

# 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

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## Abstract

This article considers how the approach of the EU and its Court of Justice to religion maps on to that of the European Court of Human Rights. It will show that there is a high degree of convergence but that the broader remit of the Luxembourg Court means that its approach to religion will not be restricted to following that of the ECtHR. In particular there is scope for significant differences between the two courts on the question of a 'ministerial exemption' in relation to the protection of the rights of employees of religious bodies and the question of indirect discrimination on grounds of religion or belief. These differences highlight the degree to which restricting indirect discrimination on religious grounds draws on ideas of collective disadvantage which are distinct from (and somewhat in tension with) the right to freedom of religion and belief as interpreted by the ECtHR which has seen religious freedom as primarily an individual right that applies equally to all forms of belief. The article closes by assessing what these potential differences tell us about the nature of the EU legal system, and the limits of role of rights in providing the basis for the defining the relationship between religion, the state and the law more generally.

## The Prominence of European Law and Pan-European Courts in Religion-Related Matters

Whether or not the accession of the European Union to the European Court of Human Rights ultimately comes about, the relationship between the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR') is likely to be of significant importance for the development of the relationship between religion, the state and the law in Europe.

Pan-European courts have become an increasingly important focus of disputes in this area in recent times. Issues such as the compatibility of theocracy with human rights norms,<sup>1</sup> the presence or the prohibition of religious symbols in various contexts,<sup>2</sup> the question of conscience exemptions from anti-discrimination rules,<sup>3</sup> the rights of employees of religious institutions<sup>4</sup> and free speech on religious matters<sup>5</sup> have all been litigated before pan-European courts. Such courts have also played significant roles in issues of major interest to many of the major

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<sup>1</sup> *Refah Partisi and others v Turkey* (2003) 37 EHRR 1.

<sup>2</sup> *Dahlab v Switzerland* (Application No 42393/98) 15 February 2001, *Lautsi v Italy* (Grand Chamber) (2012) 54 EHRR 3.

<sup>3</sup> *Eweida and others v United Kingdom* [2013] ECHR 37.

<sup>4</sup> *Schuth v Germany* (2011) 52 EHRR 32, *Fernandez-Martinez v Spain* [2014] ECHR 615.

<sup>5</sup> *IA v Turkey* (Application No 42571/98) 13 September 2005.

religious denominations in Europe such as the use of materials from human embryos for scientific purposes,<sup>6</sup> the legal recognition of same-sex relationships<sup>7</sup> and restrictions on abortion.<sup>8</sup>

Increasing religious diversity in Europe means that disputes around legal and social structures that reflect particular religious traditions or particular conceptions of the limits on religion's social and legal influence are likely to multiply. As cases such as *Lautsi*,<sup>9</sup> *Eweida*,<sup>10</sup> and *SAS*<sup>11</sup> show, individuals and groups have increasingly resorted to European-level litigation to challenge national arrangements and rules relating to religion and its role in society. The foundation of the European Centre for Law and Justice by conservative American Christians showed the degree to which key actors in the area of religion and law have come to see European courts as an important arena for the attainment of their goals. One may question whether courts and litigation (especially rights-based litigation) are the best ways in which to come up with comprehensive, sustainable and fair approaches to multi-faceted matters such as the relationship between religion, the law and the state,<sup>12</sup> but recourse to pan-European courts to resolve disputes in this area is unlikely to diminish.

The European Court of Human Rights has accumulated a relatively extensive jurisprudence covering a range of areas relating to Article 9's protection of the right to freedom of thought, conscience and religion along with other rights that, in certain circumstances, impact on religion and its role in society such as Article 8 (the right to respect for private life), Article 10 (freedom of expression) and Article 14 (freedom from discrimination). In contrast, religion-related caselaw in the European Court of Justice is much smaller. There have been very few freedom of religion cases litigated in Luxembourg. However, while the European Court of Human Rights is a rights-focused court whose sole task is to interpret a charter of fundamental rights (the ECHR), the CJEU approaches religion-related cases as part of its wider duty to interpret EU law as a whole including defining workable constitutional and legal norms for the EU legal and political order.

Thus, while the CJEU has occasionally ruled on matters of religious freedom,<sup>13</sup> those rulings are merely part of a broader general approach to the role of religion in its legal and political order. The Union, as I have written elsewhere, has an overall approach to religion that is committed to balancing Europe's largely Christian religious inheritance with a strong secular and humanist

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<sup>6</sup> Case C-34/10 *Brüstle v Greenpeace*, Judgment of the Court (Grand Chamber) of 18 October 2011.

<sup>7</sup> *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen Vd dB* Case C-267/06 [2008] ECR I 1757, *Schalk and Kopf v Austria* [2010] ECHR 995.

<sup>8</sup> Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, *A, B and C v Ireland* [2010] ECHR 2032.

<sup>9</sup> See n 2 above.

<sup>10</sup> See n 3 above.

<sup>11</sup> *SAS v France* [2014] ECHR 695.

<sup>12</sup> See R McCrea "Rights, Recourse to the Courts and the Relationship between Religion, Law and State in Europe and the United States" in P Annichino and O Roy (eds) *Freedom of Religion at the Bar: Transatlantic Perspectives on Religious Freedom* (London, Ashgate, 2016, forthcoming).

<sup>13</sup> Joined Cases C-71/11 and C-99/11 *Y and Z* Judgment of 5 September 2012 (Grand Chamber).

tradition.<sup>14</sup> Rulings relating to religious freedom in cases such as Y and Z<sup>15</sup> are therefore only part of the story and take their place alongside other elements. There is a wide range of these other elements. There are broad constitutional norms such as the preamble to the Treaties that speaks of the “cultural, religious and humanist inheritance” of Europe.<sup>16</sup> There is also more specific EU legislation and judicial decisions on matters such as employment,<sup>17</sup> market regulation,<sup>18</sup> religiously-influenced Member State derogations from Single Market rules.<sup>19</sup> Finally, there is a background of political policies and statements that provide evidence of the contours of the political role of religion within the EU constitutional order. EU enlargement policy has made it clear that limits on religious influence on law and politics or “democratic secularism” as one Commissioner put it, are entry requirements for aspirant EU Member States.<sup>20</sup> There has also been a remarkably developed statement on matters of freedom of religion and belief in the 2013 Guidelines on the Promotion and Protection of Religion and Belief<sup>21</sup> in which Member State governments unanimously set out their commitment to the equality of religious and non-religious belief, the right to criticize and ridicule religion (provided this does not rise to the level of hate speech) and rejecting the justification of human rights violations in the name of religion.<sup>22</sup>

While freedom of religion is a major element of the relationship of religion to the law and the state, it is not the only consideration. Many of the key elements of important norms relating to religion and its role in society, such as expectations that laws will be based on non-religious “public reasons” are only imperfectly articulated in rights terms.<sup>23</sup> The broader remit of the CJEU means that it will have to take into account factors in addition to the fundamental right to freedom of religion and belief when deciding cases. This may mean that there is scope for it to depart from the conclusion of the Strasbourg Court even when it defers to that Court’s assessment of the fundamental rights elements of the case before it.

## 2. Key Elements of the Approach of the Strasbourg Court

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<sup>14</sup> R McCrea *Religion and the Public Order of the European Union* (Oxford and New York, OUP, 2010, paperback edition 2014) Chs 3, 5 and 7.

<sup>15</sup> n 13 above.

<sup>16</sup> See Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/01.

<sup>17</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 – 0022.

<sup>18</sup> See for example, Council Directive (EC) 93/119 on the protection of animals at the time of slaughter or killing [1993] OJ L340/33.

<sup>19</sup> Case C-145/88 *Torfaen Borough Council v B and Q plc* [1989] ECR I-3851.

<sup>20</sup> n 14 above, p 182.

<sup>21</sup> Council of the European Union, Foreign Affairs Council Meeting, Luxembourg 24 June 2013.

<sup>22</sup> *Ibid.* paras 26, 27 and 32.

<sup>23</sup> n 12 above.

The jurisprudence of the Strasbourg Court on Article 9 is now extensive so I propose only to highlight some of its key features here rather than to give a comprehensive account.

### *An Individualistic, Egalitarian Approach*

The most important factor to note is what the Court views to be the central focus of the right to freedom of religion. The Court has consistently stated that “religious freedom is primarily a matter of individual thought and conscience”<sup>24</sup> and that religious beliefs are “one of the most vital elements that go to make up the identity of believers and their conception of life”.<sup>25</sup> Such an approach is, obviously, not neutral. It is an approach that values religious freedom as one of the ways in which individuals can choose an identity and way of living that is meaningful to them. There will always be world-views with which a meaningful right to religious freedom will conflict. Indeed the protection of a fundamental rights to freedom of religion and belief is based on a non-neutral worldview that privileges the idea of human autonomy in matters of belief. Religion is a vast and diverse category that covers a large spectrum of claims and behaviours, some very noble and morally compelling, others quite unworthy or trivial. The task of Courts is to identify what, as a matter of sociology or theology, falls within the category of religion and to protect that in its entirety, or to identify what it is that is valuable about religious freedom (perhaps on the basis of an ideological preference for liberal values) and to ensure that that is what is protected. This individualistic and belief focused approach has been criticised for underplaying ritualistic elements of religion or the idea of religion as a set of embodied practices rather than beliefs. The approach of the ECtHR sees religious freedom as primarily about individual conscience and autonomy and is closer to a Western Protestant view of religion with its emphasis on the individual’s relationship with God. This is the inevitable result of the fact that the ECHR is a text committed to the protection of liberal values and that signatory States are committed to being liberal societies that value liberal principles.

This liberal and individualistic approach to Article 9 leads to a second notable feature of the caselaw in this area: the commitment to the equality of religious and non-religious worldviews. Viewing the right to religious freedom as a means to protect the ability of individuals to hold beliefs of their choosing and to exercise autonomy in their construction of their own identity naturally leads to a view that it is not religion itself but the ability of people to hold and adhere to their beliefs that is the aim of Article 9. The Court has consistently stated that Article 9 “is also a precious asset for atheists, agnostics, sceptics and the unconcerned.”<sup>26</sup> The Court has been willing to recognise atheistic beliefs and other forms of philosophical belief that

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<sup>24</sup> *Eweida* n 3 above, para 80.

<sup>25</sup> *Ibid.* para 79.

<sup>26</sup> *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A also *Eweida* *ibid.* para 79.

demonstrate sufficient “cogency, seriousness, cohesion and importance”<sup>27</sup> as falling within the scope of the protection provided by the Convention. As Dworkin<sup>28</sup> and others have pointed out, the alternative view of freedom of religion and belief, namely that it exists to protect religious belief alone, raises significant issues of discrimination against the non-religious as well as difficult questions relating to the definition of religion.<sup>29</sup>

The Court has recognised institutional and collective religious freedom. Institutional and collective religious freedom has been seen as necessary to give life to the individual rights protected by Article 9. In *Fernandez-Martinez v Spain* it reiterated that

religious communities traditionally and universally exist in the form of organised structures [...] The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.<sup>30</sup>

#### *The Limits of Rights-Focused Caselaw*

Thus, religious freedom is seen as important for its contribution to individual autonomy and to the overall pluralism which ought to characterize democratic societies. This autonomy and individualistic view of religious freedom does pose some problems for some of the claims made in the name of freedom of religion or belief. Article 9 and, indeed, freedom of association (Article 11 ECHR) both protect the autonomy of ideological and religious organisations to select their own leaders or clergy (and EU law recognizes ‘genuine and determining occupational requirements’ as a basis on which a discriminatory decision can be justified).<sup>31</sup> However, Article 9 has also been the basis for individual claims to broader ‘conscience’ exemptions from compliance with non-discrimination rules, normally where compliance with such rules clashes with a person’s religious beliefs.<sup>32</sup> As the Court has consistently ruled that Article 9’s protections apply equally to religious and non-religious forms of belief, if such exemptions were held to be required under the Convention anyone with a serious, cogent and cohesive objection

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<sup>27</sup> *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011, 54 EHRR 15, Eweida, n 24 above, para 81.

<sup>28</sup> R Dworkin *Religion without God* (Cambridge MA, Harvard University Press, 2013).

<sup>29</sup> For a good account of these issues in an American context see “What if Religion Is Not Special?” M Schwartzman 79 *U. Chi. L. Rev.* 1351 (2012).

<sup>30</sup> *Fernandez-Martinez v Spain* n 4 above, para 127.

<sup>31</sup> n 17 above, Article 4.1.

<sup>32</sup> n 3 above.

to an anti-discrimination rule could claim an exemption. Much of the discrimination prevented by anti-discrimination rules can be merely a result of thoughtlessness or unthinking prejudice but such rules are also necessary because significant numbers of people felt and still feel that discrimination is the right thing to do in particular circumstances. Discriminatory beliefs in relation to inter-racial, inter-racial or same-gender sexual relationships or views that attach moral significance to adherence to traditional gender roles can all draw on long traditions (religious and non-religious) and can be the product of deep thought and feeling. An objection to registering a marriage between a Muslim woman and non-Muslim man or between two men or between people of different races (or refusing such couples a hotel room) may flow from religious or other beliefs that go back centuries. Similarly, an employer who refuses to employ mothers of young children may be motivated by religious teaching or attachment to venerable traditions of gender roles or her perception of the interests of children and the family. Anti-discrimination rules that covered only unthinking or unconscious prejudice would be seriously impaired in their effectiveness. It is therefore unsurprising that attempts to interpreting the ECHR as requiring conscience based exemptions from anti-discrimination norms have struggled to succeed before the Strasbourg Court.

The rights-focus of the Article 9 also means that the ECtHR has limited capacities to deal with issues in relation to the relationship between religion, law and state that have elements that go beyond individual rights. Challenges to rules mandating the presence of religious symbols in state contexts are likely to struggle to succeed as the impact of simply seeing a symbol with which one disagrees is, absent other forms of coercion, unlikely to be severe enough to justify a finding of a violation of the rights of an individual. Other reasons that might justify the ECtHR applying a ban on such symbols (such as avoiding religious contestation for symbolic predominance in state contexts) are beyond the purvey of a rights-focused court.

There are many elements to religion-state norms that are not fully explicable in rights terms. Commitments to religious co-existence or to non-theocratic politics or to avoiding the use of state bodies for proselytism are based on ideas of managing religious diversity and are only imperfectly translated into rights norms. The *Lautsi* decision showed the weakness of rights-based arguments for the religious neutrality of public institutions while the *SAS v France* decision showed how the Court struggled to accommodate the notion of “vivre ensemble” within the rights-focused framework of the ECHR.<sup>33</sup> If a judge wants to wear a controversial religious or political symbol while sitting, this may offend no one in court and harm no individual’s fundamental right but it may harm a vital non-rights based principle.

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<sup>33</sup> See R. McCrea ‘The French Ban on Public Face-Veiling: Enlarging the Margin of Appreciation’ <http://eulawanalysis.blogspot.it/2014/07/the-french-ban-on-public-face-veiling.html> (last accessed 26 October 2015).

The Strasbourg Court can only accommodate these concerns by deferring to state autonomy and invoking the margin of appreciation. All it can say about many key elements of the relationship between religion, state and law such as the cultural role of religion, the compulsory presence or absence of religious symbols in state contexts is whether a particular arrangement does or does not violate the Convention. It is, in other words, a rights-defending court, not a constitutional court.

### *Recent Possible Changes*

Finally, I should note a possible change in the approach of the ECtHR to institutional religious autonomy in recent times. When faced with clashes between the autonomy rights of religious organisations and the rights to privacy and religious freedom of their employees, the Strasbourg Court had engaged in a balancing exercise weighing various factors such as the degree of invasion of private life, the impact on the employment opportunities of the employee and the proximity of the relevant job to the proclamatory mission of the religion in question.<sup>34</sup> In some recent cases such as *Sindicatul*<sup>35</sup> and *Fernandez-Martinez*,<sup>36</sup> the Court has moved much closer to the American model of recognizing a “ministerial exemption” where categories of employment are deemed to be ministerial and are covered by a much more absolute right of religious autonomy. This is one area where perhaps the trans-Atlantic influence of the European Centre for Law and Justice is to be seen.<sup>37</sup> The Centre’s intervention in the case cited a large amount of American and other comparative material in support of the original Spanish decision which upheld a policy under which the education authorities were obliged to give effect to the decision of the local Catholic Bishop to prevent the renewal of the contract of a religion teacher in a state school. Whether this trend will persist is unclear. The Grand Chamber decision in *Fernandez-Martinez* was by a vote of 9-8 and the majority denied they were abandoning the balancing approach set out in previous cases. However, as will be explained below, this may be a source of potential disagreement between judges in Strasbourg and Luxembourg.

### **3. Compatibility of EU Norms with the Approach of the Strasbourg Court**

One of the primary aims of the attempt to ensure accession of the EU to the ECHR was to ensure that the EU complied with the requirements of the Convention but the desire to achieve

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<sup>34</sup> *Schuth* above n 4.

<sup>35</sup> *Sindicatul (Pastorul cel Bun) v. Romania* [2014] ECHR 646.

<sup>36</sup> n 30 above.

<sup>37</sup> See C McCrudden ‘Transnational Culture Wars’ *International Journal of Constitutional Law* (2015) 13(2) 434-462.

accession also had the additional purpose of seeking to avoid a situation where an EU member state would be faced with a situation where it was required to choose between its duty to apply and uphold EU law and its duty to respect the ECHR. Indeed, one of the chief concerns expressed by the CJEU in its ruling in Opinion 2/13<sup>38</sup> that the proposed accession treaty was incompatible with the EU treaties was that accession may jeopardise the unity of the EU legal order by encouraging Member State courts to believe that they had grounds to refuse to recognize the primacy of EU law if such law had been held to violate the Convention.<sup>39</sup> In the post-Opinion 2/13 era, we are likely to have, for some time, two pan-European Courts ruling on issues related to the relationship between religion, the law and the state with no agreed mechanism for resolving cases where these courts adopt mutually inconsistent positions. Therefore, for those interested in the relationship between religion, the law and the state, the question of whether there are likely to be conflicts in the approaches of the two courts in this area will be of significant interest.

The two possible problematic scenarios that could arise would be where the Strasbourg jurisprudence casts doubt on an established EU way of approaching the relationship between religion, the state and the law or where EU legal norms are used to challenge successfully national arrangements that survived review in Strasbourg.<sup>40</sup> Therefore, this section considers how CJEU caselaw and established EU patterns of dealing with religion map on to the approach adopted by the Strasbourg Court outlined above.

### *A Compatible Overall Framework*

The first thing to state is that large-scale divergence between the two courts is very unlikely. The CJEU has for decades been citing the ECHR as a key source of its human rights norms and respect for the ECHR has been written into the Treaties. Before the drafting of the EU Charter of Fundamental Rights, the CJEU recognized back in 1975 in the *Rutili* case<sup>41</sup> that the ECHR was a key source of the “common constitutional traditions” of the Member States from which EU fundamental rights norms were derived. The EU Charter of Fundamental Rights includes a right

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<sup>38</sup> Opinion 2/13 of the Court (Full Court), 18 December 2014.

<sup>39</sup> It is unclear that a failure to accede would significantly remedy this problem. In many Member States the ECHR has constitutional status equivalent to that of EU law so, even in the absence of accession of the EU to the ECHR, national courts may already feel they have grounds to refuse to apply an EU law that violates the ECHR.

<sup>40</sup> This latter scenario may not be problematic in that a ruling that a particular national practice that survived review in Strasbourg, violates EU law may merely result in that practice disappearing from EU member states without affecting the validity of Strasbourg’s initial ruling. On the other hand, if all 28 EU Member States abandon a practice previously upheld by Strasbourg, it may affect Strasbourg’s assessment of whether there is an evolving European consensus on that matter which may reduce the margin of appreciation given to states that retain the practice in question.

<sup>41</sup> Case 36/75 *Rutili v Minstre de l’Interieur* [1975] ECR 1219.

to freedom of thought, conscience and religion in Article 10. The text of this article almost exactly reproduces that of Article 9 ECHR and the Court of Justice has accorded an important role to the jurisprudence of the Court of Human Rights in many of its key rulings on the Charter.<sup>42</sup>

In its first significant consideration of Article 10 of the EU Charter of Fundamental Rights Court of Justice endorsed a vision of that right that encompasses the individualistic and egalitarian approach of the ECtHR. In *Y and Z*<sup>43</sup> the CJEU was faced with a reference from a German court which was dealing with the case of Pakistani Muslims from the Ahmadiyya sect who were seeking asylum on the basis that they would be persecuted if they openly followed their faith in their home country. The German court requested an interpretation of the term “persecution” in the EU Directive<sup>44</sup> that set down minimum standards in relation to asylum. It asked whether only interference with the ‘core areas’ of religious freedom rather than all acts that would violate Article 9 ECHR constituted such persecution and if so, whether public manifestation of a religious faith fell within such a core. The Court of Justice refused to divide freedom of religion and belief into core and non-core areas on the basis that this would be inconsistent with the definition of religion given by the Directive which covered:

The holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.<sup>45</sup>

The Court held that interference with the manifestation of religious freedom, as well as the forum internum of private belief could, if sufficiently severe, constitute persecution for the purposes of the Directive. This conclusion was mainly driven by the wording of the Directive in question rather than by Article 10 of the Charter. However, for our purposes, the judgment did contain notable references to the protection of freedom of religion in the Charter and its relationship to Article 9 of the ECHR. The Luxembourg Court explicitly stated in the judgment

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<sup>42</sup> Between 2009 and 2012 in the 27 cases in which the CJEU engaged with the Charter substantively in 27 cases. It cited Strasbourg jurisprudence in 10 of these cases agreeing with the approach of the ECtHR on each occasion. See G de Búrca “After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?” 20 *Maastricht Journal of European and Comparative Law* 2 (2013) 168 at 174-75.

<sup>43</sup> Joined Cases C-71/11 and C-99/11 *Y and Z* Judgment of 5 September 2012 (Grand Chamber).

<sup>44</sup> 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).

<sup>45</sup> n 43 above, para 20.

that Article 10(1) of the EU Charter ‘corresponds to Article 9 ECHR’.<sup>46</sup> In addition it made several statements that clearly echo the Strasbourg jurisprudence saying that freedom of religion ‘is one of the foundations of democratic society’ and a ‘basic human right’<sup>47</sup> as well as noting that it was a right that could be restricted. All of these statements appear in Strasbourg caselaw.

In addition, in Y and Z the CJEU explicitly recognized the importance of including non-religious beliefs and the right to abstain from religious practice within the terms of Article 10 of the Charter. This approach is in line with both the Text of the EU Treaties<sup>48</sup> 2013 Guidelines on the Promotion and Protection of Religion and Belief<sup>49</sup> in which Member State governments unanimously set out their commitment to the equality of religious and non-religious belief meaning that the endorsement of such equality by the CJEU is in harmony with the approach of other key actors in the Union’s constitutional order. The “specialness” of religion relative to other forms of belief, in terms of human rights protection is currently a source of lively dispute<sup>50</sup> and is particularly pertinent given that the Strasbourg Court has been the focus of efforts by bodies such as the European Centre for Law and Justice to adapt its caselaw in the direction of recognizing greater ‘specialness’ of religious belief.<sup>51</sup> The fact that the CJEU and EU Member States are so clear in their endorsement of the equality of religious and non-religious forms of belief may therefore be a force that acts in opposition to attempts to encourage the ECtHR to move away from its longstanding endorsement of such equality.

#### *Non-Rights Issues and the Impact of the Broader Remit of the Court of Justice*

The fact that the CJEU regards Article 10 of the Charter as corresponding to Article 9 ECHR does not mean that there is no realistic chance of divergence between the Strasbourg and Luxembourg on religion-related issues. The relationship between religion, the law and the state

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<sup>46</sup> Ibid. para 56.

<sup>47</sup> Ibid. paras 57-68.

<sup>48</sup> n 16 above, preamble and Article 17.

<sup>49</sup> n 21 above.

<sup>50</sup> For an enlightening discussion of these issues see C Laborde 'Dworkin's Religious Freedom without God', *Boston University Law Review*, 94(4): 1255-1271, July 2014. See also Schwartzman n 29 above and B Leiter *Why Tolerate Religion?* (Princeton, Princeton University Press, 2012).

<sup>51</sup> The most notable instance of this is in relation to the granting of a category based ministerial exemption to religious employers in cases such as *Fernandez-Martinez*. As discussed above, this moved away from replaced the previous approach which had been based on based on reconciling various autonomy rights such as those of employees under Articles, 8 (privacy), 9 (religion or belief) and 10 (freedom of expression) and those of employers under Articles 9 (collective religious autonomy) and 11(freedom of association). An approach that permits or requires the state to grant particularly wide autonomy on the basis that an employer falls within the category of religious body is based on a recognition that religion is in some ways special in the sense of being entitled to wider autonomy than other forms of belief.

goes beyond the issue of the fundamental right to freedom of religion and belief. As noted above, the Court of Justice must interpret a range of laws that go beyond human rights issues. It is the final authority for the interpretation of EU legislation. Such legislation ranges across a range of areas and can touch on religion in many ways. In addition, as the Constitutional Court of the European Union, the Court of Justice must develop broader constitutional norms for the proper functioning of the Union's political system. This means that EU constitutional law and the interpretation of EU constitutional norms can require the Court of Justice to deal directly with matters that are only dealt with in an indirect manner by Strasbourg.

To give some examples, in any case that it decides, the Strasbourg court is required to make only one decision; whether the law or practice questioned in the case is, or is not, compatible with the ECHR. Certainly, the reasons given for its decision in this regard can be illuminating as to broad constitutional principles and may provide guidance to decision makers in other situations, but the fact remains that the ultimate decision is binary: violation or no violation. Because of this, the Strasbourg Court does not lay down rules of what ought to be, but only what ought not to be. A finding of no violation does not mean that Strasbourg endorses the relevant Member State action as ideal. For example, the fact that Strasbourg has not found that the ECHR requires recognition of same sex marriages<sup>52</sup> does not mean that signatory states ought not to provide such recognition, merely that the ECHR does not require them to do so. Many cases before the CJEU are similar in that they often involve a challenge to a Member State action or implementation of EU law that is alleged to violate an EU legal norm. Often the Court will rule that the action of the Member State falls within their discretion or that it is a proportionate restriction of the EU legal right in question. As in the case of a finding of no violation in Strasbourg, this does not amount to an endorsement of the choice of the Member State. The CJEU has found that Ireland is entitled under EU law to restrict the provision of abortion services,<sup>53</sup> a holding that does not establish Irish abortion law as the ideal for other Member States to follow.

However, the CJEU also has other kinds of cases in which its decision is not about whether a Member State did or did not fulfill its EU law duties. It deals with cases in which it interprets the acts of the EU's own legislature or the constitutional requirements of the EU's own political order. These cases do not have parallels at Strasbourg and give much greater scope for the Court of Justice to set out a vision of what it considers to be the ideal or most appropriate way to approach a particular issue.

This is relevant to the relationship between the ECtHR and CJEU in matters touching on religion two ways. First, CJEU interpretations of EU legislation that touches on religious issues may

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<sup>52</sup> *Schalk and Kopf v Austria* [2010] ECHR 995.

<sup>53</sup> *Grogan* n 8 above.

diverge from Strasbourg's views in some areas as the text of the relevant legislation may require an interpretation that diverges from Strasbourg's understanding.<sup>54</sup> Second, while Strasbourg deals with key issues in the relationship between religion, the law and the state only insofar as they affect the fundamental rights contained in the ECHR,<sup>55</sup> Luxembourg deals with them directly in that it can invoke principles beyond fundamental rights when the same issues arise in the context of the EU's own constitutional order.

To take some examples, in *Lautsi v Italy*,<sup>56</sup> the Strasbourg Court had to assess the question of the presence of a crucifix in state schools through the lense of the rights guaranteed by the ECHR, namely, freedom of religion and of the right to parental autonomy in matters of education. Its ultimate conclusion was that the presence of the crucifix was not sufficiently oppressive to violate the Convention. Similarly, in *Refah Partisi v Turkey*<sup>57</sup> the Court of Human Rights had to assess whether the dissolution of a political party aiming to institute a regime based on Sharia law was compatible with the ECHR. It ruled that there had been no violation, controversially citing, inter alia, the dangers to rights such as equality, privacy and freedom from inhuman treatment inherent in its interpretation of Sharia law. In each case Strasbourg judges were looking to see whether there were violations of specific rights (*Lautsi*) or whether a state could conclude that the religious regime in question may threaten Convention values (*Refah*).

The CJEU can approach these issues much more broadly. If a decision were taken to place crucifixes in meeting rooms of the European Commission and this were challenged before the CJEU, the Luxembourg judges would not be restricted to deciding the case on the basis of whether the human rights of those using the rooms were being violated. They could also draw on broader constitutional norms of the EU itself such as the invocation of humanist inheritance of Europe in the preamble to the Treaty, the recognition of the equal status of non-religious world views in Article 17 and the political consensus amongst key constitutional actors around the separation of religion and state as a value of the Union. While the ECtHR is restricted to assessing if a right had been violated and to assessing the broader constitutional norms asserted by Member States as claims to autonomy or a margin of appreciation, the CJEU can itself act as the interpreter of the constitutional values of the EU and can invoke non-rights principles without having to reformulate them into a claim for autonomy.

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<sup>54</sup> It should be noted that if an interpretation that satisfies the requirements of EU fundamental rights norms is impossible, the measure in question will be annulled.

<sup>55</sup> Issues beyond fundamental rights can be taken into account only insofar as they are invoked by Member States as a ground to restrict a Convention right.

<sup>56</sup> n 2 above.

<sup>57</sup> n 1 above.

Religious symbols are unlikely to be placed in EU institutions and the CJEU is therefore unlikely to have to rule on this kind of challenge. It has however, been faced with cases relating to the permissibility of religious norms forming the basis of law in the Union and has ruled on these cases in ways that go beyond the rights focused rulings of the Strasbourg Court. These cases have mainly related to attempts by Member States to derogate from free movement rules in order to uphold religiously-influenced norms such as restrictions on gambling or Sunday trading. In cases such as *Schindler*<sup>58</sup> and *Sjoberg*<sup>59</sup> the Court of Justice upheld restrictions on gambling on the basis 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 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 question<sup>60</sup>

In *Torfaen Borough Council* the Court upheld restrictions on Sunday trading on the basis that they were an instance of

certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics.<sup>61</sup>

In other words, the Court of Justice will permit religious norms to form the basis of law but only insofar as these norms can be reformulated as claims to cultural autonomy or as a 'reason in the general interest'.

In Case C-165/08 *Commission v Poland*,<sup>62</sup> the Court was faced a more direct claim to invoke religious norms in a case where Poland sought 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:

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<sup>58</sup> Case C-275/92 *Her Majesty's Customs and Excise v Schindler* [1994] ECR I-1039.

<sup>59</sup> Judgment of the Court (Fourth Chamber), 8 July 2010.

<sup>60</sup> *Ibid.* paras 36 and 37.

<sup>61</sup> Case C-145/88 *Torfaen Borough Council v B and Q plc* [1989] ECR 3851.

<sup>62</sup> Case C-165/08 *Commission v Poland* [2009] ECR I-06843.

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<sup>63</sup>

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,<sup>64</sup> 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].<sup>65</sup>

This was because the Court found that:

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 upon<sup>66</sup>

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<sup>63</sup> *Ibid.* para 31.

<sup>64</sup> See for example *Case C-159/90 SPUC v Grogan* [1991] ECR I-4685.

<sup>65</sup> n 62 above para 51.

<sup>66</sup> *Ibid.* para 52.

As the EU constitutional order is committed to balance between Europe's religious and humanist heritage and the ECtHR has held that theocracy is incompatible with the Convention, divergence between the two courts on this issue is unlikely. However, I have included them in the discussion in order to show how the CJEU will be required to develop constitutional norms in relation to religion that go beyond simple issues of freedom of religion. Accordingly the CJEU's religion-related jurisprudence will not be able to restrict itself to simply following Strasbourg. The Union will develop its own norms that will fall to be tested for ECHR compliance by Strasbourg at some stage. It is not guaranteed that these norms will necessarily always be in harmony with those set out in Strasbourg.

### **Potential Sources of Tension between EU Law and the Strasbourg Court**

The potential for a clash between Luxembourg and Strasbourg is most likely in the area of employment law where the EU has legislated and where recent developments in Strasbourg place a question mark over the compatibility of the approaches of the two courts. The potential clash arises in two areas, the rights of employees of religious organisations and in relation to the question of indirect discrimination on grounds of religion.

#### *(a) Employees of Religious Organisations and the Ministerial Exemption*

I noted above how in recent cases relating to employees of religious organisations (or those carrying out partly religious functions), Strasbourg had moved away from an approach that balanced the competing autonomy rights of the employee and religious employer towards an approach that was closer to the American "ministerial exemption" approach under which there is recognition of more absolute autonomy for religious organisations in relation to certain categories of employee.

This approach is somewhat out of line with the approach of EU law in this area. Discrimination in employment is an area in which the Union has legislated. Directive 2000/78<sup>67</sup> prohibits direct and indirect discrimination in employment on a range of grounds including gender, religion and sexual orientation. It does also provide some protection for the autonomy of religious organisations.<sup>68</sup> Indeed, the principle of recognizing the autonomy of religious bodies (and those of non-religious forms of belief) within EU law goes back to 1998 where a *Declaration on the Status of Churches and of Non-Confessional Organisations*<sup>69</sup> was appended to the Amsterdam Treaty. The key provisions of this declaration were later brought into the Treaty on the Functioning of the European Union by the Lisbon Treaty. Article 17 on TFEU now states that

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<sup>67</sup> n 17 above.

<sup>68</sup> *Ibid.* Article 4.

<sup>69</sup> Declaration No 11 to the last act of the Treaty of Amsterdam [1997] OJ C340/133.

'The Union respects and does not prejudice the status under national law of churches and religious associations and communities in the Member States'.<sup>70</sup>

This commitment to avoid disturbing established national approaches to the relationship between religion, the law and the state can be seen in Article 4 of Directive 2000/78. The Directive's aim of preventing discrimination in employment had the potential to affect national arrangements allowing religious bodies scope to discriminate against employees whose religious beliefs or way of living was in tension with the teachings of their employers. Article 4(1) provided that an otherwise discriminatory condition may be imposed by an employer where 'by reason of the nature of the particular occupational activities or of the context within which they are carried out' the condition reflects a 'genuine and determining occupational requirement, provided the objective is legitimate and the requirement is proportionate'.<sup>71</sup> Thus, by permitting discrimination by employers in order to fulfill a 'genuine and determining occupational requirement' EU law gives scope to religious bodies to adhere to their beliefs in hiring staff, such as clergy, whose job is religious in nature. Thus, the directive allows, for example, the Catholic Church to refuse to employ non-Catholics or women as priests notwithstanding that, in general, discrimination on grounds of gender and religion are not permitted. There is no tension with the ECtHR rulings here. The Strasbourg Court has always found that religious autonomy must be strongly protected when one is dealing with employment for core religious functions.<sup>72</sup>

However, there is scope for some tension once we consider employment by religious bodies for purposes that are more distant from such core religious functions. As we have seen, in *Fernandez-Martinez v Spain*,<sup>73</sup> the Strasbourg judges were willing to recognize a very broad exemption in respect of the employment of a religion teacher in a public school and took significant steps towards recognizing an American-style, category-based ministerial exemption rather than the balancing approach seen in previous cases.

Such an approach may not be consistent with EU legislation in this area. The Directive does recognize some claims to religious autonomy beyond core religious functions. Article 4.2 provides:

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is

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<sup>70</sup> Article 17 (1) Treaty on the Functioning of the European Union.

<sup>71</sup> n 68 above.

<sup>72</sup> n 4 above.

<sup>73</sup> *Ibid.*

based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, 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.<sup>74</sup> (emphasis added)

There are a number of noteworthy features here. The exemption is limited to maintaining existing privileges in national law. Thus, in an example of how EU law must also deal with factors beyond fundamental rights, the provision's focus is as much respect for national autonomy as collective religious freedom. In any event, the provision confirms that religious organisations can apply a condition in relation to belief in respect of employees where this is a genuine and determining occupational requirement. In addition, there is scope for organisations, 'the ethos of which is based on religion or belief [...] to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

This may initially appear to provide even wider exemptions than those recognized by the ECtHR in *Fernandez-Martinez*. The category of individuals working for an organization 'the ethos of which is based on religion or belief' is broader than a ministerial exemption and could theoretically apply to all employees of religious organisations including, for example, a cleaner in a religiously-owned hospital. However, the exemptions provided are<sup>75</sup> are subject to the proviso that they must be implemented 'taking account of Member States' constitutional provisions and principles as well as the general principles of Community law'. The general principles of Community law (and the Charter of Fundamental Rights) include the right to privacy and equal treatment.<sup>76</sup> Vickers notes how the Directive grants very narrow scope to religious employers to discriminate on grounds other than religion (such as marital status) other than in the case of religious teachers and clerics and even in these cases (where somewhat

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<sup>74</sup> n 68 above.

<sup>75</sup> The application of this proviso to the good faith and loyalty exemption comes from the phrase 'provided that its provisions are otherwise complied with'.

<sup>76</sup> Case C-144/04 *Mangold* ECR [2005] I-9981.

broader exemptions are provided) the principle of proportionality must be respected.<sup>77</sup> In litigation in the UK, the courts have stressed that the exemptions, as departures from the principle of equal treatment, ought to be narrowly construed.<sup>78</sup> Indeed, Sandberg notes that challenges to UK law implementing the Directive by Trade Unions concerned that too much scope to discriminate had been granted to religious employers failed 'on the basis that it was clear from the parliamentary material that the exceptions were intended to be of very narrow scope, tightly drawn and were to be construed strictly'<sup>79</sup>

The European Commission has also taken a narrow view of the exemptions granted and threatened to bring the UK before the Court of Justice for a failure to properly transpose the Directive on the basis that the exemptions granted by UK implementing legislation were too wide. The relevant law allowed employers 'to apply a requirement related to sexual orientation in respect of employment for an organized religion in order to comply with the doctrines of the religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.<sup>80</sup> The Commission found fault with the UK legislation on the basis that the exemption had not been restricted to situations where the decision to discriminate was as a result of a genuine and determining occupational requirement, had a legitimate objective and satisfied a proportionality test. For the Commission any exemption had to require that otherwise discriminatory acts satisfy a proportionality test. The approach of the Court of Justice has been to seek to balance conflicting rights. It has stressed how when they are transposing directives Member States must 'take care to rely on an interpretation of the directives which allows for a fair balance to be struck between the various fundamental rights protected by the Community legal order'.<sup>81</sup>

The concept of proportionality and the idea of balance between religious and humanist influences are both central to EU law.<sup>82</sup> A proportionality based approach focused on balancing conflicting rights is in marked tension with the idea of a ministerial exemption that precludes proportionality review of the decision of a religious employer to terminate the employment of a

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<sup>77</sup> L Vickers 'Freedom of Religion and the Workplace: The Draft Employment Equality (Religion or Belief) Regulations 2003' (2003) *Industrial Law Journal* 32 (1), 23 at 33.

<sup>78</sup> *R (Amicus and Others) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

<sup>79</sup> R Sandberg 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157-181, n 126.

<sup>80</sup> Commission of the European Communities, Reasoned Opinion addressed to the United Kingdom under Article 226 of the Treaty establishing the European Community on account of the failure to transpose correctly Articles 2(4), 4 and 9 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 20 November 2009 quoting the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) and the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) para. 15.

<sup>81</sup> Case C-275/06 *Promusicae v Telefonica de Espana SAU* (29 January 2008), para 68.

<sup>82</sup> n 14 above.

employees deemed to fall within the category of minister. If, as the Commission believes, a proportionality test is an inherent part of any exemption from the duty of religious employees not to discriminate against their employees, then it is difficult to see how the arrangement upheld by the Strasbourg Court in *Fernandez Martinez* could survive challenge under EU law. After all, in this case, Spanish law required the education authorities to defer to the decision of the local bishop not to approve an individual for employment as a teacher of religion in a state school. EU law would require the authorities to review that decision for its compliance with the principle of proportionality before giving effect to it in order to terminate the employment of a teacher in a state school.<sup>83</sup> This difference in approach may not matter all that much if the Strasbourg Court concludes in future cases that, while Spain was entitled under the ECHR, to provide an exemption that did not require a proportionality assessment, other countries are entitled to provide more limited exemptions. However, the approach of EU law in this area means that any moves to use Article 9 ECHR to require states to provide an American-style ministerial exemption will struggle to succeed. It would certainly be difficult to argue that there was a European consensus in favour of such an approach when all 28 EU Member States are constrained to ensure that all exemptions provided to religious employers be subject to a proportionality test.

## *2. Indirect Discrimination and the Solitary Believer*

I have already noted that the Strasbourg Court has seen religious freedom as primarily a matter of individual conscience and has consistently held that non-religious beliefs are entitled to the same degree of protection as religious beliefs. The Court has also moved away from a previous approach in which it decided on objective grounds what constituted the requirements of a religious faith and has moved to a position where it defers to individuals' assessment of what their faith requires.<sup>84</sup> This change is in line with the approach of the US Supreme Court which has refused to second guess (beyond verifying sincerity) individuals' claims of what their faith requires of them on the basis that

intrafaith differences [...] are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses [of the US Constitution]....Courts are not arbiters of scriptural interpretation.<sup>85</sup>

The change in the approach of the Strasbourg Court in this regard is to be welcomed. If, as the ECtHR has frequently said, freedom of religion is 'primarily a matter of individual belief' then

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<sup>83</sup> Provided the employee could show that the decision to terminate employment related to one of the protected grounds under the directive.

<sup>84</sup> n 3 above, *Eweida and Others*.

<sup>85</sup> *Thomas v Review Board of the Indiana Employment Security Division* 450 U.S. 707 (1981).

the Court should ensure that each individual has an equal right to develop and adhere to those beliefs. Therefore, even discounting the very real problems inherent in judicial identification of what a religion does or does not require, whether or not an individual's beliefs are shared by others should be irrelevant. Just as the non-religious have an equal right to freedom of religion and belief so those with idiosyncratic religious beliefs have as much right to protection of those beliefs as the orthodox believer.

EU law, as noted above, recognizes the right to freedom of belief in similar terms to Article 9 ECHR. However, it also has a much more developed right to freedom from discrimination than the ECHR. Equal treatment is a general principle of EU law.<sup>86</sup> In addition, as well as prohibiting direct discrimination on grounds of religion in employment, Directive 2000/78 prohibits indirect discrimination unless it can be shown to be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."<sup>87</sup> Article 14 of the ECHR provides some protection against discrimination but it covers only discrimination in relation to the rights provided by the Convention. This, as will be shown below, may be a significant difference.

In relation to freedom of religion, the commitment to treating each individual with equal concern and respect means that it is of paramount importance that each individual is accorded the same degree of protection to hold and adhere to their own beliefs. The same is not necessarily true of indirect discrimination. Indirect discrimination on grounds of religion is a distinct issue from the right to freedom of religion. It is true that the prohibition of indirect discrimination can help to ensure that individuals have greater scope to adhere to their religion in contexts where established norms in the workplace (such as dress codes) may clash with the demands of adherence to a person's faith but it has other functions too.

According to EU law, indirect discrimination occurs when, in an employment context there is 'an apparently neutral provision, criterion or practice [that] would put persons having a particular religion or belief [...] at a particular disadvantage compared to other persons'.<sup>88</sup> The prohibition of unjustified indirect discrimination has two bases. One, partly influenced by the American experience of the use of facially neutral rules to perpetuate discrimination against African-Americans, hopes to ensure that the anti-discrimination law is able to catch camouflaged direct discrimination.<sup>89</sup> The second basis involves recognition that certain groups face structural disadvantages. In the case of religion, the majority faith in a society will inevitably have influenced broader structures and arrangements such as working times, dress

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<sup>86</sup> n 76 above.

<sup>87</sup> n 17 above, Article 2(2)(b)(i).

<sup>88</sup> *Ibid.* Article 1.

<sup>89</sup> There has been lively judicial discussion of the categorisation of measures which are facially neutral but where there is an exact correspondence between those suffering the disadvantage those with the protected characteristic. See the discussion in *Bull and Another v Hall and Another* [2013] UKSC 73.

codes, holidays etc. Accordingly, religious minorities may find that rules that do not relate directly to religion do indeed particularly disadvantage them.<sup>90</sup> The key issue in relation to indirect discrimination is *group* disadvantage. Therefore, the imperative of ensuring that each individual is accorded the same degree of protection for their individual choices, which the duty to accord equal concern and respect requires to apply in claims of religious freedom, does not apply to the same extent in relation to indirect discrimination on grounds of religion. This is because protecting religious freedom and prohibiting indirect discrimination have different goals. One aims, inter alia, to protect the autonomy of each individual to hold and adhere to beliefs the other aims to alleviate some of the burdens that fall on members of a group whose particular beliefs mean they face particular obstacles.<sup>91</sup>

This raises complex issues in relation to the claims on the part of a particular individual that a workplace arrangement creates particular disadvantage for them individually but where it is unclear that any others are of the same view. This issue arose in the Court of Appeal in the UK in *Eweida v British Airways*<sup>92</sup> a case that went on to become *Eweida and Others v UK*<sup>93</sup> in Strasbourg. In this case Ms. Eweida, a check in worker for British Airways, was, for a time, refused permission to wear a cross over her uniform. Before the national courts she argued both that her Article 9 ECHR rights had been infringed and that this refusal was indirect discrimination contrary to Directive 2000/78 (as implemented in the UK) against Christians, such as herself, who wished to wear a visible cross.

There were some complicating factors in the case, namely no other Christians working for British Airways claimed that their faith required them to wear the cross visibly and Ms. Eweida herself had characterized her decision to wear the cross as a personal choice rather than a religious requirement. In the Court of Appeal Sedley LJ noted that the relevant provision of the Directive and the implementing UK legislation was phrased in the plural ‘a provision, criterion or practice [...] which puts or would put *persons* of the same religion or belief as [the employee alleging discrimination] at a particular disadvantage compared with other person’).<sup>94</sup> He noted that this reflected the fact that in dealing with claims of indirect discrimination ‘equality laws on both sides of the Atlantic have, for many years sought to do this by seeing, first, whether an

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<sup>90</sup> In the US in *Griggs v Duke Power Company*, the Supreme Court recognised that the measure in question had been adopted without any discriminatory intent but held that that did not redeem measures that ‘operate as “built-in headwinds” for minority groups’ *Griggs v Duke Power Company* 401 US 424.

<sup>91</sup> Though, of course, individual religious freedom may be enhanced by measures restricting indirect discrimination on grounds of religion or belief thus reducing the cost to believers of adhering to their beliefs.

<sup>92</sup> *Eweida v British Airways* [2010] EWCA Civ 80.

<sup>93</sup> n 3 above.

<sup>94</sup> *Ibid.* para 6.

identifiable group is adversely affected, whether actually or potentially, by some ostensibly neutral requirement and then whether the claimant has in fact been disadvantaged by it'.<sup>95</sup>

Sedley LJ concluded that there was 'no indication that the Directive intended either that solitary disadvantage should be sufficient –the use of the plural ("persons") makes such a reading highly problematical –or that any requirement of plural disadvantage must be dropped'.<sup>96</sup> He contrasted the wording of the Directive with legislation in relation to disability discrimination which was phrased in terms of a condition that 'places the disabled person concerned at a substantial disadvantage'.<sup>97</sup> Accordingly, for indirect discrimination on grounds of religion or belief, 'some identifiable section of the workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares'.<sup>98</sup> The Court of Appeal therefore endorsed the holding of the lower court (Employment Appeal Tribunal) that 'in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably be able to appreciate that any particular provision may have a disparate adverse impact on the group'.<sup>99</sup> This approach was confirmed in *Mba v London Borough of Merton*<sup>100</sup> where the Court of Appeal again confirmed that indirect discrimination, involved in the words of Elias LJ, 'the need to establish group disadvantage'.<sup>101</sup> In this case, in which a Christian care worker sought an exemption from working on Sundays, the judges noted that Article 9 claims were not subject to such a requirement but disagreed over the impact this ought to have. All of the judges deprecated the notion of assessing what was a core component of an individual's religion by reference to group beliefs (though it should be underlined this is a separate issue from whether there is group disadvantage in the first place). Lay LJ limited himself to stating that he was not convinced that the need to show group disadvantage could amount to a breach of the Convention. Elias and Vos LJ felt that once group disadvantage had been shown and the issue of the justification of any disadvantage was being considered, Article 9 would function so that a court should avoid finding that the employee's case for accommodation was weakened by the fact 'that her beliefs are not more widely shared or do not constitute a core belief of any particular religion'.<sup>102</sup> Indeed they noted that if Ms. Mba's views were not widely shared, her case for

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<sup>95</sup> *Ibid.* para 13.

<sup>96</sup> *Ibid.* para 15.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* para 24.

<sup>100</sup> *Mba v London Borough of Merton* [2013] EWCA Civ 1562.

<sup>101</sup> *Ibid.* para. 35.

<sup>102</sup> *Ibid.* paras. 35 to 42.

accommodation (which failed on the facts) would be all the stronger as the burden of accommodating her would have been all the lower.<sup>103</sup>

What is most important to note for our purposes is that the Courts regarded group disadvantage as an inherent element of claims of indirect discrimination on grounds of religion. The disadvantage need not apply to all one's co-religionists, even a small minority would suffice, but solitary disadvantage is not sufficient. This approach is correct. Indirect discrimination focuses on *particular* disadvantage. In this context the term particular could have two meanings. One possible meaning would be particular in the sense of 'specific to'. A solitary believer may suffer particular disadvantage in the sense that her particular beliefs mean that she and only she suffers the disadvantage in question. The alternative approach is to regard 'particular' as connoting 'exceptional' or 'unusual' disadvantage. However, given the fact that the relevant provision of the Directive is worded in the plural and the history of indirect discrimination as a means to address the 'headwinds' faced by identifiable groups, the judges were correct to adopt the latter meaning. Therefore, while a solitary believer suffers disadvantage that is particular in the sense that no one else is impacted as she is by a rule limiting her ability to adhere to her beliefs, this disadvantage is not 'particular' in the sense of being unusual or exceptional.<sup>104</sup> This is because everyone holds beliefs that may clash with workplace arrangements so no exceptional, and therefore no particular, disadvantage arises when an individual finds the beliefs they hold are restricted by such arrangements. The exceptional nature of the disadvantage needed to trigger protections relating to indirect discrimination only arises when one can show disadvantage relating to membership of a group identified as facing 'headwinds'<sup>105</sup> which it particularly difficult for its members to attain the same degree of autonomy and flourishing as others.

What is interesting to note is the degree to which this approach is distinct from that which applies in relation to litigation relating to freedom of religion and belief. The focus on group disadvantage does not apply in relation to the rights protected by the ECHR. Ms. Eweida's case came before the Strasbourg Court along with three others including that of Lillian Ladele, a civil registrar who refused to register same-sex partnerships and who had argued that the failure of her employer to exempt her from their no discrimination policy itself amounted to indirect discrimination contrary to Article 14 ECHR read in conjunction with Article 9 ECHR. In finding in

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<sup>103</sup> *Ibid.*

<sup>104</sup> The employee's freedom of religion or belief is, of course, restricted in this scenario, but this is a different issue from whether she faces particular difficulties on account of her membership of a disfavoured group.

<sup>105</sup> The term comes from the decision in *Griggs Power* n 90 above. For a defence of the idea of all discrimination law as aiming at the reduction of group disadvantage (rather than the standard view that collective disadvantage relates to indirect but not direct discrimination) See T Khaitan *A Theory of Discrimination Law* (Oxford and New York, OUP, 2015).

favour of Ms. Eweida's claim that her right to freedom of religion had been breached, the Strasbourg Court held that there was no need that she show 'that she acted in fulfillment of a duty mandated by the religion in question'. She instead had to show the existence of a 'sufficiently close and direct nexus between the act and the underlying belief.'<sup>106</sup> As a matter of freedom of religion (rather than indirect religious discrimination) this approach, which focused only on Ms. Eweida's individual belief and ignored the question of whether it was shared by an identifiable group, was correct. As noted above, unlike indirect discrimination, religious freedom is primarily an individual right. The fact that, unlike the national court, the Strasbourg Court found in favour of Ms. Eweida does not necessarily mean that its approach to indirect discrimination is out of line with the interpretation of the EU Directive given by the English Court of Appeal. Ms. Eweida's win was based on the (in my view, problematic)<sup>107</sup> finding that, on the facts, insufficient weight had been attached to her religious freedom by the national court and not on the basis of a discrimination claim. Having found in her favour on grounds of religious freedom, the Court did not find it necessary to go on and rule on the discrimination aspect of her claim.

However, in its decision in *Ladele*, the ECtHR did address more directly the issue of indirect discrimination on grounds of religion under the Convention. The Court noted that Article 14 ECHR has effect only in relation to discrimination in relation to the rights guaranteed by the Convention. This does not mean that a violation of another article must be shown, just that 'the facts of the case fall within the ambit of another substantive provision of the Convention.'<sup>108</sup> The Court went on to say that "that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of Article 14"<sup>109</sup> but that discrimination could arise both from 'a difference of treatment between persons in relevantly similar positions - or a failure to treat differently persons in relevantly different situations.'<sup>110</sup> In such cases, prohibited discrimination is established only if the impugned act 'does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.'<sup>111</sup>

In the *Eweida* case, the UK court's application of the EU Directive had focused on whether Ms. Eweida's claim to wear the cross was one which was shared with an identifiable group of believers. In contrast, in dealing with Ms. Ladele's claim that a failure to exempt her from a rule

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<sup>106</sup> n 3 above, para 82.

<sup>107</sup> R. McCrea 'Religion in the Workplace: *Eweida and Others v United Kingdom*' *Modern Law Review*, 77(2) (2014) 277-291.

<sup>108</sup> n 3 above para 85.

<sup>109</sup> *Ibid.* para 86.

<sup>110</sup> *Ibid.* para 87.

<sup>111</sup> *Ibid.* para 88.

requiring her not to discriminate on grounds of sexual orientation in carrying out her functions as registrar, the Strasbourg Court did not find it necessary to make any such inquiry. It held that 'the applicant's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. The events in question fell within the ambit of Article 9 and Article 14 is applicable'.<sup>112</sup>

In assessing whether there was a particular disadvantage the judgment stated:

The Court considers that the relevant comparator in this case is a registrar with no religious objection to same-sex unions. It agrees with the applicant's contention that the local authority's requirement that all registrars of births, marriages and deaths be designated also as civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs.<sup>113</sup>

Notably absent from this discussion of particular disadvantage is analysis of whether this objection was characteristic of a group or whether there were others in Ms. Ladele's situation who had raised similar objections (though it should be noted the Court did mention in passing that Ms. Ladele's beliefs in relation to the sinfulness of homosexuality reflected 'the orthodox Christian view that marriage is the union of one man and one woman for life'.<sup>114</sup>

Such an approach is different from the understanding of indirect discrimination on grounds of religion or belief in EU law. Discrimination under the Convention applies only in relation to the protection of fundamental rights. When we are dealing with the fundamental right to religion or belief, a key aim must always be to ensure that each individual is accorded the same protection to their right to choose and adhere to their beliefs,<sup>115</sup> whether such beliefs are shared by an identifiable group or not. Therefore the understanding of indirect religious discrimination under the ECHR will remain focused on protecting individual holders of belief from unjustified indirect discrimination. This deviates from the more group-focused concept of indirect discrimination on grounds of religion or belief under EU law which relates to a freestanding right to require justification of measures that create particular disadvantage for identifiable groups holding particular beliefs.<sup>116</sup>

## Significance

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<sup>112</sup> *Ibid.* para 103.

<sup>113</sup> *Ibid.* para 104.

<sup>114</sup> *Ibid.* para 102.

<sup>115</sup> See Dworkin, n 28 above.

<sup>116</sup> Although a rigorous approach to measures that are indirectly discriminatory on grounds of religion or belief may help to secure the freedom of religion or belief for religious minority groups in that such an approach may reduce the difficulties they face in adhering to their beliefs.

These potentially divergent conceptions of indirect discrimination are significant for two reasons. First, the divergence raises the question of whether both approaches are capable of co-existing. More broadly, like the divergence on the matter of a ministerial exemption for religious employers, the differences between the ECHR and EU law shed light on the key issue of the 'specialness' of religion in relation to other forms of belief which is at the centre of key debates in relation to the relationship between religion, the law and the state.<sup>117</sup>

It should be quite possible for the approaches of the ECHR and EU to co-exist. It is not clear that Ms. Ladele's claim of discrimination added anything to her chances of winning. It does not appear that the Court required any greater justification from the State in relation to her Article 14 claim than it required in relation to the claims in respect of Article 9 alone. In both cases the Strasbourg judges looked to see if the state act (or omission) alleged to be discriminatory or restrictive of religious freedom could satisfy a proportionality test. Under the ECHR therefore, once an individual shows that an act infringes their religious freedom, showing it is discriminatory will not add any extra protection. As Article 10 of the EU Charter reproduces within EU law the protection for individual religious freedom provided by Article 9 ECHR, in any case where an individual alleges that an act restricts their religious freedom, a Court applying EU law will have the ability to adequately uphold that individual's right to freedom of religion or belief, even if the individual in question is the kind of solitary believer seen in *Eweida v British Airways*<sup>118</sup> who cannot make out a claim of indirect discrimination under Directive 2000/78. Thus, a case where the failure of EU law to recognize as indirectly discriminatory for the purposes of the Directive, a claim by an solitary believer, is unlikely to result in a finding by the Strasbourg Court that EU law does not adequately respect Convention rights. After all if Article 14 read with Article 9 requires no greater justification of restrictive measures than Article 9 alone, and courts applying EU law are bound by Article 10 of the Charter to apply an equivalent standard to that which applies under Article 9 ECHR, then there is no diminution of protection inherent in the failure of EU law to apply the individualistic view of indirect discrimination applied by the ECtHR in *Ladele*.

Indeed, a more likely scenario is that EU law, by seeing indirect discrimination on grounds of religion as a group right that is based not solely on fundamental rights protection but on the fact that religion or belief is a salient form of identity, provides greater chances of success for those seeking religious exemptions from generally applicable norms. Luxembourg may therefore provide a second chance for cases that have failed in Strasbourg such as those

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<sup>117</sup> n 50 above.

<sup>118</sup> It should be noted that Ms. Eweida's win required a change in the previous approach of the Strasbourg Court to workplace measures that restricted religious freedom.

challenging restrictions on religious symbols in school, public or refusals to exempt religious individuals from compliance with anti-discrimination rules.<sup>119</sup>

Strasbourg's individualistic approach under which indirect discrimination on grounds of religion or belief can be established by a solitary believer makes it easier to raise a claim of indirect discrimination but harder to win. If one focuses on the individual and their right to equal freedom as the key aim then religious belief cannot be seen as 'special' in the sense of being entitled to greater protection than non-religious forms of belief. If our aim is individual autonomy and dignity it should not matter whether a person asserts a belief that is religious or non-religious in nature. The law should show equal concern and respect for all individuals and ensure to them the same degree of protection for their right to hold and adhere to beliefs. Indeed, in key religious freedom cases such as *SAS v France*, the Court assessed a challenge to a prohibition on public face-veiling on the basis that the claims raised under Article 8 (privacy) and Article 10 (freedom of expression) raised the same issues as the claim under Article 9.<sup>120</sup> Such an approach is inconsistent with the view that the religious claim was 'special' in the sense of being the basis for a claim for a greater degree of protection of the autonomy of the individual in question than other rights autonomy rights such as privacy or free expression which everyone accepts apply equally to religious and non-religious individuals. This individualistic view of religious freedom has underpinned Strasbourg's move away from deciding objectively on what is required by an individual's beliefs and to content itself instead with verifying that there is 'a sufficiently close and direct nexus between the act and the underlying belief'.<sup>121</sup> This chimes with the notably individualistic approach to freedom of religion and belief adopted by EU Guidelines and the endorsement by the Strasbourg Court and the EU institutions that non-religious beliefs are entitled to equal protection.<sup>122</sup> Indeed, moving

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<sup>119</sup> However, in cases such as that of Ms. Ladele where the accommodation sought involves a request to discriminate, the imperative of preventing discrimination is likely to mean that a refusal to accommodate such a claim is highly likely to be found to be proportionate (see n 3 above).

<sup>120</sup> *SAS v France*, Application No 43835/11, Judgment of 1 July 2014 (Grand Chamber), paras 123 to 163.

<sup>121</sup> n 3 above para 82.

<sup>122</sup> It should be noted that even if a court defers to an individuals' assessment of the requirement of their faith, this does not mean that the concept of freedom of religion or belief will always cover the act in question. The Strasbourg approach of requiring a 'sufficiently close nexus' has received academic support in the US from commentators concerned with recognition of expansive notions of complicity in cases such as Little Sisters of the Poor where claims were made that requiring employers to sign an opt-out from providing contraception and thus triggering provision of contraception by a third party violated religious freedom by making employers complicit in the provision of contraception. Gedicks argues (F M Gedicks, "'Substantial' Burdens", Brigham Young University Law Research Paper 15-18 available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733) last visited 22 November 2015) that the notion of "substantial burden" on religious freedom contained in the Religious Freedom Restoration Act must be interpreted objectively and not solely in accordance with the believer's view of what is substantial in order to avoid recognizing unsustainable and unfairly extensive complicity based opt-out

towards the more group-focused approach of EU legislation relating to indirect discrimination would fundamentally undermine the egalitarian and individualistic view of religious freedom that the Strasbourg Court and EU Member States have long championed.

From the point of view of those seeking maximal religious liberty, there are drawbacks to Strasbourg's approach. If any form of belief, including beliefs only held by one person, can form the basis of indirect discrimination claims, the compelling nature of the particularity of the disadvantage asserted is hard to see. After all, we all hold beliefs, even deeply felt ones and some of those beliefs will inevitably rub up against some workplace or other rules. There is nothing particularly disadvantageous to any one person who finds there is a clash between one of their beliefs and a particular rule. Such an experience is universal, not particular. In addition, in circumstances where a clash with any belief is recognized as constituting indirect discrimination, the costs of accommodating a claim to exemption will inevitably be higher. If anyone with a deeply felt objection to complying with a non-discrimination rule must be accommodated, the damage to the aim of prevention of discrimination will be greater than if exemptions could be confined to a particular category.<sup>123</sup>

On the other hand, if one can show that one has a particular religious identity that is shared with an identifiable group (thus coming within the indirect discrimination definition of EU law) then one can ask for an exemption that need not be generalizable to everyone. This is because the aim of preventing indirect discrimination here is to compensate members of groups whose particular identity places them at a particular (in the sense of exceptional) disadvantage, not to ensure that each individual has an equal chance to follow their beliefs. If the exemption claimed can be restricted to a particular category of people (something that is not possible when dealing with claims of religious freedom as it is a right to which each individual is entitled in equal measure) then the impact on the attainment of the objective pursued by discriminatory norm that has been challenged will be less making it easier to assert that a refusal to grant the exemption is disproportionate.

The divergence in the understanding of indirect discrimination on grounds of religion that we see between the ECHR and EU law highlights how the way in which we perceive religion and religious freedom can impact hugely on the role and restrictions of the role of religion in law and society that we are willing to recognize. When religion is seen as a form of belief it may be treated differently from when it is seen as a salient form of identity.

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rights. This must be correct if we are to avoid scenarios such as a petrol station attendant refuse to provide fuel to a taxi driver who may use the taxi to drive women seeking abortions to a hospital.

<sup>123</sup> As noted above, claims for exemption from anti-discrimination rules on the basis that requiring compliance is indirectly discriminatory are likely to fail in any event due to the strong countervailing interest in preventing the symbolic or material harms that result from acts of discrimination.

This is something that applies to both areas of divergence between the ECHR and EU law that I have noted and to bigger debates around the relationship between religion, state and law. As we have just seen, regarding religion as a salient form of identity may provide more scope for the assertion of particular or special rights (i.e. accommodations not granted to all) for followers of particular religions in the context of discrimination law. Viewing religion as a salient form of group identity provides the ground for special measures as it allows holding beliefs to be recast as a particular disadvantage rather than a universal right.

This echoes broader debates around religion's broader political and legal role such as the secular nature of state. Rules that prevent symbolic endorsement of a faith by the state or the use of law to enforce the teachings of a particular religion cannot be upheld if we see religion simply as a form of belief. After all, states symbolically endorse and legislate to impose many forms of belief such as commitments to racial or sexual equality so why should they be precluded from endorsing or enforcing religious beliefs?<sup>124</sup> Rather, such rules rely on a recognition of religion as a particularly salient form of identity, thus justifying the conclusion that allowing the possibility for religions to compete for the opportunity to use the symbolic of legislative powers of the state to advance their own faith would be to invite political instability and conflict or that due to religion's status as a deep and unchanging part of human identities, state endorsement of one faith would have an equivalently exclusionary effect as state endorsement of the superiority of a particular racial identity (an approach that is consistent with to Nussbaum's view of the First Amendment as providing exemptions for believers on the basis of the unique political disabilities placed on the faithful by the non-establishment clause of the First Amendment of the US Constitution).<sup>125</sup>

The distinction between religion as a belief or truth claim and as a form of cultural identity also operates in the opposite direction. Both EU law and the ECHR regard religious freedom as being primarily a matter of individual belief and, as I have written elsewhere,<sup>126</sup> the EU constitutional order is rigorous in rejecting the idea that religious truth claims have a role to play in law or policy making. But both systems see religion in other ways in other contexts. For instance, EU law is willing to allow indirect religious influence over EU law by culturally-entrenched faiths providing that the religious influence in question is repackaged as a claim to respect for broader national cultural identity.<sup>127</sup> Thus, EU does accommodate Member State rules that preserve restrictions on gambling and Sunday trading on the basis that they are cultural characteristics

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<sup>124</sup> See the discussion by Laborde n 50 above.

<sup>125</sup> M Nussbaum *Liberty of Conscience* (New York, Basic Books, 2008). Nussbaum's analysis does not readily transfer to Europe due to the strong commitment to treating religion and non-religion as entitled to equal protection under fundamental rights norms which, as noted above, is at the core of European approaches in the area of individual freedom of religion and belief.

<sup>126</sup> n 14 above, chps 6 and 7.

<sup>127</sup> *Ibid.* chps 3, 5 and 7.

or part of a broad national ethical framework.<sup>128</sup> This is something that echoes the ECtHR's upholding of the presence of the crucifix in Italian state schools in *Lautsi* on the basis that its presence represented the continuation of a cultural tradition.<sup>129</sup>

The fact that the CJEU is required to interpret the meaning and significance of religion and belief may help to highlight to a greater degree the different forms that religion takes in its interaction with the law and the state and the degree to which it is necessary to develop distinctions in how it is characterized in differing contexts in order to come up with just and sustainable arrangements in liberal societies. As Laborde's valuable work on disaggregating religion shows,<sup>130</sup> religion raises different problems and is the basis for very different claims in differing contexts. Sometimes it should be seen as a belief akin to political beliefs, other times it is right to treat it as something closer to ethnic or racial identity. Designing legal rules for such a shape-shifting phenomenon that is viewed in so different ways by different people in so many different contexts is immensely difficult. The fact that we have two pan-European Courts with different tasks and frameworks of analysis will hopefully help to enrich the work of each Court by providing additional perspectives to each other that can enhance their approach to their work in each case.

## **Conclusion**

As will be apparent from the above, the Court of Justice of the EU and the European Court of Human Rights are unlikely to come into very serious conflict on matters of religion. There are some differences in the legal texts they interpret and the interpretative approaches they must adopt, most notably arising from the broader scope both of EU law and of the task of the CJEU whose interpretative task goes beyond issues of fundamental rights. However even where there are differences, those differences should be able to coexist if we recognize that they are founded on distinctions of principle

EU law may influence Strasbourg away from requiring adoption of a broad, US-style ministerial exemption and CJEU cases on the secular nature of the EU legal order, if they arise, may be significantly more demanding than Strasbourg caselaw due to the ability of the Luxembourg court to take more full account of broader reasons for separating religion and law, beyond issues of fundamental rights. Even if, over time, we do not witness any serious clashes between Luxembourg and Strasbourg the differences in approaches of the Courts have significant potential to highlight and add to our knowledge in relation points of wider general importance. In particular, the divergence between the approach of Strasbourg, which looks at indirect discrimination in relation to the right to freedom of religion or belief and the approach of EU

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<sup>128</sup> nn 19 and 58 above

<sup>129</sup> n 2 above.

<sup>130</sup> nn 19 and 58 above.

law, which regulates indirect discrimination in relation to religion or belief as a means of reducing exceptional disadvantages faced by those with certain forms of collective identity, may help to clarify separate nature and differing aims of the fundamental right to freedom of religion or belief and the right to be free of unjustified direct discrimination in relation to religion or belief.

Discussion of indirect discrimination on grounds of religion has sometimes tended to conflate issues of religious freedom and discrimination.<sup>131</sup> The divergence between the EU law concept of indirect discrimination and Strasbourg's individualistic approach may help to counteract this tendency. It may also allow us to recognize the particular form of indirect discrimination recognized in *Ladele* (indirect discrimination in relation to an individual right to religious freedom) as a hybrid form of individualized indirect discrimination that is conceptually separate from indirect discrimination more generally. Recognising indirect discrimination tout court on the one hand, and indirect discrimination in relation to a fundamental right on the other, as distinct legal principles with different aims, will also allow the CJEU to continue to apply Strasbourg's approach when it deals with Charter of Fundamental Rights cases without changing its approach to indirect discrimination in Directive 2000/78. Finally, the fact that Ms. Ladele's invocation of indirect discrimination in relation to her religious freedom got her no further than a simple claim of infringement of religious freedom would have got her may serve as a warning for those who wish to see the individualized approach of the Strasbourg Court applied to claims of indirect discrimination under Directive 2000/78.

More broadly, for EU lawyers the differences between the legal systems can also show us how, although, the CJEU (like Strasbourg) deals with balancing of Member State choices with upholding common legal standards, in some ways its relationship to the ECtHR is more like that of a national constitutional court rather than a fellow international tribunal in that its rulings are made on the a variety of grounds will fall to be assessed by Strasbourg on rights grounds alone. For scholars of the relationship between law and religion the differences may equally help to highlight key issues such as what rights can and cannot justify in debates on secularism and the key distinction between religion as belief and religion as salient form of identity that will be at the centre of future debates in this area.

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<sup>131</sup> N Hatzis 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' *Modern Law Review* 74(2) 287–305 (2011).