

## Religion and Law in Europe

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The three major European institutions – the European Union (EU), the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE) – all acknowledge the importance of religion within European history and culture and their core documents give formal recognition to freedom of thought, conscience and religion. As has been argued elsewhere (Doe, 2011), the attitude of the EU and, for that matter, of the CoE to ‘religion’ is characterized by seven principles – the value of religion and of non-religion; subsidiarity; religious freedom; religious equality and non-discrimination; the autonomy of religious associations; cooperation with religion; and the special protection of religion by means of privileges and exemptions – principles that may be induced from their laws and other regulatory instruments. Ronan McCrea (2010) suggests that the EU seeks to maintain a balance between its religious, humanist and cultural elements. How that balance and recognition operate in practice, however, is far from clear-cut and is highly sensitive to individual circumstances.

The same values are of equal importance to the CoE – of which all EU states are members – as to the EU. Article 9 of the European Convention on Human Rights (ECHR) – formally, the Convention for the Protection of Human Rights and Fundamental Freedoms – guarantees ‘the right to freedom of thought, conscience and religion’ subject only to ‘such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’. Consequently, the values are asserted in the Recommendations and Resolutions of the Parliamentary Assembly of the CoE and in the jurisprudence of the European Court of Human Rights (ECtHR): for example, the first case to be decided under Article 9 ECHR<sup>1</sup> declared at paragraph 31 that religion was ‘one of the most vital elements that go to make up the identity of believers and their conception of life’ and pluralism ‘indissociable from a democratic society’. Article 10 of the EU Charter of Fundamental Rights 2012 (CFR) echoes the terms of Article 9 ECHR and its Preamble affirms ‘with due regard for the powers and tasks of the Union and for the principle of subsidiarity’ the rights resulting *from the ECHR*.

As for the EU, its relationship with ‘religion’ in the wider sense has been a matter of debate at least since the early nineties. In a speech to representatives of the European Churches on 4 February 1992, Commission President Jacques Delors argued that the Union would not succeed solely on the basis of legal expertise or economic know-how: ‘If in the next ten years we haven’t managed to give a soul to Europe, to give a spirituality and meaning, the game will be up ... This is why I want to revive the intellectual and spiritual debate on Europe. I invite the Churches to participate actively in it. We don’t want to control it; it is a democratic discussion, not to be monopolised by technocrats ... We must find a way of involving the Churches’ (Krause 2007: 1.1; Hogebrink 2015: 16).

The issue re-emerged in 2002 when the EU Treaty was, in effect, being re-negotiated within the European Convention chaired by Valéry Giscard d’Estaing. One of the burning issues in the discussions was the place of ‘religion’: in short, whether or not there was to be any mention of the religious heritage of the Union in the Preamble to what was to become the Treaty of Lisbon – more formally, the European Union Reform Treaty 2007 (EURT). Looking back in 2008, Valéry Giscard d’Estaing said that it had been ‘an important debate ... It was quite difficult to achieve, because words don’t have the same meaning everywhere’, pointing

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<sup>1</sup> *Kokkinakis v Greece* [1993] ECHR 20.

to the different connotations of *laïcité* in France, Italy and the UK but stressing that Europe from the sixth to the eighteenth century was Christian: ‘It’s not a value judgment, it’s not saying it’s good or bad. It’s just how it is’ (Bribosia 2008: 17). In the end, the issue was finessed by broadening its terms: the EURT as finally agreed (EURT 2007: C 306/1) inserted into the Preamble of the Treaty on European Union (TEU) as the second recital:

‘DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.’ (TEU 1992/2008: C115/15)

The institutional relationship between the EU and the ECHR is a complex one. What is now Article 6 of the TEU declares, *inter alia*, that ‘The Union shall accede to the [ECHR]’ while, for its part, the CoE reciprocated by adding a new paragraph (2) to Article 59 ECHR: ‘The European Union may accede to this Convention’. The EU’s accession was stalled, however, in 2014, when the Full Court of the Court of Justice of the European Union (CJEU) concluded that accession would be incompatible with EU law, primarily because, contrary to Article 6(2) TEU, it would adversely affect the characteristics and autonomy of Union law.<sup>2</sup>

Whether corporate accession would make any great practical difference is, however, arguable. All current Members are also members of the CoE and, under Article 6.3 TEU, fundamental rights *as guaranteed by the ECHR* ‘shall constitute general principles of the Union’s law’, while the CFR reaffirms, *inter alia*, both the ECHR itself and the validity of the case-law of Strasbourg. Accordingly, the CJEU takes careful note of the jurisprudence of Strasbourg: it has declared that the ECHR has special significance<sup>3</sup> and has held that, where Charter rights correspond to those guaranteed by the ECHR, ‘their meaning and scope are to be the same as those in the ECHR’.<sup>4</sup> In what follows, therefore, it should be remembered that European law on religion must be understood both from the perspective of the European Union and within the wider context of the European Convention on Human Rights.

## **The value of religion**

The first of the principles of European religion law is the value of religion and, equally, of non-religious life-stances. As noted above, the Preamble to the EURT recognized that value, declaring that the EU draws inspiration ‘from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’. Article 17 of the consolidated 2012 text of the Treaty on the Functioning of the European Union (TFEU), inserted by the EURT, recognizes the status under national law of churches, religious associations or communities, philosophical and non-confessional organizations and commits the Union to ‘an open, transparent and regular dialogue’ with them.

All the foregoing implies recognition of the value of religion *per se* and of the principle of subsidiarity – of which more below. However, it is not new: the Preamble to the CFR refers to Europe’s ‘spiritual and moral heritage’, while the Seventh Framework Programme directive, Council Decision (EC) 1982/2006, recognizes ‘religions’ (plural) as one ‘building element’ of European multicultural identity and heritage. Nor does the EURT specify *which* spiritual or

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<sup>2</sup> [2014] EUECJ *Avis-2/13* at 258.

<sup>3</sup> *Akrich v Secretary of State for the Home Department* [2003] EUECJ C-109/01.

<sup>4</sup> *J McB v L E* [2010] EUECJ C-400/10 at 53.

religious heritage is inspirational; indeed, Article 22 CFR obliges the Union to respect ‘religious diversity’.

Directive (EC) 2004/83, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, adopts a studiously-neutral approach to its understanding of religion, which includes holding theistic, non-theistic and atheistic beliefs, participating in or abstaining from private or public worship, other religious acts or expressions of views, or personal or communal conduct based on or mandated by religious belief. That lack of obvious Christian bias is consistent with equality and non-discrimination. So, for example, under the regulation to establish a Community code on the movement of persons across borders – the Schengen Agreement – border guards must ‘fully respect’ human dignity irrespective of religion or belief. In contrast, however, the Common Position adopted in 2005 on dealing with prevention, management and resolution of conflict in Africa also recognizes the dangers posed by ‘the radicalisation of religious groups’.

### **Subsidiarity in religious matters**

The principle of subsidiarity first emerged in the Preamble to the Treaty on European Union (TEU) as signed in Maastricht in 1992, under which the parties ‘RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’. (TEU 1992/2008: C115/16).

Under it, the Union will not intervene in areas outside its exclusive competence unless the objectives of a proposed action cannot be adequately achieved by the individual Member States. The regulation of religion is not expressly listed among the competences of the EU, though subjects associated with religion, such as culture and education, are listed explicitly in, for example, Article 6 TFEU.

The principle is affirmed by the TFEU, while the Preamble to the CFR mentions ‘due regard for ... the principle of subsidiarity’; both recognize the right of States to determine the legal position of domestic religious organizations over a wide range of issues. So, for example, the Union respects the special constitutional status of Mount Athos for ‘spiritual and religious’ reasons; the CJEU has held that religious factors may be an important element in national decision-making on the regulation of gambling; and religious and ethical issues about abortion have been held to be irrelevant in determining the legality of restrictions on student associations providing information about abortion services. In 1996, the CJEU rejected the UK’s attempt to have Directive (EC) 2003/88 – the working time directive – annulled but, in doing so, it also rejected the Commission’s attempt to make Sunday the Europe-wide day of rest. In 2018, the CJEU held that for the Flemish Regional Government to require that ritual slaughter without pre-stunning be carried out only in an approved slaughterhouse did not infringe religious freedom.<sup>5</sup>

Nevertheless, matters within the Union’s economic competence may have a religious dimension. For example, under Directive (EEC) 92/456, Annex 1 on public works procurement rules, the domestic procedures adapted to the relevant EU law that national authorities must apply include, in the case of Belgium, church councils, while the provisions under Regulation (EEC) 3911/92 on the export of cultural goods include elements which form an integral part of religious monuments.

Furthermore, how a third country treats religion may be of direct interest to the EU in its relations with that State. The most recent version of the Accession Partnership with Turkey,

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<sup>5</sup> *Liga van Moskeeën Islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* [2018] EUECJ C-426/16.

in Council Decision 2008/157/EC [2008] OJ L 51/4, 3.1, requires that Turkey guarantee in law and in practice the full enjoyment of human rights and fundamental freedoms by all individuals, without discrimination – irrespective, *inter alia*, of religion or belief – and ‘comply with the ECHR, and ensure full execution of the judgments’ of the European Court of Human Rights (ECtHR). It also requires Turkey to take the necessary measures to establish an atmosphere of tolerance conducive to the full respect of freedom of religion in practice and sets out in considerable detail how it should do so. Though the Turkish example would seem to be a qualification to the principle of subsidiarity, it assumes that *subsidiarity cannot extend to unlawful discrimination on whatever grounds*.

McCrea, echoing Delors, has suggested that the weakness of the EU’s identity means that it ‘lacks the authority to effect fundamental change in the relationship between religion, law, and the state in Europe’ (2010: 3). And perhaps, because the Union is divided between a historically Protestant north and a historically Roman Catholic south – with an increasingly large population who adhere to other religions or to none – the Convention chaired by Giscard d’Estaing concluded that for the EU *as an institution* to attempt to formulate an overall statement on religion was simply a bridge too far. Moreover, Davie (2010: 11) has noted a traditional north-south divide in religious observance in Europe – except for Poland and the two jurisdictions in Ireland, all of which she would regard as special cases. Data from the 2009 European Values Survey on the proportions of those who *never* attend a religious service would largely support that view.

That said, subsidiarity means that national religious affairs are primarily the concern of the Member States without EU intervention and that the Union respects the status of religious organizations under national laws. It may, however, decide on matters falling within its competence even if they have indirect religious implications for Member States.

## Religious freedom

The CJEU has declared that ‘the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law’.<sup>6</sup> In so doing, the EU recognizes the rights, freedoms, and principles set out in Article 10 CFR, which, says Article 6.1, has ‘the same legal value as the Treaties’ (and is consolidated with them). The CJEU’s early jurisprudence took that as a feature of Community polity, along with many other rights that potentially concern religion, even though it was not in the Rome or Maastricht treaties. For example, the Court has held that, though the law on community officials forbade religious discrimination, scheduling an examination on a Friday did not breach the freedom of religion of a Jewish candidate.<sup>7</sup> The principle is also embedded in the Preamble to the Equal Treatment Directive (EC) 2004/113: ‘it is important to respect other fundamental rights and freedoms, including ... the freedom of religion’. Other rules are prohibitive: for example, under Decision (EC) 2004/676 Article 36, staff appointments to the European Defence Agency must not refer to the religious beliefs of candidates.

The principle is particularly evident in the administration of justice. A Member State has no duty to extradite if that State has substantial grounds to believe that the request has been made to prosecute or punish a person on religious grounds or would prejudice the position of that person for religious reasons. The framework decision (EC) 2005/214 on the mutual recognition of financial penalties allows a Member State to refuse to execute a decision or financial penalty if it believes – objectively – that the aim is to punish a person on grounds of religion. Similar considerations apply in the framework decision (EC) 2006/783 on the mutual

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<sup>6</sup> *Omega Spielhallen* [2004] EUECJ C-36/02 at 34.

<sup>7</sup> *Prais v Council of Ministers* [1976] EUECJ C-130/75.

recognition of confiscation orders. Similar rules exist when a Member State refuses transit of third country nationals or stateless persons if they run the risk of torture, inhuman or degrading treatment or punishment, the death penalty – which is in any case forbidden in all EU Member States by Protocol 13 to the ECHR – or persecution because of religion (but not persecution on grounds of belief).

As the European Council pointed out during the Danish presidency in June 1993, the basic prerequisite for EU membership is respect for democracy, the rule of law, human rights and the protection of minorities. In addition, the EU commonly makes religious freedom or equality a condition in its policies on external relations with non-Member States – as in its Common Position on Nigeria, 2002/401. Article 2.1(b)(iii) of Regulation (EC) 1889/2006, to establish a financing instrument for democracy and human rights worldwide, enables Community assistance in the fight against discrimination based on religion or belief. Strasbourg jurisprudence is also important in that regard, while religious freedom is a well-developed element of the constitutional traditions common to the countries of Europe. The CJEU has emphasized that fundamental rights form an integral part of the law and that, in safeguarding those rights, the Court ‘has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the Community may not find acceptance in the Community’.<sup>8</sup>

### **Religious equality and discrimination**

Article 21 CFR prohibits ‘Any discrimination based on any ground’, including ‘religion or belief, political or other opinion’ in accordance with Article 13 of the Treaty of Rome, which declares that ‘the Council, acting ... on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. The Court has therefore declared non-discrimination to be a fundamental principle of EU law.<sup>9</sup>

The prohibition against religious discrimination appears in a multitude of EU regulatory instruments, such as Decision (EC) 2002/621 on the recruitment of Union personnel and Decision (EC) 2004/676 on staff of the European Defence Agency. Under Directives (EC) 2005/71 and 2004/114, Member States must admit third country nationals for the purpose of scientific research and for study, pupil exchanges, unremunerated work, and voluntary service without discrimination on grounds of religion or belief. Equally, under the terms of the Corrigendum to Directive (EC) 2004/58, Preamble (32), EU citizens and their families may move and reside freely within the Union without discrimination on account of religion or belief. Under Regulation (EC) 1905/2006, health care for lower income and marginalized groups must include ‘persons belonging to groups suffering religious discrimination’. Similarly, access to the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Globalisation Adjustment Fund must not discriminate on grounds of religion or belief.

The ECHR’s bar on religious discrimination is similar in breadth to that developed in EU law: Article 14 secures rights under the Convention ‘without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

Conversely, both the ECtHR and the CJEU have been equivocal over the issue of religious dress. For example, the Strasbourg Grand Chamber upheld the French ban on the Islamic face-veil, partly on the ground that France had a wide margin of appreciation in the

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<sup>8</sup> *Wachauf v Bundesamt für Ernährung und Fortwirtschaft* [1989] EUECJ R-5/88 at 17.

<sup>9</sup> *Mangold v Helm* [2005] EUECJ C-144/04.

matter and partly because, in its view, wearing the *niqab* offended against the principle of ‘living together’ (*‘vivre ensemble’*).<sup>10</sup> In two judgments handed down on the same day,<sup>11</sup> the Grand Chamber of the CJEU came to somewhat ambivalent conclusions. In *Achbita*, it ruled that Article 2(2)(a) of Directive 2000/78 – the equal treatment directive – had to be interpreted as meaning that an internal rule of a private undertaking prohibiting the visible wearing of *any* political, philosophical or religious sign in the workplace, including the *niqab*, was not *direct* discrimination based on religion or belief. It might, however, constitute *indirect* discrimination under Article 2(2)(b) if it put persons adhering to a particular religion or belief at a particular disadvantage, unless it was objectively justified by a legitimate aim, such a policy of political, philosophical and religious neutrality in relation to customers, and the means of achieving that aim were appropriate and necessary. In *Bougnaoui*, however, where the request that the claimant should not wear her *hijab* had come from one of her employer’s customers rather than from the employer itself, the Grand Chamber ruled that Article 4(1) had to be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have its services provided by a worker wearing a *hijab* could not be considered a genuine and determining occupational requirement within the meaning of the Article.

### **The autonomy of religious associations**

Neither the Treaty of Rome nor the Maastricht Treaty provides for the autonomy of religious organizations; however, the Treaty of Lisbon amends the Treaty on European Union to provide that ‘the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’ (Article 10, TFEU) – and it is certainly a necessary aspect of religious freedom. In any event, it has been assumed in many other instruments. For instance, under the Accession Partnership decision Council Decision (EC) 2006/35, Turkey must establish conditions for the functioning of religious communities, *inter alia*, through their legal personality, their members, and assets, teaching, appointment and training of clergy, and enjoyment of property rights in line with Protocol 1 ECHR.

Importantly, the Union sometimes explicitly allows for the operation of religious duties, as Advocate General Eleanor V. E. Sharpston has noted.<sup>12</sup> Under the Council Common Position 2007/140, Member States could grant exemptions from the restrictive measures against Iraq (introduced for security reasons) to prevent the entry or transit through their territories of proscribed persons where the travel was justified by ‘urgent humanitarian need, including religious obligation’. In a judgment about French restrictions on the financial freedom of the Church of Scientology, the CJEU did not address religious autonomy but did strike down the law in question on grounds of imprecision and breach of legal certainty.<sup>13</sup>

Perhaps the most well-known juridical expression of the autonomy principle is the freedom of religious organizations to discriminate on grounds of religion in employment. Directive (EC) 93/104 – the working time directive – allows derogations from prescribed requirements for workers officiating in religious ceremonies provided there is proper regard for health and safety, while the Directive (EC) 2000/78 prohibits direct and indirect discrimination on grounds of religion or belief. However, Article 4(2) of Directive (EC) 2000/78 permits religious discrimination for ‘occupational activities within churches and other

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<sup>10</sup> *S.A.S. v France* [2014] ECHR 695.

<sup>11</sup> *G4S Secure Solutions* [2017] EUECJ C-157/15 – more commonly known as *Achbita*, after the Advocate General’s initial Opinion – and *Bougnaoui and ADDH* [2017] EUECJ C-188/15.

<sup>12</sup> *Stichting Regionale Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financien* [2007] EUECJ C-434/05 O.

<sup>13</sup> *Association Église de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] EUECJ C-54/99,

public or private organisations the ethos of which is based on religion or belief' where the nature or context of those activities means that religion or belief is 'a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos' and goes on to declare that it shall 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'. That said, however, the CJEU has ruled that, where a religious organization imposes a religious requirement for employment, that requirement must be *genuine*.<sup>14</sup> Similarly, it has ruled that re-marriage after divorce without a prior annulment was not a genuine and justifiable reason for dismissing a Head of Department of a Roman Catholic hospital because it did not appear to be necessary for the promotion of the hospital's ethos – and similar positions in the hospital were held by non-Catholics who were not subject to the same discipline.<sup>15</sup>

An important by-product of religious autonomy is the integration of decision-making by a religious authority into the EU regime which assigns it public EU functions. So, for example, Directive (EC) 2001/88, on minimum standards for the protection of pigs, refers in the Preamble to the obligation on Member States to respect 'religious rites [and] cultural traditions'. Article 5.2 of Directive (EC) 93/119, on the protection of animals at the time of slaughter, exempts from the requirement for pre-stunning 'particular methods of slaughter required by certain religious rites', while, under Article 2, 'the religious authority on whose behalf slaughter is carried out shall be competent for the application and monitoring of the special provisions which apply to slaughter according to religious rites'. Nevertheless, the Court has ruled that the EU organic production logo cannot be displayed on products derived from animals slaughtered without pre-stunning because 'such a practice fails to observe the highest animal welfare standards'.<sup>16</sup> Under Regulation (EC) 1347/2000, the EU recognizes decisions of church tribunals in matrimonial causes operative under concordats between the Holy See and Portugal, Spain and Italy in determining marital status. Regulation (EEC) 3201/90, on the description of wines, allows wine to be described as acceptable for religious use if it has been produced 'in accordance with the special rules laid down by the religious authorities concerned, and those authorities have given their written approval as to such indication'.

Similarly, though processing personal data about religious or philosophical beliefs is prohibited, there are exceptions for processing carried out by foundations, associations, or other non-profit-making bodies with a religious or philosophical aim in the course of their legitimate activities, provided the procession relates solely to members or persons having regular contact with them and the data subject consents. That said, however, though the General Data Protection Regulation (EU) 2016/679 'respects and does not prejudice the status under existing constitutional law of churches and religious associations or communities in the Member States, as recognised in Article 17 TFEU', that by no means confers *carte blanche*. At the request of the Supreme Administrative Court of Finland, the CJEU ruled in an advisory opinion that the collection of data by the Jehovah's Witnesses during their door-to-door preaching about visits to persons unknown to themselves or to the local congregation was not covered by the exceptions laid down by EU law on the protection of personal data.<sup>17</sup>

## Cooperation with religion

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<sup>14</sup> *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* [2018] EUECJ C-414/16.

<sup>15</sup> *IR* [2018] EUECJ C-68/17.

<sup>16</sup> *Oeuvre d'assistance aux bêtes d'abattoirs* [2019] EUECJ C-497/17.

<sup>17</sup> *Tietosuojavaltutettu v Jehovan todistajat* [2018] EUECJ C-25/17.

The sixth principle is cooperation with religion. Article 17.3 TFEU provides that ‘the Union shall maintain an open, transparent and regular dialogue with ... churches and organisations’. The database of Consultation, the European Commission and Civil Society (CONECCS), which carries information about formal consultative bodies and civil society organizations, lists a long series of religious organizations, such as the Church and Society Commission of the Conference of European Churches, the European Humanist Federation, the *Centre Européen Juif d’Information* and the Quaker Council for European Affairs. The Roman Catholic Church, the Protestant Churches, the Orthodox Churches, the Quakers and the Jewish and Muslim faiths all have full-time representation in Brussels.

Cooperation may be justified on the basis of the particular expertise of religious bodies in, for example, moral and social affairs – but it may also represent a pragmatic response to the fact that religions have simply refused to accept being marginalized by the separation of the State from religion. The Roman Catholic Church, for example, commonly pronounces on matters of public concern; and in an address to members of the European People’s Party, Pope Benedict XVI said that the principal focus of the Church’s public interventions was the protection and promotion of the dignity of the person and to draw particular attention to principles that were not negotiable: the protection of life at all its stages, the family and marriage, and the right of parents to educate their children (Ratzinger, 2006).

Moreover, the principle merely articulates existing EU practices and procedures: Decision (EC) 2006/971 on Specific Programme Cooperation, for example, accepts that ‘appreciation and understanding of differences between value systems of different religions or ethnic minority groups lay foundations for positive attitudes’. Under the terms of Community Regulation (EC) 168/2007, the EU Agency for Fundamental Rights must cooperate closely with non-governmental organizations (NGOs) combating racism and xenophobia at national, European and international levels and one of its functions is to establish a ‘cooperation network’ (the Fundamental Freedoms Platform) to include ‘religious, philosophical and non-confessional organisations’. Cooperation is also a feature of EU external relations; a recent comprehensive overview argues that faith-based organizations ‘are playing a pivotal role in a number of new fields, including climate change, development, and conflict resolution, and the EU is taking them increasingly into account’ (Perchoc, 2017: p.1).

That principle extends also to financial support for religion which, under Regulation (EC) 113/2002, is included in the classification of non-profit institutions for the purposes of expenditure. Churches and religious associations and communities are eligible for funding in relation to a range of issues: development cooperation, nuclear safety cooperation, joint cross-border cooperation under the European Neighbourhood and Partnership Instrument and, under Regulation (EC) 1717/2006 Article 10(2), promoting ‘Stability Abroad’.

The Lisbon Treaty obligation to cooperate in dialogue with religions that became Article 17.3 TFEU goes beyond the constitutional laws of Member States – and, indeed, beyond the reach of the EU; the Council of Europe’s White Paper on Intercultural Dialogue, *Living Together as Equals in Dignity* CM (2008) gave rise to an annual dialogue, of which the 2017 session was the tenth in the series.

National constitutions do not explicitly impose *duties* to engage in dialogue and cooperate with religions, but under them States may have a *right* to do so—and concordats and other agreements on church-state relations have proliferated within national borders. Moreover, national laws facilitate cooperation on a host of matters of common concern, ranging from acquiring legal personality and non-interference by the State in the internal affairs of religious organizations to chaplaincy in hospitals, prison and the armed forces. Dialogue with religious organizations by the Union and the Council of Europe in policy-making and recognition of



their importance in civil society simply reflect a basic principle of religion law common to the Member States of the two institutions.

### **The special protection of religion**

The special protection of religion by means of privileges and exemptions is more prevalent in EU functional instruments than its treaties. However, Article 10.2 of the CFR recognizes ‘The right of conscientious objection ... in accordance with the national laws governing the exercise of this right’, while Article 14.3 guarantees ‘the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions’. That position is by no means uncontroversial; Habermas, for example, argues that justifying laws or policy on religious grounds is inconsistent with a liberal constitutional order (2006: p.4). As with religious autonomy, special protection seems to be a micro-principle of religious freedom: people cannot practise their religions freely if rules of general applicability disadvantage them in particular ways because of their religious needs.

The concept of special protection is based on EU practice in various fields. First, special protection may be afforded to religious *associations*. Under Directive (EEC) 89/104, Article 3(2)(b), for example, a Member State may provide that a trade mark shall not be registered where it covers ‘a sign of high symbolic value, in particular a religious symbol’, while Directive (EC) 2000/31, Article 3(4)(a) bans advertisements in any broadcast of a religious service. Secondly, special protection may be afforded to *individuals* – so Directive (EC) 2000/31, Art 3(4)(a) provides that Member States may derogate from the terms of the directive on electronic commerce in order to combat any incitement to hatred on grounds of religion. Thirdly, special protection may apply to religious *property*. Regulation (EEC) 3911/92, Annex, Article 1.2, for example, makes provision about the export of cultural goods forming an integral part of religious monuments while, under Directive (EEC) 93/7, the return of cultural objects unlawfully removed from a Member State includes objects found in ecclesiastical inventories. Fourthly, special protection is extended to *food* – we have already noted the exemption from pre-stunning of animals accorded to religious slaughterers. Under Regulation (EC) 1829/2003, an applicant for authorization to trade in genetically modified food or feed must submit ‘a reasoned statement that the food does not give rise to ethical or religious concerns’ and the product label must state whether the modification gives rise to such concerns. Similarly, under the terms of Regulation (EC) 2000/2005, export refunds on beef and veal should be granted for third countries which, ‘for cultural or religious reasons, traditionally import substantial numbers of animals for domestic slaughter’.

A related practice is the conferral of special religious privileges, though this has not been articulated formally in EU foundational instruments. Special privileges or exemptions for religion have long been a feature of national laws on a wide range of matters; and McCrea (2010, p.164) suggests that, in relation to discrimination, ‘EU law recognizes religion as an exceptional phenomenon whose communal rights and public role are entitled to broad recognition not accorded to other kinds of bodies’.

EU law commonly exempts religion from prescribed requirements. Under Directive (EC) 2001/85, ‘mobile churches’ enjoy exemptions from the requirements of vehicle harmonization, while under Directive (EEC) 77/388, tax exemptions may allowed for ‘supplies of staff by religious or philosophical institutions for medical, welfare, child protection and educational purposes with a view to spiritual welfare’.

By way of contrast, Council Decision (EC) 2006/35 on the Turkey accession partnership requires at Annex 3.1 that Turkey adopt a law ‘comprehensively addressing all the difficulties faced by non-Muslim religious minorities and communities in line with the relevant European standards’ and suspend all sales or confiscation of properties belonging to non-

Muslim religious communities, implement ‘the exercise of freedom of thought, conscience and religion by all individuals and religious communities in line with the European Convention on Human Rights and taking into account the relevant recommendations of the Council of Europe’s Commission against Racism and Intolerance’ and establish conditions for the functioning of all religious communities, including their legal and judicial protection.

Such privileges, however, are at the discretion of Member States. Under Article 17(1)(c) of Directive (EC) 2003/88 – the working time directive – exceptions to working time requirements may be made for religious officiants. Article 2(2) of Directive (EEC) – the directive on equal treatment of men and women in employment – allows Member States to exclude from its application occupations for which the sex of the worker constitutes a determining factor by reason of their nature or the context in which they are carried out. So, for example, Articles 5(3)(c) and (g) of Directive (EC) 2001/29, on harmonization of copyright, allow Member States to make exceptions for material on ‘religious topics’ and for ‘use in religious celebrations’, while Article 18 of Regulation (EC) 1781/2006 allows them to exempt payment service providers from requirements about providing information on the payer accompanying transfers of funds to organizations carrying out non-profit religious purposes, provided that such organizations are subject to external reporting and audit.

## **Conclusion**

Both EU law and the ECHR through the jurisprudence of the ECtHR recognize a wide range of religious phenomena – religious associations, groups, authorities, leaders, rules, customs, obligations, beliefs, teaching, ceremonies, rites, worship, observance, practice, and education – and the evidence suggests that the EU shares characteristics most in common with the so-called cooperationist model of religion-state relations, though the language of separation is also employed. The EU is neither a state-church system nor an exclusively secular institution; rather, it recognizes the value of religion in the life of Europe.

The Union’s Charter of Fundamental Rights provides a convenient presentation and summary of the seven principles. Though they have not been articulated *de novo* by the EU in its recent reforms, they may be found in a host of pre-existing legal instruments of the EU. Some of them, of course, are also to be found in the ECHR and the jurisprudence of Strasbourg and it is clear that the ECHR has had an enormous influence on EU religion law.

The implementation of EU religion law by the Member States, notably on data protection and non-discrimination, has produced a degree of national juridical uniformity; equally, however, national religion laws mirror the EU principles. This has occurred without any identifiable influence on the part of the EU (or indeed of the CoE). Any influence on their development may be justified on the basis that the ‘general principles of law common to the Member States’ are, according to the EU, a material or inspirational source for its own law. The principles induced from national religion laws may also serve to measure the legitimacy of future developments in EU law on religion, and perhaps to help to promote the idea that treaty/charter rights are to be interpreted in harmony with the common constitutional traditions of Member States.

Finally, the likely effect on domestic human rights of the UK’s departure from the EU is a matter of some dispute. The Joint Committee on Human Rights argues in its report, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis* (2018), that the exclusion of the CFR from domestic law and the retention of underlying ‘fundamental rights and principles’ may, on Brexit, result in ‘an uncertain human rights landscape’: the Committee’s overall conclusions are summarized at paragraph 5. On the other hand, however, the CFR has no direct impact on national human rights guarantees because Article 6(1)(2) TEU

declares that the Charter ‘shall not extend in any way the competences of the Union as defined in the Treaties’, while Article 52(3) CFR confirms that position:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

Since the UK remains a signatory to the ECHR notwithstanding its withdrawal from the EU, it remains bound by its terms. Moreover, the CFR applies only to situations in which public bodies make decisions *within the purview of EU law*; under section 6 of the Human Rights Act 1998 and section 24 of the Northern Ireland Act 1998, however, public bodies in the UK are bound by the provisions of the ECHR *when making decisions generally*.

The impact of Brexit on the human rights landscape of the UK may not, however, be so great as the Joint Committee predicts, because the practical protections offered to human rights overall – and to the freedom of thought, conscience and religion in particular – are in any case probably greater under the ECHR than under the CFR. Whether the UK will at some point in the future seek to renege from the ECHR and leave the jurisdiction of the Court remains a matter of mere speculation.

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### **Suggested Readings**

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