use their legally privileged status to restrict criticism or mockery of religion to too great a degree.

Such a system is proving unsustainable. There are now too many diverse cultural expectations about religion, its role in political life, and the degree to which it can be criticised or mocked. The more muscular religiosity of some

migrant communities, among other factors, is provoking European governments to restrict religion firmly to the private sphere and is producing a degree of hostility towards religious claims for exemptions from particular laws and towards religious residual roles in public life that is evident in a European states. I discuss this more fully in an article in Aeon magazine (available here: <http://aeon.co/magazine/world-views/ronan-mccrea-secular-europe/>)

Thus, even though the EU and national governments have been establishing outreach and dialogue programmes for religious bodies, they cannot be seen to favour religion per se so have had to include nonreligious and antireligious bodies in such dialogues. Furthermore, such bodies, though they appear to be part of religious public life, are operating in a context in which the demands of secularisation are squeezing the influence of religious institutions in European states.

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