18. Religion in the European Union
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1. INTRODUCTION

The issues that arise in the relationship between religion and the constitutional order in liberal democracies generally also arise in the constitutional order of the European Union, but they do so in a distinctive form.[1] Like most polities, the EU's approach to religion must address itself to the question of the separation of religious of political authority, the limits of religious freedom and the reconciliation of the idea of state neutrality towards religion with the reality of that particular religions have had a significant (usually foundational) influence on national cultures. However, the EU must carry out this task conscious of its own limited democratic legitimacy and the consequent requirement that it balance its need to develop and protect its own distinctive constitutional values with the need to respect member state autonomy in religious matters. This dilemma is particularly acute because EU law is used not only to form the EU's own approach to religion, but also – in common with the European Convention on Human Rights (ECHR) – as a means to challenge national settlements on religious matters. This role can be engaged when an individual or institution brings a case before the Court of Justice of the European Union (CJEU) alleging that a national law or practice relating to religion that falls within the scope of EU law violates EU legislation or shared European fundamental rights norms. Given the sensitivity of religious issues, this is a role that the EU is usually reluctant to take on; and to date, the approach of EU law has been largely, but not totally, 'hands off'.

The approach of the EU's constitutional order to religion can be broken down into three main themes. The first section of this chapter deals with the relationship between religion and state under EU law. The second deals with the EU's approach to freedom of religion; and the third deals with anti-discrimination law, which is the area of EU legal competence most likely to interfere with national arrangements relating to religion.

2. RELIGION AND STATE

The EU's approach to religion is based on two pillars: the predominantly Christian religious heritage of its member states; and the strong secular and humanist tradition that limits the political and legal influence of religion and requires some degree of separation between religion and state.

The growth of the EU beyond its origins as an economic project has meant that, as the Union's competence has expanded into a wider range of policy areas, the need to develop and state its fundamental values has become greater. With every successive revision of the Treaties, references to human rights and to the Union's status as a community of values have become more numerous and more explicit. However, the relationship between the EU's constitutional order and religion is often implicit and must be drawn out of rulings and statements on other matters.

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[1] For a more extensive account of religion in the constitutional order of the EU, see RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION (2013).

That said, the negotiations on the Preamble to the Constitutional Treaty (later reproduced in the Lisbon Treaty) provided a relatively rare instance of explicit debate on the role of God and religion in the EU Constitution. The main source of disagreement was the desire of some member states (and a number of religious organizations, including the Catholic Church) to include a reference either to Christianity or to God as a source of the Union's values.[2] Following significant debate, both political and academic, the final version of the Treaty agreed on the insertion of the following into the Preamble of the Treaty: 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. . .'[3]

This formulation involves recognition of a religious element to the Union's values. In addition, by linking this recognition to the idea of 'inheritance', this means that Christianity – the religion that forms by far the largest element of Europe's religious inheritance – will form the main part of this religious element. On the other hand, recognition of this religious element is counterbalanced by references to cultural and humanist influences which have functioned so as to reduce the influence of religion over public life in Europe. Furthermore, the text makes it clear that recognition of Europe's religious inheritance is recognized as being valuable due to its role in developing human rights, democracy, equality and the rule of law; thus implying that religious values inconsistent with democratic human self-government, human rights and equality will not be recognized as part of the Union's ideological inheritance.

The balancing of religious inheritance with secular and humanist norms within the Union's constitutional order is also seen in Article 17 of the Lisbon Treaty which, *inter alia*, provides that 'Recognising their identity and specific contribution, the Union shall maintain an open, transparent and regular dialogue' with what it terms 'churches and religious associations or communities in the Member States', as well as 'philosophical and non-confessional organisations'.[4] This process has led to a structured dialogue between the European Commission and religious bodies which, as Foret has argued,[5] does give a degree of preferential access to religious bodies. On the other hand, the Union's religious neutrality is shown by the fact that it has insisted on equal participation rights for non-religious groups such as secular and humanist organizations in this process of structured dialogue. Indeed, as will be discussed below, Article 17 has been interpreted by the CJEU as expressing the Union's 'neutrality towards the organization by Member States of their relations with churches and religious associations and communities', and has not been seen as the basis to grant broad exemptions from EU discrimination law to religious employers.[6]

This refusal to associate the EU with any particular faith or, indeed, to indicate any preference for religion over non-religion is reinforced in the *Guidelines on the Promotion and Protection of Religion and Belief* which were unanimously agreed by the member states in 2013, and which state explicitly:

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[2] See, for example, JOSEPH WEILER, UN'EUROPA CRISTIANA (2003).

[3] Treaty on the European Union, Preamble, OJ C 202 (2016).

[4] Treaty on the Functioning of the European Union, Article 17, OJ C 202 (2016).

[5] FRANCOIS FORET, RELIGION AND POLITICS IN THE EUROPEAN UNION: THE SECULAR CANOPY (2015).

[6] Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Endwicklung*, Judgment of 17 April 2018 (Grand Chamber), para 58.

> 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.[7]

As will be discussed below, this is an approach to religious freedom that chimes with the consistent statement of the European Court of Human Rights (ECtHR) that Article 9 of the ECHR applies equally to non-religious forms of belief[8] and the approach of the CJEU in the ruling in *Y and Z* in relation to the right to asylum on grounds of religious persecution, where it held that religious freedom covered 'the holding of theistic, non-theistic and atheistic beliefs'.[9]

The secular-humanist influence seen in the EU's refusal to favour religion over non-religion is also seen in its enlargement policy, in which it has been made clear that states wishing to join must comply with a requirement of 'democratic secularism'.[10] This criterion has been interpreted so as to require states to maintain limits on religious influence over law and to prevent the use of the criminal law to enforce religious teachings in areas such as lesbian, gay, bisexual and trans (LGBT) rights and sexual morality. The EU is therefore a polity whose own constitutional order is committed to separation of religion and politics, and which shows no preference for any particular faith or for religious over non-religious forms of belief.

Yet I have said that the EU's approach is characterized by two pillars: one that is secular and one that draws on the largely Christian religious inheritance of its member states. Other than the implicit reference to religious heritage in the Preamble of the Lisbon Treaty, where is the evidence of the religious element? This element acts largely through the commitment of the Union to respect the autonomy of member states in religious matters. This commitment not only means that EU law adopts a hands-off approach that avoids interfering directly in the status of religion at national level, but also provides a means through which religion can exercise an indirect influence over EU law by means of claims of national cultural autonomy. The hands-off approach to the status of religion is explicitly set out in the text of Article 17 of the Lisbon Treaty, which states that 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'.[11] This provision weighs against the invocation of EU law to overturn arrangements such as recognition of state churches in the member states. However, this deference to state autonomy goes further and allows religion a degree of indirect influence over the substance of EU law. Explicitly religious lawmaking by the Union is ruled out by the EU's commitment to religious neutrality. It is unthinkable that the EU would seek explicitly to legislate to enforce religious teachings; just as it is unthinkable that EU institutions would symbolically endorse a particular faith – for example, by displaying crucifixes in European Commission

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[7] *Guidelines on the Promotion and Protection of Religion and Belief*, Council of the European Union, Foreign Affairs Council, Luxembourg (24 June 2013).

[8] See Ronan McCrea, *Singing from the Same Hymn Sheet? What the Differences Between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State*, 5(2) OXFORD JOURNAL OF LAW AND RELIGION 183–210 (2016).

[9] Joined Cases C-71/11 and C-99/11 *Y and Z* Judgment (Grand Chamber, 5 September 2012).

[10] MCCREA, *supra* note 1, Chapters 6 and 7.

[11] Treaty on the Functioning of the European Union, Article 17, *supra* note 4.

buildings. However, EU law regularly allows religiously influenced member state choices to be reflected in EU law by recharacterizing such choices as claims to national cultural or ethical autonomy that can form a part of a broader notion of public policy. The CJEU rejected a challenge to laws restricting Sunday trading on the basis that the freedom to provide services could be restricted by national authorities so as to ensure 'that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics'.[12] The Christian Sabbath could therefore be legally protected not to enforce religious law, but because of its status as 'a regional socio-cultural characteristic'. Similarly, in *Schindler* the CJEU upheld member state restrictions on gambling on the basis of the 'particular moral, religious or cultural aspects' of gambling;[13] while in *SPUC v Grogan* Advocate General Van Gerven characterized restrictions on abortion in Irish law as 'a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of public policy'.[14]

EU law therefore allows religions that are culturally entrenched within member states some scope to indirectly influence the content of EU law by recharacterizing religiously influenced norms as an element of a broader notion of public policy. This raises the question of whether there are limits on this influence. What would happen if it were clear that a member state's public policy claim aimed entirely or predominantly to enforce religious teaching? The answer to that question is still unclear. The closest the CJEU has come to deciding this issue was in *Commission v Poland*,[15] in which it was faced with a Polish measure that aimed to restrict the movement of genetically modified organisms. The Polish government initially sought to defend this restriction on the basis of the potential harm to the environment and human health, but later sought to justify it 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 society.

As I wrote elsewhere:

> This represented the clearest 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)

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[12] Case C-145/88 *Torfaen Borough Council v B&Q plc* [1989] ECR 3851.

[13] Case C-275/92 *Her Majesty's Customs and Excise v Schindler* [1994] ECR I-1039.

[14] Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, Opinion of Van Gerven AG, para 78.

[15] Case C-165/08 *Commission v Poland* [2009] ECR I-06843, para 51.

As it has previously done when faced with highly controversial ethical issues,[16] the CJEU 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].[17]

The CJEU was able to sidestep this issue as it found that the Polish authorities had failed to establish that 'the true purpose of the contested national provisions was in fact to pursue the religious and ethical objectives relied upon'.[18]

Religious norms therefore can exercise influence over EU law insofar as they can be repackaged as part of a broader public policy. This 'repackaging' of 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 some cases effectively involve disguised legal enforcement of religious truth. It is possibly because of this danger that the CJEU in *Commission v Poland* 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.[19]

To summarize, the constitutional order of the EU is one that has a clear commitment to the religious neutrality of the EU and its institutions. This is manifested in the refusal of the Union to associate itself with any particular faith and its commitment to equal treatment of religious and non-religious groups and institutions. It also has a clear commitment to 'democratic secularism', including some restrictions on religious influence over law.[20] At the same time, it is keen not to interfere with the status of religion under national law (a policy that echoes the unwillingness of the ECtHR to use the ECHR to overturn state recognition of official churches, religious symbols in public life or restrictions on religion inherent in *laïcité*).[21] EU law thus permits a degree of indirect religious influence over its laws by allowing member states to repackage religiously influenced norms as part of a broader notion of public policy which will be accommodated by the CJEU. This is a system that allows greater influence on the part of culturally entrenched insider faiths, as the norms of minority

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[16] See *Grogan*, *supra* note 14.

[17] Case C-165/08 *Commission v Poland* [2009] ECR I-06843, para 51. See McCrea, *supra* note 1, foreword.

[18] *Commission v Poland*, *supra* note 15, at para 52.

[19] *Ibid*, at para 51.

[20] McCrea, *supra* note 1, Chapter 6, where it is shown that the Commission required Romania to decriminalize homosexuality (which had been criminalized at the behest of the Orthodox Church) and forced Turkey to abandon attempts to criminalize adultery as part of the accession project. In addition, the Commissioner responsible for enlargement of the EU stated to the European Parliament that 'democratic secularism' was a condition of accession to the Union.

[21] See, for instance, *Ebrahimian v France* ECHR [2015] 1041 (upholding a ban on the wearing of religious symbols by civil servants) and *Lautsi v Italy* [2011] ECHR 2412 (finding no violation in the 'passive display' of a cross in Italian state schools).

faiths are less likely to be susceptible to successful repackaging as part of national culture – though minority religions do have the scope to achieve influence as they make their mark on national cultures over time. By and large, however, this is a permissive system which allows the EU to maintain its own religious neutrality and secular nature of its political order without extensively interfering with member state arrangements. Only the most blatant attempt to enforce religious norms would be incapable of reformulation as part of broader public policy, so the EU's relationship to law and religion is much less likely to disturb member state arrangements than either the fundamental rights commitments or substantive legislation of the EU, to which I now turn.

3. FREEDOM OF RELIGION

Given that it is a Union of liberal democracies and one which has explicitly committed itself to upholding fundamental rights, an important element of the approach to religion in the EU's constitutional order is respect for freedom of religion and belief. This is notable for its individualistic approach to religious freedom and its commitment to the equality of religious and non-religious worldviews. These are characteristics that, as will be discussed later, are in tension with claims to exemptions from generally applicable rules seen in cases relating to indirect discrimination, which draw on the idea of religion as a form of collective identity.

EU law protects the right to freedom of religion and belief in two ways. It does so indirectly in that religious freedom may be an indirect beneficiary of the market freedoms provided by EU law. This occurred in the *Steymann* case, in which the CJEU ruled that a German national living in a religious commune in the Netherlands was carrying out economic activity and could benefit from the free movement rights accorded to workers under EU law, notwithstanding that the work consisted of carrying out household chores and help with the community's commercial activities, in return for which the community met his basic needs.[22] Thus, Mr Steymann's ability to follow through on his devotion to this religious community was enhanced by the economic rights provided by EU law.

More directly, the EU is explicitly committed to the protection of the right to freedom of religion or belief as part of its broader commitment to upholding fundamental rights. This right is now explicitly recognized by Article 10 of the EU Charter of Fundamental Rights, which provides:

> Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance.
>
> The right to conscientious objection is recognized in accordance with the national laws governing the exercise of this right.[23]

Aside from the reference to conscientious objection, the text of Article 10 largely reproduces the text of Article 9 of the ECHR. The CJEU has repeatedly stated that the case law of the ECtHR is one of the major sources of the EU's human rights norms, and the fact that the two

[22] Case 197/87 [1988] ECR 6159.

[23] Charter of Fundamental Rights of the European Union, Article 10, OJ 364/1 18 December 2000.

articles are so similarly worded further reinforces the influence that ECtHR jurisprudence is likely to have on the approach of the CJEU.[24]

The ECtHR has a notably individualistic view of religious freedom, regarding it as 'primarily a matter of individual thought and conscience'.[25] This is not an ideologically neutral view of religion. It has been criticized for neglecting ritualistic elements of religion or the idea of religion as a communal identity rather than an individual choice. It is certainly a view of religion that is closer to Western Protestantism's emphasis on belief and on an individual's relationship with God. That said, the fact that the approach of the two courts to religious freedom stresses the importance of individual choice in religious matters is an inevitable result of the fact that the ECHR and the idea of individual human rights are not neutral ideas, but represent a decision to uphold liberal values and individual freedom. It is therefore unsurprising that the approach to religion in this context reflects liberal and individual autonomy focused ideas.

The ECtHR is also committed to the equal protection of religious and non-religious worldviews, stating consistently that Article 9 'is also a precious asset for atheists, agnostics, sceptics and the unconcerned', and recognizing beliefs that show sufficient 'cogency, seriousness and importance' as falling within the scope of Article 9.[26]

The CJEU has followed both of these elements of the ECtHR's approach. In its first major ruling on religious freedom in *Y and Z*, the CJEU held that freedom of religion covered:

> The holding of theistic and non-theistic and atheistic beliefs, the participation in or abstention from, formal worship in private or 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.[27]

In the same case – perhaps because it was dealing with a case involving asylum seekers from Pakistan, where atheists and apostates face such severe persecution – the CJEU explicitly recognized the importance of including non-religious beliefs and the right to abstain from religious practice under Article 10.

As noted above, this approach is very much in line with the individualistic approach to religious freedom set out in the 2013 EU Guidelines on religious freedom. This approach is controversial. There is intense debate about whether religion ought to be regarded as 'special' in the sense of being entitled to greater protection than other forms of belief. This approach is also controversial, in that it is alleged that it is insufficiently protective of collective forms of religious freedom. However, the ECtHR has been increasingly protective of institutional religious freedom in recent times. It has consistently recognized that religious institutions are necessary in order to give meaning to the individual right to religious freedom that is the primary focus of Article 9. When faced with a clash between the rights of religious institutions and the rights of individual employees of such institutions, the ECtHR has always regarded religious freedom as including autonomy rights of such organizations, which must

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[24] MCCREA, *supra* note 1, Chapter 4.

[25] *Ibid*.

[26] McCrea, *supra* note 8.

[27] *Y and Z* Judgment, *supra* note 9, at para 20.

be balanced against the privacy and religious freedom rights of the employee. In this analysis, it has weighed factors such as the degree of violation of privacy suffered by the employee, the employee's chances of obtaining alternative employment and the closeness of the job in question to the proclamatory mission of the religion in question. In recent cases the ECtHR has appeared to give greater weight to collective autonomy rights – most notably in *Fernandez Martinez v Spain*,[28] where it upheld (albeit only on a nine-to-eight vote) a policy under which the public education authorities in a Spanish region were obliged to give effect to the decision of the local Catholic bishop to prevent the renewal of the contract of a teacher of religion in a state school.

EU law also recognizes collective religious freedom and the autonomy rights of religious institutions. Given that the interpretation of Article 10 of the Charter of Fundamental Rights tracks the interpretation of Article 9 of the ECHR, it is likely that Article 10 will be read to include some right to religious institutional autonomy. However, this has proved to be an area where the CJEU has taken an approach that is at odds with the increasing emphasis on allowing states broad freedom to promote institutional religious freedom seen in ECtHR case law. EU legislation on discrimination in employment specifically addresses the reconciliation of the rights of religious institutions with those of their employees. As noted above, Article 17 of the Lisbon Treaty commits the EU to avoid interfering with the status of churches under national law. This commitment – coupled with recognition of the autonomy rights of religious institutions as a part of the right to religious freedom – underpins Article 4 of Directive 2000/78[29] (the EU directive restricting discrimination in employment on various grounds, including religion, gender and sexual orientation). Article 4(1) allows religious employers to impose a discriminatory condition if such a condition reflects a 'genuine and determining occupational requirement',[30] thus permitting, for example, the Catholic Church to employ only male Catholics as priests. Where EU law may provide less scope than the ECHR for religious employers is in relation to employment for less clearly religious functions, such as a teacher in a religious school. Article 4(2) of the Directive provides that in relation to employment in organizations 'based on religion or belief', member states may retain existing laws under which discrimination on grounds of religion is allowed where this is 'a genuine, legitimate and justified occupational requirement having regard to the organisation's ethos'. This exception is, however, subject to the proviso that it must be implemented 'taking account of Member States' constitutional provisions and principles, as well as the general principles of [EU] law and should not justify discrimination on another ground'. In addition, Article 4 provides that:

> provided its provisions are otherwise complied with this Directive shall not prejudice the right of [religious employers] acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.[31]

[28] [2014] ECHR 615.

[29] Directive 2000/78 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2 December 2000.

[30] *Ibid*, Article 4.

[31] *Ibid*.

The CJEU has taken a narrow approach to the degree of exemption that these provisions afford to religious employers. In *Egenberger*[32] the CJEU found that the Directive was violated by German employment law, which allowed religious bodies to determine for themselves (subject only to plausibility review by the courts) whether their ethos required that a particular role be reserved to people of a particular faith. In this case, a non-religious woman challenged the reservation to Protestants of a post with the body associated with the German Protestant churches that involved writing a report on racism and international law in Germany. The CJEU found that the Directive merely codified the EU general principle of law prohibiting discrimination. It held that the protection of the right to an effective remedy under the EU Charter of Fundamental Rights required that acts of discrimination in employment be capable of being challenged in the courts. This meant that the insulation of the decision of a religious employer to make a particular role subject to a religious test from review by the courts was contrary to EU law.[33]

It went on to hold that the Directive's aim was a 'fair balance' between the autonomy rights of religious organizations and the right of workers to be free from discrimination. Any discriminatory policy, the CJEU held, had to be shown to be 'genuine, legitimate and justified, having regard to [the] ethos [of the religious employer]'. For the CJEU, this meant that discriminatory policies must be shown be objectively necessary for 'the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy'.[34] This was a more restrictive approach to religious autonomy than that taken by the German courts to date, and the CJEU made it clear that the national court was under an obligation to adapt this case law to comply with EU law.[35]

The CJEU took a similar approach to the Directive's exemption (mentioned above) allowing the imposition of a duty of loyalty on the part of employees to the ethos of their employer. This duty had the potential to be very wide-ranging, as it could potentially apply to any employee (eg, a teacher in a religious school or caretaker in a religious hospital whose personal life violated religious teachings). However, in *IR v JQ*[36] the CJEU took a narrow approach to the scope of the exemption. In this case, a Catholic hospital had fired its director of internal medicine on the grounds that he had divorced and remarried and, as a Catholic, he had a higher duty of loyalty to his employer's ethos. The court reiterated its commitment to the need for all discriminatory actions (including application of a higher duty on co-religionists) to be subject to a proportionality test and strongly suggested to the national court (which was responsible for applying the ruling to the facts) that applying a duty of loyalty to a medical post was likely to be disproportionate.[37] Although in this case the issue was discriminatory application of a loyalty requirement, the consistent endorsement by the CJEU of the importance of proportionality means that it is likely that all loyalty requirements will have to satisfy a proportionality test.

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[32] *Supra* note 6. See also Ronan McCrea, *Salvation Outside the Church: The ECJ Rules on Religious Discrimination in Employment* (18 April 2018), http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html, last accessed 19 May 2020.

[33] *Supra* note 6, at paras 49 and 53–59.

[34] *Ibid*, at paras 61–69.

[35] *Ibid*, at para 72.

[36] *IR v JQ* Case C-68/17 Judgment of 11 September 2018 (Grand Chamber).

[37] *Ibid*, at paras 49–54 and para 58.

Under such an approach, a situation such as that upheld by the ECtHR in *Fernandez Martinez* – where the local authorities were obliged to give effect to the decision of the local bishop to terminate the employment of a religion teacher in a state school – would be unlikely to stand, as a proportionality test would require careful balancing of the right of religious autonomy against the employee's rights to privacy, freedom of religion and freedom of expression. EU law, therefore, seems to provide somewhat less scope for collective religious freedom than that which the ECHR permits signatory states to grant to religious employers.

4. DISCRIMINATION

Finally, the approach of the EU's constitutional order to religion has important consequences for discrimination law, both in relation to claims by religious individuals of a right to discriminate and in relation to the right to be free of indirect discrimination on grounds of one's religion.

By adopting an individualistic approach to religious freedom, which gives equal protection to non-religious beliefs, EU law (and the ECHR) make it very difficult for individuals to claim exemptions from compliance with non-discrimination rules on the basis of religious freedom. After all, if all belief systems must be treated equally, and if freedom of religion and belief entitle a person not to comply with anti-discrimination rules, then anyone with a deeply felt conscientious objection to complying with such rules could claim an exemption. This would risk defeating the very object of anti-discrimination rules; so it is unsurprising that the ECtHR turned down claims that failure to allow two Christians to discriminate against LGBT people violated Article 9 of the ECHR.[38] Given that non-discrimination is a general principle of EU law, it is likely that a similar claim before the CJEU would also fail.

I have already noted that EU law provides some, albeit limited, scope for religious institutions to discriminate in order to uphold their ethos. EU law also covers discrimination against religious individuals, and in 2017 the CJEU gave its first major ruling on the interpretation of the prohibition on discrimination in employment on grounds of religion in two cases relating to workplace policies preventing the wearing of the Islamic headscarf at work. The two cases had slightly different facts. Both came under the Article 267 procedure, which allows national courts to stay proceedings to seek a ruling on how EU law should be interpreted by the CJEU which, once its ruling has been given, returns the case to the national court. In *Achbita*,[39] a woman had been fired for her failure to comply with a workplace rule prohibiting the wearing of any religious or political symbols while at work. In *Bouganoui*,[40] the employee had been dismissed for failing to comply with a demand from her employer to remove her headscarf following the request of a client of the employer, to whose office Ms Bouganoui had been posted, that there be 'no headscarf next time'. In both cases the CJEU was asked whether the employers' rules were directly or indirectly discriminatory (Directive 2000/78 allows indirect discrimination to be justified if proportionate and necessary, but permits direct discrimination only where there is a genuine and determining occupational

[38] See *Eweida and Others v United Kingdom* [2013] ECHR 37.

[39] Case C-157/15 *Achbita Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* (Judgment of 14 March 2017, Grand Chamber).

[40] Case C-188/15 *Bouganoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers* (Judgment of 14 March 2017, Grand Chamber).

requirement). The contrasting preliminary rulings given by the advocate general in each case show the degree to which the EU's approach to freedom of religion raises serious issues for the law of religious discrimination.

In her opinion in *Achbita*,[41] Advocate General Kokott characterized religion as a matter of belief and ideology, thereby distinguishing it from other protected characteristics such as gender or race. She noted that the ban in question covered all religious and political signs, and that:

> That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear).[42]

Thus, a distinction could be made between 'immutable physical features or personal characteristics — such as gender, age or sexual orientation — rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here'.[43]

This is a view in line with the Union's approach to religious freedom, in that it treats religious and non-religious beliefs equally.

Advocate General Sharpston's Opinion[44] in *Bouganoui*, on the other hand, characterized religion as a form of identity, akin to race or gender, stating that:

> to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not.[45]

As I wrote at the time:

> As with many debates in relation to law and religion, one has the slight impression that two Advocates General are talking at cross-purposes. The problems that arise in regulating religious expression at work is that religion is both a set of ideological beliefs and a form of identity.

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[41] *Achbita*, *supra* note 39, opinion of Kokott AG.

[42] *Ibid*, at para 52.

[43] *Ibid*, at para 45.

[44] *Bouganoui*, *supra* note 40, opinion of Sharpston AG.

[45] *Ibid*, at para 118.

> This makes things particularly difficult. If one views religion as a set of beliefs, this often calls out for treatment which is entirely contrary to the treatment that would be appropriate if religion were regarded as a form of belief.
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> If one views religion as immutable identity then refusing to allow someone to wear a headscarf or crucifix when dealing with the public is akin to refusing to allow a worker with brown skin from serving customers. On the other hand, if one views religion as a form of ideology and belief, then refusing to allow a worker wearing a religious symbol from serving customers is no less justifiable than refusing permission to a worker to wear a Labour Party/Les Republicains/British National Party/Jobbik/ badge while at work.
>
> Often, there simply is no way to treat religion that does justice to its belief and identity elements at the same time.[46]

The law on indirect discrimination seeks to remedy the disadvantage that arises when people with a particular characteristic face structural (or 'particular') disadvantages in society, normally arising from the fact that a dominant group (eg, males or Christians in most European states) will have influenced societal rules and structures to a greater degree. For example, in majority Christian societies, dress codes, holiday times and broader social norms will have been significantly influenced by Christianity (eg, Sunday as the day of rest), thus placing those who belong to minority religions at a particular disadvantage.

Rules against indirect discrimination focus on remedying this group disadvantage. The aim is not to ensure that each individual has the same degree of protection for his or her individual choices, but to give additional protection to make up for the fact that some groups of people suffer additional disadvantage on account of a socially salient characteristic that they share. Thus, the law on indirect discrimination has usually required those making a claim to show that they are part of a disadvantaged group. Solitary disadvantage has been seen as insufficient. There is a clear tension between this approach and the EU's commitment to an individualistic view of religious freedom, which gives each individual the same degree of freedom to hold and express his or her religious beliefs and identity. On this view, which is reflected in Advocate General Kokott's opinion, we all have beliefs and those beliefs may clash with the requirements of one's job. Therefore, merely showing that a workplace rule clashes with one's religious identity in some way shows no particular (in the sense of additional or unusual) disadvantage.

It is only if we regard members of religious minorities as being particularly disadvantaged (because their faith has not influenced social norms to the same degree as the majority faith) that we can regard an individual who, for example, wishes to wear a headscarf at work in violation of the usual uniform code as having established a claim of particular disadvantage that would entitle him or her to an exemption from a rule that others are required to follow. However, such a right to extra accommodation of one's faith rubs up against the deep commitment of EU law to treating individuals equally and avoiding discrimination between

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[46] Ronan McCrea, *Religious Discrimination in the Workplace: Which Approach Should the CJEU Follow?* (13 July 2016), http://eulawanalysis.blogspot.co.uk/2016/07/religious-discrimination-in-workplace.html, last accessed 19 May 2020.

different types of beliefs. After all, if the law is to require an employer to allow an employee to wear an item that shows her to be Muslim, why should her colleague not be allowed to wear an item that shows her to be an atheist?

The result of this tension was twofold. First, in its final ruling on the two cases, the CJEU gave relatively minimalist rulings. It held that a policy that targeted only the symbols of one faith ('no headscarf next time') was directly discriminatory and furthermore, such a rule could not be seen as a genuine and determining occupational requirement (only such requirements can justify direct discrimination).[47] Second, it held that a genuinely comprehensive ban on all forms of religious or political symbolic statements was indirectly discriminatory and could potentially be justified by the economic needs of the employer.[48] Thus, we can see that the Union's deep commitment to an individualistic and egalitarian (in the sense of not discriminating between religious and non-religious forms of belief) is exercising a significant influence on the way in which the CJEU is interpreting anti-discrimination law as it relates to religion.

5. CONCLUSION

The EU has its own distinctive approach to religion, which is largely individualistic and egalitarian (in the sense of not discriminating between religious and non-religious worldviews). It is also an approach that requires a degree of separation between religious and political authority (what the Commission has termed 'democratic secularism'), and which sees liberal human rights norms as providing an absolute limit on the degree to which religious norms can be enforced by the state. On the other hand, the Union's approach also shows a significant commitment to the autonomy of its member states in matters of religion. EU law allows the role of religion in the member states to be accommodated within the EU legal order by providing scope for religious norms to influence law by reconfiguring such religious influence as an element of a broader public policy exemption that member states can invoke to limit the operation of EU legal rules. In this, it parallels most secular democracies. Secularism could never remove all religious influence from society, but rather ensures that religious norms cannot *per se* form the basis of law, thus keeping the political system open to the participation of religious minorities, which can contribute to the formation of national culture over time in a way that they cannot contribute to the internal theological debates of a particular faith. This accommodation is significant and allows, for example, the maintenance of laws restricting Sunday trading despite the EU law right to freedom to provides services. However, the case law hints that there are limits to this accommodation, and that an attempt to enforce a purely or largely religiously based public policy exemption may violate EU law. The European Union's legal order is reluctant to be used as a tool through which national settlements in relation to the relationship between religion, state and law are overturned or radically reconfigured. Like the ECtHR, it has generally refused to intervene in a dramatic fashion so as to declare fundamental building blocks of such relationships at national level, such as recognition of state churches or restrictions on religious symbols in public contexts in secular states, to be violations of European law. Given their limited democratic legitimacy, attempts by European institutions to carry out such fundamental change would provoke a constitutional crisis. What EU institutions have done is to 'nibble at the edges', ensuring that national arrangements are implemented in ways that respect EU legal norms. For example, in *Egenberger* and *IR v JQ* the CJEU found that

[47] *Achbita* and *Bouganoui*, *supra* notes 39 and 40.

[48] *Ibid.*

member states could permit religious employers to discriminate to maintain their ethos, but required that such discrimination pass a proportionality test and that it be possible to meaningfully contest such discrimination before the courts. Similarly, in *Achbita* and in *Bouganoui*, the CJEU found that bans on religious symbols at work could be justified, but at the same time required that such bans be comprehensive in nature. Thus, it distinguished between the situations of a ban on all symbols (*Achbita*) and the targeting of the symbol of one faith (*Bouganoui*).

Some would have like the CJEU to have gone further. However, the reality is that no one in Europe can be certain about which is the best way to manage increasing religious diversity. Some in France feel that they would be in a better situation if they had taken a more multicultural approach that allows more religious expression in shared contexts; many in the United Kingdom feel that they would be better off if they had been a little less multicultural and had followed approaches that emphasis integration and discretion on the part of all about religious identity in shared institutions. The story of religion and law in Europe over the past 25 years has been one of utterly unpredictable developments. No one in 1985, for example, would have believed you if you had said that 20 years later, blasphemous cartoons would be a key issue in Danish politics. In these circumstances it would be very brave indeed for the judges of an international court sitting in Luxembourg to decide that they know best and to impose a single approach on all 28 EU states. On the other hand, in an era when arguments about secularism or gender equality are sometimes cynically used by those, such as the National Rally in France, that see them as a means to target particular groups, we can see the EU law as making a valuable difference. 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 CJEU has sought to ensure that the often justifiable desire to curtail expression of controversial beliefs in the workplace cannot be used as a means to selectively target unpopular minorities.[49]

Therefore, the rulings in *Achbita* and *Bouganoui* can be seen as encapsulating the approach of the EU to religion in a nutshell. They show a legal order that is keen to treat religion and irreligion equally, but also to enforce common European norms against discrimination to some degree. However, this enforcement happens in a way that shows appropriate doubt about the Union's ability to identify or enforce an ideal 'one size fits all' solution, and which therefore gives significant scope for member states to follow their own path in the sensitive matter of the relationship between religion, state and law.

[49] See Ronan McCrea, *Faith at Work: The CJEU's Headscarf Rulings* (17 March 2017), http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html, last accessed 20 May 2020. For a contrary view on these rulings, see Eleanor Spaventa, *What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case* (21 March 2017), http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html, last accessed 19 May 2020.